Special Session I-D

Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me)

Litigation Series
Planning with Trusts Series

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THE PAST YEAR'S MOST SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES (2017 Edition)*

**At least it seems to me. Your mileage may vary.*

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I. ELDER ABUSE, POWERS OF ATTORNEY & GUARDIANSHIP

***A. Cumming v. Cumming,* 2017 Cal. App. Unpub. LEXIS 6129 (2017).** California Probate Code does not authorize court to fully disinherit elder abuser.

1. Robert and Lois established a joint trust. After Robert's death in 1991, the trust was divided into one revocable (by Lois) trust with Lois as trustee, and one irrevocable trust for Lois's benefit with Lois and her son Steven as co-trustees. In 2005, Lois suffered a stroke and Steven moved into her house and remained there until her death in 2013. Steven obtained a power of attorney naming him as agent while Lois was in a facility recovering from her stroke and was disoriented. Her care deteriorated to the point where a neighbor called adult protective services, but that did not lead to meaningful action. Until her death, Steven paid all of her personal bills out of her trusts. During those eight years, he rebuffed attempts by his siblings Janet and William to assist in her care. In 2007, Janet tried to assist with her care but Steven drove her away and set about trying to cause her to resign or be removed as a co-trustee.

2. Lois's medical records showed that she suffered from aphasia, an inability to speak, and dementia. From 2009 until her death, she was taken very infrequently for medical assessment and treatment (with one gap in medical attention lasting 2 years), and she suffered from extreme anemia, anxiety, severe weight loss, pulmonary disease, iron deficiency, high blood pressure, and stroke. She was agitated, her dementia increased, and she had numerous skin tears. William located a festering wound that was left untreated and led to a toe amputation. She suffered a fall at home, was released to hospice a few days later, and then died a few days after that. When she was admitted she had severe diaper rash, numerous bruises and skin tears, elongated toenails, and dehydration. A nurse found her body lying in a bed soaked with urine and feces with injuries to her chest, arm, and legs, in an unclean room. The causes of death were pulmonary disease, cardiovascular disease, hypertension, and malnutrition (and she weighed only 70 pounds at her death).

3. Janet and William sued Steven to compel access to trust records and for breach of duty as trustee. They also petitioned to have Steven disinherited under Probate Code Section 259 on the grounds of financial elder abuse. Steven claimed that his actions were not as trustee, but rather as agent under the power of attorney and that Lois had authorized his actions. The trial court found numerous breaches of duty as trustee, imposed a surcharge of $193,000 that doubled to $386,000 under state law, and ordered that Steve be disinherited

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under Lois's will, any trusts, and intestate succession. At the time of Lois's death, her trust had assets of over $1.5 million.

4. Steve appealed. On appeal, the court of appeals affirmed the finding of breach of trust and surcharge and rejected Steven's claim that he should have had a right to trial by jury. The court of appeals reversed the trial court order of disinheritance on the following grounds: (a) Probate Code section 259(a) provides for disinheritance to the extent of subdivision (c) where a person is found liable for elder abuse; (b) that section does not give the court authority to disinherit an abusive beneficiary entirely, but rather prevents the abuser from taking a share of any judgment awarded to the decedent's estate from the abuser, and prevents an abuser from benefitting from his own misconduct; (c) to the extent the estate exceeds the monies recovered from the abuser, the abuser retains his right to inherit; and (d) while Steven cannot receive any part of the surcharge award against him, he is not disinherited from his share of the balance of the assets.

***B. Chapman v. Wilkinson,* 2017 Iowa Sup. LEXIS 16 (2017).** Age alone rendering a person unable to protect herself from elder abuse can make someone a vulnerable elder under the elder abuse statute.

1. After her husband's death and at age 69, Judith gave her mobile home to her son John and told him "when I'm dead it's yours. It's your inheritance", and then continued to live in the mobile home and pay the taxes. She gave her duplex to her two daughters. At some point, one daughter moved into the mobile home with Judith, and then John: (a) demanded that Judith pay him $35,000 to take the mobile home back from him; (b) posted repeated eviction notices against Judith and his sister; and (c) tried unsuccessfully to have the police remove them as trespassers.

2. Judith filed a petition against her son for relief from elder abuse (the property dispute where the son was trying to take her home before her death) under the Iowa elder financial abuse statute. The parties appeared *pro se*. The trial court found that John had financially exploited his mother by failing to recognize the life estate she maintained in her mobile home at the time she gifted the remainder to him. John obtained counsel and moved the court to change its ruling, but the trial court entered a final elder abuse protective order against John. John appealed, and the court of appeals affirmed the trial court. John appealed again, and the Iowa Supreme Court granted appeal on only the issue of whether Judith was a "vulnerable elder" under the new statute.

3. A divided Iowa Supreme Court, with three dissenting justices, affirmed the finding that Judith was a vulnerable elder under the statute on the following grounds:

> ***a)*** Under the statute, a vulnerable person is a person age 60 or older who is unable to protect herself from elder abuse as a result of age or a mental or physical condition. The statute is clear that age alone can be the only cause of someone being unable to protect herself from elder abuse, and that person can be a vulnerable elder under the statue.
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> ***b)*** The trial record was sparse at best, but the trial court correctly found that Judith's age made her unable to protect herself because: (i) she gave all her assets to her child; (ii) she was unemployed with a fixed income; (iii) John demanded $35,000 from her and at her age she was unable to pay him; and (iv) she said she was too old to handle the eviction notices.

4. The dissenting justices would hold that Judith failed to prove an inability to protect herself from elder abuse, due to the absence of proof in the record, her independent living, the tone of her testimony and remarks, and the lack of any evidence of any impairment related to age or mental or physical condition. The legal issues could have been worked out in a title proceedings. Moreover, the label of "elder abuse" can be stigmatizing, and the potential for stigma supports not expanding the law unduly.

C. Burke v. Burke, **C.A No. 10768 (Del. Chancery Court 2017).** Lifetime sale of specifically devised property causes ademption of interests in estate and dismissal of claims for abuse of power of attorney.

1. Under his will, Edward gave (a) his residence to a trust and (b) the residue of his estate to his wife. The trust terms provides that the house be retained for 3 years with his daughter having the right to reside there, then after 3 years the house should be sold and the proceeds held in trust for Mildred's lifetime benefit, with his children from a prior marriage as remainder beneficiaries. Before he died, Edward sold his residence and placed the proceeds in a bank account. After Edward had quadruple bypass surgery, Mildred used her power as Edward's agent under a durable power of attorney to retitle his bank accounts in their joint names (including the account that held the proceeds from the sale of the residence).

2. Two years after Edward died, his son Kevin sued Mildred alleging she had breached her fiduciary duties to Edward by retitling the accounts to frustrate Edward's testamentary intent. Mildred moved to dismiss the suit, which was recommended by the Master and granted by the Chancery Court. On appeal, the Delaware Supreme Court affirmed the dismissal of the suit on the grounds that: (a) when Edward sold the residence during his lifetime, the specific gift of the residence to a trust with Kevin as remainder beneficiary was eliminated by ademption; (b) the ademption of the specific gift of property to the trust extinguished any interest Kevin might have; and (c) therefore permitting the matter to proceed to trial would be futile because Mildred was the sole beneficiary of the estate and would be entitled to anything recovered from her for the estate.

D. Estate of Bronson, **2017 SD 9 (2017).** Named agent's act of signing account paperwork *amanuensis* is not an exercise of power under power of attorney.

1. In 2003, Lester named his son Leslie (who goes by the nickname "Butch") as his agent under a power of attorney. In 2010, Lester went to his bank and asked that Butch be added to one bank account. The banker (who had worked with Lester for years) informed Lester that Butch would also need to sign the paperwork. Lester called Butch, and Butch came to the bank. The banker explained the account features to Lester and Butch, confirmed what Lester wanted, prepared the paperwork, and stepped out of the office to make a deposit for Lester. When she returned the paperwork had been signed.

2. Lester died in 2014 leaving a will that left his estate equally to Butch and his two sisters. The sisters sued Butch concerning the $124,643 in the account that passed to Butch alleging he had breached his duties as agent and committed an act of self-dealing. While both Butch and the banker testified that Lester signed the form himself, a handwriting expert determined that Butch had signed Lester's name and then the banker stated she could not recall who signed the form. The parties stipulated that Butch had signed Lester's name and Butch testified that Lester had severe gout, parts of his hands were amputated, and he had difficulty holding the pen because his gout was bad that day. The banker testified that Lester wanted to add Butch to the account and wanted him to have it after his death, and that she saw Butch trying to put the pen into Lester's hand.

3. The trial court ruled that Butch was the owner of the funds and the daughters appealed. On appeal, the South Dakota Supreme Court affirmed on the following grounds:

a) The power of attorney did not give Butch the power to self-deal. However, Butch did not claim ownership under the power of attorney, but instead relied on the amanuensis doctrine and claimed he signed the form for Lester in his presence and at his direction. The trial court did not err by recognizing this doctrine.

b) Applying only the laws of agency and fiduciary self-dealing in a case like this would create an irrebuttable presumption that once a power of attorney is granted, every subsequent act of the agent involves a fiduciary duty, even if it is an act regarding a matter unconnected to the agent, and the court will not adopt that rule.

c) The evidence indicates that Lester was independently and completely handling his own affairs. To balance concerns about an agent also acting as an amanuensis where he has an interest in the act and had no express written authority, the signing by the agent will be presumed to be invalid, but can be rebutted by a showing that the signing was a mechanical act and the grantor intended to sign the instrument using the instrumentality of the amanuensis.

d) While there was no direct evidence that Lester requested Butch to sign, there was adequate circumstantial evidence: (i) there were no claims of fraud, duress, or undue influence; (ii) there is no dispute that Lester desired to add Butch to the account and Lester was meticulous with money and knew what he wanted; (iii) Lester went to the bank alone, directed the bank to prepare the papers, and Butch only came when called by Lester; and (iv) Lester had difficulty holding a pen. The evidence supports the finding that Butch's signing was a mechanical act of amanuensis and that Butch signed in Lester's presence and by his authority.

***E. Alford v. Shelton,* 2017 IL 121199 (2017).** Successor agent under power of attorney not subject to claims for breach of duties.

1. Thomas and Doris named each other as their agents under their powers of attorney, and named their son, Rodney, as successor agent (in part upon the incapacity of the agent, which was defined to mean only judicial adjudication of incapacity or certification of a licensed physician). Thomas deeded certain farmland to Rodney, and also (acting both individually and as his wife's agent) deeded a jointly owned parcel of additional farm land to Rodney. At that time, neither Thomas nor Doris had been adjudicated or certified as incapacitated. Thomas and his wife both died the next year.

2. Their daughter, Ruth Ann, as executor of both estates sued Rodney alleging he had breached his alleged common law duties as agent and that, as a named agent, the transfers to him were presumptively fraudulent. The trial court dismissed the claims, the court of appeals affirmed in part and reversed in part, and the case was appealed to the Illinois Supreme Court.

3. On appeal, the Illinois Supreme Court dismissed all of the claims against Rodney on the following grounds:

a) The Power of Attorney Act recognizes that it is the agent's exercise of power that triggers the agent's duties to the principal. A successor agent's authority to act is contingent upon the initial agent's resignation, death, incapacity, or refusal to serve. Until one of these events occurs, the successor agent has no authority to act, and without power to act, under the Act has no duty to act in good faith for the principal's benefit. The Act does not impose any duties on a successor agent until the agent is authorized to exercise powers. There is no authority for holding that a designated successor agent has a common law fiduciary duty to the principal before being authorized to act under the power of attorney. At the time the deeds were signed, Rodney was a mere successor agent. If the legislature intended to extend duties to successor agents, it could have done so and the court refused to expand the express statutory language.

b) The document is clear and unambiguous on what was required for Doris to be deemed incapacitated, and those conditions were not met at the time the deeds were signed. The clear terms of the power of attorney preclude any form of retroactive certification of incompetency. Where there was not an adjudication of certification of incapacity before the deeds were signed, the conditions were not met.

F. Matter of Nelson, **2017 SD 68 (2017).** Court cannot approve new will for incapacitated person that disinherits spouse without specific factual findings based on evidence on a fully developed record.

1. Dean owned a successful farming operation in South Dakota (although he and his wife eventually moved to Las Vegas). He was married to Liza, and had four daughters from a prior marriage. In 2008, he and Liza entered into a postnuptial agreement that provided for half of his estate to pass to a marital trust for Liza, with the remainder passing to his daughters. The postnuptial agreement also provided that his agent under his power of attorney could not amend his will. Between 2008 and 2013, Dean executed a series of estate planning documents, all of which provided for half of his estate to pass to the marital trust, but the plans varied on whether to include three, or all four, of his daughters as remainder beneficiaries (the final documents included all four daughters equally). Dean was diagnosed with Alzheimer's in 2013 and a conservator was appointed.

2. The conservator petitioned to approve a new will for Dean that would disinherit Liza. Liza and the daughters agreed to a compromise that preserved the marital trust, and the conservator agreed to the compromise will in 2013. In 2016, the conservator again petitioned the court to approve a new will for Dean that disinherited Liza, Liza objected, and the court approved the new will over her objection. Liza appealed.

3. On appeal, the South Dakota Supreme Court reversed the trial court on a finding of clear error on the following grounds:

a) State law allows a court to approve a new will for an incapacitated person, but the court must primarily consider the decision the protected person would have made, and must also review eight other statutory factors.

b) At the hearing, no witnesses were called, no exhibits were presented, and no clear factual findings were made, and the minimal oral findings of the court were not based on any evidence available for review on appeal. In-depth factual findings are needed primarily as to what Dean's wishes would have been along with the other statutory factors. This is especially true where his estate plan consistently provided for Liza's trust. Approving the new will, only on the arguments of counsel without evidence, was clear error.

c) It was clearly erroneous to change the estate plan without adequate factual findings based on evidence, and to grant the conservator power to redraft a will without factual findings based on evidence. Here, a conservator is asking to redraft a will of an incompetent person and to significantly change an estate plan. This is a decision of great import. While the action is authorized by statute, absent strong and specific factual findings based on evidence in a fully developed record, the court's action was clearly erroneous and an abuse of discretion.

G. Smith v. Smith**, No. SC16-1312 (Florida Supreme Court 2017).** Partially incapacitated adult without right to contract can marry without advance court approval, but the marriage does not have legal effect until approved by the court.

1. Alan met and became engaged to Glenda, and named her as his agent in his agency documents. In 2010 Alan suffered a head trauma in a car accident, he was judicially determined to be partially incapacitated, and his right to contract was removed and delated to a limited guardian of the property. No guardian of the person was appointed. In 2011, Alan and Glenda were married. A Florida statute provided that where the right to contract is removed in guardianship proceedings, the right to marry is "subject to court approval". Despite Glenda's requests that Alan seek court approval of the marriage, he refused to do so.

2. Alan's court-appointed counsel petitioned to annul the marriage as void because court approval was not obtained in advance. The trial court and Fourth District Court of Appeal held that the marriage was void. Glenda appealed.

3. On appeal, the Florida Supreme Court (over one dissenting opinion) held that: (a) concepts of "void" or "voidable" marriages that apply in other contexts do not apply in the guardian context because the statutory language did not apply those concepts; (b) the terms "subject to court approval" means that the ward's right to marry is contingent on court approval, although that approval may come later in time and after the marriage ceremony; (c) while the validity of the marriage depends on court approval, the statute does not require that approval be obtained prior to marrying (whereas advance approval is expressly required in other guardianship statutes); (d) court ratification of the marriage requires an order ratifying the marriage and a hearing to verify (i) the ward understands the marriage contract, (ii) the ward desires the marriage, and (iii) the relationship is not exploitive; and (e) mere remarks by the guardianship court in proceedings or the admission of the marriage certificate into evidence are not adequate.

***H. Membrino v. Membrino,* 2017 Conn. Super. LEXIS 4561 (2017).** Court may adjudicate appeal of appointment of conservator even after ward has died.

1. Ralph held power of attorney for his mother, Emily, and his brother Conrad believed he had abused that power. Emily revoked the power in 2012 and named Ralph and Conrad as joint agents under a new power of attorney. Ralph then filed contested proceedings to declare Emily incapacitated and the probate court appointed Ralph as conservator (and their sister Roberta as guardian of her person). Conrad appealed the appointments, claiming to have evidence that Ralph, Roberta, other relatives, and the reporting physician had conspired to have a conservator appointed through false and fabricated evidence, fraud, collusion, and perjury.

2. Emily died while the appeal was pending, the probate court settled Ralph's accounts as conservator, and no appeal was taken from his settlement of accounts. Ralph moved to dismiss the appeal as moot, as a consequence of Emily's death. The court refused to dismiss the appeal as moot on the following grounds:

a) The appropriateness of the appointment of a conservator is claim that can be a continuing case or controversy, even after the conservatorship ends or is terminated. That a conservatorship has ended does not resolve the issue of whether an order of appointment was appropriate or justified in the first place. Setting aside the appointments is relief that the court can award on appeal.

b) Collateral consequences exist that further support a finding that the matter remains justiciable. An appointment of a conservator comes with a stigmatizing effect that is not remedied by the termination of the conservatorship. Also, a conservator enjoys a form of quasi-judicial immunity where the acts are authorized by the probate court. Conrad is considering further legal actions against his brother and sister, and to dismiss the appeal would cloak possible future defendants with quasi-judicial immunity and hinder recourse.

II. STATE NEXUS & TAXATION

A. ***Fielding v. Commissioner of Revenue*, File Nos. 8911-8914-R (Minnesota Tax Court 2017).** Minnesota statute that taxes worldwide income of an irrevocable non-grantor trust based solely on the domicile of the grantor violates the due process clauses of the Minnesota and U.S. constitutions.

1. In 2009, Reid McDonald, a Minnesota domiciliary, created separate irrevocable *inter vivos* trusts for each of his four children and transferred nonvoting common stock in a Minnesota Subchapter S corporation into the trusts. The trusts were grantor trusts (by virtue of a swap power) until 2011. All trust distributions were discretionary, and distributions were made to the children from their respective trusts. None of the trustees were domiciled in Minnesota, and for tax year 2014 there was first a Colorado trustee and then a Texas trustee. Both trustees made discretionary decisions about the trusts and maintained the books and records of the trusts outside of Minnesota, and neither travelled to the state for trust business. For part of 2014, the original trust instruments were retained in the Minnesota drafting lawyer's office. Neither trustee was involved in any trust related court actions in Minnesota other than this tax dispute. Three of the children lived entirely outside the state, with just the settlor's son being domiciled in Minnesota in 2014 but attending college in New York.

2. In 2011, the trusts became Minnesota "resident trusts" under a state statute that defined non-grantor trusts created and irrevocable after December 31, 1995 as resident trusts based solely on the domicile of the grantor in the state at the time the trusts became irrevocable (or for testamentary trusts, the in-state domicile of the decedent at death). The statute applied a different test based on the circumstances of the in-state administration activities of the trust (rather than only the domicile of the grantor) to pre-1995 trusts.

3. In 2014, the trusts sold their stock in the S corporation and opened investment accounts with Wells Fargo that were administered in California. The trusts timely filed resident tax returns and paid tax as resident trusts on their worldwide (and not just their Minnesota source) income under protest, and then filed amended returns and claims for refund that were denied. The trusts appealed to the Minnesota Tax Court and moved for summary judgment. The trusts sought to exclude from tax the gain on the sale of the stock and the subsequent investment income in the Wells Fargo account.

4. The Tax Court awarded the trusts summary judgment that the Minnesota definition of a resident trust, as applied to these trusts, violated the Due Process clauses of the Minnesota and U.S. constitutions on the following grounds:

a) The parties agreed that the state was imposing tax on the worldwide income of the trusts as "resident trusts" and the applicable statute for post-1995 trusts clearly bases taxation solely on the domicile of the grantor. Therefore, the state's arguments about benefits the trusts received from the state are irrelevant. The only issue is the constitutionality of taxation based on the historical domicile of grantor.

b) Other courts have held that the historical domicile of the grantor is not a constitutionally sufficient nexus to justify taxing the worldwide income of the trusts, and this approach is problematic in that it (1) reaches back through time to a discrete historical moment and does not rely on protections afforded by the state during the time period where the income was earned, and is an immutable and perpetual characteristic with a worsening due process concern each year, (2) reaches across persons and relies on connections with the grantor rather than connections with the trusts themselves, and (3) is a relatively superficial connection. Domicile of the grantor does not amount to present and substantial connections to the taxing state, and standing alone is not a sufficient basis to justify the resident tax treatment of an *inter vivos* trust.

c) Therefore, the state statute as applied to these trusts in 2014 violates the due process provisions of the Minnesota and U.S. constitutions, the state did not have authority to tax the gain on the stock sale and the Wells Fargo investment income which are intangible items of personal property not located in Minnesota.

5. On July 28, 2017, the Commissioner of Revenue petitioned the Minnesota Supreme Court for review of the tax court decision.

B. *T. Ryan Legg Irrevocable Trust v. Testa,* 73 N.E. 3d 381 (Ohio Supreme Court, December 28, 2016); 2017 U.S. LEXIS 5567 (U.S. Sct. 2017). Ohio Supreme Court upheld imposition of Ohio income tax on nonresident Delaware trust's sale of Ohio S corporation interests. The Delaware trustee petitioned for a writ of *certiorari* to the U.S. Supreme Court for alleged due process violations, which was denied.

1. In 2002, Ohio enacted R.C. 5747.212, which can require in part that nonresidents pay Ohio income tax on taxable gains from the sale of a 20% or greater interest in an Ohio pass-through entity, and provides a method for apportionment. In 2016, the Ohio Supreme Court held that the statute was unconstitutional under the Due Process Clause as applied to a Connecticut resident that sold his 79% of an Ohio LLC, because in the sale of the LLC interest (as opposed to the pass-through income prior to sale) it was not clear that the seller (as opposed to the company) had availed himself of Ohio's protections and benefits in a direct way and the state's connection was indirect as to the sale of the intangible interests in the company. *Corrigan v. Testa, 149 Ohio St.3d 18 (2016).* Following the decision in *Corrigan*, the Ohio Department of Taxation maintained a narrow view of the decision and asserted that it could still apply R.C. 5747.212 to certain nonresidents that sold an Ohio pass-through business.

2. T. Ryan Legg, an Ohio resident, co-founded and equally co-owned a trucking-logistics business in 1997. The company was an S corporation and a pass-through entity for tax purposes. In 2005, Legg withdrew from the business and transferred his half of the business to two trusts, including the transfer of 32.5% of the company to an irrevocable Delaware non-grantor trust with a Delaware corporate trustee. The trust terms provided that there would be no distributions to the beneficiaries (Legg and his family) for two years. A month after the trust was funded, the trust agreed to sell its shares to Legg's partner and the sale was completed in February of 2006, generating a capital gain of $18.6 million.

3. The Ohio Department of Taxation assessed the trust for $1.3 million in unpaid taxes on the sale, plus interest and penalties, for a total of $1.9 million under R.C. 5747.212 and applied an apportionment ratio of 91.8307% of the trust's 2006 gain on the sale by looking at the 3-year average of the company's Ohio-based property, payroll, and sales. The trust petitioned for reassessment, and the commissioner upheld the assessments of tax and interest (but not penalties) based on its findings that: (1) the trust was nonresident trust; (2) the gain was taxable as a "qualifying trust amount" under R.C. 5747.01(BB)(2); and (3) the gain was properly apportioned to Ohio as "modified nonbusiness income" under R.C. 5747.212. The trust appealed to the Ohio Board of Tax Appeals, which denied last minute procedural arguments by the tax commissioner (that somehow through the change of corporate trustees, and lack of specific express authorization for every action taken by the trust's counsel, counsel was not authorized to file the appeals for the trust), but upheld the assessment as both a "qualifying trust amount" and as apportionable business income, and also held that the trust was actually an Ohio resident trust. The trust appealed to the Ohio Supreme Court and the tax commissioner cross-appealed on its procedural objections (which were rejected by the Ohio Supreme Court and will not be discussed further in this summary).

4. On appeal, the Ohio Supreme Court affirmed the imposition of Ohio tax, but remanded the case, on the following grounds:

a) With respect to the application of tax as a "qualifying trust amount" under R.C. 5747.01(BB)(2) (which would apply to ownership of an Ohio pass-through entity but not an Ohio C corporation), the only statutory issue in dispute was whether the trust had access to the book value of the company's Ohio physical assets as of the last day of the fiscal or calendar year preceding the sale. There was no disagreement as to the statutory requirements that the company be a "qualifying investee" or that the trust own at least 5% of the company. The court found that the information access requirement was satisfied by the fact that the trust had shareholder rights to information by state statute that included the right to information that impacted its tax liability as owner of a pass-through entity, regardless of whether the trust exercised those rights. The court rejected that a narrower information right under the purchase agreement (in connection with closing) implicitly negated the pre-closing shareholder rights under state law. Because the court found that the income was taxable as a "qualifying trust amount", the court found to be moot and vacated the BTA's holding that the income was also taxable as "modified business income" or "modified nonbusiness income" (based on its reconciliation of the interrelation of the various state statutes).

b) The BTA erred by using a 3-year average method with respect to Ohio physical assets to apportion 91.8307% of the gain to Ohio, and remanded the case back to the BTA for the correct application of the end of the prior year snapshot approach that would likely result in an apportionment to Ohio of 80.5094%.

c) The BTA erred by finding that the trust was a resident trust on the grounds that the Ohio statutory definition requires that for the tax year there must be a "qualifying" Ohio beneficiary (meaning a potential current beneficiary under I.R.C. Section 1361(e)(2) that has the right or a discretionary right to trust income or principal), and here the trust prohibited all distributions during the tax year at issue. Legg was an Ohio resident when he transferred the shares to the trust (one of the other statutory requirements for trust resident status), and while he was a trust beneficiary during the tax year, he was not a potential current beneficiary as required by the statute. Therefore, the trust should be taxed as a nonresident trust and the BTA's finding to the contrary should be vacated.

d) The assessment of tax against the nonresident trust did not violate the trust's due process rights on the grounds that: (1) this case materially differs from *Corrigan* because the trust grantor was an Ohio resident during the tax year, and unlike Corrigan, was a founder and manager of the pass-through entity; (2) here an Ohio resident did not dispose of his business by a personal sale, but rather by using a trust, and his Ohio contacts remain material for constitutional purposes; and (3) (paraphrasing from the 5-4 state inheritance tax case *Curry v. McCanless, 307 U.S. 357 (1939))* Legg's own power to dispose of the intangibles was a potential source of wealth which was property in his hands from which he was under the highest obligation, in common with his fellow citizens of Ohio, to contribute to the support of the government whose protection he enjoyed.

e) The assessment of tax against the nonresident trust did not violate the trust's equal protection rights by treating a pass-through entity different than a C corporation (the state statute at issue only applied to pass-through entities), on the grounds that: (1) a tax classification that does not involve a suspect class is subject only to a rational basis test and with respect to taxation the assessment is especially deferential to the legislature; (2) the taxpayer has a heavy burden and here the trust falls well short; and (3) equal protection does not require things that are different in fact to be treated in law as the same, and corporations that are separate taxpayers are different than pass-through entities, and pass-through entities are more likely to have shareholders directly involved in the business.

f) One concurring justice would reverse *Corrigan v. Testa, 149 Ohio St.3d 18 (2016)* as wrongly decided and unworkable.

5. On July 13, 2017, the Delaware corporate trustee petitioned the U.S. Supreme Court for a writ of *certiorari* based on the following allegations:

a) Ohio's taxing regime imposes tax on a nonresident trust's gains from selling holdings in an Ohio pass-through company that is not in a unitary business with the nonresident trust, based solely on the contacts between Ohio and the grantor (a different taxpayer), and ignoring the lack of contacts between the trust and the taxing state.

b) The court erred by relying on the 1939 5-4 state inheritance tax case *Curry v. McCanless*, and ignoring the relevant precedent (i.e. *Allied –Signal; MeadWestvaco*; *Safe Deposit; Quill)* that the required constitutional minimum contacts cannot be premised on or aggregated with a different taxpayer's (the settlor's) contacts with the taxing state. The court applied general jurisdiction principles, when it should have applied a specific jurisdiction analysis. The trust had no Ohio beneficiaries for the tax year and the trust was not involved in the company's business (and its settlor had previously withdrawn as well). Here, Ohio is purporting to tax nonresidents on a portion of the gain from the sale of any interest in an Ohio pass-through entity.

c) The only contacts with Ohio were by the settlor, and the court did not make any findings as to any connect between the trust and Ohio, which are required by precedent and constitutional due process specific jurisdiction principles.

6. On October 2, 2017, the U.S. Supreme Court denied the writ of *certiorari.*

C. *Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue,* 2015 NCBC LEXIS 39 (2015); 2016 N.C. App. LEXIS 715 (July 5, 2016); 2016 WL 7189950 (2016). Taxation of wholly discretionary trust based on residence of beneficiaries, without other contacts, violates the Due Process and Commerce Clauses. The North Carolina Court of Appeals affirmed the decision. The state Supreme Court has agreed to hear the appeal of the case.

1. In 1992, Joseph Rice created an *inter vivos* trust under New York law for his three children, which divided on its terms into separate trusts in 2002 (the assets were physically segregated in 2006). The original trustee resigned in 2005 and a new trustee located in Connecticut was appointed. The separate trust at issue was for the benefit of residents of North Carolina.

2. All trust distributions were discretionary, and none were made for the tax years at issue (although the trust made AFR loans for the benefit of the North Carolina beneficiaries or trusts for their benefit, which were repaid). The trust assets, all of which were financial, were custodied in Boston. The trust records were maintained in New York, and tax returns and accountings were prepared in New York. The trustee communicated with the primary beneficiary about the trust occasionally, and met with her in New York. After the tax years at issue, the trustee decanted the trust assets into a new trust that eliminated the mandatory distribution of trust assets at age 40, with the consent of the primary beneficiary.

3. North Carolina taxed the trust income in the amount of $1.3 million under a state statute that imposed tax on out of state trusts that are for the benefit of state residents. The trust paid the tax, and after its request for refund was denied, petitioned to seek the return of the tax paid. On cross motions for summary judgment, the court granted the trust summary judgment for the following reasons:

a) As applied to this trust, the statute imposing tax based on the residency of the beneficiaries alone violates the Due Process Clause of the U.S. Constitution and the Law of the Land Clause of the North Carolina Constitution on the grounds that: (i) the trust did not have a physical presence in the state, own real or personal property in the state, or invest directly in state investments, trust records were kept out of state, and its principal place of administration was out of state; (ii) the trust did not purposely avail itself of the benefits of state law; (iii) the trust is a separate legal entity from the beneficiaries and the contacts of the beneficiaries are not relevant; (iv) the equitable interests of the beneficiaries, even if relevant, were an inadequate nexus with the state where the beneficiaries had no control over discretionary distributions, investments, or income, and receipt of loans from or information about the trust are not sufficient contact with the state; and (v) the tax is not rationally related to state values, as the state has not provided the trust for which it can ask for tax in return.

b) As applied to this trust, the statute also violates the negative sweep of the dormant Commerce Clause of the U.S. Constitution on the grounds that: (i) the trust, as a legal entity separate from the beneficiaries, lacks minimum contacts with the state to form a substantial nexus; and (ii) the benefits provided to the trust beneficiaries by the state are not relevant.

4. On appeal, the North Carolina Court of Appeals affirmed and found that the imposition of tax would violate the Due Process Clause, on the following grounds:

a) The U.S. Supreme Court case of *Brooke v. Norfolk*, 277 U.S. 27 (1920) is controlling. In that case, a bank was directed to pay the income of a trust created by a Maryland resident to a Virginia beneficiary. The trust property remained in Maryland and was never in Virginia. The trust property was not controlled by the beneficiary. The U.S. Supreme Court found that the imposition of tax by Virginia on the trust corpus was unconstitutional (the beneficiary paid Virginia the tax on the income received).

b) The trust in both this case and in *Brooke* were created and governed outside the taxing state, the trustees resided outside the taxing state, and the trusts did not own property in the taxing state. In addition, in this case the beneficiary did not receive any distributions.

c) The connection between North Carolina and the trust is insufficient to satisfy the requirements of due process and the application of the tax violated the Due Process Clause of the U.S. Constitution and the Law of the Land Clause of the North Carolina Constitution.

d) The Commerce Clause issues were not addressed on appeal.

5. On December 8, 2016, the North Carolina Supreme Court agreed to hear the appeal of the case.

III. TAX ELECTIONS, PLANNING, AND TAX BASED CLAIMS

A. *Vose v. Robert E. Lee, III,* 2017 OK 3 (2017). Court can order administrator to file a federal estate tax return electing portability of the decedent's DSUE.

1. Anne married C.A. in 2006 after entering into a prenuptial agreement, and then died intestate in 2017. After some disputes between her son from a prior marriage, Robert E. Lee, III, and her husband, her son was named as administrator of her intestate estate. The husband petitioned to compel the son to file a federal estate tax return electing portability of the decedent's deceased spousal unused exclusion amount (DSUE), and the trial court ordered the son to prepare the return, allow the husband 60 days to review it prior to filing, and then timely file the return, and ordered the husband to pay for the filing of the return. The son appealed.

2. On appeal, the Oklahoma Supreme Court affirmed the trial court and ordered the son to file the return and make the portability election on the following grounds:

> **a)** Only the executor of the estate, and not a spouse who is not an executor, may make the DSUE portability election.
>
> **b)** The district court has broad statutory authority over probate matters, including the authority to determine the application of federal estate tax provisions and determine the husband's interest in the DSUE.
>
> **c)** The federal tax rules that give the executor discretion to make or not make the portability election do not preempt the jurisdiction and power of the state court. Complete federal preemption is a rare doctrine, and the DSUE statutes do not so pervasively regulate the area such that there is no room left for state-law claims related to the duties of the estate administrator, even where the state law claims involve a federal matter such as the DSUE election. The IRS acknowledged in its regulations that state law claims are outside the scope of the regulations, implicitly acknowledging the interplay between state probate laws and the federal estate tax law. While tax law grants the administrator discretion to make the election, the statute is silent as to the effect state laws might have on how the administrator must make that choice. Here, the trial court ordered the election in response to arguments that his fiduciary obligations under state law compel him to do so. The result, the portability election, does not directly conflict with federal tax laws which allow the election. The fact that state law may restrict a choice granted by federal law does not necessarily implicate the preemption doctrine by thwarting the object and purpose of the law. Absent an express congressional purpose served by the DSUE election choice, there is no preemption of state law. By allowing the possibility that a state court may appoint a spouse to make the election and take that power from the executor, the IRS makes it clear that there is no such congressional purpose that supports application of preemption.
>
> **d)** The husband had standing to compel the portability election, despite waiving his right of election in the prenuptial agreement and not being an heir under the estate plan, because he had a pecuniary interest in portability of the DSUE, which would increase his own applicable exclusion amount.
>
> **e)** The prenuptial agreement cannot be construed as waiving the right to seek to compel the portability election, because the agreement was signed in 2006 and portability did not become an option until passage of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. The change in the law was unforeseeable when the contract was made, and one must have actual or constructive knowledge of rights to waive them.
>
> **f)** The only person with an interest in the portability election is the surviving spouse, if the election is not made it is lost, and the husband agreed to pay any costs associated with preparing and filing the return. The district court did not err in finding that any risk to the estate (i.e. from an extended audit window) was outweighed by the administrator's fiduciary obligation to preserve the assets of the estate and safeguard the husband's interest in the DSUE. The district court did not err by requiring the son to file a federal estate tax return and elect portability,

regardless of the fact that the son as administrator was not allowed to demand consideration from the husband in exchange for making the election.

B. ***Matter of Katelanksy*****, 2017 NY Slip Op 32064(U)(2017).** Uncontested reformation of formula clause in will permitted to avoid New York “cliff tax” from estate tax law changes.

1. Under his 1987 will, decedent divided his assets between a family trust and marital trust based on the amount of the federal estate tax exemption. In 2014, New York revised its estate tax laws to gradually raise the state death tax exemption to match the federal exemption, but also created a “cliff tax” on the entire taxable estate if the New York domiciliary’ s taxable estate exceeds the state exemption by only 5%. Decedent died in 2016 with an estate of $7.6 million.

2. The executor filed an uncontested petition to reform the will to fund the marital trust with additional assets and avoid the cliff tax of $420,000. The surrogate allowed the reformation on the grounds that: (a) at the time the will was drafted, the New York and federal tax regimes were unified (the state tax was a “pick up” tax tied to federal credit (since eliminated); (b) reformation has been liberally allowed when the relief is needed to avert tax problems caused by a change in the tax law subsequent to the execution of the will, which renders a tax driven will provision counterproductive; (c) the central question is whether reformation serves the testator’s intent and courts have presumed that testators intend to take full advantage of their tax minimizing possibilities; (d) here the reformation is needed to protect the testator’s intent from being thwarted by a change in the tax law: and (e) the descendants’ consent is critical to the relief requested because the increased funding of the marital trust is at their expense.

C. ***Estate of Bilo*****, 2017 Conn. Super. LEXIS 4213 (2017).** Disinheritance of spouse under formula clause in revocable trust does not justify including trust assets in estate subject to elective share contrary to plain statutory language.

1. Martha married Kurt in 1997. In 1999, Kurt executed a pour-over will and a revocable trust that divided the assets between a marital trust and credit shelter trust, and only funded the marital trust to the extent necessary to eliminate federal estate taxes. Kurt gave Martha an envelope containing the documents that bore the inscription “to Martha…1/3 Trust”. Kurt’s children from a prior marriage were trustees of the trust and beneficiaries of the credit shelter trust (Martha was not a beneficiary of that trust).

2. Kurt died in 2015. Under the formula clause, the marital trust would receive no assets and Martha would be essentially disinherited. Martha petitioned to have the trust assets included in the estate for purposes of calculating her elective share, which the children opposed as trustees and beneficiaries of the trust. The probate court denied the petition and Martha appealed.

3. On appeal, the Connecticut Superior Court affirmed the trial court on the following grounds: (a) by statute, the elective share of the spouse is equal to one-third of the assets passing under the decedent’s will; (b) valid trusts do not pass by will and are not included in the estate for elective share purposes, and there was no dispute about the validity of the trust; (c) the court will not exercise equitable powers to bring the trust into the probate estate, where the trust is unambiguous and only provides for the spouse to the extent the assets exceed the federal exemption, and the envelope inscription cannot be used to infer an intent that is contrary to the plain trust terms.

D. ***Estate of Brill*****, 2017 NYLJ LEXIS 2495 (2017).** Executor did not breach duties by failing to seek qualified reformation of charitable remainder trust to save estate taxes, but did breach duties by paying unnecessary fiduciary income taxes incident to 13-year delay in transferring assets to charitable remainder beneficiary.

1. Robert Brill died in 2000. His will provided for his residuary estate to pass to a trust that would pay his friend, Maryanne, the amount of $40,000 annually, with the remainder payable to the National Wildlife Federation at her death. Maryanne died within 6 months after Robert, and just a few days after probate of the will. The trust terms provided that the executor would serve without compensation, and the trustee's compensation would be limited to $1,000 annually. Because Maryanne was named as executor and died, the successor executor, Evelyn, qualified as executor. Robert's friend, James, was named as initial trustee, and after his death in 2009 Evelyn was named as trustee, and an attorney was named as co-trustee in 2011 because the will required bonding of fiduciaries, and the bonding company would not issue bond unless Evelyn served with an attorney co-trustee. As directed in the will, Evelyn retained the drafting lawyer as counsel and also retained the decedent's CPA.

2. Although Maryanne died in 2001, the Federation did not receive any payments until 2010. In proceedings to judicially settle her account, the Federation and the New York Attorney General filed objections, in part (there were other claims that are not addressed here because they required development of a factual record and were not resolved on summary judgment) claiming that Evelyn breached her fiduciary duties by: (a) failing to reform the trust to save federal and state and estate taxes, and overpaying those taxes by $2,010,000; and (b) incurring unnecessary trust income taxes of $455,000 by the unreasonable delay in transferring assets to the Federation upon Maryanne's death. Both sides moved for summary judgment. The Federation claimed that, by directing the trustee to invest in tax-free municipal bonds, the testator intended to save taxes, and that the executor could have sought to reform the trust through a tax qualified reformation to qualify as a charitable remainder annuity trust with a 5% annual payout to Maryanne.

3. Evelyn and her bonding claimed that she acted solely on the advice of the attorney and CPA. Evelyn: admitted she never verified the qualifications of the lawyer and CPA named in the will; met with them every few months to sign checks or tax returns; believed that the professionals took care of everything else including trust investments; didn't maintain any records; didn't know about a timeframe for distributing to the Federation but conceded the 13-year delay was too long; didn't understand that the benefits for Maryanne ended at her death (despite the plain trust terms); didn't question the payments made by James out of the trust assets; was unaware whether the tax returns were discussed with counsel before being filed; did not understand, prepare, or ask any questions about any of the tax returns she signed; and did not know she had any duties to reduce taxes or discuss tax savings with the attorney or CPA.

4. The CPA testified that he had never dealt with a charitable remainder trust before and never considered reforming the trust, and while preparing the trust income tax returns for 9 years after Maryanne's death was not aware that unnecessary taxes were being paid. The attorney testified that: the decedent did not ask for tax avoidance advice and was not adverse to paying taxes because he was a patriotic veteran; he deferred to the CPA on tax issues and did not consider estate tax matters to be within the scope of his responsibilities; believed that his duties ended with probate and qualification; it was his view that the accountants "ran the show" for tax returns and he was a mere messenger to bring returns to Evelyn to sign; he didn't review the contents of returns with her; and did not provide her with advice related to any returns.

5. The trial court granted Evelyn summary judgment dismissing the estate tax claims on the following grounds. The claim is based on the speculative assumption that a court would have approved the reformation. The will provisions that benefit the charity, and direct investment in tax-free bonds, are insufficient by themselves to establish that the executor had a duty to seek trust reformation. The Federation also fails to explain why it did not mention this proposition to the executor until recently or why it did not itself apply for it; and therefore, reformation was presumably not such a clear and viable option. Also, any relief would have required jurisdiction over Maryanne's estate, which has not been obtained.

Absent a clear intend to avoid taxes, or a clear mistake in the will drafting, the Federation has failed to prove that the failure to seek trust reformation was a breach of duty.

6. The trial court granted the Federation summary judgment against Evelyn on the income tax claims on the following grounds. Regardless of who was responsible to distribute the trust assets to the Federation, as executor Evelyn paid fiduciary income taxes without making any inquiry or understanding the nature of her duties as executor. The defense of relying on professional advice does not protect her from her breach of her duty to properly manage the estate and minimize fiduciary income taxes. She allowed her "professionals" to act and perform all of her functions without every questioning their actions. She never obtained advice on income tax matters, and instead remained ignorant and mute. She cannot rely on an "advice of professionals" defense, when she never took steps to obtain advice. Even if her reliance was "advice", she conceded that it should not have taken 13 years to transfer assets of the Federation. She breached her duty to avoid paying unnecessary income taxes to the detriment of the Federation.

7. Because the will provides she should not receive commissions and due to her breach, Evelyn is not entitled to commissions and her request for commissions was dismissed.

IV. INVESTMENTS

A. *Diallo v. SunTrust Bank*, 2017 U.S. Dist. LEXIS 102509 (Maryland 2017). Mere suspicions without proof are inadequate to support claim for conversion of trust assets.

1. Upon her death in 1990, Mary established a charitable remainder unitrust for the benefit of her employee Aisha, with a bank trustee. The trust was funded with $150,000 and provided for a 5% annual unitrust payment to Aisha. For 27 years, the trust made the required unitrust payments, and the corpus of the trust also increased over that time to $174,000. From time to time, Aisha asked the bank for advances or loans against the trust that were contrary to the trust terms (and presumably rejected by the trustee). In 2017, Aisha filed a *pro se* complaint against the trustee alleging embezzlement from the trust and alleging that the bank had opened an offshore account in her name without her knowledge or consent. The trustee moved to dismiss the claims and for attorneys' fees.

2. The court dismissed the claims, without prejudice, and awarded the trustee its attorneys' fees on the following grounds:

a) Because of Aisha's modest circumstances and the burden to her of retaining counsel, the court took an informal approach to the case (allowing Aisha's letters to be taken as pleadings, and contorting her claims into recognizable causes of action), ordered discovery from the trustee which the trustee provided, and reviewed the bank account statements, which show no suggestion of any wrongdoing by the trustee or any missing assets.

b) Embezzlement is a criminal cause of action, but the court will assume she meant conversion and breach of fiduciary duty.

c) The bare allegation of "*how can $150,000 since 1989 be to this day $174,332.69 only why why why*" does not adequately plead a claim, where Aisha received all of the required unitrust payments (totaling $230,000) and the required 5% distributions were the reason the trust assets did not grow more significantly. All trust assets, gains, losses, and disbursements were fully accounted for in the trust account statements.

d) Mere suspicions of foreign bank accounts, without any proof at all, cannot support a claim. The bank's counsel represented to the court that there are no offshore accounts in Aisha's name, and the only basis for her claim was that, 12 years prior, a bank employee had made some comment about some types of forms being used for offshore accounts.

e) The trustee is entitled to have its attorneys' fees and costs paid out of the trust. Aisha made serious allegations that went directly to the integrity and reputation of the trustee, and the trustee's counsel is not obligated to work for free. Aisha may have brought her case not knowing this, but that in no way means that the trust attorneys are not entitled to compensation.

f) Aisha was offered 45 days to retain counsel and file a motion to reconsider, with no assurance it will be granted, and the court cautioned that the trustee would be entitled to continue charging the trust for its attorneys' fees and reduce her 5% payout further if she is not successful. If she brings her claims again based only on mere suspicion and without proof, there will be economic consequences even if she brings her claims in good faith.

V. DISTRIBUTIONS & DISBURSEMENTS

A. ***Brown v. Brown,*** **2017 Mo. App. LEXIS 576 (2017).** Trust terms override duty to consider preservation of trust for remaindermen in making distribution decisions.

1. Under his trust agreement, upon his death Harlin established a trust for the exclusive lifetime benefit of his wife, Marlene, with Marlene, the estate planning lawyer, and one of his sons, Jason, as co-trustees. Harlin's eldest son, Keith, sued the trustees alleging that they had breached their duties by making excessive distributions to Marlene. The trial court dismissed the claims and awarded Marlene her attorneys' fees, and Keith appealed.

2. On appeal, the court of appeals affirmed the trial court on the following grounds:

a) In addition to the "HEMS" distribution standard, the trust terms provide that the settlor desired that the spouse be able to live in a manner consistent with her accustomed manner of living, and mandated that the trustee give primary consideration to the needs of the income beneficiary (here the spouse) rather than conservation of the estate for the remandermen. Therefore, the trustee does not have a duty to preserve principal for remaindermen. The trustees could properly give Marlene's needs primary consideration, over and above any interest in conserving the trust estate for persons with remainder interests.

b) Keith improperly ignored that a substantial portion of the "distributions" received by Marlene were not for personal support, but rather were to reimburse her payment of various trust obligations. Marlene has received an average of $50,000 annually from the trust, well within the range of her standard of living when the settlor was alive, and Keith improperly attempted to select a discreet time period in isolation rather than looking at a broader time period. Marlene also made a $200,000 contribution to the trust that Keith improperly ignores. During the period of Keith's objection, the other trust distributions were for Keith's bankruptcy trustee fees ($44,000), attorneys' and accountant fees ($38,000), income taxes ($158,000), trust debt ($125,000), and expenses for the trust's lake house property ($25,000).

c) The trial court did not err by considering evidence of Keith's threats (by an "anonymous" letter to the bar association sent from the Air Force Reserve duty site in Texas where Keith reports) against Jason and his wife, as evidence of his credibility, bias against Jason, prejudice, and motive to lie about Jason's conduct as trustee. The trial court was also not required to recuse himself *sua sponte* as a result of hearing that evidence.

d) Regardless of whether Marlene counterclaimed for attorneys' fees individually or as trustee, the court could properly award Marlene as trustee the cost of her attorneys' fees for successfully defending against the claims of breach of duty, because the UTC allows the court to award fees in the interests of justice and equity in trust matters.

B. *Passero v. Fitzsimmons,* 2017 Mass. App. LEXIS 110 (2017). Trustees breached duty of prudent administration by paying fees for storage of tangible personal property for 15 years.

1. The settlor died in 2001 and under his estate plan established a trust for the lifetime benefit of his daughter Elaine, with her sister Madeline and Madeline's daughter Paula as co-trustees (the shares for the settlor's other children were distributed outright). Other than a $25,000 distribution ordered by the court in 2016 for medical bills and housing costs, the trustees did not make any discretionary distributions to Elaine. After the settlor's death, the trustees moved Elaine's personal property left in the settlor's home and the tangibles that Elaine was to inherit from her father into a storage facility. Two years later, the trustee's lawyer wrote Elaine letters informing her that the tangibles were in storage and that she needed to arrange to have it shipped to her in California, but on instructions from the trustees refused to provide Elaine the location of the facility. The next communication was in 2008 and 2009, when the attorney informed Elaine she could not "cherry pick" items and had to accept them all, and again refused to provide Elaine the location. There was no further communication until Elaine filed suit in 2013.

2. By the time Elaine sued the trustees in 2013, the trustees had paid storage fees exceeding $50,000 for over 15 years. The trustees also used her trust assets to pay trustee and attorney fees, reducing the trust from $542,000 to $463,000. By June of 2016, the trust was reduced to $250,000 because of ongoing storage, trustee, and attorneys and litigation fees. At the same time, the trustees did not provide Elaine with accountings until ordered to account by the court in 2014, while at the same time giving them to other heirs.

3. The trial court held that the trustees breached their duties, removed and replaced the trustees, and awarded other relief. On appeal, the court of appeals affirmed the finding of breach and removal, but reversed the trial court in part and remanded the case on the following grounds:

a) A trustee has duties to administer the trust prudently, with reasonable care, and in the interests of the beneficiaries. The court did not err by finding the trustees breached their duties in paying storage fees for 15 years where: (i) the beneficiary did not authorize the payment; (ii) the trustees failed to provide the beneficiary with accountings or communicate with her at all for periods of 5 years and 4 years; (iii) the trustees refused to provide the beneficiary with information about the storage facility. The finding of breach by the trustees did not reform the trust to nullify the trustees' discretion because the discretion is not boundless and the court found that the trustees did not adhere to fiduciary principles and act in the interest of the beneficiary.

b) The exculpatory clause in the trust does not protect the trustees because under state law the clause does not excuse bad faith or reckless indifference, and the court expressly found that the trustees committed reckless indifference to the interests of the beneficiaries.

c) The trial court was entitled to weigh the credibility of the trustees' testimony that the beneficiary authorized the storage, and the trustees cannot complain about inability to call witnesses when the trial record shows that they did not ask to call witnesses during the trial.

d) Because of their breaches of duty and the hostility to the beneficiary displayed at trial, the trial court could properly remove the trustees. However, the trial court on remand must select new successor trustees because the trustees selected by the court are also beneficiaries and the trust terms prohibit an interested trustee from exercising discretion. The trial court also erred by ordering mandatory monthly trust distributions to Elaine of $4,000, because that would eliminate the trustee discretion and be a trust modification that was not sought in the pleadings or argued at trial.

C. *Gorby v. Aberth,* 2017 Ohio 274 (2017). Trustee did not commit breach of trust by not commencing trust income distributions until expiration of limitations period on contest to trust. Minor technical breach of trust does not justify removal of trustee.

1. Under his revocable trust, Richard gave the residue of his trust assets to a charitable remainder trust that paid income quarterly to his children and gave the remainder to the University of San Francisco. Richard named his long-time attorney as executor and trustee. The children filed objections to the trustee's accounts and sued him for breach of trust and sought his removal. The trial court found in Richard's favor on all of the claims and the children appealed.

2. On appeal, the Ohio Court of Appeals affirmed on the following grounds:

a) The children cannot object to the court's consideration of hearsay testimony about the settlor's intent, where the testimony was elicited by their own counsel on cross-examination.

b) While the trust terms did not mandate that the trustee pay estate debts from trust assets, the trust gave the trustee discretion to do so and the trust was to be funded with the "remaining" trust assets. The settlor therefore contemplated that the trustee would ensure the payment of estate debts before commencing income payments to the beneficiaries. Therefore, the trustee did not breach his duties by delaying trust distributions until seven months after the settlor's death to allow for the limitations period on a contest to expire and until information about all estate assets was collected, and the trial court correctly found that the trustee acted prudently by delaying the start of the income payments.

c) Claims that the trustee failed to communicate his compensation, or otherwise communicate with the beneficiaries, fail for lack of proof in the record. Because all of the trust assets were held in an investment management account, the trustee could meet his reporting obligations by his providing the account statements to the children. The account statement was not inadequate as a report for failing to show the trust liabilities, because there was no proof that there were any trust liabilities that actually existed.

d) The trustee did not commit self-dealing by retaining his own law firm to defend against the children's claims, where the trust terms allow the trustee to retain counsel and do not preclude the trustee from hiring his own firm, and there was no proof in the record to support the self-dealing claims.

e) A technical breach of duty, where the trustee paid court fees with an IOLTA check where no trust assets were held in the IOLTA account, is not a breach of the trustee's duty to use special skills and does not justify his removal as trustee.

f) Claims of breach based on alleged errors in the reporting of debts and charges properly on the estate tax return were properly dismissed for lack of any legal authority to support the claims.

g) Because the trustee successfully defended against the children's claims, the trustee was entitled to use trust assets to pay for his legal defense.

h) The trustee did not commit any serious breach of trust that would justify his removal.

VI. ESTATE & TRUST ACCOUNT CLOSINGS

A. *Restaino v. Northern Trust Company,* 2017 Ill. App. Unpub. LEXIS 2171 (2017). Trustee did not breach duties by liquidating trust assets and retaining cash while litigation was pending and seeking dismissal of claims, and an oral contract to make a will and related claims are dismissed where both settlors expressly retained the unrestricted power to revoke their respective trusts.

1. Jeanette and Charles married in 1960. At the time, each had two children from prior marriages. They moved to Florida in 1993, and each executed Florida revocable trusts, both with the bank as successor trustee. Both trusts provided, at the death of the surviving spouse, for distribution equally to all 4 children. They each reserved the right to amend or revoke their respective trusts and authorized the trustee to distribute assets in cash or in kind. They moved into an assisted living facility in 2000 and Charles died in 2001. Through a series of amendments to her revocable trust, Jeanette disinherited Charles's children and left her assets to her own issue. Jeanette then moved to Illinois in 2006 and died in 2014.

2. Charles's son, Frank, found out about Jeanette's death in 2015 from his children. He called the bank to ask about the trusts, and the bank sent Frank a letter discussing Charles's trust, asking that the beneficiaries mutually agree on whether to retain or liquidate the trust assets, and informing Charles that, in the absence of an agreement, the bank would liquidate the trust assets worth $540,000 and distribute cash. Frank than called a bank trust officer about Jeanette's trust, and was informed he was no longer a beneficiary. The bank then sent Frank a letter informing him that Jeanette's daughters wanted to receive cash and that the assets would be liquidated, and the bank liquidated the assets that same day the letter was sent.

3. The bank then informed Frank that they would settle its accounts judicially at the expense of the trust if Frank did not settle its accounts by a release agreement. Frank, through counsel, demanded various documents and information and the bank informed Frank again that he was not a beneficiary of Jeanette's trust and they would not provide those documents and information. The bank then informed Frank that if Frank did not proceed by release, the bank would proceed to settle its accounts judicially and charge the costs to Frank's share of Charles's trust. The bank then informed all of the beneficiaries that it would proceed to settle its accounts judicially.

4. Frank then filed a 7-count petition and the bank moved to dismiss the entire petition, in which Jeanette's daughters joined. The trial court dismissed the petition with leave to amend, but cautioned Frank and his counsel about the deficiencies in the claims and asked Frank to consider whether his suit made economic sense given the amount at issue. The bank and daughters moved to dismiss the amended petition (which restated the original 7 counts but added hundreds of additional paragraphs and exhibits), and the court dismissed the petition again, but this time with prejudice. Frank appealed the dismissal.

5. On appeal, the court of appeals affirmed the dismissal with prejudice of all 7 counts on the following grounds (and by applying Florida substantive law as provided in the trust terms):

a) Breach of fiduciary duty. The claim that the bank breached its duties by failing to timely inform Frank of Jeanette's death (where her death was the measuring life for when Frank's interest in Charles's trust vested) fails because, even if the failure of notice was a technical breach of the Florida notice status, Frank did not allege any harm resulting from the breach and Frank learned about the death from his children.

b) Liquidation of trust assets. The bank did not breach its duties by liquidating the trust assets because: (i) the trust terms expressly authorized the bank in its discretion to distribute in cash or in kind without the consent of the beneficiaries; (ii) there was no duty to obtain consent before liquidating; and (iii) the bank had informed the beneficiaries that it would liquidate assets if the beneficiaries did not reach a unanimous agreement. In response to Frank's claims, the bank was not required to keep the trust assets invested in the market and file an interpleader action, because there was no dispute about the beneficiaries of Charles's trust, Frank was not a beneficiary of Jeanette's trust, and therefore there was no duty to file an interpleader action for either trust.

c) Duty to remain impartial. The bank did not breach its duty of impartiality because the bank did communicate with Frank with respect to Charles's trust, and Frank was not a beneficiary of Jeanette's trust. Also, even though the bank was only directly named as a defendant in Count I of the petition, the bank properly responded to the other six counts because significant parts of the claims against the bank were related to the other counts.

d) Prudent investment. The bank could properly retain the trust assets in cash, consistent with the Prudent Investor Rule, because: (i) the bank did not prematurely liquidate the investments as noted above; (ii) there is no authority cited for the argument that a trustee is not allowed to retain assets in cash; (iii) the law required the trustee to manage assets "with care and caution" considering the facts and circumstances of the trust and suitable risk and return objectives; and (iv) here the bank retained the assets in cash in view of Frank's refusal to sign a release and his suit against the bank and others, and the bank could properly retain assets in cash in consideration of the uncertainties of the litigation by Frank.

e) Breach of contract**.** The claim for breach of contract to make a reciprocal will (that left all assets to all of the children) against Jeanette's estate was properly dismissed because: (i) the allegations of an oral agreement to make a will are vague and lacking specificity; (ii) an oral agreement to make a will is unenforceable under Florida law; and (iii) the plain terms of the trusts show no agreement because Charles and Jeanette both reserved the unrestricted right to amend or revoke their respective trusts.

f) Fraud. Frank could not prove Jeanette induced Charles to leave part of his trust to her children by fraud, because he did not allege any statements or actions by Jeanette that amounted to fraud or that she even told Charles that if he included her children in his trust, that she would include his in hers.

g) Lack of capacity. Frank failed to adequately plead lack of capacity and the other parties moved to dismiss his complaint without having admitted that Jeanette lacked capacity. Frank also made contradictory allegations about Jeanette's capacity in different counts of his petition. The allegation that Jeanette required Frank and his sons to shower in the pool locker room, rather than in her house, does not give rise to an inference of incapacity and the court will not speculate on her reasons for requiring this.

h) Undue influence. Allegations that Jeanette's children alienated Frank from Jeanette are not adequate to support a claim of undue influence because Frank did not allege that they had any involvement in the preparation of the documents, or how they influenced Jeanette's free will to be overcome. A conclusory statement of undue influence is not adequate to meet the pleading requirements.

i) Tortious intentional interference with economic expectancy to inherit. This was dismissed due to conclusory and inadequate pleadings, and because Frank could not have an expectancy to inherit in trusts where the settlors retained the power to revoke.

j) Trust modification. There are no circumstances that would support modification of Charles's trust to exclude Jeanette's children as beneficiaries, because the express and unrestricted right to amend the trusts contradicts Frank's claim that Charles did not anticipate that Jeanette would amend her trust.

VII. LIMITATIONS & OTHER DEFENSES

A. ***Doermer v. Oxford Financial Group,*** **2017 U.S. Dist. LEXIS 28176 (N.D. Illinois 2017).** One of three co-trustees may not, as beneficiary or as trustee, sue trust financial advisor without consent of other co-trustees.

1. Richard established a North Dakota trust for his son and daughter, his grandchildren, and six charities, with both children as co-trustees along with a corporate co-trustee. After Richard's death, his children disagreed about trust asset management, causing a year-long standstill. The daughter retained a financial advisor paid out of trust assets, and the son sued the advisor, as beneficiary and co-trustee, claiming the advice caused trust losses. The suit was removed to federal court under diversity jurisdiction, and the federal district court respected the choice of law provision in the trust and applied North Dakota law.

2. The court dismissed the suit on the grounds that: (a) the son cannot sue a third party as beneficiary because generally only the trustees can sue third parties on behalf of a trust, and the son did not allege that any exceptions apply (such as where a trustee improperly refuses or neglects to bring the action); and (b) the trust terms did not allow a single co-trustee to act alone, there was no evidence the trust was validly amended to allow a single co-trustee to act alone, under state default law the filing of the suit required the consent of a majority of the three co-trustees, and here the corporate trustee abstained and the daughter voted against bringing the claims.

B. ***Jones v. Wells Fargo Bank,*** **2017 U.S. App. LEXIS 9678 (2017).** Court reverses jury award against bank trustee on legal theory not pleaded and not introduced until closing arguments.

1. JPMorgan Chase Bank served as trustee of four trusts created by Sweetie Boyle for the benefit of Richard Jones, until 2001 when Wells Fargo become trustee after acquiring JP Morgan's trust department. Wells Fargo remained as trustee until the trusts terminated in 2010. In 1999, JPMorgan petitioned to settle its accounting as executor of Sweetie's estate and to resign as trustee, Richard filed objections and counterclaims for mismanagement, and both matters were dismissed.

2. In 1995, JPMorgan as trustee purchased a home at Richard's request to hold inside of a 1994 trust for Richard's benefit. The house had numerous flaws including mold issues, and in 1999 JP Morgan sued the sellers (who were later nonsuited) and the home inspector. By the mid-2000s, the trust could not pay for home repairs, Wells Fargo (now trustee) sued to dissolve the trust, and the court denied its request to terminate the trust. Wells Fargo concluded it would lose its case against the inspector, settlement negotiations fell apart, Wells Fargo tried to assign the claim to Richard but he refused to take it, and in 2009 Wells Fargo nonsuited the claim.

3. In 2013, Richard sued JPMorgan and Wells Fargo in state court, and the banks removed the case to federal court and moved for summary judgment. The court dismissed all of the claims other than the claim that, by nonsuiting the claim against the house inspector rather than proceeding to trial, Wells Fargo had breached its fiduciary duty to Richard and violated the Texas Property Code. The claim went to trial by jury. In his closing arguments, and at no point before then, Richard's lawyer introduced a new legal theory and argued that Wells Fargo did not breach its duties by nonsuiting, but rather had breached its duties by nonsuiting the case earlier when it was clear it would be unsuccessful. Wells Fargo did not object at trial, but objected repeatedly in post-trial briefings. The court held that Wells Fargo was on notice of this potential theory of liability and had waived any objection to the adequacy of the pleadings by not objecting on its first motion for judgment as a matter of law. The jury appeared to rely on this new theory, and held that Wells Fargo breached its duty by nonsuiting and that the harm to Jones was the result of gross negligence or malice. At the same time, the jury held Richard's likely recovery from the suit would be "$0.00", and then awarded Richard $172,000 in exemplary damages, $34,000 in attorneys' fees, and $4,500 in disgorged trustee fees. The court entered final judgment on the jury award. Wells Fargo appealed and Richard cross-appealed dismissal of his other claims against the banks.

4. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the trial court in part, and dismissed all of the claims against both banks, on the following grounds:

> **a)** Richard failed to persuade the jury of the claim actually tried as evidenced by the jury's conclusion that the lawsuit had a value of zero at the time of nonsuit.
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> **b)** The only theory on which the jury could have found breach was a theory that was not pleaded (that the trustee should have nonsuited sooner). By entering judgment on the unpleaded claim, the court allowed amendment of the complaint. Post-trial amendments conforming pleadings to the evidence are only allowed if the defendant gives express or implied consent. Fairness entitles a defendant to notice, before trial, of the nature of the claims. Wells Fargo could not have recognized, during trial, that the new unpleaded claim had entered the case because, after Richard rested his case, the court stated the unpleaded claim was not part of the case and would not go to the jury. Therefore, Wells Fargo could not have consented to the claim, the claim was neither pleaded nor tried, and Wells Fargo did not consent to the post-trial amendment. It was therefore improper for the court to award damages on that theory.
>
> **c)** Richard's claims that Wells Fargo misapplied insurance proceeds, double-billed trusts, improperly used trust funds to pay attorneys' fees, and failed to advise him of the possibility of merging trusts, and that JPMorgan failed to convey title to mineral interests, were properly time-barred and were inherently discoverable, or not properly pleaded.

C. *Hansen v. Rozgay,* 2017 Wash App. LEXIS 2417 (2017). Contest to LLC, irrevocable trust, and funded revocable trusts that disinherited children was not subject to shorter statute of limitations for will contests, despite being signed on the same day as the will.

1. Clarence and Barbara had four adopted children including daughter Kim and son Mark. Barbara's mother created a trust for her lifetime benefit with all four of her adopted children as remainder beneficiaries, and Mark became trustee in 2004. In 2010, Clarence and Barbara updated their estate planning, including changes to the ownership and inheritance of their Hood Canal home and a community property collection of art. Mark was involved in the planning, took them to meet the accountant, attorney, and financial planner, received drafts from the attorney and authorized the attorney to proceed with drafts. The attorney testified he met privately with Clarence and Barbara but the journals by their caretakers did not reference the meetings. Mark, Clarence and Barbara met together with the attorney on December 27, 2010 at Clarence and Barbara's home and they executed 24 documents to carry out a comprehensive estate plan, which included: (a) converting Barbara's separate property including the house into community property; (b) creating an LLC for the house with Mark as manager; (c) creating an irrevocable trust with Mark as trustee, for the benefit of Mark and their other son, and not including their daughters Kim and Lisa, and funding the trust with the LLC units through a part gift part sale transaction for a promissory note; (d) creating a joint living trust and funding it with the balance of their assets, with the sons only (and not the daughters) as remainder beneficiaries; (e) signing new pour-over wills that left tangible personal property to only the sons; and (f) signing new powers of attorney naming Mark as agent.

2. In February 2011 (2 months later), Clarence and Barbara were institutionalized in a memory loss care unit and Mark informed the unit at that time that they both were incontinent, had dementia, and had CPAP machines. Barbara had a feeding tube and died in September of that year, and Mark become personal representative.

3. Kim received notice of probate, started asking Mark questions and received an accounting with respect to the trust created by Barbara's mother, and eventually sued to (a) terminate the power of attorney for the father; (2) invalidate the irrevocable trust and LLC and restore the assets; (3) order the transfer of the Hood Canal House to all four children; and (4) award damages.

4. The trial court granted Mark's motion for summary judgment, in part, on the basis that all of the claims challenging the LLC, the irrevocable trust, and the living trust were "will contests" that were barred by the statute of limitations on will contests (along with other rulings that are not included in this summary). There was no dispute that the claims were filed long after the 4-month limit for contesting Barbara's will.

5. On appeal, the court of appeals reversed the trial court ruling that the suit was time-barred a "will contest" on the following grounds: (a) an action is a will contest where the fundamental thrust of the claim is to determine issue affecting the validity of the will; (b) the complaint did not challenge the will, but rather challenged all of the other documents; (c) even though the documents were all signed at the same time, and even though a court may treat some actions not styled as will contests as actual will contests, here there was no challenge of any kind to the will; (d) the estate planning documents here were stand-alone and not wholly dependent and exclusively funded by a pour-over will, had present legal effect and assets, and were created separate and apart from the will.

6. The court also reversed summary judgment for Mark on the issue of undue influence.

D. *Haworth v. Ligon,* 2017 Ariz. App. Unpub. LEXIS 1546 (2017). Statute of limitations of breach of trust claims does not run on age-based termination date where assets were not actually distributed by trustee.

1. Robert and Ruth created a trust that provided for half of the assets to pass to their daughter Judy and the other half to their granddaughters Autumn and Amber (Judy was their aunt), but with the shares for Autumn and Amber held in trust with Judy as trustee until they reached age 25 (the trust terms stated that upon reaching the age of 25, the beneficiary would receive his or her share of the Trust "and the Trust estate as to such beneficiary shall thereupon terminate"). When Amber reached age 25, Judy provided Amber with $25,000 but claimed it was a personal gift from her. When Autumn reached age 25 three years later: (a) Judy told her she had no interest in the trust and all of the assets passed to Judy alone, and the prior gift to Amber was a personal gift from Judy; (b) despite requests by Autumn's counsel, Judy refused to provide the trust instrument or an accounting and Judy's husband told Autumn she had no interest in the trust; (c) Judy's husband told Autumn's counsel that Robert told Judy before he died that he did not want to leave them anything, that Judy had set aside $25,000 for her in a retirement account out of her own generosity, and that he and Judy sold the trust assets and used the sales proceeds to purchase their own current home.

2. Autumn and Amber petition to remove and surcharge Judy, Judy did not appear for trial, and judgment was entered against her. Two months later, Judy moved to dismiss the claims as time-barred as having been filed more than 2-years after they turned 25, and raising other challenges. Two years later, final judgment was entered against Judy and the court ordered imposition of a constructive trust on Judy's personal assets, the community assets of Judy and her husband, and their home. Judy appealed.

3. On appeal, the court of appeals affirmed the judgment but reversed the imposition of a constructive trust on the following grounds: (a) the trust terms clearly provided that Autumn and Amber's interest in the trust would not terminate until they actually received their age 25 distributions (upon receiving the distributions the trusts would "thereupon" terminate), and not merely upon reaching age 25, and therefore the statute of limitations did not commence running upon their birthdays; (b) a constructive trust may not be imposed where there is an adequate remedy at law, there was no evidence to trace the trust assets directly to the assets subject to the constructive trust, the evidence did not suggest that Judy's home was purchased exclusively with trust assets, and the court could not enter a judgment against Judy's husband's assets when he had not been named as a defendant and there was no finding of liability against him.

4. On remand, the trial court was ordered to determine a proper remedy, and directed to consider whether: (a) Judy's community interest in the home is subject to an equitable lien; and (b) whether the complaint should be amended to name Judy's husband as a defendant.

E. ***In re Briggs Trust,* 2017 SD 40 (2017).** UTC 60-day notice bars action to contest trust amendment for lack of capacity and undue influence.

1. Elizabeth amended her revocable trust to disinherit her son and her son's daughter, and to leave all of the trust assets to her daughter. After Elizabeth died in 2013, counsel for the trustee (the daughter) sent the son a letter informing him of his mother's death, copies of the trust documents, the trustee's contact information, and a notice pursuant to a state statute (similar to Section 604 of the UTC) that the son had only 60-days to commence a judicial proceeding to contest whether the trust was validly created. Within the 60 day period, the son emailed the court clerk and the trustee's counsel a "notice of objection to trust instrument" that did not identify any specific objections and did not seek any specific relief. Then, 611 days after receiving the trustee notice, the son sued to declare the trust amendments invalid for lack of capacity and undue influence, and also claimed that the daughter breached her duties as trustee (although the suit failed to name her as a defendant or bring an action against her individually). The daughter moved to dismiss the claims based on the notice, the trial court granted the motion, and the son appealed.

2. On appeal, the South Dakota Supreme Court affirmed the dismissal of the claims on the following grounds:

a) The statute bars claims contesting whether a trust "was validly created" that are brought more than 60 days after receipt of statutory notice from the trusts, and is very similar to Section 604 of the UTC. The statute operates as a statute of limitations and statute of repose that bars untimely judicial proceedings contesting the validity of trusts and trust amendments.

b) Claims of lack of capacity or undue influence relate directly to whether a trust is validly created, and are therefore subject to the statute. The UTC comments use these claims as specific examples that are subject to the statutory time limits.

c) The "substantial compliance" and "equitable tolling" doctrines do not apply to statutes of limitations, and allowing an email that raises no specific objections, brings no actual claims, and seeks no relief to stop the running of the statute would frustrate the purpose of the statute to facilitate the expeditious administration of trusts by limiting the period of time for trust contests.

d) The son's claims against the daughter as caretaker were dismissed for failing to name the daughter as a defendant in her individual capacity. The claim for an accounting was dismissed because, as a result of the failure to timely contest the trust amendments, the son was not a beneficiary with standing.

VIII. REMEDIES & DAMAGES

A. *Wells Fargo Bank v. Militello,* 2017 Tex. App. LEXIS 5640; 2017 Tex. App. LEXIS 6546 (2017). Evidence was largely adequate to support damage awards against bank for gross negligence in wrongful below market sale of oil and gas interest to larger bank client.

1. Angela was orphaned at age 7 and, as a result of suffering from lupus, was dependent on trust for her benefit created by her grandmother and great-grandmother. The trusts held millions of dollars in assets, including oil and gas properties, and a bank served as trustee. Angela looked regularly to her trust officer for advice. When she was 25, one of her trusts that held over 200 marketable oil and gas properties was coming to an end. The trust officer asked her to keep the assets in trust so that he could keep working with her, but did not disclose the ongoing fees. Relying on the trust officer, in 1999 Angela placed the properties into a revocable trust with the bank as trustee.

2. In 2005 and 2006, Angela advised the trust officer that she needed cash as a result of her divorce and high uninsured medical costs. She asked if it would be possible to sell a small portion of her oil and gas properties to raise cash, and asked for other options. The bank advised her not to sell the properties in other trusts for her benefit, and even though it controlled all of the funds for her benefit did not offer her any other possible solutions. The bank only discussed with her selling oil and gas properties in her revocable trust. The trust officer said they could sell half of the properties for $300,000, despite the actual value being as high as $1.9 million. Angela travelled to visit with the bank and its oil and gas asset manager, the manager provided her a one page document that showed annual trust income of $286,000, and the manager suggested they would sell as little as 35% of the interests for $200,000.

3. The manager had contacted another of the bank's large clients with large royalty trusts managed by the bank, and along with two higher ranking bank relationship managers, had dinner with the large client. The client was in the process of doing estate planning that could involve additional trust management business for the bank that the bank hoped to secure. The manager, acting alone, negotiated the sale of all of Angela's interests to the large client for $530,000 in 2005 and 2006. Eighteen months later, that large client sold the same properties to another company for $5.2 million. In response to Angela's inquiries about the trust and several years before Angela expressed an interest in selling, the manager hired a land man (who was not a qualified engineer) to value the properties, and that person valued the sold assets at only $400,000. No updated valuations were obtained in connection with the sale of all of her interests. Even though Angela had only asked to sell enough of her interests to raise $200,000, the manager did not do any analysis to determine what amount to sell in a series of three one sentence letters he wrote to the bank dictating the terms of sale, and everything was sold in percentages dictated by the large client and with no negotiations. Those letters were the only sales documentation, there were no purchase agreements, and the deeds were not finalized years after the sales.

4. The manager also left the properties on Angela's account until 2009, the bank did not notify the oil and gas producers of the sale until after the large client sold the interests to a third party, and until 2008 the bank charged Angela's account for the taxes, insurance, and fees associated with the sold properties. Angela's account was used as a filter to pay the income to the large client, while Angela's accounts paid the costs and taxes. Other times, checks made payable to Angela's trust were deposited into the large client's account.

5. In 2007, Angela or her counsel tried to get information from her new trust officer about her trust and the sales, and she was referred to bank counsel and then still could not get basic information from the bank. Angela received tax forms showing she had received income that was actually diverted to the large client, which caused a $17,000 levy on her accounts by the New Mexico taxing authority along with an IRS audit, and the bank refused her requests for the information needed to defend against the tax claims.

6. Angela sued the bank and the trial was completed in 2012. The trial court failed to enter judgment, and only after a mandamus action by Angela eventually in 2015 (three years after close of trial) entered judgment against the bank in the amounts of: $1.33 million in past economic damages; $30,000 in disgorgement of trustee fees; $1 million in mental anguish damages; $3.47 million in exemplary damages; and $470,000 in attorneys' fees. Angela agreed to $339,000 in remittitur of damages for credit for a settlement with a former defendant, certain legal services, and a tax levy that was redirected to another party. The bank appealed and claimed that the evidence was not legally and factually sufficient to support the trial court's damage awards.

7. On appeal, the court of appeals largely affirmed the damage awards on the following grounds.

> **a)** *Tax-related damages.* The tax-related damages were supported by the evidence because: (a) the bank did not properly document the sales or update its records, causing Angela's accounts to show false income that caused problems with Angela's tax returns and taxing authorities, and then failed to provide her with the information to resolve these tax problems the bank caused by its undisputed breaches of fiduciary duty; (b) Angela's tax lawyer testified credibly about the actions and costs required to redress the tax matters; (c) a court may award damages in the amounts of legal fees to protect against a third party that is the result of the breach, and the breaches made it necessary to obtain tax advice to correct the bank's errors; and (d) the penalties and interest owed to the IRS caused by the bank's breach were proper damages, where the bank's failure to provide Angela with the information to defend against the tax claims was the cause of the charges.
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> **b)** *Tax levy damages.* The $17,000 seized by New Mexico as a tax levy was a proper damage award because the bank's breach was the source of the levy, and after being informed of the tax dispute, the bank did nothing to help solve the problem.

c) *Lost production revenue.* The $75,000 award for production revenue (for a one month period) was the result of the bank's failure to properly document the sale to the large client and the exact date of the sale or even have a sales contract, and any uncertainty on the exact date where Angela's interest in revenue should have ceased is properly resolved against the bank that caused the uncertainty.

d) *Money market account.* The evidence supported a finding that the bank wrongfully transferred Angela's money market account that held $25,000 from production revenue to the large client, because Angela did not agree to the transfer, and any uncertainty about the right to the production revenue was caused by the bank, and the bank wrongfully used Angela's account for three years after sale as a vehicle to transfer revenues to the large client.

e) *Mental anguish.* The evidence supported an award of mental anguish damages because: (i) the stress from the bank's actions caused Angela to suffer an ulcer and have shingles and she testified that was emotionally broken from the matter, and medical testimony was not required to support the award; (ii) the bank delayed paying insurance deductibles for her son when he suffered a severe hand injury, which resulted in the son receiving basic stiches rather than the corrective surgery he needed to receive within 4 days of the accident; (iii) Angela made numerous requests for information that received only cursory replies; (iv) as a disabled person unable to work, Angela relied on access to credit that was harmed by the bank's actions and the tax liens; (v) the bank's actions caused Angela disruptions and distress in caring for her and her children's basic financial needs, in a state of perpetual worry, and with no help from the bank, being forced to retain counsel. However, the $1 million mental anguish award is not supported by evidence where the actual damages relate in part of matters addressed by actual damage awards (such as for the below market sale of the property) and for the award for breach of fiduciary duty. The actual damage awards fairly and reasonable compensate Angela for the mental anguish she suffered, and the mental anguish damages are affirmed only to the extent of $311,000 in damages for breach of fiduciary duty.

f) *Prejudgment interest.* It was appropriate to include in the damages the interest for the period of the trial court's extreme delay in entering a final judgment because: (i) Angela made all of the effort to compel the trial court to enter the final judgment; (ii) prejudgment interest is awarded to fully compensate the victim, not as punishment on the wrongdoer, and to fail to award interest for the delay period would result in the victim not being fully compensated; and (iii) as between a victim and a wrongdoer, the wrongdoer should bear the costs of the delay.

g) *Exemplary damages.* Exemplary damages in the maximum amount allowed under the statutory cap (twice the economic damages, plus $75,000) were appropriate because: (i) the record provided clear and convincing evidence that the bank was grossly negligent, the bank's conduct involved an extreme degree of risk to a vulnerable client, and the bank was aware of that risk; (ii) the bank used an unreliable valuation to sell assets below market to a high profile client, and then comingled funds causing tax liabilities and penalties; (iii) the bank pursued its own interests by serving a larger client and neglecting Angela, then refused to speak with her or remedy its actions, and refused to accept responsibility or show any remorse for its wrongful actions, thereby ignoring its fiduciary duties; (iv) the bank's actions were reprehensible by inflicting economic harm on a financially vulnerable client, the bank committed intentional fraud, and then failed to provide information; and (v) the damage award does not exceed the statutory cap, there is both past harm (from the below market sale and tax penalties) and future harm (from the permanent loss of an income source).

h) *Trust exculpatory clause.* The trust clause, on its terms, does not protect against gross negligence, and the evidence supports the trial court finding of gross negligence.

i) *Total remittitur.* The court of appeals proposed remittiturs that would revise the trial court damage award to be $311,000 in total mental anguish damaged (down from $1 million) and $2.8 million in exemplary damages (down from $3.47 million). Angela could either accept these or have the case remanded for a new trial. Angela consented to these adjustments, the court of appeals modified the trial court decision on damages, and the court of appeals then affirmed the decision.

B. ***Lynch v. Romano*, 285 Ore. App. 243 (2017).** Trial court did not err by rejecting plan to redistribute assets to restore credit shelter trust to allegedly remedy breach of trust by deceased surviving spouse while serving as trustee.

1. Chris and Lois created a joint revocable trust and amended it several times together. Under the final version of their joint amendments, at the death of the survivor of them all trust assets would pass to their daughter Christine (and nothing to their son Rick). Lois died in 1993 and the trust provided for an irrevocable credit shelter with Chris as trustee, and also a survivor's trust that was revocable by Chris and also with Chris as trustee. Chris funded the credit shelter trust with a 20-acre property worth $560,709 and $32,750 in stock. In 1999, Chris removed the property from the trust, replaced it with other property of lesser value, sold the removed property, and used the sales proceeds to fund a charitable remainder trust that benefitted himself and his second wife, Dolores. Thereafter, Chris moved assets freely between the revocable and irrevocable trusts, lost track of the assets, told his lawyers to stop trying to correct and track the asset movement, and his counsel eventually determined the tax benefits of the credit shelter trust had been lost.

2. Chris amended and restated the revocable trust and in its final version left the family farm to Christine's son, subject to a life estate for Rick. The balance of the assets were left equally to Christine and Rick. Chris died in 2009, and Christine become the trustee. She hired estate planning counsel who developed a plan to trace and unwind Chris's allegedly improper actions as trustee and sort through the "rat's nest of transactions", and Christine presented the plan to the court for approval. The plan involved restoring $400,000 of assets, in 1999 dollars, to the credit shelter trust (that would pass to only Christine), including the family farm where Rick lived, plus another property and cash. Christine alleged that the asset reallocation plan was necessary to remedy Chris's breach of trust, and Rick opposed the petition and asked the court to order distribution pursuant to the trust terms.

3. The trial court rejected Christine's petition and Christine appealed. On appeal, the court of appeal affirmed the trial court on the following grounds: (a) Christine sought only equitable, rather than legal, relief, a court has broad discretion in crafting equitable relief, and its decisions are reviewed only for abuse of discretion; (b) Christine, petitioning as trustee, has not identified any legal right that has been violated or pointed to any legal or constitutional principle the trial court violated; (c) the parties disputed whether Chris breached his duties and the trial court did not state that it found Chris had breached his duties; (d) the petition did not ask the court to determine whether Chris committed breach, the petition did not seek to hold Chris's estate liable for breach, and even if breach was shown, there is no right as successor trustee that was violated and that would require a remedy for breach; (e) no legally recognized right was identified and no relief was sought for violation of a right that would require the trial court to grant Christine a remedy; (f) Christine sought equitable relief only to repair the damage caused by Chris's action, but the court could find that there was no way to unwind those actions; and (g) because Christine also asked the court for instructions in the absence of approving the asset plan, and the respondent asked the court to enforce the trust terms, the court could enforce the trust terms as a proper remedy, especially in view of the extreme damage done by Chris, the settlors' intent, the property already given to Christine during Chris's life, and the court's finding that Christine's actions were motivated by her desire to make as much of the estate for herself as possible, and the testimony that the IRS was not bound for tax purposes by court approval of the asset plan.

C. ***Matter of Knox, 2010 NY Slip Op 52234U*** **(February 24, 2010);** ***2010 NY Slip Op 52251U*** **(November 24, 2010); 2012 N.Y. App. Div. LEXIS 4880 (June 19, 2012); 2012 NY Slip Op 6531 (2012); 2013 NY Slip Op 64886 (2013);** ***Campbell v. Bank of America,*** **2014 N.Y. Misc. LEXIS 4353 (2014); 2017 NY Slip Op 03295 (2017); 2017 N.Y. App. Div. LEXIS 3304 (2017).** Surrogate's court surcharged trustee for over $21 million for not diversifying investments and taking investment directions from a non-fiduciary family member. The appellate division largely reversed the surcharge on appeal. Supreme Court refused attempt by beneficiaries to re-litigate lost claims, or raise new related claims in Suffolk County court and disqualify Erie judge that had rendered adverse rulings. Appellate division binds additional beneficiaries to a high/low agreement on damages for breach.

1. Seymour Knox II (Mr. Knox) created a trust under a trust agreement in 1957 for the benefit of his son Seymour Knox III (Seymour), with a predecessor to HSBC Bank as sole trustee. The Knox family had long been involved with the bank, and both Mr. Knox and his son Northrup headed the bank for many years. The Knox family was one of the bank's most important clients and among the founders of the modern version of the bank. Seymour and Northrup also founded the Buffalo Sabres NHL hockey franchise.

2. The trust provided for discretionary income and principal distributions among Seymour's children and more remote descendants on a *per stirpes* basis, with the goal of treating Seymour's children equally. The trust was funded with 5,000 shares of Woolworth stock and 5,200 shares of Marine Midland (now HSBC) stock.

3. At the time Mr. Knox created the trust, he was on the board of directors of both Woolworth and Marine Midland and owned 13% of all Woolworth stock. Within a year following the creation of the trust, the trustee sold 2,100 shares of Woolworth stock and purchased other equities. The trustee retained the balance of the stock at Mr. Knox's request. In 1985 the Woolworth stock made up 38.1% of the trust portfolio, which increased to 40.2% by 1996. The concentration was approved by the trustee's regional manager due to the low cost basis of the stock and "the sensitive nature of these issues on this account." In 1991, the trustee wrote to Seymour and recommended the sale of the stock, but said they would continue to hold the stock because "co-trustee" Seymour did not want the stock sold. By 1995, Woolworth was showing signs of trouble and stopped paying dividends. That year, at Seymour's request, the trust invaded principal to make up for the income lost when Woolworth stopped paying dividends, but continued holding a 33.6% concentration of the stock. There was no documentation in the file as to why the stock was retained.

4. Seymour died in 1996. In 1997, Northrup wrote to the trustee and warned against holding Woolworth stock, and informed the trustee that all Woolworth stock in the Knox Foundation had been sold. That year, the trustee sold 5,000 shares of Woolworth stock, leaving 23,000 shares in the trust, making up a 21.1% concentration. That same year, Woolworth was removed from the trustee's "hold list." In 1998, the trustee sold another 3,000 shares. Later that year, the trustee received 20,000 shares of Venator (the successor to Woolworth) stock in an exchange. The trustee did not fully divest the trust of Woolworth stock until 1999, four years after it stopped paying dividends.

5. When the trust was created, it was also funded with 5,200 shares of Marine Midland stock. The trust agreement expressly authorized the retention of the Marine Midland stock, even if the asset was not otherwise authorized by law as a suitable trust investment and even if the bank was acting as trustee. Internal bank documents stated that Mr. Knox understood that the trustee had complete authority to sell the bank stock for purposes of diversification, and that Mr. Knox was not adverse to the sale but hoped other assets would be acquired rather than the bank stock sold. In 1981, Seymour informed the trustee of his preference to retain the bank stock, and the trustee retained the stock. The only documentation of the annual decision to retain the stock was a literal rubber-stamped entry in the investment diary, with no analysis in the trust files. The bank stock was finally sold in 1987.

6. In 1969, Mr. Knox and Seymour requested that the trustee purchase stock in Dome Petroleum and Leesona Corporation for the trust. The trustee determined these stocks were not good trust investments, but purchased them anyway on the approval of Mr. Knox and Seymour. Despite the trustee's negative conclusions about the Dome stock, it was held in an overweight position (well above 10% of the trust portfolio, and by 1981 as high as 43.4%) at Seymour's direction, whom the bank internally referred to as a "co-trustee" even though he was not actually a co-trustee. Even though Leesona was an off-list security not proper for the trust, the trustee held a concentration in Leesona as high as 30.4% of the trust portfolio on Seymour's authorization. There was no documentation in the file that explained the retention of the overweight position. The trust also retained an overweight position of Digital Equipment stock (as high as 20%) without documentation.

7. In September of 2006, the trustee brought an action in the Surrogate's Court to settle its accounting from 1957 to 2005 and to resign and be discharged as trustee. Seymour's children objected to the accounting and alleged that the trustee negligently retained the Venator Group (the successor to Woolworth) stock. The guardian *ad litem* appointed for Seymour's minor descendants also filed objections alleging that the trustee breached its duty by failing to diversify investments, violating its own internal procedures in making investments, improperly abdicating its fiduciary role to Mr. Knox and Seymour, and being engaged in an overall pattern of imprudence and negligence.

8. The court held that the trustee breached its fiduciary duty and was negligent in purchasing the Dome and Leesona stock at the direction of a non-trustee (at different times Mr. Knox and Seymour) when the trustee's own analysis concluded those stocks were not proper trust investments. On critical management issues, the court concluded that the trustee simply deferred to Mr. Knox and Seymour, even to the extent of allowing one or both of them to effectively override the best consideration of the sole trustee.

9. With respect to the Woolworth stock, the court held that the trustee should have sold the stock when it became an off-list holding in 1997 at the latest, and that the trustee offered no plausible explanation for its gross dereliction of its fiduciary duty. The court rejected the trustee's defense that the stock produced one-third of the trust's income because there was no documentation of that rationale during the administration, other stocks could have generated more income, and the stock was retained by the trustee after it stopped paying dividends. The court was also sharply critical of the trustee's distribution of principal to make up for the lost Woolworth dividends, without any analysis and simply at Seymour's request.

10. With respect to the bank's stock, the court held that: (1) the trust instrument exonerated the trustee for holding its own stock, but only where it exercised its discretion with respect to the stock; and (2) since there was no proof that the trustee performed any actual analysis about the prudence of holding the stock and ignored its fiduciary duties, the trustee could not be absolved of its negligence by the trust terms.

11. The court held that the trustee negligently managed the trust by: (1) failing to maintain documentation; (2) failing to develop an investment plan; (3) being indifferent to bank policies; (4) acquiescing to directions by a non-trustee and treating Seymour as a co-trustee; (5) failing to sell the bank stock at the inception of the trust; and (6) failing to sell 90% of the Woolworth stock at the inception of the trust and the balance of the shares by 1991.

12. In a supplemental decision concerning damages against the trustee, the court: (1) used a straightforward application of the *Matter of Janes* method of calculating damages; (2)

awarded 9% interest compounded annually, finding that a 9% return would have been earned by the trust assets if invested properly; (3) awarded actual damages in the amount of $21,437,084; (4) declined to order the trustee to return commissions due to a lack of evidence of malevolence or dishonesty; and (5) reserved decision about the trustee's attorneys' fees.

13. On appeal, the Appellate Division largely reversed the surrogate on the following grounds:

> **a)** The trust terms gave the trustee the power to invest without regard to diversification.
>
> **b)** The trust terms allowed the trustee to consult with "counsel" and provided that the trustee would be protected for acting in good faith in accordance with the opinion of counsel. This provision is not an absolute exoneration provision that is contrary to law.
>
> **c)** The term "counsel" is not limited in the trust terms to only legal counsel.
>
> **d)** The trustee acted prudently in consulting with Seymour in making investment decisions because Seymour (i) was co-trustee of other family trusts, (ii) had a vested interest in the success of the trust for his children, and (iii) was a knowledgeable and savvy investor.
>
> **e)** The retention of the bank stock was specifically authorized by the trust terms.
>
> **f)** Dome and Leesona were purchased and held in reliance on advice from Seymour, and to the extent they were sold for losses the losses were nominal. There was no evidence that the trustee acted imprudently in relying on Seymour's advice, and no evidence that Seymour was acting against the interest of his children or that he was uneducated in financial matters.
>
> **g)** Even though assets were held in overweight positions, the objectant failed to establish that it was imprudent to do so, those positions were held in consultation with Seymour, and the objectant failed to show a financial loss from the holdings.
>
> **h)** The Woolworth and bank stocks were inception assets, and inception assets may be prudently retained even where it might be imprudent to purchase those assets during the administration. Those stocks also generated significant income for the beneficiaries. It would be unreasonable to find that a trustee acted imprudently in retaining assets that had both appreciated in value and provided significant income to the trust.

14. The appellate division sustained the surcharge award only as to the retention of the Woolworth stock after the date it stopped paying dividends. The appellate division denied the motion for leave to appeal to the Court of Appeals or for rearmament. The Court of Appeals dismissed the motion for leave to appeal on the grounds of the decision not being final and appealable.

15. *Damages and High/Low Agreement.*

> **a)** Before the appellate division's decision was released, the trustee, the adult remainder beneficiary, and the guardian *ad litem* for the minor remainder beneficiaries orally agreed to a "high/low" agreement that was executed and approved by the surrogate. Under that agreement, the trustee paid the trust $6.5

million. In 2014, the trustee sought to amend its petitions to settle its accounts to include an additional minor remainder beneficiary born two weeks before the initial petition, sought recalculation of the surcharge award, and for a determination that the high/low agreement was binding upon the income beneficiaries and additional minor remainder beneficiary. The surrogate agreed to add the additional minor party and appoint a guardian *ad litem*, but denied the other relief. In 2015, the trustee again sought to recalculate damages and bind the other beneficiaries to the high/low agreement, which the surrogate again denied. Both sides retained experts to calculate damages with respect to the Woolworth stock. The trustee's counsel agreed to accept the calculation of the beneficiary's expert in the amount of $641,494 (which only varied slightly from its own expert's calculation).

b) The appellate division held that the surrogate erred by denying the petition to recalculate the damage award and held that the trust was damaged in the amount of $691,494 with respect to the Woolworth stock as of June 30, 2012, noting that the purpose of damages is to replace capital lost to the trust and not by the beneficiaries and to put the trust in no worse, but no better, than the position the trust would have been had it sold the Woolworth stock.

c) The appellate division held that the trust had been made whole with respect to the Woolworth stock, since an amount 10 times higher than the damage calculation was paid by the trustee under the high/low agreement. The court also held that the high/low agreement applies to both the income and additional remainder beneficiaries, and that the trust had already been made whole with respect to any additional surcharges that may be imposed as a result of any pending objections up to the amount of the $6.5 million already paid, because the additional remainder beneficiary is only entitled to be put in the position she would have occupied absent any breach.

d) The matter was remanded to the surrogate to determine whether to add interest to the recalculated surcharge up to the date the trust was made whole.

16. The Court of Appeals denied appeal of the order on the grounds it was not a final and appealable order. The appellate division denied the motion for re-argument or leave to appeal to the Court of Appeals.

17. *Additional Chapter.* Following their losses in the Erie County Surrogate's and Supreme courts, certain beneficiaries then filed a new lawsuit in the Suffolk County Supreme Court with 15 causes of actions seeking accountings and claiming abuse of process, bad faith, breach of fiduciary duty, fraud, conversion, aiding and abetting, judicial bias, and other claims. The beneficiaries also sought to move the matters currently pending in Erie to Suffolk County, and to disqualify counsel for the trustees. The only contact with Suffolk County was that one of the beneficiaries resided there. All other contacts related to the claims were in Erie County. The Suffolk County Supreme Court generally granted motions to dismiss all of the claims and required any claims not subject to dismissal to be heard in Erie County on the grounds that:

a) The Erie judge refused to recuse herself, and the grandchildren failed to appeal her decision which is the proper course of action. The Erie surrogate can afford complete relief in the case, the surrogate and supreme courts have concurrent jurisdiction in these matters, and the proceedings in Erie were filed before the Suffolk County action. Any allegations that the Erie judge is biased must be raised before that judge.

b) The trustees and family office, which are at the center of the case, are located in Erie.

c) The court may not vacate, overrule, modify, reconsider, or disturb the decision of a fellow judge with coordinate jurisdiction.

d) Unless the Erie judge's decree is vacated by reversal on appeal, the causes of action that are an attempt to re-litigate prior decisions in another court are dismissed.

e) Causes of action dependent on factual issues presently before the Erie court are dismissed without prejudice so they can be filed in Erie, due to the possibility of inconsistent rulings and judicial economy.

f) Claims that within the scope of releases signed by the beneficiary of trusts that are terminated are dismissed.

g) Claims that seek an accounting beyond the 6-year limitations period on accountings after trust termination are dismissed as untimely.

h) Claims that are related to the accountings for trusts, where the trustee has already petitioned for settlement of the accountings in Erie, are dismissed.

i) Claims related to a fictional trust that does not exist are dismissed.

j) The guardian *ad litem* appointed by the Erie court may not intervene in the Suffolk action, as his claims are better heard in Erie.

k) The Erie accounting proceedings filed by the trustees cannot be joined with the Suffolk actions because the Suffolk actions are dismissed or properly filed in Erie.

l) The beneficiaries' multiple claims and motions do not rise to the level of sanctions as they are based upon legal theories.

m) The beneficiaries' claim to disqualify the trustees' attorney are rejected.

IX. ARBITRATION

A. *Harvey v. Cumberland Trust & Investment Co.,* 2017 Tenn. LEXIS 701 (2017). Powers under UTC allow trustee to enter into pre-dispute arbitration agreement with investment advisor, and trustee did not breach its duties as a matter of law by agreeing to pre-dispute arbitration with advisor. Non-signatory minor trust beneficiary is bound to arbitration agreement to the extent the beneficiary's claims seek to enforce the investment agreement.

1. Alexis was hospitalized when she was eight months old, and due to complications endured several amputations and was significantly disabled. Her parents divorced shortly thereafter, her mother Shauna sued various medical providers, and eventually settlement proceeds of $2.6 million were placed in trust for Alexis's lifetime benefit with a corporate trustee. Shauna successfully petitioned to remove the initial and successor corporate trustees, and eventually obtained the appointment of a third corporate trustee. All of the corporate trustees, at Shauna's urging, retained Albert and his firm, Wunderlich Securities, as investment advisor for the trust. The trustee entered into an investment advisory agreement with Albert and Wunderlich that included a broad pre-dispute arbitration provision.

2. Alexis's grandfather was appointed as her guardian, and on her behalf he sued Albert and Wunderlich (he also sued the corporate trustee but that suit is not at issue in the case), alleging that: (a) Albert had entered into an inappropriate relationship with Shauna, and assisted her in raiding the trust for her own benefit; (b) the trust had been depleted from $2.6 million to just $200,000 and used for Shauna rather than Alexis, including building Shauna a five-bedroom house on seven acres of land; and (c) funds were not provided for Alexis's care (other than a single $1,500 payment) which harmed Alexis, including by causing her handicap-accessible van to be repossessed. Alexis died in 2013 at age 16 and her grandfather was substituted as plaintiff, presumably as administrator of her estate.

3. Albert and Wunderlich moved to compel arbitration. The trial court granted the motion, the court of appeals reversed, and the case was appealed to the Tennessee Supreme Court. The Tennessee Supreme Court reversed the court of appeals and remanded the case to the trial court on the following grounds:

> **a)** Under the Tennessee UTC, a trustee has broad default powers unless limited in the trust agreement. Those broad default powers, while not expressly addressing entering into a pre-dispute arbitration agreement, are broad enough to grant a trustee power to enter into the agreement. The UTC favors arbitration by allowing for nonjudicial settlement agreement, the comments to the UTC encourage the use of resolution of disputes by nonjudicial means, and (based on the history of trust law and the purposes of the UTC) the legislature must have intended for the UTC to give the trustee the power to enter into pre-dispute arbitration agreements.
>
> **b)** The trust terms do not override the broad default powers under the UTC because: (i) the trust terms grant the trustee all of the powers granted under state law; (ii) trust terms that allow the trustee to settle by arbitration "any and all claims" authorize the trustee to enter into pre-dispute arbitration agreements, and is not limited to existing claims and does not include a temporal limitation; and (iii) the trust terms evidence an overall intent to give the trustee wide-ranging authority to do anything not prohibited under the UTC, including the authority to enter into brokerage agreements for the purposes of investment of trust assets. Nothing in the trust agreement expressly prohibits or limits the trustee from agreeing to settle future claims by arbitration. The trust terms and the UTC permit this.
>
> **c)** In modern times, engaging the services of banking and brokerage institutions almost necessarily requires a trustee to enter into pre-dispute arbitration agreements. The trustee did not breach its fiduciary duty of good faith as a matter of law by agreeing to pre-dispute arbitration. Finding a breach of duty would contradict the investment standards under the Uniform Prudent Investor Act. Account agreements with pre-dispute arbitration provisions are ubiquitous among financial services institutions. Most prudent investors are subject to them, and even if beneficiaries object to them, the chances are remote that the trustee would be able to find another quality firm that does not include the same provision in the account agreement. Discouraging a trustee from signing such an agreement would have the undesirable result of encouraging the trustee to proceed on his or her own, without the benefit of a brokerage firm or an investment advisor. Prudent individuals employ financial services institutions to assist them. Also, strong federal policy under the Federal Arbitration Act and U.S. Supreme Court precedent undermines any argument that signing the agreement was a breach of trust.
>
> **d)** Alexis, as a non-signatory trust beneficiary, is subject to the arbitration agreement to the extent her claims arise under the investment advisor agreement. While the trustee did not bind her to the agreement as her agent, under Tennessee Supreme Court precedent a non-signatory third-party beneficiary is bound to an arbitration provision in a contract to the extent that the beneficiary's claims seek to enforce the contract. Before a beneficiary may accept the benefits of the contract, the beneficiary must accept the burdens of the contract. To the extent the claims do not seek to enforce the investment advisor agreement, the claims are not subject to

arbitration and Alexis's estate is entitled to judicial resolution of the claims. On remand, the trial court must determine which of the claims seek to enforce the investment advisor agreement. State law on the voidability of contracts entered into by minors does not change the result because this was not a contract entered into by a minor. A 1932 statute that forbids arbitration where a party is a minor does not apply because it is preempted by the Federal Arbitration Act.

B. *Verri v. RBC Capital Markets*, 2017 R.I. Super. LEXIS 120 (2017). Participation in private mediation does not waive right to enforce arbitration provision.

1. In 1994, Valenzio Izzi and his wife Rose each executed revocable trusts, with each serving as their own initial trustee. Valenzio died in 1998, and Rose and Paul Verrecchia became co-trustees and Rose became beneficiary of his trust. On behalf of the trust, Rose signed account agreements with the trust investment advisor that included a broad arbitration clause. When Rose died in 2012, Patricia became co-trustee along with Paul, and they signed a new account agreement with the investment advisor that included a broad arbitration clause.

2. The trustees came to believe that Rose had wrongfully taken assets from Valenzio's trust, and sued the investment advisor for wrongfully allowing Rose to take the assets. The investment advisor participated in voluntary private mediation (that was unsuccessful) and then answered the complaint by moving to compel arbitration under the account agreements.

3. The court enforced the arbitration clause in the account agreements against the trustees of Valenzio's trust on the following grounds:

a) the advisor's residence in Minnesota is a sufficient nexus with the state to enforce the choice of Minnesota law in the account agreement (although the result is the same under either Minnesota or Rhode Island law);

b) a party can waive the right to arbitration by substantially engaging the judicial machinery and calling on the courts to resolve the merits of the dispute;

c) waiver is not appropriate in this case because no answer was filed, no discovery conducted, and the mediation was not ordered by the court;

d) the arbitration clause, included in the account agreements signed by the trustees who are also the plaintiffs, is very broad and applies to all controversies with the investment advisors, and is broad enough to include claims about wrongful transactions with trust assets (and a withdrawal is a "transaction"); and

e) the fact that the beneficiaries are not parties to the arbitration agreement is not relevant because the beneficiaries are not parties to the case and are being compelled into arbitration.

C. *Hargen-Rodriguez v. UBS Trust Company of Puerto Rico*, 2017 U.S. Dist. LEXIS 107918 (Puerto Rico 2017). Arbitration agreement between bank trustee and affiliated investment division binds non-signatory trust beneficiaries.

1. In 2000, Mason created a trust for himself during his lifetime, then for his wife, and then for his son Paul, with UBS Trust as trustee. In 2000, the trustee opened an investment account with its affiliated investment firm, and the entities signed an account agreement that included a broad arbitration clause.

2. Mason died in 2003, his wife later died, and Paul become beneficiary and asked the trustee for distributions. Paul opened a personal investment account with UBS that also included a broad arbitration clause. Paul then sued UBS Trust and UBS for SEC violations, racketeering, breach of contract, and breach of fiduciary duty. UBS Trust and UBS moved to stay the case and compel arbitration, which the district court granted on the following grounds:

a) The account agreement signed by UBS Trust and UBS included a valid arbitration provision of all disputes between the trust and UBS. The individual account agreement signed by Paul also included a valid provision for arbitration of all disputes with UBS. Paul failed to provide any support for his argument that the provisions are unconscionable and therefore waive that argument.

b) While the account agreement was only signed by UBS Trust and UBS, and not by any beneficiaries, UBS Trust and UBS have the right to invoke the arbitration provision and Paul is a beneficiary of the trust and as such is considered a party to the agreement.

c) The broad arbitration clauses are not limited to only disputes over the terms of the contract or disputes arising under the performance of the contract, there is a strong presumption in favor of arbitration where there is a broad all-encompassing arbitration clause, and therefore the trust claims fall within the scope of the arbitration agreements.

D. ***Whipple v. Whipple*, 2017 Nev. Unpub. LEXIS 538 (2017).** Provision requiring all disputes between co-trustees to be submitted to arbitration is enforceable.

1. Jane and Kent executed a joint revocable trust in 1969. Upon Kent's death in 1977, the trust was divided into separate trusts, one for Jane's community property interests that was for her benefit (Trust A), and one for their children (Trust B). Jane and Keith Whipple served as co-trustees. The trust terms provided that "in the event of a disagreement at any time when there are only two co-trustees, then the dispute shall be submitted to arbitration".

2. The trust acquired certain water right permits, which the trust conveyed to Kent Whipple Ranch, LLC. In 2015, the ranch applied to modify the water rights, and a remainder beneficiary of Trust B protested and claimed that the rights were Trust B property. The state engineer stayed the request. Keith resigned as trustee and Warner Whipple became successor trustee. Jane petitioned to declare that the trust still owned the water rights, Warner notified he disagreed, and moved the court to compel arbitration of the dispute. The trial court denied the motion to compel arbitration, and Warner appealed.

3. On appeal, the Nevada Supreme Court reversed the trial court and ordered arbitration on the following grounds: (a) Nevada courts resolve all doubts about arbitrability in favor of arbitration; (b) the dispute at issue falls within the broad scope of the trust arbitration provision; and (c) the provision is not limited in terms of legal versus factual disputes, is not limited to acts performed by the trustees, is not limited to disputes arising after the trustee was appointed, and does not exclude an action to declare whether the acts of prior trustees were valid and whether a trust owns certain rights.

X. MEDIATION, SETTLEMENT, RELEASES & INDEMNIFICATION

A. ***Brakke v. Bell State Bank & Trust*, 2017 ND 34 (2017).** UTC does not expressly address settlement of claims about capacity to create a valid trust, but UPC provisions provide court with authority to settle those disputes without regard to UTC limitations on agreements or reformations not violating material trust purposes.

1. Bradley and Timothy operated a family farm. Timothy agreed to split the profits with Bradley (despite doing more of the work), and Bradley in return agreed that when he died he would leave his farm interests equally to Timothy's daughter Alana and their sister Kari. In 2009, Bradley executed a will giving his wife, Vicki, a life estate in his property, with the remainder passing to Alana and Kari upon her death. In 2013, Bradley executed new estate planning documents that would (through a revocable trust) still give his wife a life estate, but at her death pass his assets entirely to Kari, and disinheriting Timothy's daughter. Bradley named a bank as his agent under a power of attorney and as successor trustee. In 2014, the bank as power of attorney restated the revocable trust at Bradley's request adding a 15 acre gift of land to Alana and Kari upon his wife's death, but leaving the majority of the remainder to his sister Kari.

2. Bradley suffered from alcoholism and for years was intoxicated from morning and lasting all day, which caused years of mental and physical impairments, delirium tremens, and his death in 2014 from liver disease. Alana assigned her interest in Bradley's trust to her father, and he sued to set aside the 2013 trust on the grounds that Bradley lacked capacity due to his alcoholism, and to compel distribution under the 2009 will. He later amended the petition with court permission to challenge the 2014 trust as well, which the court allowed, and the court held that the amended pleading related back to his original filing which was before the 120 day challenge period following notice by the trustee under the UTC.

3. Timothy and Kari (but not the trustee, Alana, or Vicki) entered into a settlement of the claims that provided for distribution of an additional 1,060 acres of land to Alana after Vicki's death, and Timothy moved to approve the settlement. The bank trustee opposed the settlement as violating material trust purposes by passing significant assets to Alana. The trial court approved the settlement under the Uniform Probate Code (and not under the Uniform Trust Code which had also been enacted), and the bank trustee appealed.

4. On appeal, the North Dakota Supreme Court affirmed the trial court approval of the settlement agreement on the following grounds:

> **a)** The UTC provision permitting nonjudicial settlement agreements that do not violate material trust terms does not apply because Timothy filed suit, rendering this provision inapplicable. The UTC provisions on modification of a trust by consent, unless inconsistent with a material trust purpose, also presumes the existence of a valid trust. The UTC allows the court to intervene in the administration of a trust where its jurisdiction is invoked by an interested person or as provided by law, and the comments to the UTC explain that the UTC generally encourages resolution of disputes without the court, but that the court remains available when its jurisdiction is properly invoked. Here, Timothy's petition challenged Bradley's ability to create a trust, which is proven would invalidate the creation of the trust and render the UTC inapplicable. The UTC does not therefore expressly address settlement agreements in judicial proceedings raising claims about a settlor's capacity to create a trust.
>
> **b)** The Uniform Probate Code (Section 3-1101 and 3-1102, however, authorizes a court to approve compromises that alter or terminate trusts under family settlement agreements if the court is convinced the litigation is undertaken on reasonable grounds and in good faith, the results of the agreement are fair to all parties, and the parties to the agreement constitute the entire class of beneficiaries that are competent to execute the agreement. The compromise may be approved by the court even if the interests of some of the beneficiaries are inalienable and it appears the settlor intended to deprive those beneficiaries of management of trust property. The UPC settlement provisions (under 1993 technical amendments) also apply to any governing instrument, and not just to wills. The availability of settlement under the UPC is consistent with the UTC comments (under Section 201)

that the courts are always available to resolve disputes involving trusts. It is clear that a court may apply the UPC provisions to settlements in judicial proceedings challenging a settlor's capacity to create a trust. In proceedings that do not challenge a settlor's capacity, any trust modification must be consistent with material trust purposes. That limitation does not apply to this settlement. The court did not err in approving the settlement under the UPC.

c) The law favors compromises and does not scrutinize too closely the nature of the rights of the parties concerned. In view of Timothy's allegations about his agreement with his brother, and his brother's alcoholism and its impact on his capacity, the court correctly concluded the trust challenge was brought in good faith and the settlement addressed a good faith dispute. Family settlement agreements are looked upon with favor.

d) A settlement may be just and reasonable as, in this case here, the settlement prevents the dissipation of estate assets in litigation.

e) Under both the UTC and UPC, Kari validly represented her minor children in the settlement. While Alana did not sign the settlement, she filed papers with the court approving the settlement. While Vicki was not a party to the settlement, the settlement only addressed distribution of assets after her death and did not disturb her life estate, and therefore the court could accept the settlement without her signature.

B. ***Estate of Ingraham*, 2017 NYLJ LEXIS 1641 (2017).** Releases of trustee that excludes claims for fraud or willful misconduct, and that do not expressly waive a claim for a final accounting, do not prevent successor trustee from compelling accounting from resigned trustee.

1. Cynthia created two separate *inter vivos* trusts in 2003 with the same terms that she funded with a total of $180 million in assets. Cynthia, her descendants, and unnamed charities were the beneficiaries, Cynthia retained a lifetime general power of appointment, and at her death any assets not appointed would pass to trusts for her descendants. The trust terms waived periodic accounting and provided that successor trustees were not liable for the actions of predecessors or required to inquire into them.

2. Cynthia's friend, Diana, and Highmount Fiduciary LLC served as co-trustees. Highmount resigned as trustee in 2006 and was replaced by Lewis, an accountant. Diana resigned as trustee in 2011. Cynthia removed Lewis in 2014 and he was replaced by Affinity Trust Limited as sole trustee. When Diana resigned, both Cynthia and Lewis as trustee signed a broad agreement releasing Diana from all claims related to the trusts other than claims arising out of fraud or willful misconduct.

3. Affinity sought to compel Diana and Lewis to account due to their concerns about the trust from during their trusteeship. Lewis filed an accounting, but Diana refused citing the release agreements.

4. The court compelled Diana to account, notwithstanding the release agreements, on the following grounds:

a) the releases were not full releases because they reserved claims for fraud or willful misconduct, and the release by the settlor did not expressly foreclose the duty to account, and if it did, the release would only waive accountings by the settlor and not by other beneficiaries or the successor trustee;

b) the waivers signed by Lewis as trustee are ambiguous, waived only the right to object for mere negligence, and did not expressly waive the duty to account to the successor trustee;

c) The trust terms waiving periodic accountings do not apply to waiver of a final accounting upon resignation; without a full release from all beneficiaries or a formal discharge from the court, Diana occupies the usual position of a trustee who has left office and remains duty bound to account; and

d) The trust terms that exonerate a successor trustee from inquiring into a predecessor trustee do not preclude the trustee from seeking the accounting, and the court may order the accounting *sua sponte.*

C. *Matter of Spacek,* 2017 N.Y. App. Div. LEXIS 7787 (NY Supreme Court 2017). Court refuses to set aside release that fully disclosed distributions through attached estate tax return.

1. Anton died in 2017 leaving a will that devised his property equally to six people. Diana was named and qualified as executor. Diana was also joint owner of certain of Anton's bank accounts and received them after his death. Diana's counsel sent all of the estate heirs a release agreement to settle Diana's accounts, which the heirs signed. The agreement attached the estate tax return and other financial documents.

2. Lynne objected to Diana's accounts and moved to set aside the release she had signed, claiming that she was not made aware of the joint accounts. The surrogate refused to set aside the release, and Lynne appealed. On appeal, the appellate court affirmed on the grounds that: (a) where a release is challenged, the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars; and (b) the documents provided along with the release agreement, including the tax return, made the beneficiaries aware of all of the distributions, and the estate tax return showed that Diana would receive a greater share of the estate as a result of the jointly held bank accounts.

XI. NO CONTEST CLAUSES

A. *Estate of Burkhalter,* 2017 Ga. App. LEXIS 510 (2017). Extraneous declaratory judgment action concerning forfeiture clause rejected, and trial court may not approve filing of suit against executors as being exempt from forfeiture without the nature of the suit being disclosed to the court.

1. Louise died in 2015. Under her will, she directed her executors to calculate the harm caused to her by the actions of her daughter Nancy and grandson Robert, and to charge that amount as an advance against her inheritance. Her will also included a broad no-contest clause that applied to, and caused a forfeiture, in the event of any attack on any will provision, the administration of her estate, or the management of a family trust.

2. After the qualification of two of her sons as executors, Nancy and another of Louise's sons petitioned the court for declaratory judgment that they may: (a) file another declaratory judgment action about the equalization clause without triggering forfeiture; (b) file another declaratory judgment action about the forfeiture clause without triggering forfeiture; and (c) file a petition to remove the executors without triggering forfeiture. The trial court denied the petition as to the equalization clause and there was no appeal of that ruling. The court allowed the petition with respect to the forfeiture clause and the suit to remove executors, and the executors appealed.

3. The Georgia Supreme Court refused the appeal and returned the appeal to the court of appeals, which reversed the trial court on the following grounds:

a) By statute and consistent with prior case law, an interested person may seek a declaration concerning the validity of a forfeiture clause, and the filing of that action is not a violation of the clause itself. But there is no authority supporting a procedure by which an interested party may file one declaratory judgment action to determine whether it may file another declaratory judgment action to determine the validity of a forfeiture clause.

b) Under prior case law, it would violate public policy to construe a forfeiture clause to cause a forfeiture for bringing an action for accounting and removal of an executor, and the determination of the court is limited to considering the action proposed to be filed. To make the determination, the court must compare the forfeiture clause with the action proposed by the petitioner. Here, the petition failed to specify the proposed claims against the executors to allow the trial court to determine whether the claims violate the forfeiture clause. There was no proposed complaint or other statement of the basis for a suit to remove the executors. Without those allegations, the record does not support the trial court's conclusion that the proposed petition would not violate the forfeiture clause. While it is true that a forfeiture clause may not punish a suit brought to enforce the will and compel the executor to carry out its terms, there is nothing in the record to support a determination that the proposed actions fit within those categories.

XII. ATTORNEYS' FEES & COSTS

A. *Cohen v. The Minneapolis Jewish Federation*, 2017 U.S. Dist. LEXIS 4197 (2017). Trust terms authorizing the trustee to pay costs of administration, to sue or defend on behalf of the trust, and to pay trust expenses do not override the UTC provisions and provide the trustees with a blanket indemnification where there is a suit against the trustee for breach, and court may order that fees cannot be paid until the merits of the suit are resolved.

1. In 1980, the Melvin S. Cohen Foundation established a charitable trust for the benefit of the Minneapolis Jewish Federation (the "Federation"). The trust income distributions were required to benefit or carry out the charitable, education, and religious purposes of the Federation. The trustees were required to maintain a close relationship with the Federation and obtain its recommendations for the use of trust distributions, but the trustees were authorized to designate to the Federation a "particular function, activity, or grant program of the Federation, for the benefit of which the trust's annual distribution…shall be applied". In the absence of a designation by the trustees, the distribution would be an unrestricted gift to the Federation.

2. From 1981 until 2014, the trustees designated beneficiaries to receive the trust distributions through the Federation. For 2015, the trustees designated the vast majority of the distribution to go to the Jewish Education and Support Fund. The Federation's CEO believed that a number of the designations were not consistent with the Federation's mission and refused to honor the designations. The trustees and Federation exchanged adversarial letters, eventually met in April of 2016 to discuss the matter, and reached an impasse. Months before the April meeting, the trustees amended the trust agreement to allow the trustees to make distributions directly to charities other than the Federation without running them through the Federation, but did not reveal the amendment to the Federation before or at the meeting.

3. The trust sued to modify the trust to replace the Federation as beneficiary, to compel the Federation to honor the trustee designations, and to declare the validity of the trust amendment. The trustees paid counsel for the trust out of the trust assets. The parties stipulated to substitute the trustees as parties and dismiss the trust itself from the suit. The Federation sued the trustee for breach of trust for designating beneficiaries, attempting to designate trust funds for their personal benefit, attempting to deceive the Federation by concealing the trust amendment, and for seeking to amend the trust to remove the Federation as a beneficiary. The case was removed to federal court.

4. The Federation moved for an order prohibiting the trustees from paying their litigation fees from the trust assets, and also sought to compel the return to the trust of fees already paid, and for payment of its attorneys' fees from the trust. The court granted the motion to prohibit further payment of fees from the trust while the litigation was pending, but denied the balance of the relief sought on the following grounds:

> **a)** The trust terms authorizing the trustee to pay costs of administration, to sue or defend on behalf of the trust, and to pay trust expenses do not provide the trustees with a blanket indemnification where there is a suit against the trustee, and where for such a suit a potentially faithless trustee is not acting under the trust agreement. Because these trust terms do not expressly address the payment of fees for defending against claims of breach of trust, the terms of the UTC are not subject to override and the court may enter an order prohibiting the payment of fees where there is a claim of breach of trust, unless the court finds good cause to allow the payment of the fees.
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> **b)** Without deciding the merits of the case, the Federation has at least a reasonable basis for its allegation that the trustees have breached their duties by seeking to remove the Federation as a beneficiary and supported organization. However, the trustees may be able to show that the Federation has become so radically secular since 1980 that the trust must be modified to carry out the settlor's intent to benefit a Jewish charity, but that will take a substantial showing the trustees have not yet made.
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> **c)** The trustees have now shown good cause to allow them to pay their fees, where they have only argued that the trust terms permit the payment, it has not yet been shown whether the trustees' actions are consistent with the trust, and the trustees have not claimed that they cannot press their claims or mount a defense without access to the trust assets.
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> **d)** The fees previously paid by the trustees out of trust assets were for counsel for the trust (until the trust was dismissed as a party), and the court did not order that those costs must be returned to the trust. The trustees had not yet paid any fees for responding to the counterclaims against them out of the trust, and the court ordered that they cannot do so without court approval. The court held it would revised the issue of fees after the case was decided on its merits.

B. *Rick v. Trustmark National Bank,* 2017 U.S. Dist. LEXIS 176392 (S.D. Ala. 2017). In trustee surcharge and removal action, court refuses to dismiss trustee's counterclaim for attorneys' fees and costs as redundant.

1. Trust beneficiaries sued the bank trustee for breach of trust and sought removal of the trustee. The trustee counterclaimed for payment of its attorneys' fees and costs from the beneficiaries. The beneficiaries sought to dismiss the counterclaim under Rule 12(f) on the basis that it is "redundant" with their claims or the trustee's affirmative defenses.

2. The court rejected dismissal of the counterclaim as redundant on the grounds that: (a) if the court rules against the beneficiaries, the result will be only that the trustee is not prohibited from using trust assets to pay its attorneys' fees and costs; (b) the counterclaim goes further than "not being prohibited" and affirmatively seeks payment of the trustee's attorneys' fees and costs, seeks affirmative relief beyond the defeat of the beneficiaries' claims, and is therefore not redundant; and (c) to the extent the beneficiaries believe that the seeking of attorneys' fees from the beneficiaries directly, as opposed to only seeking payment out of trust assets, goes beyond what the law allows and will cause the beneficiaries "severe prejudice", the trustee having to defend against a legally deficient counterclaim is not the kind of "prejudice" to the beneficiaries that is relevant to a Rule 12(f) analysis.

C. *Mullany v. Massie,* 2017 Wis. App. LEXIS 25 (2017). Prevailing party fee shifting statute does not preempt equitable power to award fees against a trustee's beneficial interest in estate and personally where the court finds the trustee acted in bad faith.

1. Suzanne served as trustee of a trust created by her mother for the benefit of Suzanne and her brothers. The brothers sued her for breach of trust and the court found that she breached her duties as trustee, grossly mismanaged the trust, and acted in bad faith. Suzanne did not appeal the court's ruling. The brothers also sought payment of their attorneys' fees by Suzanne under a state statute that allowed a prevailing party to have fees paid "out of the estate". The trial court awarded the fees to be paid first out of Suzanne's share of the trust assets (which consumed her entire share causing disinheritance), with the shortfall of $33,000 to be paid by her personally, and the court cited both the state statute and also its equitable powers incident to the court's finding of bad faith and gross mismanagement in support of its decision.

2. Suzanne appealed, and the court of appeals affirmed the trial court award of fees on the following grounds: (a) the state prevailing party statute authorized payment of the prevailing party's attorneys' fees out of the "estate", case law has construed that to mean the estate as a whole and not a person's separate share of the estate, and the trial court could not base its award of fees against Suzanne's share of the trust under that statute (which was the basis for relief cited by the brothers as well); (b) however, the better reading of the trial court's decision, although not perfectly clear on this point, is that the court was relying on its equitable powers to award fees in trust litigation where the court makes a finding of bad faith or misconduct; (c) nothing in the "prevailing party" statute suggests that it was meant to preempt or eliminate the court's common law power to award fees in equity as an exception to the American rule on fees, and the court also correctly cited to that common law authority; (d) equity has long recognized that attorneys' fees may be awarded when a trustee engages in bad faith and the other statute does not circumscribe that authority; and (e) while neither party briefed the issue, the UTC expands and clarifies any confusion about the court's authority to award fees, authorizes a court to award fees as justice and equity require, and authorize exactly what the trial court did in this case.

XIII. FIDICIARY COMPENSATION & COSTS

A. *Estate of Zeid,* 2017 IL App (1^{st}) 162463-U (2017). Court approves 65 basis point fee for directed trustee based on fee agreement and burden of litigation.

1. Philip created a revocable trust with himself as trustee, but the trust terms did not name a successor trustee upon his death in 2011. The trust provided for a $1 million family trust and for a $20 million marital trust for his second wife, Paula, which was funded primarily with Philip's $14 million scrap metal business. Philip's son from a prior marriage, Jason, was named as investment advisor for the scrap metal business having sole power to vote the stock and take other actions with respect to the stock, with the trustee being a directed trustee under the Illinois statute. As a marital trust, Paula had the ability to compel certain actions for assets that were not productive of income. In litigation between Jason and Paula over the estate, Jason petitioned the court to appoint a corporate trustee over the trusts. Paula's attorney inquired with various individuals and institutions, but only Fifth Third Bank would agree to serve (and that was based on representations, since proved inaccurate, that the litigation was close to being settled).

2. Following negotiations with Paula, the bank and Paula agreed that (a) the bank would waive miscellaneous, litigation, and closely held asset fees and (b) the bank would charge only a flat rate of 65 basis points annually for serving as trustee. Jason was not informed about the fee.

3. After being appointed as trustee, the bank sought information about the directed assets (because Paula asked for information so that she could determine whether to exercise her rights over marital trust assets that did not produce income). Jason refused to provide the trustee with information and the trustee was forced to obtain the information through litigation. The trustee's "unique asset division" became concerned over Jason's restructuring of debt between the different entities held as part of the special directed assets. Jason then sued the trustee to impose a different fee structure and force disgorgement of fees previously taken. Jason's position was largely based on his view that the trustee had reduced duties and liabilities as a directed trustee.

4. The trial court approved the trustee's fee as reasonable, and Jason appealed. On appeal, the court of appeals affirmed and found that it was not an abuse of discretion to approve the fee as reasonable, on the following grounds:

> **a)** Determining reasonable compensation is based on the facts and circumstances of the particular case. Responsibility assumed (or not assumed) is one of many factors, but is not dispositive. While time spent may be an important factor, there is not legal duty imposed on a fiduciary to reflect the number of hours spent on each activity performed.
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> **b)** The trustee had numerous obligations, including paying bills, filing tax returns, insuring property, reviewing financial statements and gathering asset information, minoring the special assets at Paula's request, and suing Jason to compel disclosure of information he refused to provide. The trustee also had to monitor the over 300 filings in the ongoing litigation between Jason and Paula. The trial court held that Paula and Jason's relationship was acrimonious, distrustful, and litigious, the court had been inundated with thousands of pages of pleadings for over five years, and without the involvement of the corporate trustee the successful administration of the trust would be impossible.
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> **c)** The amount of legal work performed by the trustee, and the complexity of the litigation, are relevant to the reasonable fee, and justified a fee higher than the trustee's published standard directed trustee fee of 40 basis points. Applying the 65 basis point fee to even the directed assets is reasonable in view of the work required, the trustee's waiver of other customary fees, and the burden of managing a trust through complex litigation. Jason cannot make the contradictory argument that the fee should be based on the hours spent and work performed, and then also argue that the trustee should charge its normal lower fee schedule regardless of the complexity of the work performed.
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> **d)** Where the trustee's published fee schedule provides for a "negotiable" fee for trusts over $10 million, the trustee testified that "negotiable" does not always mean "lower", and the 65 basis point fee was the result of negotiations with Paula and her counsel, the trial court did not commit error by holding that the trustee was not required to charge a fee lower than the 40 basis point standard fee for directed assets based on the value of the assets. While the fee schedule is one factor, it is not dispositive. While a directed trustee has some limitations on liability under state law, that limitation on liability is one factor relevant to the fee but is also not dispositive. State law also imposes some ongoing obligations on directed trustees including staying reasonably informed about the special assets which required litigation by the trustee in this case because of Jason's refusal to cooperate.

e) While the court impermissibly relied on hearsay testimony that Paula's counsel could not find any other trustee to serve, the reliance was not prejudicial to the outcome and the court based its decision on the complexity of the litigation and the work the trustee performed.

XIV. STANDING & PARTIES

A. *Zink v. Avery,* 2017 OK Civ. App. LEXIS 22, (2017). Removed trustee of charitable trust has standing to contest his removal under trust amendment by co-trustees.

1. Jacqueline created a charitable trust with herself and her sisters Millicent and Etta May as trustees. Jacqueline appointed John Zink and another individual as additional trustees then she and Millicent died shortly thereafter. The trustees amended the trust to give themselves lifetime appointments as trustee, and authorized Etta May to fill vacancies and appoint additional trustees, but any new trustees would be limited to 2-year terms. In 2014, Etta May and John were the only remaining trustees, and Etta May appointed two additional co-trustees. Then the three trustees other than John amended the trust to give only Etta May a lifetime appointment and also the power to remove trustees. John did not approve the amendment. Etta May then removed John as trustee.

2. John sued challenging the amendment and his removal and the court dismissed his claim for lack of standing. On appeal, the Court of Civil Appeals reversed on the grounds that a former trustee whose status is revoked by a trust amendment by the other co-trustees is a person affected by the trust administration with standing to bring his claims. John also alleged that his grandfather's gravesite and home place were held in the trust.

B. *Gonzalez v. Martinez,* 2017 Tex. App. LEXIS 4655 (2017). Intestate heirs do not have standing to sue agent under power of attorney without showing that estate administration is unnecessary.

1. Albino fathered nine children. At age 77, he lost the ability to manage his affairs due to dementia. His daughter, Elma, lived next door, obtained power of attorney, and used the power of attorney to transfer all of his assets (other than $109) to herself during his lifetime and incapacity. Albino died intestate in 2013. The other eight children sued Elma for breach of fiduciary duty, fraud, and conversion. They moved for summary judgment, Elma failed to respond to the motion, and the court entered judgment against Elma and awarded the other children damages totaling over $290,000. Two weeks after judgment was rendered, Elma contested the court's jurisdiction, the trial court did not rule on the plea, and Elma appealed.

2. On appeal, the court of appeals reversed the trial court and entered judgment in Elma's favor on the following grounds: (a) heirs cannot sue in their own right for property of the estate, unless they prove that an administration is closed or is not necessary; (b) an administration is necessary where there are estate debts, or to recover property of the estate; (c) the causes of action against Elma existed during Albino's lifetime, were his claims, and are therefore estate property; (d) the lawsuit was filed within the 4-year period when an administration can be opened, but there was no allegation that the administration was closed or unnecessary; (e) the complaint did not allege any facts to support the exception to the general rule that the heirs cannot sue for estate claims, or make any argument at all against application of the general rule; (f) the suit was brought during the time for filing for administration, without pleading or proving that administration was closed or unnecessary, and therefore the heirs lacked standing to sue and the court did not have jurisdiction; (g) the Uniform Declaratory Judgment Act is a procedural device for cases already within the court's jurisdiction and does not convey standing; and (h) because the central issue is a recovery of funds owed to the estate, it would be impossible for the heirs to prove that administration was unnecessary under the statute, and therefore judgment for Elma is appropriate.

XV. JURISDICTION & VENUE

A. *Transfirst Group, Inc. v. Magliarditi,* 2017 WL 2294288 (N.D. Texas 2017). Nevada trusts and LLCs are subject to personal jurisdiction of courts in Texas as alter-egos of co-defendant in collection action that is related to judgment rendered by Texas courts.

1. In 2009, various companies obtained a judgment from Texas federal court against Dominic J. Magliarditi in the amount of $4.5 million, on claims based on mail and wire fraud and racketeering. The Fifth Circuit Court of Appeals affirmed the judgment in 2014. Dominic only paid $62 towards the judgment. The plaintiffs sued in Texas federal court to enforce the judgment in part against Dominic and various Nevada trusts and LLCs, and claimed that the transfers to the trusts and the entities were fraudulent transfers. The defendants moved to dismiss in part for lack of personal jurisdiction.

2. The Texas federal court held that personal jurisdiction existed on the following grounds:

a) The court has the inherent authority to enforce its judgment against Dominic and the lawsuit is a continuation of postjudgment enforcement proceedings, and therefore the judgment against Dominic is adequate to create specific jurisdiction over Dominic for the suit to enforce the judgment against him.

b) The fact that the Nevada trusts and entities may be participating, from Nevada, in an alleged scheme to frustrate enforcement of a Texas judgment, is not alone adequate to support personal jurisdiction, where the parties that are actually harmed from the lack of enforcement are in Delaware and New York, and not in Texas. However, the complaint adequately alleged that the entities and trusts were Dominic's alter-egos, and that allows for personal jurisdiction under reverse veil-piercing.

B. *Gray v. U.S. Department of Treasury*, 2017 U.S. Dist. LEXIS 144615 (2017). Person cannot declare a trust with himself as the trust assets and the U.S. Treasury Department as trustee to avoid tax lien on personal assets.

1. Schere' Denica Gray, who was born female but filed federal tax returns as a "man of the female gender", was issued a notice of tax levy by the U.S. Treasury Department for filing a frivolous income tax return that claimed nonexistent withholding creditors and resulted in a fraudulent refund of $170,987. Sixteen days after receiving the levy notice, Schere' executed a "Deed of Special Trust" putting himself into the trust with himself as beneficiary and with the U.S. Treasury Department as trustee, and delivered the instrument to Treasury.

2. Schere' then filed a *pro se* suit alleging that Treasury violated the trust terms and its fiduciary duties as trustee by pursuing the tax levy. On Treasury's motion, the Maryland federal district court dismissed the suit on the following grounds: (a) Treasury did not waive its sovereign immunity and therefore the court lacked jurisdiction over the action; (b) the trust theory is pure fantasy, and apart from its absurdity, under a trust law a person cannot be a trust asset, there was no evidence that Treasury accepted the fiduciary duties under the alleged trust, and even if the trust was created the alleged breach by notice of levy occurred before the claimed trust creation and commencement of fiduciary duties.

XVI. DISCLOSURE & INFORMATION ACCESS

A. *Ajemian v. Yahoo,* 2013 Mass. App. LEXIS 73 (2013); SJC-12237 (Mass. Supreme Judicial Court, October 16, 2017). Massachusetts appellate court determines enforceability of email user agreement in dispute over decedent's email accounts. Massachusetts Supreme Judicial Court holds that the Stored Communications Act does not prevent Yahoo from turning over emails to the personal representatives, and remands case to determine whether email user agreement allowing withholding or destruction of emails was a valid contract.

1. Siblings, as administrators of their brother's intestate estate, brought suit in the Massachusetts Probate and Family Court seeking a declaratory judgment that the decedent's Yahoo e-mails were assets of this estate. In an initial action, the administrators filed a complaint in which they sought subscriber records for the e-mail account (they did seek the contents of those e-mails). They limited their complaint as they had reached a partial resolution of their dispute with Yahoo under which the plaintiffs would seek a court order requiring Yahoo to produce basic subscriber and e-mail header information only and Yahoo would not oppose this application. The Court granted this relief. Thereafter, the administrators filed this second action in which they sought the contents of the e-mail account. Additionally, one of the administrators claimed to be the co-owner of the account and therefore claimed to be individually entitled to the contents.

2. Yahoo moved to dismiss the action on the grounds that the action was not properly before the Massachusetts court as a forum selection clause in the website's Terms of Service ("TOS") required suit in California, that the action was time-barred, *res judicata* barred the action, and that the complaint failed to state a claim upon which relief could be granted. The Court would not apply the *res judicata* doctrine to bar the action. It noted that the administrators' claim for the e-mail contents could not have been pursued in the first action without violating the parties' partial settlement agreement and that the issue over the rights to the contents was explicitly carved out from the first complaint. The Court also refused to enforce the forum selection clause. The Court noted that Yahoo had the burden to demonstrate that the clause was reasonably communicated and accepted and that if Yahoo met its burden, the administrators would have to demonstrate that the clause was unreasonable in the circumstances. The Court found that Yahoo did not reasonably communicate the clause as there was no evidence that the TOS was actually displayed on the decedent's computer screen – users were only given the opportunity to review the TOS. The Court also noted that the TOS was never accepted by the decedent or by the administrator who claimed co-ownership over the account. Yahoo did not require its users to click "I accept" after reading the TOS's terms. The Court further found that even if the terms were reasonably communicated and accepted, it could not conclude that it was reasonable to enforce the terms against the estate because the administrators were not parties to the contract, only the Massachusetts probate court had *in rem* jurisdiction over the estate, and because the TOS had unreasonable breadth. The Court did not determine whether the contents of the e-mails were property of the estate as the parties did not fully brief the issue and held that the question would be addressed on remand after full briefing.

3. On remand, the parties filed cross motions for summary judgement and the trial court held on summary judgment in Yahoo's favor on the grounds that: (1) the estate has a common-law property interest in the contents of the account; (2) however, the Stored Communications Act ("SCA") prohibits Yahoo from disclosing the contents of the emails to the estate; and (3) there were disputed issues of material fact concerning the formation of the TOS, which purported to give Yahoo discretion to refuse to turn over (or even destroy) the contents of the account, and summary judgment was denied on that claim by Yahoo. The administrators appealed the ruling, but Yahoo did not appeal the ruling on the estate's property interest. On its own initiative, the Massachusetts Supreme Judicial Court transferred the case to its docket from the court of appeals.

4. The Massachusetts Supreme Judicial Court vacated the trial court decision and remanded the case to the trial court on the following grounds:

a) The SCA prohibits unauthorized third parties from accessing stored electronic communications and regulates when service providers may voluntarily disclose stored electronic communications. Voluntary disclosure is restricted unless a statutory exception applies. The exception for disclosure to an agent cannot apply here because "agent" is not defined and must take its common law meaning, and at common law a personal representative is not an agent, was not appointed by the principal, and is not subject to the control of the principal.

b) Another statutory exception permits disclosure upon receipt of "lawful consent" which is also not defined. Lawful consent does not mean "actual consent" by the principal, and can include consent by the administrators of the principal's estate, because: (i) requiring actual consent would preempt state probate and common law, and there is presumption against interpreting statutes to preempt such laws; (ii) an actual consent standard would prevent personal representatives from performing their fiduciary duties and create a class of assets that could not be marshaled and interfere with estate administration by precluding access to financial information; (iii) the plain meaning of "lawful consent" means consent permitted by law and does not preclude consent by a personal representative, and personal representatives give lawful consent for a decedent in other contexts, such as under HIPAA, for waiving privileges, and to sell property, bring claims, and vote stocks; (iv) Congress could have required actual consent and did not do so; and (v) nothing in the legislative history suggests that Congress intended to preempt state law.

c) Yahoo is not required under the SCA to divulge the contents of the email to the personal representatives, but the trial court erred by going further than finding disclosure to be discretionary by Yahoo and holding on summary judgment that the SCA prevented it from doing so.

d) The express language of the TOS, if enforceable, would give Yahoo the unfettered right to deny access to the emails or destroy them. The trial court correctly denied summary judgment for Yahoo under the TOS on the grounds that the record was not adequate to show that a valid contract was formed and whether the TOS was an enforceable contract.

e) A concurring and dissenting justice, because Yahoo did not appeal the ruling on the estate's property rights in the email account, would find remand to be unnecessary (and unfair economically to the estate because of legal costs) and would hold that Yahoo's TOS cannot be enforced to prevent estate access to the emails in which it has a property interest, because such a result could lead to spoliation of evidence and contempt of court orders to turn over the emails, because the Supreme Judicial Court would surely reverse any ruling that the TOS was enforceable in that way, and because the personal representatives "should not have to spend a penny more to obtain estate property in the possession of Yahoo that they need to administer the estate".

B. *Williamson v. Brooks,* 2017 Cal. App. LEXIS 64 (2017). Trustees not liable for breach where settlor informed beneficiary about the existence of the trust and the trustees, and beneficiary cannot show any harm to the trust from inadequate disclosure.

1. William founded and owned 155 shares of a closely-held company that manufactured commercial-grade driving helmets. His daughter Connie owned the remaining 45 shares. In 2008, William created trusts for his children, including a trust for his daughter Beverly (at issue in the case), with his lawyer and accountant as trustees, and with Beverly having age-based withdrawal rights. He gifted $67,500 cash to the trust, and the trust purchased 18 shares for $675,000 (with a 10% down payment and a promissory note for the balance). The board issued company distributions to allow the trust to service the note and pay taxes. The trustees discussed with William the need to inform Beverly about the trust, William agreed to inform her, and on two occasions (once in 2008 and once on a beach in

2009) he mentioned the trust to Beverly, the identity of the trustees, and just that "she would be taken care of in the event of his death").

2. In 2010, William fired Beverly from the company for refusing to perform any work. Concerned with Beverly owning interest in the company through trust withdrawal rights, he exercised his power to substitute the stock in the trust for a promissory note in the amount of $799,999 that would be fully repaid in 12 years). Beverly could not make the $2,800 monthly payments on her home (that William and Connie helped her purchase, and Connie owned half of the house to help her sister and paid half of the mortgage payments) without her company salary. Connie offered to loan her money, quitclaims her interest in the property to Beverly so Beverly could sell it, or allow Beverly to quitclaim the property to her (and then Connie would rent it back to Beverly for just $1,000 per month which Beverly could afford). At that time the property was worth $100,000 less than the mortgage debt, and Beverly elected to quitclaim the property to Connie. Beverly declined to rent the property from Connie as offered, and chose to move into a guest house owned by Joanne Williamson at Hollister Ranch. Beverly said it was her dream to live there. Connie eventually sold the property for less than the debt, and had to contribute $61,000 of her personal money to complete the sale.

3. In 2012, Beverly contacted the trustees about the trust, and she promptly received all of the information and documents she requested. When she asked to withdraw funds from the trust, a plan was put in place for monthly trust distributions to her. After the trustees resigned, the successor trustee, at Beverly's insistence, sued the prior trustee for failure to inform Beverly about the trust and claiming that Beverly would not have quitclaimed the house to Connie had she known about the trust. The trial court rejected all of the claims and awarded the prior trustees $500,000 in attorneys' fees and costs. The successor trustee appealed.

4. On appeal, the court of appeals affirmed on the following grounds:

> **a)** Evidence, including Beverly's testimony, supported the trial court's finding that even if there was a breach of the duty to inform, Beverly would not have retained the house because it was underwater, she believed it was toxic, and because she had always wanted to live at Hollister. Therefore, there are no compensable damages of any kind related to the house. Trustees accused of breach of duty may only be held liable for losses to the trust itself, not for personal damages to the beneficiaries. Even if a breach of duty did occur, Beverly suffered no compensable loss and failed to prove that the action of the trustees damaged the trust itself. To the contrary, the equity value of the trust increased from $67,500 to $725,000 during their tenure. Without proof of any damage, Beverly has not established a claim for breach of duty.
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> **b)** The trial court also correctly found that the trustees did not breach their duties to Beverly because: (i) Beverly was informed about the existence of the trust and its trustees shortly after the trust was created; (ii) it was not required that she receive every detail about the trust at that time; she was only entitled to adequate information so that she could take action to gain more information, meaning the existence of the trust and her status as beneficiary; (iii) the trustees fulfilled their duty by ensuring that William informed Beverly about the trust; (iv) when Beverly asked a trustee for information, she was promptly provided everything she requested; (v) it was Beverly's lack of due diligence that prevented her from learning the details earlier; and (vi) she had ample opportunity to obtain more information while she was negotiating with Connie and William about the property, and that she failed to do so does not make the trustees liable for breach of fiduciary duty.

XVII. FIDUCIARY PRIVILEGES & EXCEPTIONS

A. ***Fiduciary Trust International v. Klein*****, 2017 Cal. App. LEXIS 245 (2017); 2017 Cal. App. Unpub. LEXIS 5406 (2017); 2017 Cal. App. Unpub. LEXIS 5404 (2017).** Where a removed trustee seeks to withhold legal communications from the successor trustee, it is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the prior trustee's personal liability, that is dispositive under California privilege law; rather it is whether, at the time the advice was sought, the purpose of the advice was protection against personal liability; and the prior trustee is required to take affirmative steps, such as retaining separate counsel and paying personally for the advice, at the time of the advice to establish the privilege. Court reverses beneficiary appointment of corporate successor trustee and orders appointment of successors named in document.

1. The case involved a long-running dispute over the estate of Mark Hughes, the founder of Herbalife, which previously involved a large surcharge against the executors, who also served as co-trustees of the Mark Hughes Family Trust. In 2013, the trial court removed the three individual co-trustees of the trust and appointed a corporate successor trustee on a finding that the trustee failed to act prudently with respect to the sale of 157 acres of undeveloped Beverly Hills real property, and that decision was affirmed by the court of appeals in 2015. The sole non-contingent trust beneficiary filed numerous objections to the twelve accountings of the prior trustees from 2000 to 2013, along with surcharge claims totaling tens of millions of dollars, and those objections and claims were still pending.

2. Shortly after the successor trustee was appointed in 2013, the beneficiary and the successor trustee demanded that all trust documents be turned over to the successor trustee, including all communications with counsel that were paid for with trust funds. The trustee moved to compel the production; court ordered settlement discussion failed; the court ordered the prior trustees to submit a privilege log; the court ordered the transfer of the documents to the trustee for preservation but prohibited the trustee from accessing the documents until privilege issues were resolved; the first privilege log identified over 3,000 documents; additional settlement discussions failed; another motion to compel was filed; the court appointed a discovery referee who held hearings and rendered recommendations, but the court rejected the recommendations; the court ordered a supplemental privilege log, which eventually identified 195 documents as privileged but provided little detail; and the court eventually ordered that the prior trustees could withhold "those documents that they now identify as protecting them from personal liability, specifically the petitions for surcharge and removal". Both parties appealed.

3. On appeal, the court of appeals found that the trial court had abused its discretion and remanded the case on the following grounds:

a) Where a trustee asserts the privilege, the client is the office of trustee rather than the particular trustee, as a consequence of the unique relationship between a trustee and beneficiary and the trustee's duty to provide information to the beneficiaries. There is a narrow exception where a trustee seeks or obtains legal advice in its personal capacity under *Moeller v. Superior Court, 16 Cal. 4th 1124 (1997).* Under that case, a distinction is made between fiduciary advice for guidance in trust administration (which the trustee must turn over to the successor trustee because the successor trustee holds the privilege) and personal legal advice out of a genuine concern for possible future charges of breach of fiduciary duty (where the prior trustee may be able to withhold the advice by hiring separate counsel and paying for the advice out of its personal funds). This distinction is derived from the facts that the trustee powers are not personal to the trustee but belong to the office and a successor trustee assumes all of the powers of the office including the power to assert the privilege.

b) With respect to how to distinguish between the categories of advice, the beneficiary and successor trustee were correct that a former trustee is required to turn over all communications, including privileged communications, in the trust records unless the prior trustee can demonstrate that counsel was retained in a personal capacity and the prior trustee took affirmative steps to distinguish the personal advice from the fiduciary advice. This approach is consistent with *Moeller* and the principle that the party claiming privilege has the burden of proof. It is error to use a hindsight approach where the description of the advice as "defensive" in nature, rather than administrative in nature, determines the validity of the privilege. It is the character of the relationship between the trustee and counsel (personal or fiduciary) that is the focus of the inquiry, not the label ascribed to the communication after the fact.

c) *Moeller* requires a trustee to take certain affirmative steps to preserve the privilege, such as hiring separate counsel and paying for the advice out of its personal funds. Proof of payment of the advice from personal funds is material to, but not dispositive, of the issue – it is one indicium in determining who holds the privilege. Requiring a trustee to distinguish, scrupulously and painstakingly, his interests from those of the beneficiaries is entirely consistent with the purposes of a trust. The court expects a trustee to undertake some process to establish that trust communication was intended to be privileged at the time the communication was requested or obtained; and not, as here, many months or years later when a communication is actually withheld. Even if separate counsel and individual payment are not required by *Moeller*, actual steps must be taken to identify a communication as privileged when the communication is sought from the trustee's personal counsel. Any other rule would unduly interfere with the successor trustee's ability to carry out its duties, and expose the successor trustee to liability and risk irreparable damage to the trust.

d) Even assuming *arguendo* that the trustee's disclosure obligations do not trump the privilege, it is not true that a resigning trustee can withhold documents without making the requisite *prima facie* showing that the documents are actually privileged. It is clear that the probate court did not properly hold the prior trustees to their burden to show facts in support of the privilege claim. The prior trustees ignored the *Moeller* mandate to take steps to distinguish personal advice from trust records, and the trial court failed to hold the prior trustees to their burden by allowing withholding of documents marked as related to the petitions for removal and surcharge. Merely adding that label to a document is not adequate to show that the communication was obtained personally. One of the primary duties of the trustee is to respond to beneficiary questions and objections, and the mere fact that advice relates to that response does not prove that the advice was sought out of concern for personal liability, rather than a general concern for the health of the trust.

e) It is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the trustee's personal liability, that is dispositive under California privilege law; rather it is whether, at the time the advice was sought, the purpose of the advice was protection against personal liability. While some legal advice obtained by a trustee may be disclosed to a successor trustee, that is consistent with the fiduciary duties and burdens of a trustee. In a trust relationship, the benefits belong to the beneficiaries and the burdens to the trustee; the job is an onerous one, the proper discharge of its duties necessitates great circumspection; and liability for mismanagement is merely one of the burdens professional trustees take on, for, presumably, an appropriate fee.

4. Samantha Faulkner was named as a successor trustee of the Mark Hughes Family Trust, and retained counsel to challenge the appointment of the corporate successor trustee. The removed prior trustees moved to disqualify Samantha's counsel on the basis that three lawyers from her firm had represented the prior trustees giving rise to vicarious disqualification, and as successor trustee (if appointed), Samantha would have the ability to pursue surcharge claims against them which gives rise to conflict. The trial court agreed and disqualified Samantha's counsel, and Samantha appealed. On appeal, the court of appeals reversed the trial court on the following grounds:

a) There is no evidence to support a finding that the prior trustees sought legal advice from the firm lawyers in their personal capacities or took any steps to separate their requests for advice from the advice rendered to them in their capacity as trustees.

b) In pleadings, the trustees represented that they retained the lawyers as trustees. As held by the court of appeals, the trustees did not establish that, at the time of engagement, they sought the legal advice for personal protection. None of the lawyers believe they represented the trustees personally. The first attempt to segregate personal from administrative advice came after removal. Retrospective segregation is insufficient to preserve the right to privilege.

c) Because there is no evidence of any relationship imposing a duty of confidentiality owed to the former trustees personally, they did not meet their burden of demonstrating standing to seek disqualification of Samantha's counsel.

5. The trust terms named Samantha and Dale Sefarian as successor trustees if the prior trustees became "unable" to serve. The trust terms also provided that a trustee's "incapacity or inability" means physical or mental incapacity. Samantha and Dale petitioned to be appointed as successor trustees and challenged the appointment of the corporate trustee, and the beneficiary opposed the claims. The trial court held that the trust was silent on the trusteeship following judicial removal of the trustees and therefore the beneficiary could appoint the corporate trustee under state default law, and Samantha and Dale appealed. On appeal, the court of appeals reversed the trial court and ordered the appointment of Samantha and Dale as co-trustees on the following grounds: (a) the trust unambiguously names individuals to serve as successor trustees where all of the prior trustees were removed by the court by using the word "unable"; (b) interpreting "unable" to include judicial removal gives effect to the settlor's clear intent not to have an institutional trustee; (c) the settlor demonstrated this intent by naming only a series of individuals to various roles, not naming any corporations to any roles, providing for fiduciary compensation at one-half the rate of the fee charges by average corporate trustees, and the many amendments the settlor executed to carefully select over time the individual to serve in fiduciary roles; and (d) while "inability" is defined more narrowly elsewhere in the trust with reference to only mental or physical incapacity, the interpretation of the word "unable" is not ambiguous or doubtful, and reading "unable" more narrowly would defeat the settlor's intent to name a series of carefully selected individuals to serve.

XVIII. CY PRES & TERMS OF CHARITABLE TRUSTS

A. *Matter of Gurney*, 2017 NY Slip Op 05902 (2017). Court refuses to apply *cy pres* to redirect charitable residuary gift to closed catholic school to other catholic charities.

1. Margaret Gurney died in 2015 leaving a will that gave her residuary estate to three charities, including 20% to the "St. Mary's Roman Catholic School at 5588 State Route 7, Oneonta". The school had closed in 2011 and the grounds were sold. At that time, Margaret lacked capacity to amend her estate plan. After her death, the successor trustee petitioned for permission to distribute the school's share to the other charitable beneficiaries. The catholic parish and diocese sought application of *cy pres* and distribution of the assets to the parish's faith formation ministry and a diocesan scholarship fund. The surrogate granted the trustee's petition and the parish and diocese appealed.

2. On appeal, the New York court of appeals affirmed on the following grounds: (a) she made gifts to local institutions, suggesting an intent to limit her largesse to local organizations; (b) the description of the school by reference to its address supports that inference, rather than a religious based intent; (c) the decedent pre-planned her funeral and burial to avoid the trappings of Catholicism; (d) although a regular churchgoer who financially supported the parish, she had no interest in Catholic education and felt she had satisfied her giving to the church during her lifetime; and (e) testimony showed that she wanted to support her adoptive hometown and had fond memories of volunteering at the school.

XIX. CHARITABLE MATTERS

A. *In re Jackson,* 2017 Pa. Super. LEXIS 891 (2017). Where there is a year-end deadlock between bank trustee that wants to support the poor, and family trustee that wants to support political advocacy groups, court could properly limit the charitable trust payout to the IRC Section 4942 amount, but erred by not developing a factual record of the settlor's intent before ordering distribution under bank's list of recipients.

1. In 1950, John and Sue created a charitable trust with John's brother and a local bank as co-trustees. The trust was for the benefit of public charities selected by the trustees (and any suggestions by the settlor were non-binding). The trust terms left the amount of the annual payout to the discretion of the trustees, and provided that the trust would continue for three years after all trust assets were distributed to allow the settlors a chance to add funds to the trust. The trust provided that upon the brother's death or resignation as co-trustee the successor would be an officer of Pittsburgh-Des Moines Company (at that time owned by the family). The settlors lived until 1991 and 1994.

2. The brother resigned as co-trustee in 1989, none of the company officers were willing to act as co-trustee, and the court appointed the brother's daughter as trustee (she had previously been a company officer and director). In 1994, the daughter resigned and the bank served alone as trustee. In 1998, the court reappointed the daughter as co-trustee and modified the trust to require that a family member selected by the bank always serve as co-trustee. In 2005, the daughter and the bank (now a large national bank that had acquired the local initial bank) successfully petitioned the court to modify the trust to provide for two individual co-trustees selected by the family (each with 25% of the trustee vote) and a corporate trustee (with 50% of the trustee vote), and to appoint the second family co-trustee. In 2006, the family co-trustees tried unsuccessfully to compel termination of the trust, or to appoint another corporate trustee that would cooperate with them in terminating the trust, because of their concern that successive family generations won't be able to agree on how to make trust distributions. The family trustees did not appeal the court's rejection of their petition. In 2008, another larger bank acquired the corporate trustee.

3. In September of 2016, the family trustees sent the bank trustee a proposal to distribute $701,000 that year to a list of charitable political issue advocacy organizations that "promoted the U.S. Constitution, free market principles, personal freedom, and personal rights". The bank analyzed the proposal and sent the family trustees a revised proposal that deleted some recipients from the list. On November 1st, the family trustees presented a revised list that deleted a few organizations and reduced the payout to $693,000. The next day, the bank petitioned the court to resolve the deadlock, and sought expedited intervention because of the need to make the 5% distribution required under IRC Section 4942 (in the amount of $476,000) by year-end. The bank alleged it was no longer willing to jeopardize the long-term viability of the trust for the sake of the short-term expediency of reaching agreement with the family trustees. The bank alleged that, during their lifetimes, the settlors favored traditional charities in Western Pennsylvania over political advocacy groups, and tendered to the court a list of proposed charities consistent with this intent and limiting the payout to the 5% amount to avoid exhaustion of the trust. The family co-trustees responded that they believed the proper role of the bank is to manage assets and otherwise defer to the family on charitable recipients.

4. On December 1st, the family trustees moved for expedited discovery which the court denied. The next day, the court heard argument from the trustees and the state attorney general, and held that it would cap 2016 distributions to 5% and avoid tax penalties. On December 6th, the trustees submitted a revised list of charities which the court approved the next day on the basis of lack of time to properly consider other options before year end. The court denied the family trustees' motion for reconsideration. The family trustees appealed.

5. On appeal, the superior court affirmed in part and reversed and remanded in part on the following grounds:

> **a)** There is no support for the family trustee position that they should have control over selecting the charitable recipients and that the court cannot intervene in the event of a deadlock such as the one here. The trust terms do not address resolution of a deadlock, and clearly vest the bank trustee with 50% of the voting power on all trustee matters. No distinction is made to minimize or reduce the bank role on distributions. While the bank (or its predecessors) may have operated that way in the past, the power must now be shared with the bank. The trust terms require that they work together. The family trustees are wrong to insist on exclusive authority, and the bank acted in a manner inconsistent with its fiduciary obligations when it alleged that it was no longer willing to try to reach agreements with the family trustees. A trustee may be removed where lack of cooperation among the trustees substantially impairs the trust administration.
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> **b)** Where trustees having equal power deadlock and the trust terms are silent, the UTC allows the court to direct the exercise or non-exercise of the trustees' discretion as in the best interest of the trust. The bank was entitled to seek relief under this statute. The court had discretion to be bound by the distribution deadline to avoid an excise tax on under-distributions, and the court did not err by respecting the deadline in order to avoid the excise taxes. Because of the short deadline imposed by the bank on making a decision to avoid tax penalties (the bank claimed it needed a decision by December 12th in order to get checks out before year end), the court had discretion under trust law to limit the amount of the distributions to the 5% amount and use the list submitted by the bank. The court did not err by limiting the 2016 distribution to 5% in view of the limited time available, and preserving trust assets until a more considered decision could be made without the time pressures imposed by the bank. Going forward, the court must more closely assess the settlor's intent on the amount of the payout. The trust terms do not limit distributions to preserve the perpetual life of the trust, and the trust terms at least contemplate that the trust may exhaust all of its assets. A factual record will be needed on the settlor's intent.
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> **c)** While the court was under time pressures, the determination of the proper charitable recipients required a determination of the intent of the settlors and that determination required a factual hearing. The court erred by not having a factual hearing to explore that intent, and should have granted the motion for expedited discovery to collect information that is relevant. By resolving the issue on the basis only of party submissions and oral argument the court decided critical trust issues without factual evidence of the settlor's intent. On remand, the court must hold a hearing and give further consideration to these issues. The court should make factual findings about the settlors' intent to support its resolution of a trustee deadlock. The court erred by picking the bank's list of donees without taking evidence. The trust agreement is silent on the types of charities to receive distributions, so extrinsic evidence should be considered, including the giving history of the trust (especially for the years where the settlors were alive and had input, and when the husband's brother was co-trustee). The extrinsic evidence may also shed light on whether the preferences of the family are entitled to weight in the decision-making process. If the

original local bank played no role in the selection, then that fact may mean that the settlors intended to defer to the individual trustee. The trust agreement itself does not support the bank's preference for charities that provide a direct service to the poor or needy as opposed to the family's preference for political advocacy groups. The trust terms also fail to support the bank's preference for recipients in western Pennsylvania. The trust terms do not preclude political advocacy groups as recipients so long as they qualify as public charities.

d) While the intent of the settlors will be relevant to guide the trustees, each year the trustees must jointly and in good faith exercise their shared discretion and select recipients. Requests that the court break a deadlock should be extraordinary, and where a request is made, the court must be guided by the settlors' intent as determined by factual evidence.

e) On remand, the court must also determine how to address the fact that distributions were made to charities based on trial court error in their selection. It may be unrealistic and inequitable to compel the charities to repay those amounts, and it may not be practicable to make additional 2016 distributions.

XX. REVOCABLE TRUSTS

A. *Rhea Brody Living Trust v. Deutchman,* 2017 Mich. App. LEXIS 1430 (2017). Contingent remainder beneficiary of revocable trust may sue trustee, despite settlor being alive and regardless of any finding that the settlor is incapacitated and that the trust is irrevocable.

1. Rhea created a revocable trust with her husband Robert as trustee. The trust provided at her death for marital and family trusts, and then at the death of her surviving spouse for equal trusts for her son Jay and her daughter Cathy. The trust assets included a 98% interest in Brody Realty, which owned another family business called the Macomb Corporation. Robert was also the manager of Brody Realty. Rhea was alive and had not been declared incompetent.

2. Robert acting as manager sold Brody Realty's interest in certain property to Jay and Jay's children, subject to 15% and 40% valuation discounts, and for a total purchase price of $3.35 million paid by a down payment of $1 million and a 9.5 year note at 1.65% interest. Robert also sold to Jay for $136,000 an option to purchase the trust's interest in Brody Realty and the Macomb Corporation, at fair value (and with 9 years to pay the purchase price with interest at the AFR rate) and subject to valuation discounts, for a period lasting from 9 months to 15 years after Rhea's death, during which time Jay would have proxy to vote the trust's interests before sale, and where the purchase price would be discounted by $2 million if Cathy or her husband attempted to interfere with Jay's right, with Jay being allowed to allocate the $2 million reduction between himself and his sister.

3. Cathy sued to remove and surcharge her father as trustee. The probate court removed Robert, found on summary judgment that he breached his duties as trustee, and that Jay was complicit, and: (a) modified the terms of the property sale to increase the sales price and the interest rate on the note; and (b) voided the option agreement. Robert appealed. On appeal, the court of appeals affirmed Robert's removal and the finding of breach of duty, reversed the modification of the property sales agreement, and remanded the case to revise the remedies for breach, on the following grounds:

a) The fact that the trust assets are businesses is not alone enough to divest the probate court of jurisdiction over a trust lawsuit and force the case to be heard in the business court, and the probate court had jurisdiction to hear the case.

b) As a contingent remainder beneficiary of the revocable trust, Cathy had standing to bring her claims regardless of whether Rhea had capacity and the trust was revocable. A court may intervene in a trust administration to the extent its jurisdiction is invoked by an interested person. Interested persons includes beneficiaries. Cathy has a future contingent beneficial interest in the trust, and will receive Rhea's clothing and jewelry at her death, and a subtrust with 50% of the trust assets after both of her parents die. The court declined to adopt the approach of UTC jurisdictions in holding that a contingent beneficiary lacks standing to challenge the administration of a revocable trust, because those cases involve statutory language that does not control here. It is unnecessary to determine whether Rhea was disabled under the trust terms or whether the trust is revocable to resolve the issue of Cathy's standing.

c) The trust terms prohibited Robert as trustee from possessing powers that would enlarge or shift the beneficial interests under the trust. If he had such a power, the trust terms required Robert to appoint an independent co-trustee. Robert failed to appoint a co-trustee to ensure that the beneficiaries' best interests were served while he served in a potentially conflicting role, and his failure constituted a breach of his duties under the trust. The sale of property was the sale of an asset held in an entity owned by the trust, and the option agreement would transform Cathy's interest from 50% of Brody Realty to 50% of its sales proceeds, and there was no guarantee those interests would be equivalent, especially given the income from the company. The option shifted beneficial interest under the trust. Rhea had a general intent to treat her children equally at the death of her spouse, and the option agreement was inconsistent with that intent (notwithstanding trust terms that allows discretionary distributions in unequal shares).

d) The court erred by reforming the purchase agreement because the parties to the sale intended the terms of sale, reformation is not permitted as a remedy for breach of trust because an order to recover sales proceeds could have been tailored to remedy the breach of duty, and because the reformation impacted Jay's children without evidence that they played any role in any improper conduct. Reformation was not permitted under the court's equitable powers because those powers are not unlimited, and the court did not weigh the sales terms against the parties responsible for the misconduct. On remand, the court should determine an appropriate remedy for breach.

e) The court correctly rescinded the option agreement because: (i) Cathy was not also given an option to purchase the interest; (ii) the option was part of a pattern of favoring Jay over Cathy; (iii) Jay would have the trust's proxy before sale was completed; (iv) the 15-year option would delay funding of Cathy's trust (which even if a "reasonable" delay under trust law would still unfairly burden Cathy but not Jay) while Jay had present rights to vote the stock; (v) there was a $2 million penalty that Jay could impose on Cathy; and (vi) the inequity in that arrangement is clear.

XXI. DIRECTED TRUSTS, PROTECTORS & SPECIAL FIDUCIARIES

***A. Beardmore v. JPMorgan Chase Bank,* 2017 Ky. App. LEXIS 60 (2017).** Trial court did not commit error by retaining jurisdiction over pending case after enactment of UTC, modifying trust to make it a directed trust, and transferring the trust situs to Delaware to save income taxes.

1. John Stoll created several trusts that provided income for his issue that would last another 50 years (until the expiration of the perpetuities period). The trust assets exceeded $100 million. At the time the corporate trustee petitioned to modify the trust, there were 28 income beneficiaries and 133 contingent beneficiaries. Since the mid-1970s, an informal family investment committee had recommended investments to the trustee. In 2013, the trustee petitioned the probate court to modify the trusts to formalize the committee role and make the trusts directed trusts, and to move the trust situs to Delaware to save income taxes. The petition was conditioned on a favorable IRS private letter ruling that the modification would not affect the status of the trusts as grandfathered-exempt from the GST tax, which was received in January of 2014. Only one of the 151 beneficiaries, only one contingent beneficiary, James, objected and 143 beneficiaries consented.

2. Because of James's objection, the probate action was dismissed and, in April of 2014, the trustee petitioned the circuit court to approve the modifications. The guardian *ad litem* approved the modifications, and 161 of 165 beneficiaries consented to the relief, with only James objecting. James's out-of-state counsel caused delays in the trial because he did not qualify *pro hac vice* or retain local counsel. He later withdrew because his Hawaii law license was revoked. While James retained local counsel, he did not appear at the hearing. Two days before the hearing, Kentucky's version of the UTC become effective. The Kentucky UTC provided that the district court (as opposed to the circuit court where the action was pending) would have exclusive jurisdiction over trust matters, but included the customary UTC transitional rule with respect to actions filed and pending before UTC enactment. The court approved the petition to modify and move the situs of the trusts, and James appealed.

3. On appeal, the Kentucky court of appeals affirmed the trial court on the following grounds:

> ***a)*** While the UTC does provide that the district court has exclusive jurisdiction over trust matters, the UTC rules do not apply in this case because: (i) the action was initiated and the action is subject to the UTC transitional rules; and (ii) the trial court correctly found that requiring the re-filing of the action in district court would substantially interfere with the effective conduct of the judicial proceedings and prejudice the rights of the parties, by adding expense to the trusts and requiring the re-serving and re-noticing of all of the beneficiaries.
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> ***b)*** Kentucky law specifically permits a trust to be modified into a directed trust, under both a statute that defines the duties of a bank trustee where subject to direction, and under the common law doctrine of equitable deviation where a court may modify a trust because of circumstances not anticipated by the settlor where the modification will further the trust purposes and is made in accordance with the settlor's probable intention. The trial court found that the settlor intended to maximize the income to the beneficiaries by whatever legal means available, and the settlor could never have anticipated trust administration through a directed trust and various investment strategies because they did not exist during his lifetime.
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> ***c)*** Kentucky laws permits a court to change the principal place of trust administration. Under the UTC, the trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, administration, and the interests of the beneficiaries; and the prior state statute imposed a duty on the trustee to administer a trust in a place appropriate to its purposes and sound, efficient management. Over the 50-year life of the trust, which has assets of over $100 million, the move to Delaware and its favorable tax laws would provide a significant aggregate tax savings. The comments to the UTC specifically mention that lower state income taxes may be a reason to move the trust situs. Because of the evidence that the settlor intended to maximize the income to the beneficiaries by whatever legal means available, and because tax savings would carry out this intent, the trial court did not commit error by transferring the trust situs to Delaware.

***B. Davis v. Davis*, 2017 Nev. LEXIS 39 (2017).** Nevada has specific personal jurisdiction over trust protector of Nevada trust.

1. In 2000, Beatrice, a Missouri resident, created an irrevocable Alaska ILIT with an Alaska corporate trustee. Beatrice died in 2012 and the Alaska trustee resigned the next year. In 2014, the trust protector amended the trust to transfer the trust situs to Nevada, appoint a Nevada corporate trustee, and appoint Beatrice's son, Christopher, as investment trust adviser. The trustee then created a Nevada LLC and named Christopher as manager. Christopher's sister, Caroline, sought information about the LLC, Christopher failed to provide information, and Caroline petitioned the Nevada court for relief. The Nevada court validated the amendment and situs transfer, confirmed the appointment of the Nevada trustee and trust adviser, took jurisdiction over the trust, and ordered Christopher to produce documents and information related to the LLC.

2. Christopher appealed and challenged, in part, the Nevada court's exercise of jurisdiction over him, alleging that the exercise of jurisdiction was an abuse of discretion that warranted extraordinary write relief. The Nevada Supreme Court rejected his challenge to jurisdiction on the following grounds:

> ***a)*** State statutory law provides that a person accepting a role as a Nevada trust protector or adviser submits to jurisdiction in Nevada, regardless of any trust terms to the contrary, and that a protector or adviser may be made a party to an action or proceeding arising out of a decision or action of the protector or adviser.
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> ***b)*** Even read in its entirety, the statute grants courts *in personam* (rather than *in rem*) jurisdiction over protectors and advisers, subject to constitutional minimum contacts analysis.
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> ***c)*** Nevada's long-arm statute reaches the constitutional limits of due process. Specific jurisdiction is proper where the cause of action arises from the defendant's contacts with the forum; the defendant must purposefully avail himself of the state.
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> ***d)*** Nevada courts may exercise specific personal jurisdiction over persons accepting a position as a protector or adviser of a Nevada trust should the suit arise out of a decision or action of the protector or adviser. Accepting a role as protector or adviser manifests the purposeful availment of the privileges of acting in Nevada where, as here, the suit arises out of a nonresident defendant's role as protector or adviser. In that case, the exercise of specific personal jurisdiction would satisfy the requirements of the state long-arm statute as well as traditional notions of fair play and substantial justice.

C. Schwartz v. Wellin, **2014 U.S. Dist. LEXIS 143644 (Charleston South Carolina Division, October 9, 2014);** ***Schwartz v. Wellin,*** **2014 U.S. Dist. LEXIS 1528 (January 7, 2014); 2014 U.S. Dist. LEXIS 172610 (December 15, 2014); No. 2:13-cv-3595-DCN (February 11, 2015); 2016 U.S. Dist. LEXIS 5139 (2016); 2016 U.S. Dist. LEXIS 135604 (2016); 2017 U.S. Dist. LEXIS 48612, 48613, 48616 (2017).** South Dakota trust code provision giving court power to enter preliminary orders in trust cases does not eliminate general requirements for issuance of preliminary injunction. Trustee appointed by trust protector substituted as plaintiff because beneficiaries' removal of trust protector without appointing a successor protector for three months violated the trust terms and did not bar protector from appointing trustee. Trust protector validly amended trust terms that prevented beneficiaries from removing him from office. Attacking fiduciaries were not entitled to a preliminary injunction awarding their fees, where they could not show harm and the settlor contracted to advance the costs. Grandchild who provided affidavit in support of beneficiaries is entitled to protection of certain of her communications with counsel.

1. A 2009 irrevocable trust was funded with a 98.9% limited partnership interest in a family limited partnership (with an LLC as 1.1% general partner), which was in turn funded with 896 Class A Berkshire Hathaway shares. In 2013, the LLC manager directed the liquidation of the partnership. The settlor's three adult children, as co-trustees, directed that the trust retain enough assets to satisfy the promissory note, and then distribute the balance of the assets outright to themselves as beneficiaries. Four days later, the corporate co-trustee resigned.

2. On December 6, 2013, the partnership sold its shares, the trust received its share of the proceeds, the trustees set aside $52 million to pay the note, and then the trustees distributed $95 million to themselves.

3. 11 days later, the attorney named as trust protector sued the trustees for breach of trust in the Charleston, South Carolina probate court for allegedly frustrating the settlor's intent to also benefit his grandchildren with the trust, and sought removal of the co-trustees, fees, and a temporary injunction. The probate court enjoined the children from taking any action with the assets (both those distributed and those retained in the trust) without the trust protector's consent.

4. The children removed the case to the federal court, and the trust protector filed an emergency motion to extend the probate court's TRO.

5. The trust protector argued that the South Dakota trust code provision empowering the court to order appropriate relief to protect trust assets pending a final decision on a request to remove a trustee relieved him of the burden of proving the customary elements to obtain a temporary or preliminary injunction, including the requirement of irreparable harm.

6. The federal court refused to issue an injunction on the grounds that: (1) the trust code provision simply codified a court's inherent power, and therefore the trust protector must show irreparable harm to obtain an injunction; (2) there was no allegation of damages other than monetary, and no allegation that the children would become insolvent while the case is pending, and therefore no showing of irreparable harm; (3) the injunction does not preserve the status quo, but rather gives the trust protector powers beyond what he has in the trust instrument; and (4) there is no public interest that plays a meaningful role in the injunction.

7. On January 17, 2014, the court granted the children's motion to dismiss the suit on the grounds that the trust protector was not a real party in interest, and allowed 15 days from entry of the April 17, 2014 order to substitute a party in interest.

8. On April 29, 2014, the children purported to exercise their power under the trust instrument to remove the trust protector, but did not appoint a successor. On May 2, 2014, the protector proposed to appoint a new trustee for the trust, and moved to substitute the new trustee as plaintiff in his place.

9. The court held that the appointment of the trustee was valid and the trustee was a proper party on the grounds that: (1) the trust terms required that there always be a protector serving and a successor should have been appointed contemporaneously with the removal; (2) by not appointing a successor protector for three months following removing the original protector, the children violated the trust terms and the removal of the protector was invalid; (3) the protector therefore had the power to appoint a trustee for the trust; (4) a trustee is the proper party to bring claims on behalf of the trust and is properly substituted as a plaintiff.

10. The newly appointed trustee filed a new complaint against the sons seeking actual and punitive damages. The children sued to remove the attacking fiduciaries, retained the distributed trust assets in bank accounts, and expended millions of dollars in litigation costs.

11. The settlor entered into letter agreements with the attacking fiduciaries, in which he agreed to advance their fees and attorneys' fees, and those advances must be repaid to the extent the attacking fiduciaries recover the fees from the trust assets or the Wellin children.

12. During the settlor's lifetime, the trust protector modified the trust terms for the removal of the trust protector. The trust terms gave the protector the power to change the administrative provisions. A separate trust term gave the protector the power to "irrevocably" release or modify to a lesser extent any or all of the powers and discretions conferred under the trust instrument. The protector amended the trust to change the trust terms that would permit the children, after the settlor's death, to freely remove and replace the trust protector. Under the amended provisions, the children could only remove and replace the trust protector: (a) once every 5 years; (b) with the approval of a committee made up of three independent ACTEC fellows from different law firms, one appointed by the protector, one by the children, and one jointly appointed or selected by the court; and (c) with the committee being required to consider "whether any attempted change in Trust Protector may have been initiated for the purpose of seeking a Trust Protector who may not be as likely to honor the Settlor's intent or whether there are genuine" issues involved in seeking the change.

13. After the settlor's death, the children purported to use the power granted under the original trust terms to remove the trust protector, and appointed one of their children as successor. The purported successor then removed the trustee appointed by the original protector, and then the children moved to dismiss the lawsuit. The children claimed the amendment of the protector removal provisions was invalid. The court held that the amendment of the trust protector provisions was valid, and the action of the children was invalid, on the grounds that: (1) the trust terms do not limit the authority of the trust protector to prevent the amendment; (2) the broad power of the protector was included for valuable tax planning purposes; (3) where the settlor intended to limit the protector's power elsewhere in the trust, the limitation was expressly stated right after the grant of power; (4) the amendment occurred during the settlor's lifetime, and the settlor could have removed the protector during his lifetime had he felt the amendment violated his intent; and (5) the power of the trust protector is not unlimited because the protector is liable to the court for his actions.

14. At the time the settlor hired the attorney-trust protector and at all times since, the settlor maintained a separate action to have the trust declared to be void *ab initio*. After the settlor's death, his wife maintained the action as his administrator.

15. The suing trustee and trust protector moved the court seeking: (a) confirmation that the trust protector fees, trustee fees, and attorneys' fees and costs are properly payable out of the trust assets; (b) payment of the suing trustee's fees and attorneys' fees; and (c) to compel the Wellin children to segregate and preserve sufficient trust assets to fund ongoing and future payment of those fees and compelling them to pay those fees no later than 30 days after submission using personal or trust funds. The court denied the motion on the following grounds:

> ***a)*** The motion, which relies on the court's equitable powers, is best interpreted as motion for preliminary injunction, and not as simple fee motion under trust statutes. Since the motion seeks mandatory, rather than temporary relief, there is heightened scrutiny whether the standards for imposing injunctive relief are met.
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> ***b)*** The attacking fiduciaries cannot show the irreparable harm required for imposition of injunctive relief because: (i) if fees are awarded, they would reduce the funds passing or retained by the beneficiaries and the beneficiaries would not have a superior claim to the assets; (ii) if the attacking fiduciaries have no legal right to their fees at the end of the litigation, they are not harmed by an inability to receive them now; (iii) there is no risk the attacking fiduciaries will not be paid, because of the letter agreements with the settlor (and now his wife as administrator) that provide for payment of the charges, with the settlor's estate only being reimbursed to the extent of recovery from the trust or the children; and (iv) granting the motion would only provide a windfall to the settlor's estate at the expense of the beneficiaries.

16. Keith's wife, Wendy, as special representative of Keith's estate and trustee of his revocable trust, sued Keith's children alleging that they cheated Keith out of his wealth by improperly orchestrating the 2009 transaction with the 2009 irrevocable trust, and then using their positions as co-trustees to liquidate and distribute the trust assets to themselves. The children, in turn, sued Wendy alleging she took advantage of Keith by isolating him and exerting undue influence over his estate planning decisions during his diminished capacity. These two actions were consolidated with the trust protector's lawsuit for purposes of pre-trial discovery. The Wellin grandchildren filed affidavits in support of their parents in the trust protector's suit. Wendy subpoenaed one of the grandchildren, Cynthia Plum (who resided in New York), who sought to protect certain of her communications with her attorneys, brother, cousins, mother, and mother's attorney under attorney-client privilege, work-product privilege, and the common interest and joint client doctrines (which provide exceptions to the possible waiver of the privilege). The special master found that the protections largely applies, Wendy objected, and the South Carolina federal court adopted and rejected parts of the masters report on the following grounds:

> ***a)*** Applying the test in Section 139 of the Restatement (Second) of Conflict of Laws, South Carolina privilege law should apply because: South Carolina has the most significant relationship with the communications as the situs of the dispute that generated the representation and the location of the attorneys; phone and email communications between New York and South Carolina do not favor either state; and the application of South Carolina law could have been foreseen, and could have been avoided if she retained New York counsel. This approach also makes it possible to consistently determine the application of the common interest and joint defenses doctrine with respect to the various grandchildren. However, there are not significant differences between New York and South Carolina law on the privilege issues, and the law of the two states is largely compatible.
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> ***b)*** Questions seeking the source of Plum's knowledge and "understanding" about the case include legal interpretation in addition to facts, would reveal privileged communications, and are protected. The act of filing an affidavit in the case stating her general understanding does not waive the privilege. Privilege protections also apply to questions about who asked her to sign the affidavit, who she consulted before signing, and why she sought counsel. However, communications with the Wellin children about the possibility of her becoming a trustee and about the background litigation facts are not privileged.
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> ***c)*** Communications between Plum and her mother and her mother's counsel are protected under the common interest doctrine because: (i) while it is an open question under South Carolina law, it appears that South Carolina courts would recognize the doctrine; (ii) to the extent her mother and she are both beneficiaries (regardless of being different classes of beneficiaries, and regardless of the fact the mother was also a trustee), that is enough to apply the doctrine; and (iii) however, the protections only apply to the extent at least one lawyer was involved in the communications. Similarly, the protections of the joint-client doctrine applies to protect communications among the grandchildren only to the extent the communication involved counsel.

17. In additional discovery fights that carried on into 2017, the South Carolina federal court largely adopted the master's report and held that: (a) the notice to take the deposition of Keith's estate is quashed; (b) parts of the Wellin children's engagement letter with counsel (subject to some approved redactions) must be produced; (c) parts of one grandchild's engagement letter (subject to approved redactions) must be produced; and (d) unredacted phone records of the grandchildren must be produced to Wendy, because they are relevant to Wendy's claim that the children and grandchildren did not maintain regular contact with Keith during his later years.

XXII. DECANTING

A. *Ferri v. Powell-Ferri,* 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161 (Ct. Supreme Court, 2015); SJC-12070 (Mass. 2017); 2017 Conn. LEXIS 234 (2017). Applying Massachusetts law, court invalidated decanting of trust to take away vested rights over trust assets and thereby protect trust assets from claims of divorcing spouse, where trust terms did not grant trustee absolute discretion over trust distributions and the beneficiary had right to withdraw 75% of the trust assets at the time of the decanting. The state Supreme Court refused to impose duty on beneficiary to oppose decanting and protect marital assets. On certification by the Connecticut Supreme Court, the Massachusetts Supreme Judicial Court held that the broad discretion granted the trustees included by inference the power to decant, even though not expressly granted, and the court could consider the affidavit of the settlor in making the determination of intent to allow a decanting power.

1. Connecticut divorce proceedings between Paul Ferri and Nancy Powell-Ferri were commenced in 2010. At that time, Paul was the beneficiary of a Massachusetts trust created by his father. The trust terms granted Paul a right to withdraw portions of the trust principal upon reaching certain ages, and at the time of the divorce proceedings could withdraw 75% of the trust principal. The trust terms also permitted the trustees to pay trust income or principal for Paul's benefit, or "segregate irrevocably for later payment to Paul".

2. In 2011, the trustees decanted the trust assets into a new trust that did not grant Paul withdrawal rights. In the divorce proceedings, Nancy sought to invalidate the decanting and have the trust assets over which Paul had a withdrawal right included as marital property subject to division in the divorce. Nancy also filed a counterclaim against the trustee for intentional interference with an equitable interest, and asked the court to recognize this new tort. The parties moved for summary judgment, and the trustees moved to strike the tort claim.

3. The court, applying Massachusetts trust law (and decided after *Morse v. Kraft*), invalidated the decanting on the grounds that: (a) the court will not consider the affidavit of the settlor, and will construe the trust on its terms; (b) because Paul had vested rights over the trust assets, the trust assets are marital property under Connecticut law and Nancy had standing to bring her claims; (c) the decanting occurred after Paul obtained an absolute right to the trust assets; (d) the trust terms that allow the trustee to segregate assets for Paul do not amount to the level of "absolute and uncontrolled discretion" required to recognize the power to decant; (e) the fact that Paul had not asked for the trust principal does not affect his uncontrolled right to the assets; (f) the decanting frustrated Paul's rights and cannot stand; and (g) the settlor could have granted the trustees broad rights that would permit decanting, but chose not to do so, and therefore the trustees decanted without authority. The court held that the remedy to Nancy will be determined at a later hearing.

4. The court refused (albeit narrowly) to recognize the new tort of intentional interference with an equitable interest on the grounds that: (a) the fiduciary, financial, and close nature of a marriage relationship is of the type to which the tort of intentional interference with business expectancy should apply; (b) the public policy of Connecticut supports such a cause of action, and injured spouses should have a remedy in these circumstances; (c) however, because damages cannot be calculated or quantified in this case, the court should not recognize this new tort in this case; (d) while the time for this tort may have come, it is not necessarily under the facts of this case.

5. Nancy separately sued Paul for breaching the alleged duty to preserve marital assets by failing to take affirmative steps to stop the decanting, which the trial court dismissed, and the state supreme court affirmed in a case of first impression, on the following grounds: (a) Nancy was asking the court to require a party to a marital dissolution action to take affirmative steps to recover marital assets taken by a third party; (b) Paul had no role in the decanting, and most courts require affirmative action before finding dissipation of marital assets; (c) the cause of action alleged does not exist in any state, and the court would not recognize a new cause of action where state statutes and automatic orders address the obligations of spouses while divorce is pending, and reflect a public policy of preserving the status quo, and not imposing affirmative duties; and (d) adequate remedies are available through judicial sanctions for wrongful conduct.

6. The Connecticut Supreme Court certified the following questions to the Massachusetts Supreme Judicial Court: (1) whether the trust terms empowered the trustees to decant the trust assets; (2) if no, whether the assets should be returned to the original trust; and (3) whether the court could consider an affidavit of the settlor in interpreting the original trust. The Massachusetts court held that the trust terms empowered the trustees to decant the original trust on the following grounds:

> **a)** The trust did not expressly permit or deny the authority to decant and the state does not have a decanting statute. However, under *Morse v. Kraft, 466 Mass. 92 (2013)*, it is possible that the broad powers of the trustee in a particular trust may provide a trustee with the power to decant. The intent of the settlor is the paramount determination, and the power need not be expressly stated and may be inferred from the trust language as a whole and other relevant evidence of the settlor's intent. The language used by the settlor us viewed in light of the rule of law in effect at the time the powers in question were created.
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> **b)** The trust terms, read as a whole, demonstrated the settlor's intent to permit decanting by: (1) granting the trustees the broad discretion to distribute trust income and principal as desirable for the beneficiary's benefit; (2) allowing the trustees to apply the income and principal for the benefit of the beneficiary rather than paying directly; (3) granting the trustees the discretionary full power to take any action with the trust assets the trustees deem necessary or proper without order or license of any court; and (4) allowing the trustees to "segregate irrevocably" the trust assets for later payment to the beneficiary as the trustees deem desirable for the beneficiary's benefit (and decanting is one way to segregate assets irrevocably).
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> **c)** The trust's anti-alienation provision evidences the settlor's intent to protect trust assets from the beneficiary's creditors, and evidences the settlor's intent that the trustees have the means to protect the trust assets consistent with fiduciary duties.
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> **d)** The beneficiary's right to withdraw 75% of the trust assets at the time of decanting (which later became a right to withdraw 100%) does not negate the trustees' power to decant, because the trust must be read as a whole to give effect to all of its provisions, and if the trustee could not decant the assets subject to withdrawal, the trustee would lose the ability to exercise fiduciary duties (including the duty to invest) over the assets subject to the withdrawal right, and would be without a role. So long as the assets were not withdrawn by the beneficiary, the trust assets remain subject to the trustee's authority and stewardship. Therefore, the mechanism for the beneficiary's withdrawal of trust assets does not limit the trustee's decanting authority, especially here where the power to segregate assets irrevocably under the trust terms extends for "so long as the beneficiary is living" meaning both before and after the vesting of withdrawal rights. Reading the trust terms as a whole and in harmony requires finding that, until the trust assets are actually distributed in response to a withdrawal request, the trustees could exercise the power to decant if the trustees determined it was in the beneficiary's best interest.
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> **e)** The court could in this case properly consider the affidavit of the settlor (stating his intent that the trustees have all powers necessary to protect the trust assets) because extrinsic evidence is permitted to resolve a question of ambiguity. Because the trust did not expressly permit or bar decanting, the affidavit does not contradict plan trust language or attempt to vary the trust terms.

7. A concurring justice noted that the decision did not address the question under Massachusetts law (which was not certified to the court) whether the creation of a new spendthrift trust intended to solely deprive the beneficiary's spouse of marital assets during a divorce proceeding through decanting would be invalid as contrary to public policy.

8. The Connecticut Supreme Court adopted the Massachusetts Supreme Judicial Court decision in its entirety and reversed the decision of the Connecticut trial court, although the court agreed that Nancy had a right to be heard on her claims because the trustees initiated the lawsuit naming her as a defendant and because the resolution of the case would impact her rights in the divorce action. The court rejected the claim that the trustees should be removed merely because of Nancy's claims against them, on the grounds that there was no proof of any breach by the trustees and in view of the finding of the Massachusetts court that the trustees had the authority to decant the trust. The court also rejected Nancy's claim that the trust was self-settled by her husband as a consequence of his withdrawal rights on the following grounds:

a) The 2011 trust was created by the trustees and funded with the 1983 trust assets through decanting, without informing Paul in advance, and without his permission, knowledge, or consent.

b) Because Paul had no involvement in the creation and funding of the new trust, the trust could not be self-settled under Connecticut law. A beneficiary can only be deemed to be a settlor of a trust if he has some affirmative involvement with the creation or funding of the trust. Here, while Paul was entitled to withdraw the funds, he was still required to request the funds from the trustees, which was never done. In the 2011 trust, any distribution of funds rested in the discretion of the trustees.

c) Because Paul took no active role in planning, funding, or creating the new trust, there is no authority for the proposition that the trust is self-settled.

B. ***Matter of Crocitto*, 2016 NY Slip Op 32642 (2016).** Advancements clause precludes summary judgment approving trustee's power to decant trust.

1. Marie created an irrevocable trust in 2009 with her son, Michael, as trustee. The trust terms allowed Michael to distribute income and principal among Michael and his siblings "for any purpose" and waived the self-dealing distribution limitations under state law. The trust terms also included an advancements clause. Upon Marie's death, the trust terms provided for equal distribution to her children.

2. In 2011, Michael's wife nominally created a new trust and Michael decanted the 2009 trust assets into the new 2011 trust, which increased Michael's share at his mother's death to 76% of the trust assets. His sisters filed objections to his accountings and the decanting of the trust assets. Michael moved for summary dismissing the objections, which the surrogate denied on the following grounds: (a) the 2009 trust terms provided that all distributions would be treated as advancements of the residuary shares, and therefore it is not certain as a matter of law that the trustee held an absolute power of distribution that would give the trustee the power to decant the trust; (b) the testimony supporting the decanting (that the advancements provision was boilerplate and that the settlor changed her mind about her estate plan), by attorneys involved in the creation of the 2011 trust, cannot support summary judgment because neither attorney was involved in the drafting of the 2009 trust; and (c) without discovery, the court cannot simply ignore the advancements provision or render it meaningless, and the trust is ambiguous as to an absolute invasion power that would support the decanting.

C. *Matter of Hoppenstein,* 2017 NY Slip Op 30940(U)(2017); 2017 NY Slip Op 32113(U); 2017 NYLJ LEXIS 2902 (2017). Court approves independent trustee's discretionary distribution of $10 million life insurance policy to new trust that excludes daughter that had falling out with settlor.

1. Reuben created an irrevocable trust in 2004 and made cash gifts to the trust. The trust terms included annually lapsing "Crummey" style withdrawal rights for Reuben's family members. The trustees were two beneficiary-trustees and an independent trustee. The trust purchased a $10 million insurance policy on Reuben's life. The trust provided for discretionary income and principal distributions to Reuben's descendants, equally or unequally, in the trustee's absolute discretion, but principal distributions: (a) required 45 days' notice to descendants to that they had a chance to exercise any unexpired withdrawal rights; and (b) could not be made by a beneficiary-trustee for her or his own benefit.

2. Reuben then become unhappy with daughter Cheryl because of her: (a) litigiousness; (b) excessive demands for money; (c) restricting his access to his grandchildren; and (d) lack of gratitude for the substantial assets he had already given her. He excluded her, her husband, and her descendants from future withdrawal rights. He also wrote to the independent trustee and said he would let the policy lapse if Cheryl and her descendants remained as trust beneficiaries. In 2012, the independent trustee used his discretionary power (to distribute principal) to distribute the insurance policy to a new trust that eliminated Cheryl and her descendants as beneficiaries. The trustee gave the required notice to Reuben's descendants by letter.

3. Reuben died in 2015, the insurance proceeds were distributed to the new 2012 trust, and Cheryl and her adult children, Yonanton, Yitchak, Aryeh, and Yara objected to the distribution to the new trust. Both sides moved for summary judgment. The surrogate granted summary judgment in favor of the trustees and rejecting the challenge to the distribution on the following grounds:

a) The fact that the insurance policy is not income is irrelevant because the distribution was made under the power to distribute principal. The trust terms expressly authorized principal distributions and the life insurance policy is a principal asset, and the notice to the adult descendants complied with the trust terms which did not require that the life insurance policy be specifically identified in the notice.

b) The objectants were not entitled to notice of a right to withdrawal of the insurance policy itself, because they received notice of the cash gifts to the trust to purchase the policy and the trust purchased the policy directly.

c) The trust terms allowing trust merger and the NY decanting statute do not apply do not apply to this discretionary principal distribution and have no bearing on the case.

d) Lack of notice of Crummey withdrawal rights do not prevent the lapse of those rights because the lapse was not conditioned on notice, the withdrawal rights did not depend on notice but only on gift tax annual exclusion qualification, and under *Estate of Turner* the fact that they were unaware of their withdrawal rights would not disqualify annual exclusion qualification. The guardians *ad litem* also correctly calculated their unexpired withdrawal rights as being valued at zero.

e) The transfer of the policy was valid, the trustees are entitled to summary judgment, and there is no need for additional discovery.

4. The surrogate denied motion for leave to renew or reargue. The city court allowed leave to reargue (but not renew) and then affirmed the surrogate's original decision on the following grounds: (a) so-called "new facts" about gifts to the trust actually being loans were already known to the surrogate and the court did not base its decision on whether the transfers were gifts or loans; (b) claims of self-dealing are unsupportable because only the independent trustee made the distribution, and the fact that the independent trustee consulted with the other trustees and said he would only make the distribution if they agreed does not change the fact that only he exercised the power; (c) the trustee had broad "absolute discretion", the settlor clearly approved of the distribution by authorizing distribution of the entire principal in equal or unequal shares, there was clear evidence of discord between the settlor and his daughter, and the trustee's process and communications to the descendants show that the trustee did not act from any improper motive or beyond the bounds of reasonable judgment; and (d) the lack of consideration is irrelevant because this was not a sale.

XXIII. AMENDMENT, REVOCATION, REFORMATION, MODIFICATION & TERMINATION OF NON-CHARITABLE TRUSTS

A. *Matter of Ishida-Waiakamilo & Ishida-Winant Legacy Trusts,* 2016 Haw. App. LEXIS 400 (2016); 2017 Haw. LEXIS 117 (2017). Appeals court holds that bare allegations in verified pleading of mistake or lack of understanding of trust terms are not sufficient proof justifying return of assets in irrevocable trusts to settlors. Hawaii Supreme Court affirmed the court of appeals.

1. In 2006, working with their counsel, the Ishidas created two irrevocable trusts (the first page of each trust stated that the trusts were irrevocable), one for their daughter Juney and one for their daughter Jeri. Each daughter was named as trustee of her own trust. They transferred deeded parcels of land in Honolulu to each of the trusts. They did not create a trust for their third daughter, Richardeen, but in 2010 reconciled with her. Their CPA reviewed the trusts in connection with the preparation of gift tax returns, and expressed concern that the Ishidas were responsible for property expenses but would not receive income from the property in Jeri's trust. Thereafter: Jeri as trustee transferred the property to herself individually; Jeri transferred the property to her parents; the Ishidas reserved a life estate and transferred the property back to Jeri; and Jeri assigned the remainder interest to her revocable trust (apparently without regard to the gift tax issues with the transfers).

2. The Ishidas then sued to recover the properties of both trusts for themselves, and sued variously for rescission, imposition of a constructive trust, and reformation, on the basis that they did not intend to create irrevocable trusts and had left themselves unable to provide for themselves in their elder years. The only proof of their claims was their verified petition, in which they alleged that: (a) they only intended to execute simple wills and revocable trusts; (b) each trust was over 50 pages long, their counsel did not communicate with them or send them drafts before the date they were asked to sign the final versions; (c) they did not understand the documents, Mr. Ishida was in a weakened mental and physical state, and Mrs. Ishida was unsophisticated and embarrassed to admit she did not understand the trusts. The Ishidas opposed allowing any discovery or factual development and argued that the court had all the information it needed in the verified pleading.

3. The daughters opposed the petitions. The trial court refused the relief sought by the Ishidas, and they appealed. On appeal, the court of appeals affirmed the trial court on the following grounds:

a) The trusts, on the first page, unequivocally state they are irrevocable, there is no evidence they did not read the first page of the trusts or the entire trusts, they did not plead that Mr. Ishida was incompetent, and there were allegations that Mrs. Ishida ran the family businesses and both parents were competent. There is scant evidence of incapacity or inability to understand the documents, and that scant evidence is disputed.

b) A constructive trust can only be imposed on clear and convincing evidence of unjust enrichment. An irrevocable trust can only be rescinded based on mistake where there is clear and convincing evidence of a mistake of fact or law that affected the trust terms and the settlor's intent; this standard is necessary to give effect to the donor's intent. As stated in the Restatement (Third) of Property, mistakes in unambiguous donative documents should be proved by clear and convincing evidence because evidence suggesting that the terms of the document vary from intention is inherently suspect but possibly correct.

c) A grantor's ignorance of the contents of his voluntary deed of gift, its legal effect, his mistaken belief of its contents, or his attorney's failure to advise him of the contents and their effect, are facts that may be evidence of mental incapacity, but are not alone sufficient to enable a grantor to avoid his deed.

d) The omission of a revocation clause, without circumstances other than mere mistaken belief by the settlor, does not give rise to any inference as grounds for revocation.

e) The evidence, which was only the verified petition itself, falls short of the evidence necessary to establish actionable mistake, and is not identical to testimony that has been subject to cross-examination or made under penalty of perjury. The verified petition is merely attested and states it is correct so far as the petitioners know or are informed, and penalties only may attach for deliberate falsification.

f) In the absence of evidence such as testimony, notes, or correspondence with counsel, the petition by the Ishidas (although it may be correct) that they were mistaken is inherently suspicious, and could easily reflect regret over a course of action they later viewed as improvident, and there is no evidence to conclude that the trusts were so inherently improvident or unreasonable that it must be inferred that the actions were done under some delusion or so enfeebled as to render him incompetent to transact business.

4. On appeal, the Hawaii Supreme Court affirmed the court of appeals on the grounds that: (a) the Ishidas failed to produce clear and convincing evidence that the trust were the result of mistake or other grounds for equitable relief, opposed engaging in discovery that could lead to additional evidence and relied only on the bare allegations in their petition, and accordingly and because both sides made equally plausible arguments the court was justified in denying equitable relief; and (b) while the court of appeals rendered an incorrect statement on the weight to be afforded to a verified petition, on the whole the analysis of the court of appeals was correct and will not be disturbed.

B. ***Matter of Gluckman*, 2017 NY Slip Op 31440(U)(2017).** Court refused to modify trust to grant already deceased beneficiary a general power of appointment to avoid GST taxes.

1. Gladyce died in 1990 and under her will created a trust for the lifetime benefit of her daughter, Wende, with the remainder passing at her death to her children. In 1994, Wende's brother, Thomas, successfully petitioned to have Wende declared incapacitated and for the appointment of guardians of her person and property. Wende died intestate and with no assets in 2015. The trust would be subject to a generation-skipping transfer tax of $525,000 as a result of her death.

2. Thomas petitioned to reform the trust to posthumously grant Wende a testamentary general power of appointment to eliminate the GST tax. The court rejected the petition and Thomas renewed his petition on the basis of new facts to present to the court. The court allowed leave to renew the petition, but denied the petition on the following grounds:

a) The claimed "new facts" of Wende's mental illness, the importance to the decedent of minimizing taxes, and the failure of the decedent's estate planning counsel to advise properly are not new facts, and were included in the original petition.

b) The new alleged fact that Wende would have lacked capacity to exercise a general power of appointment is not supported by the record, because a finding of incapacity supporting appointment of a guardian is not a finding of lack of testamentary capacity.

c) The decision in *Matter of Brecher* is distinguishable because here petitioned does not seek reformation based on changes in the tax laws, but rather based on the circumstances a quarter century after the testator's death. Had the assets at Wende's death exceeded Wende's federal and state basic exclusion amounts, the requested reformation would not generate the same tax advantage.

C. ***Kane v. Locklin,* 2017 Kan. App. Unpub. LEXIS 885 (2017).** Joint revocable trust is contractual and could only be amended during lifetime of both settlors.

1. John and Ruth created a joint revocable trust in 1997 and funded it with agricultural properties and all of their other assets. The trust provides for equal distribution of the assets after both of their deaths to their two sons and two daughters. The trust also provided that: "We reserve the right…during our lives…to amend" the trust. The trust was silent on modification after the death of one settlor. Ruth died in 1997, and John as trustee and one son as substitute trustee for Ruth purported to amend the trust to leave the agricultural properties to the sons (who had helped John with farming operations), and the less valuable other assets to the daughters. John died, the daughters challenged the validity of the amendment, and the trial court granted summary judgment for the daughters that the trust was invalid, ordered that the trustee distribute to the daughters one-half the value of the trust assets on the date of John's death, and awarded them attorneys' fees. The sons appealed.

2. On appeal, the court of appeals on the following grounds:

a) The trust terms are unambiguous in providing that the settlors had to act together to amend the trust, and is silent on amendment after the death of the settlor. There is no patent ambiguity, and also no latent ambiguity because the trust can be administered as written, and therefore parol evidence should not be used to determine the meaning of the trust.

b) The majority of factors support the finding that the trust is contractual and could not be amended by the surviving settlor: (i) the trust provides for distribution of assets at the death of the surviving settlor; (ii) there is a provision for distribution of lapsed bequests; (iii) the trust makes use of plural pronouns and consistently and repeatedly used "we", "us", and "ours"; (iv) while there is not the typical "mutual covenants and agreement" joinder and consent language, this factor is less significant when two settlors sign a single document because the both necessarily joined in the document by creating a joint instrument; (v) as a joint trust, they provided identical provisions on their deaths; (vi) while consideration was not exchanged, this factor weighing against a contractual will is outweighed by the other factors; and (vii) construction of trust is a legal question that was appropriate for summary judgment.

c) Awarding the daughters one-half of the value of the trust assets on the date of John's death is appropriate to place the daughters in the position they would have been in had the trust been properly distributed upon John's death, and the trial court did not err by finding that the daughters should not have to take a reduced share in the trust assets because the sons mismanaged the farm property during the course of the litigation. Awarding the daughters half of their attorneys' fees in the interests of justice and equity under the UTC deviation from the American rule on fees was appropriate because the litigation resulting in the trust being properly administered.

D. ***In re Hoisington Living Trust,*** **2017 Tenn. App. LEXIS 700 (2017).** Handwritten markings on revocable trust agreement are not a valid amendment, and not adequate on their own to meet the burden of proving intent to amend under the UTC.

1. In 2001, Elizabeth executed a revocable trust with herself as trustee, and Carol as successor trustee. The trust terms provided that Elizabeth could amend the trust "an instrument in writing signed by the Grantor and delivered to the trustee during the Grantor's lifetime". At some unknown date, Elizabeth made undated and unsigned handwritten notations on the trust agreement.

2. Elizabeth died in 2015, and her daughter provided the named successor trustee with the trust agreement with the notations for the first time. One daughter petitioned to uphold the notations as a trust amendment, and another daughter opposed. The parties agreed that the notations were entitles in Elizabeth's handwriting and challenges to capacity were reserved. At some point before her death, Elizabeth ceased serving as trustee and Carol commenced serving. The trial court held that the notations were not a valid trust amendment and ordered distribution of the trust assets under the original trust terms, and one daughter appealed.

3. On appeal, the court of appeals affirmed the trial court on the following grounds:

a) Even assuming that the annotated agreement could be an "instrument" (as opposed to construing the trust to require a separate writing) and that the signature to the original trust agreement could also be the signature to the amendment, there is not adequate proof of delivery to the trustee because: (i) the handwritten notations are not dated; and (ii) there is no proof whether they were made before or after the successor trustee commenced serving, and the successor trustee did not receive the handwritten notations until after Elizabeth's death. Where the evidence is scarce and conflicting, the burden of proof of delivery is not met.

b) It cannot be shown by clear and convincing evidence that the settlor manifested the intent to amend the trust, to allow amendment under the default provisions of the UTC, where: (a) the settlor did not make the changes in separate instrument; (b) she did not sign or initial her changes; (c) she did not communicate her changes to anyone or deliver a copy to any other person; and (d) she did not perform any other action to evince an intent to change the trust terms other than to make markings on the trust. The handwritten markings themselves are not enough to meet the proof standard under the UTC.

E. ***Barrenger v. Barrenger,*** **2017 Mich. App. LEXIS 790 (2017).** Signed letters are a valid amendment to a revocable trust.

1. In 2005, Leon executed a pour-over will and a revocable trust (with himself as initial trustee) that passed his assets equally to his children at his death. The trust allowed for amendment by a signed written instrument that was filed with the trustee. He later had a falling out with his son Lynn (who was also known as "Butch"), which was evidenced by four subsequent writings:

a) A typed, signed, and dated document that stated "I LEON BARRENGER DISOWN LYNN BARRENGER HE IS DISOWNED AND REMOVED FROM ANY INHEARATANCE ALSO I DON'T WANT HIM TO ANY MEMORIAL IF THEY HAVE ONE SIGNED".

b) A typed but unsigned birthday note to his son Scott that stated "ALSO SKIPPING BUTCH, S HEISNT GETTING NO MOREMOOLA FROM ME".

c) A partially typed, partially handwritten, and twice signed letter to his daughter Judy that stated "I AM THINKINGAOUT GETTING AGO CART SO I CAN GO TO THE STORE BY MYSELF" and "I DISENHEARTED BUTCH HE CALLED ME A STUPID IDIOT SO I WILL GIVE HIS SHARE TO THE GANDKIDS AT LEAST IT WON'T BE BUYING HIM BEER".

d) A handwritten and signed note to his grandson Quinn that stated "Butch got his big mouth going and he talked himself right out of the Barrenger trust fund. Now I can leave you & Kaitlyn $14,000 a year tax free".

2. Leon died in 2014 and Scott as personal representative brought a motion to confirm the validity of the documents as trust amendments. The trial court, without a hearing, held that the documents were not valid trust amendments, primarily for failing to refer to the trust and state that they were intended as trust amendments. Scott appealed and the court of appeals reversed the trial court on the following grounds:

a) The Estates and Protected Individuals Code, which governs whether a trust can be amended, is to be liberally construed to simplify and clarify the law concerning the affairs of decedents.

b) Another state statute provides that the settlor may amend a trust by "substantially complying with a method provided in the terms of the trust", which is a flexible standard, and the legislature did not impose any type of language or formality requirement. The trial court erred by requiring a more formal document and language expressly stating that the document is trust amendment. The documents reflect an intent to remove Butch from an inheritance, and the only inheritance in the record is that from the trust.

c) Three of the four writings substantially complied with the trust terms that amendments by signed writings filed with the trustee. The first writing is clearly a written instrument that was signed, typed, and dated. The third writing also amended the trust, despite being within a personal letter. There is no authority to support the trial court's conclusion that the personal letter nature of the document automatically renders it invalid as a trust amendment. The first and fourth documents unambiguously reflect Leon's intent to exclude Butch, and the third document directs where Butch's portion of his inheritance was to go.

F. ***Brock v. Premier Trust, Inc.*, 2017 Nev. LEXIS 14 (2017).** The Nevada Supreme Court adopts Restatement (Second) of Trusts, Section 338, and allows irrevocable trust, spendthrift or not, to be modified with the consent of the surviving settlor(s) and any beneficiaries whose interests will be directly prejudiced.

1. Emil and Adoria created an irrevocable Nevada spendthrift trust for the benefit of their collective ten children (each had five from a prior marriage). After Adoria died in 2009, her son Stephen successfully petitioned the court to modify the trust, with Emil's consent, to give each child the totally unrestricted right to compel termination and outright distribution of his or her share of the trust. All of the children received notice and none objected. Thereafter, a bank became trustee of the trust.

2. The next year, Stephen settled several lawsuits that Emil and his children brought against him (concerning another trust) by agreeing to restore $415,000 to that trust by monthly payments, and secured his promise by pledging his share of Emil and Adoria's trust.

Stephen made only one $5,000 payment towards his obligation, Emil died, and the other nine beneficiaries received their share of the trust. The trustee of the other trust demanded that the corporate trustee of Emil and Adoria's trust use Stephen's share to pay his settlement debt, and the trustee made $300,000 in payments before Stephen demanded that they stop.

3. Stephen sued to recover the $300,000 and to remove the trustee, alleging that the amendment to the trust was invalid and the bank trustee breached its duties. The trial court rejected Stephen's claims and Stephen appealed.

4. On appeal, the Nevada Supreme Court affirmed the dismissal of Stephen's claim on the following grounds:

a) The Nevada Supreme Court adopted the position of the Restatement (Second) of Trusts, Section 338, that: (i) a trust may be modified if the settlor and all beneficiaries consent; (ii) even if all beneficiaries do not consent, those who desire modification may, together with the settlor, modify the trust unless the nonconsenting beneficiaries' interests will be prejudiced; (iii) a spendthrift clause alone does not prevent modification; (iv) after one settlor has passed, an irrevocable trust, spendthrift or not, may be modified with the consent of the surviving settlor(s) and any beneficiaries whose interests will be directly prejudiced.

b) Emil and Stephen, both individually and Stephen additionally as Adoria's agent under a power of attorney, consented to the trust modification, and Stephen consented to the settlement. No other beneficiaries were prejudiced by the modifications. Therefore, the judicial modifications were valid.

c) The spendthrift clause became invalid upon the trust modification because each beneficiary was entitled to have the trust principal conveyed to him or her. A beneficiary does not need to actually exercise a right of distribution, only possess it, to lose the protection of a spendthrift clause. Here, no limits were placed on the rights of the beneficiaries and the modification rendered the spendthrift clauses invalid.

d) Stephen was judicially estopped from arguing that the trust modification was invalid. Even if Stephen received bad legal advice, the remedy is a malpractice suit against counsel and not trying to invalidate the settlement. The record is clear that Stephen understood the trust modification, and it appears that he is attempting to obtain an unfair advantage over parties to the settlement by using his interest in the trust as security, failing to make payments, and then arguing that the trust modification was invalid in an attempt to escape the consequences of his failures.

e) The bank trustee did not breach its duties in making settlement payments out of the trust assets, because the spendthrift clause was invalid, and because the bank could rely in good faith on the judicial modification order and the court order approving the settlement.

XXIV. SPENDTHRIFT & ASSET PROTECTION TRUSTS

A. *Mennen v. Wilmington Trust Company,* 2013 Del Ch. LEXIS 204 (2013); C.A. No. 8432-ML (January 17, 2014); Final Master's Report (April 24, 2015); 2016 Del. LEXIS 534 (2016); 2017 Del. Ch. LEXIS 34 (2017); 2017 Del. LEXIS 206 (Del. S. Ct. May 17, 2017); 2017 Del. LEXIS 255 (Del. S. Ct. June 21, 2017). Fiduciary exception to the attorney-client privilege does not apply to trustee's legal advice in connection with trustee's petition arising out of failed investments directed by co-trustee. Master recommends $97 million surcharge against individual co-trustee, which is affirmed by the Delaware Supreme Court. Master recommends dismissal of claims to recover against trust for co-trustee's benefit under spendthrift clause, and rejects creation of public policy exception to clause for family member claims beyond support claims, which is affirmed by the Delaware Supreme Court.

1. George S. Mennen created a trust in 1970 for the benefit of John Mennen, with Wilmington Trust Company and Jeff Mennen as co-trustees. At the same time, he created separate trusts for his other children, including a trust for Jeff. The trusts contained spendthrift provisions. The trusts were funded with Mennen Company stock. Owen Robert, and not Jeff, was the individual co-trustee of the trust for Jeff's benefit.

2. In 2012, Wilmington Trust filed a petition to remove Jeff as co-trustee of John's trust, alleged that the trust was a directed trust that required Wilmington to follow Jeff's directions concerning investment, and alleged that Jeff's investment directions caused the trust to lose a significant portion of its value. Wilmington also sought investment information it claimed Jeff was withholding. The beneficiaries of John's trust, after receiving notice, did not respond to the suit for a number of years.

3. In March of 2013, the beneficiaries sued the co-trustees seeking damages exceeding $100 million. The beneficiaries alleged that after the Mennen Company was sold to Palmolive, Jeff used the liquid assets in John's trust to fund investments in, or loans to, fledgling companies founded by Jeff's friends on whose boards Jeff served, and that as a result of the trust value was lost. The beneficiaries alleged the corporate trustee did nothing to prevent Jeff's self-dealing. Jeff was not able to influence the investments of the trust for his own benefit, which as a result still had substantial assets. The beneficiaries of Jeff's trust added the trustees of Jeff's trust to the suit and sought to recover against the trust for Jeff's alleged wrongful actions.

4. During discovery, the co-trustees separately asserted that the attorney-client privilege or work product doctrine protected several categories of documents. Wilmington refused to produce any external or internal communication with counsel concerning its petition and refused to produce a privilege log. Wilmington asserted an advice of counsel defense, but refused to produce documents related to that defense. The beneficiaries sought to compel Wilmington to produce (1) all privileged documents up to the date they filed their action, (2) later documents not related to the defense against their claims, and all advice related to Wilmington's duties and powers under the trust agreement. The beneficiaries claimed that under *Riggs National Bank v. Zimmer*, Wilmington must produce all documents related to its petition because that action was for their benefit and they were therefore the ultimate clients.

5. The Chancery Court held that the fiduciary exception to the privilege did not apply, and Wilmington could withhold privileged communications related to its petition on the grounds that: (a) *Riggs* is still good law notwithstanding changes to the Delaware rules of evidence stating that the trustee is the "real client"; (b) the beneficiaries have the burden of proving the exception applies; (c) it is not surprising that Wilmington would seek legal advice for its own protection and bring the petition for its own protection; (d) Wilmington clearly sought legal advice for its own protection and to minimize its potential exposure following the bankruptcy of the trust's largest investment, and it was concerned at that time that the beneficiaries might bring suit against it; (e) pending litigation is not a prerequisite to a finding that the trustee has a legitimate personal interest in the legal advice; (f) the sharp decline in the value of the trust, and the real possibility that both guardians *ad litem* appointed in the petition action would bring claims against Wilmington, supported Wilmington's view that it was adverse to the co-trustee and the beneficiaries prior to the filing of the beneficiaries' lawsuit; and (g) while not dispositive, Wilmington's payment of the legal fees (rather than charging them to the trust) weighs in favor of finding Wilmington intended to be the primary beneficiary of the legal advice received.

6. The court ordered Wilmington to create a practical privilege log. With respect to documents containing legal advice related to Wilmington's duties and powers as set forth in the trust instrument, including whether the trust is a "directed trust", the court applied the fiduciary exception and ordered Wilmington to produce such documents because under *Riggs* "a beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust" and beneficiaries must have "knowledge of the affairs and mechanics of the trust management" in order to hold the trustee to the proper standard of care. However, any such documents produced in connection with the petition action or the suit by the beneficiaries would remain privileged. The court noted that if Wilmington pursued an advice of counsel defense any documents related to that defense would be required to be produced. The court ordered the co-trustee to produce the three documents he was withholding.

7. *Final Master's Report (Recovery against Jeff's Trust).* The individual co-trustee of Jeff's trust sought summary judgment on all claims against Jeff's trust, which the master for the Delaware chancellor recommended granting on the grounds that: (a) Jeff's trust includes a spendthrift clause; (b) by statute and by earlier common law, Delaware recognizes the enforceability of spendthrift clauses; (c) the beneficiaries are tort claimants against Jeff, which are considered creditors under the Delaware statute whose claims are barred by spendthrift clauses; (d) *Garretson v. Garretson*, which resolved an ambiguity in the Delaware statute to determine that a spousal support obligation is not a "creditor", does provide an exception for other family creditors to whom the debtor does not owe a support obligation; (e) not all familial obligations fall under the *Garretson* exception; (f) there is no authority suggesting that the general assembly intended to permit the courts to develop unenumerated public policy exceptions to an unambiguous statute merely by preserving existing common law when passing statutes; (g) there was no policy exception to spendthrift clauses at the time the spendthrift statute was enacted; (h) other states do not recognize a tort exception, the comments to the restatements (lacking any citation) are not support for the family creditor exception or a "persistent wrongdoer" exception, and the statute does not allow the court to create exceptions based on its own perception of public policy; and (i) the beneficiaries cannot apply "impoundment" principles to reach Jeff's trust because it is a separate trust under a separate instrument, and not a mere sub-part of a pot trust for the family, there is no case law supporting applying impoundment that far, Jeff's trust has beneficiaries other than Jeff, and impoundment would violate the Delaware spendthrift statute provisions.

8. *Appeal concerning recovery Jeff's Spendthrift Trust.* The beneficiaries filed exceptions to the Master's report recommending that they not be allowed to recover against Jeff's spendthrift trust. The Court of Chancery struck the objections on the basis that the exceptions were filed one week late under the purportedly applicable expedited briefing schedule (which reduced the notice time from 11 to just 3 days). On appeal, the Delaware Supreme Court reversed the Court of Chancery, and remanded the case for the court to hear the merits of the beneficiaries' objections to the Master's report, on the grounds that: (a) the expedited briefing schedule applied to the damage issue, but not to the spendthrift trust issues; (b) no party suggested or believed that expedited briefing applied to this aspect of the case until the trustee of Jeff's trust moved to strike the objections, and regular briefing had previously been used for objections to the draft pre-final report; (c) the beneficiaries acted in good faith and with reasonable justification that the regular briefing schedule applied; (d) the January 1, 2015 amendments to the briefing schedule statute were not accompanied by precedent or commentary at the time of the filing; and (e) the Register in Chancery informed counsel for the beneficiaries that the regular 11-day filing period applied, and where court personnel cause a notice of appeal to be untimely, the appeal will be accepted. On appeal, the Chancery Court affirmed the Master's report concluding that the beneficiary could not recover against Jeff's spendthrift trust stating simply that "I would like to think that I could improve on [the Master's) decision, but I know that I cannot", and adopting the Master's analysis as written. On May 17, 2017, the Delaware Supreme Court affirmed the decision of the Chancery Court based on the reasons in the final mater's report.

9. *Final Master's Report (Jeff's Liability).* The corporate trustee settled with the beneficiaries for an undisclosed amount. On April 24, 2015, the master submitted its report recommending judgment against Jeff in the amount of $97 million, plus pre- and post-judgment interest at a rate of 7.75%, on the following grounds: (a) The trust reduced from over $100 million to $25 through investment in insolvent, unproven, and unsuccessful private companies with no record of profitability, personally directed by Jeff, most of which were motivated by pride. Because Jeff's personal fortune was out of reach in his own trust, Jeff (a) used his brother's trust as a piggy bank that he readily opened to fund companies on which he had staked his claim (that he was uniquely skilled as an investor in companies he could turn into the next big thing) and (b) sought recognition in the business community with the trust assets. While different from typical pecuniary disloyalty, these actions were in bad faith when Jeff invested trust assets to protect his own name. Jeff's skill was inversely related to his own certainty in his abilities; (b) Jeff's testimony lacked credibility for lack of any records to support his claims of due diligence with respect to investments, and his inconsistent, misleading, and at times false testimony; (c) Jeff invested in LOCATE, which was involved in beepers. Before the trust invested, he personally owned 15% of the company, other family members also invested, he was friends with the CEO, and was board chairman. He caused the trust to make loans to the company, made personal loans as well, and caused more trust loans of $3.75 so the company could repay Jeff's loan (the trust borrowed at 8.5% and loaned out at 10%). Jeff had John sign a short document approving the loans, but Jeff did not inform John about the company's position or his conflicts. The company never paid the trust and was acquired, the acquiring company declared bankruptcy and was sold, the trust failed to exercise warrants to acquire the company in bankruptcy and could not recognize tax losses, and the trust lost $2.5 million plus attorneys' fees on the investment; (d) Jeff caused the trust to invest in Top Source, managed by Jeff's friend. Jeff was on the board and received 25,000 stock options (that he denied, claimed he gave the options to the trust, but failed to provide any proof of the transfer), the company was struggling, and despite its slide Jeff personally invested in the company by guaranteeing its debt in exchange for 50,000 warrants. When in trouble with its debt obligations, the company sold $3.5 million of stock to the trusts, which was used to relieve Jeff of his personal guarantee. The company sold a subsidiary, then while insolvent borrowed $19.5 million from the trust to reacquire it, the trust propped up the company by buying $11 million of additional stock (a 38% portion of the trust investments), the company declared bankruptcy, the trust then provided $11.4 in additional financing, bought out the creditors, and then the trust owned 100% of the company, with Jeff as board chairman. The company struggled still, borrowed more from the trust to pay other trust loans, litigated successfully against the former subsidiary owners, but didn't repay any of the $6.6 million recovery to the trusts (with Jeff's permission). The trusts continued to loan to the company, and Jeff loaned personal money with a super priority guarantee for payment ahead of the trust (claiming but unable to prove subordination to the trust claims). The trust lost $44.4 million on the investment; (e) Jeff was involved with Wave2Wave's founder through another company started by the founder's father, and Jeff had a consulting contract with the father's company. Jeff invested trust assets in the company in exchange for the father's company making payments under the consulting contract with Jeff. The trust also guaranteed $5 million in company loans, Jeff received equity interests personally (that he denied, and claimed but could not prove he transferred to the trust) at the same time the trusts received them, the trust loaned an additional $15 million, the trust co-borrowed on a $36 million loan taken by the company, the company defaulted on the debt causing foreclosure, the trust liquidated $40 million of Colgate stock (incurring a large capital gain) to assume the defaulted debt, then permitted the company to borrow $9.3 million and subordinated its position to the additional lender well outside of commercial terms, and without compensation. The company defaulted on another loan, the company with Jeff's permission agreed to default on the loans to the trust (which were the sole source of trust payment to John), and the trust converted half of its $40 million debt to equity while the company was insolvent. The company filed for bankruptcy, the trust's security interests were discovered to have been wrongfully terminated, but the trust did not pursue actions against the law firm that caused the wrongful termination. The trust lost $39 million on the investment when the company was sold in bankruptcy; (f) the trust document gives the trustee broad powers, alters several default fiduciary duties (including the duty to diversify), permits investment in companies where the trustee has an individual interest, and exculpates the trustees so long as they act in good faith and do not engage in willful misconduct, and the court must abide by these terms regardless of the court's view of the wisdom of those terms. Good faith is not a purely subjective standard, and there is conduct that is so far beyond the bounds of reasonable judgment that it is bad faith; (g) the trust terms that allow conflicted transactions do not authorize the trustee to prefer his own interests over the trust beneficiaries. There can be no indicia of good faith where Jeff cannot provide any records supporting his claims of diligence; (h) it is not only greed that can inspire disloyal behavior. Jeff wanted to provide to his family and associates that he possessed specialized knowledge and ability, wanted to live up to his family name, and acted in bad faith by being driven by his need to prove himself. Jeff proved he is capable of little except pouring good money after bad in a stubborn effort to right sinking ships. Jeff cannot with sleight of hand use the 2008 market crash to shift blame for his actions, and cannot so easily lay his sons upon the head of a goat; (i) despite the trust terms denying Jeff compensation as trustee, Jeff acted in bad faith by charging the trust unsupported and inflated "expenses", double-charging trusts for the same expenses, and enriching himself in the name of expense reimbursement in the amount of $536,000; (j) even if John had notice of claims, or approved transactions, John could not bind his children through virtual representation due to his conflict of interest, where he cared about his own income to the detriment of the long term trust performance, his emotional and financial dependence on Jeff during periods of addiction and alienation from the rest of his family, and his refusal to hold Jeff accountable due to his dependencies on Jeff.

10. *Appeal concerning Jeff's liability.* Jeff appealed the master's report recommending judgment against him in the amount of $97 million, plus pre- and post-judgment interest at a rate of 7.75%. On August 18, 2015, the chancellor adopted the final master's report and agreed with the analysis in the final report. On December 8, 2015, the chancellor entered an order and final judgment against Jeff in the amount of $86.6 million plus $18,387.50 per day in post-judgment interest. On June 21, 2017, the Delaware Supreme Court affirmed the final judgment based on the reasons in the final master's report.

B. *Klabacka v. Nelson,* 3017 Nev. LEXIS 40 (Nevada Supreme Court 2017). Nevada refuses to recognize public policy exceptions to spendthrift protections in self-settled asset protection trusts for spousal and child support obligations.

1. In 1993, Eric and Lynita entered into a separate property agreement that converted their community property into separate property. The property was used to fund two equal separate property trusts. They both consulted counsel before signing, and Lynita consulted separate counsel. In 2001, they converted their separate trusts into irrevocable Nevada self-settled spendthrift trusts. A Nevada individual was named as distribution trustee (but the settlors could veto any distribution decisions) and they served as their own investment trustees. Lynita claimed that she delegated her investment trustee role to Eric and he abused his power by moving assets freely between the two trusts.

2. Eric filed for divorce in 2009 and the trusts were added as parties to the divorce proceedings. Lynita filed various tort claims against Eric (i.e. unjust enrichment, breach of fiduciary duty, etc.) that were dismissed. The court considered testimony that they intended to occasionally level off the trusts, that the trust assets become community property again by co-mingling, and that there was an oral transmutation agreement to transmute separate property back to marital property. As part of the decree awarding the divorce, the court ordered that $8.7 million be used to equalize the trusts and that Eric's trust pay spousal and child support. Eric appealed.

3. On appeal, the Nevada Supreme Court reversed the trial court on the following grounds:

a) In divorce proceedings, the court has subject matter jurisdiction to adjudicate the claims raised concerning the spendthrift trusts.

b) The separate property agreement is allowable under Nevada law and valid. The terms are clear and unambiguous and parol evidence is not admissible to contradict the plain language of the agreement. Both parties received the advice of counsel in connection with the agreement.

c) The self-settled spendthrift trusts were validly created and met the requirements under state law, and there was no evidence that the trusts were created to hinder, delay, or defraud known creditors. Even if Eric breached a duty or breached the formalities of the trust, the breach would not invalidate the trust but rather create liability by the trustee for the breach. Lynita filed those types of claims but the court dismissed them. However, the court erred by not tracing the assets moving between them and determining whether any community property was actually transferred into Eric's trust. On remand, the court must perform that tracing because community property would not be subject to protection from creditors under the trust. The trial court erred by considering parol evidence to contradict the plain and unambiguous meaning of the trusts and their spendthrift clauses. The parties' inconsistent testimony about the purported separate or community property nature of the trust assets carries no weight and should not have been considered.

d) The court erred by ordering the equalization of the trusts. The Nevada state statutes express a clear intention to protect spendthrift trusts from court orders. A court may not order the exercise of the trustee's discretion and the beneficiary lacks the ability to make dispositions of the trust property, even in response to a court order. The statutory framework of Nevada self-settled spendthrift trusts does not allow a court to equalize assets among different trusts and compel the exercise of the trustee's discretion, and such an order would distribute assets contrary to the trust terms and run afoul of the statutory prohibition on payments by legal process.

e) The court erred by ordering that Eric's spousal and child support obligations be paid out of Eric's trust. While some states (and the Restatement (Third) of Trusts, Section 59) have cited public policy concerns as the basis for recognizing support exceptions to spendthrift protection, Nevada has not done so. Nevada statutes explicitly protect trust assets from the personal obligations of beneficiaries, without reference to the needs of other persons even where dependent on the beneficiary. The legislature intended to make Nevada an attractive place for wealthy persons to invest their money, provided a framework that protected trust assets from unknown future creditors of all types, and has previously rejected statutory amendments that would create exceptions for spousal and child support creditors. The rigid scheme makes Nevada's self-settled spendthrift framework unique, and this is a key difference between Nevada and other states like Florida, South Dakota, and Wyoming. Nevada has abandoned the interests of child and spousal support creditors, as well as involuntary tort creditors, seemingly in an effort to attract the trust business of people seeking maximum spendthrift protection. Nevada self-settled spendthrift trusts are protected against the court-ordered child and spousal support obligations of the settlor or beneficiary that were (like here) not known at the time the trust was created.

C. *CSFB 1998-C2 TX Facilities, LLC v. Rector,* 2017 U.S. Dist. LEXIS 75813 (N.D. Texas, April 28, 2017). Unsigned trust amendment is inadmissible hearsay and ineffective to defeat garnishment of inheritance.

1. CSFB 1998-C2 TX Facilities, LLC obtained a garnishment against Walter and Shirley's accounts at Charles Schwab. Walter and Shirley opposed garnishment of the account

that held the funds inherited from Shirley's father upon his 2014 death (that were distributed from his revocable trust). The 1991 revocable trust agreement provided for outright distribution of the funds, but Walter and Shirley alleged the funds were held in a spendthrift trust pursuant to a 2012 trust amendment.

2. Walter and Shirley moved for summary judgment that the funds should be excluded from the garnishment writ as assets of a spendthrift trust, which the court denied on the following grounds: (a) the trust amendment creating the spendthrift trust was not signed by the settlor; (b) the unsigned trust amendment is in admissible hearsay that was offered for the truth of the matter asserted; (c) without consideration of the amendment, there is no evidence that the settlor intended to create a spendthrift trust; and (d) the trustee's declaration does not explain the lack of signature, the date of execution, provide personal knowledge that the amendment was executed, state that the amendment was valid, or provide evidence of the settlor's intent.

XXV. CREDITOR CLAIMS & DEBTS

A. *Conaway v. Baird,* 2017 Del. LEXIS 134 (2017). Will and revocable trust are not unified administrative scheme that converts trust specific gifts into estate gifts for purpose of determining source of funds for payment of estate debts.

1. Jesse died in 2010. Under his will, he named his widow, Janice, and his son from a prior marriage, Jesse, as executors. Under his will, Jesse gave his tangible personal property to his widow, and then poured the residue over to his revocable trust.

2. Janice and Jesse also served as co-trustees of the revocable trust after the settlor's death. The trust terms provided for passage of bank account to Janice, specific stock share gifts to Janice, seven other individuals, and one charity, and the distribution of the residue to son Jesse. The trust assets included a 50% corporate general partnership interest, and a 69% limited partnership interest, in a family limited partnership that Jesse created as a vehicle to begin transferring assets to his son. The trust assets also included 32,486 shares of bank stock that were the stock identified for the specific gifts. The trust terms included a specific gift of limited partnership interests to Janice that was declared void in prior litigation as in violation of the partnership document restrictions.

3. The specific gifts of bank stock were not carried out. Rather, the trustees sold the stock to pay one of the decedent's debts, and to pay funeral and estate expenses. The balance of $52,000 was deposited into an estate account (rather than a trust account). Estate and trust assets were generally co-mingled. Jesse allowed the partnership to lapse and moved the partnership assets into his individual name (then claimed to have reformed the entity).

4. The trust terms made a specific gift of shares in certain stock (in a company called "CDI") to Janice. However, before his death the decedent had entered into a contract to sell his shares in exchange for $150,000 in deferred payments to him. The payments were not made to the estate after his death, but rather the estate's counsel instructed the purchaser to make the deferred payments directly to Janice. Janice also removed $78,000 from the estate account and paid the amounts to herself.

5. The chancery court removed the executors and trustees and appointed an attorney as independent fiduciary, who brought a suit to determine the propriety of the actions of the executors and trustees. The chancery court: (a) ordered Jesse to return the partnership interest to the trust along with interest and dividends; (b) held that Janice could properly receive the deferred payments of $150,000, but she was liable to the trust for interest for receiving the payments prematurely; (c) ordered Janice to repay the trust the $78,000 plus interest at the legal rate; and (d) based on its holding that the trust was adopted into the will as one unified estate plan, ordered that the partnership interests must be available to pay the estate creditors. Jesse and Janice cross-appealed.

6. The Delaware Supreme Court affirmed in part and reversed in part on the following grounds:

a) The trial court erred by holding that the will and trust were merged into one unified administrative scheme. In this case, the validity of the trust was not challenged or incorporated into the will by reference upon a failure, and there is no general rule that they trust and estate are merged. The court erred as viewing trust bequests as being incorporated into the will, and by so doing improperly reordered the statutory priority scheme addressing bequests and payment of debts.

b) The trust's specific gift of CDI stock to Janice is void because Jesse personally sold the stock during his lifetime, in exchange for payments to him personally. He never assigned the right to those payments to the trust, and those payments were properly probate assets that should have been applied to pay creditors. The payments were never trust assets, and the executors have a duty to pay estate creditors with priority over beneficiaries. The payments could not have been poured-over into the trust until estate debts were satisfied, and the application of those payments of $150,000 would still result in the estate being insolvent with a shortfall of $40,000.

c) Trust assets should not have been liquidated to pay estate debts until estate assets were exhausted. The sale of the trust-owned bank stock that was specifically given to various persons and a charity, and application of the sales proceeds to pay estate debts, was improper.

d) The trial court could properly order the return of the family limited partnership interest to the trust, because that interest is subject to the claims of creditors. Prior court orders, holding that the trust's interest in the partnership could not be assigned without Jesse's consent, do not preclude the order returning assets to the trust under the law of the case doctrine. That doctrine does not preclude the trial court from clarifying its prior order to hold that the interest passes as part of the residual clause, and must remain available to satisfy possible claims of creditors.

e) The court erred because it was inequitable to charge Janice interest on the $150,000 in deferred payments she must return to the estate. The settlor intended that Janice receive the proceeds and she only received them after estate counsel, on his own, contacted the payor and directed the payments to her. Also, two of the settlor's intended gifts to her have failed (in the prior litigation, his attempt to give her partnership interests was declared void). However, the court could properly charge Janice with interest on the $78,000 in assets she took from the estate improperly, because she withdrew the assets without the consent of the other executor and trustee and placed her own interest ahead of the estate creditor.

B. ***Depriest v. Greeson,* 213 Sp. 3d 1022 (2017).** Estate not vicariously liable for accident caused by daughter's use of decedent's car prior to qualification of personal representative.

1. Decedent lived with his adult daughter, kept his car keys there, and she occasionally drove his car with his permission. He did not give her permission to use the car after his death. Under his will, he did not make a specific gift of the car, which passed as part of the residue to his children equally. A month after he died, his daughter drove the car and collided with another car (that had already been in an accident) allegedly causing additional injuries. The daughter called decedent's stepson (the named personal representative who lived out of state) after the accident. The stepson did not grant the daughter permission to use the car. The probate estate was opened by the stepson 4 days after the accident, and letters of administration were granted 20 days after the accident. The insurance proceeds on the totaled car were paid into the estate.

2. The alleged victims sued the decedent's estate under vicarious liability and dangerous instrumentality theories of liability, and also the daughter, but later dropped their claims against the daughter. The trial court dismissed the claims against the estate and they appealed. On appeal, the court of appeals affirmed dismissal of the claims against the estate on the following grounds:

a) The car became an estate asset on the decedent's death, but did not belong to anyone individually because it was not specifically bequeathed and was subject to administration and payment of charges.

b) The daughter, and not the estate, had actual physical control over the car and she did not have permission from the estate to drive the car.

c) While under state law a personal representative has legal authority to take actions beneficial to the estate before formal appointment, there is no statutory duty to act prior to appointment.

d) The personal representative did not have actual knowledge of, or give actual consent to, the daughter's use of the car. Implied consent, which is an essential element of the claim under the dangerous instrumentality doctrine, cannot be shown because the stepson did not know the daughter ever used the car, did not think she was allowed to use the car, and only learned about matters by the daughter's call after the accident. Implied consent cannot be inferred from the stepson's failure to act as personal representative before his formal appointment, because this would create a duty to act and the law does not impose a duty on the personal representative to act prior to appointment.

C. *Estate of Henry v. Woods,* 2017 Ind. App. LEXIS 209 (2017). Court allows creditor claim by unmarried cohabitant for fourteen years of unpaid personal services.

1. Nadene provided paid care for George's wife (who had cystic fibrosis) while George pursued his law practice. After Phyllis died in 1998, Nadene asked George if her services were still needed, and George replied in the negative. When he ran out of clothes and didn't know how to do laundry, he invited Nadene over for dinner and asked her to do his laundry. Over the next 14 years, Nadene's duties expanded and, after George's first heart attack, she moved into the home. While George paid for her meals when they dined out, George never paid her for her work, despite her repeated requests. Over the 14 years until his death, her services (which were rendered 7 days a week and often 24 hours a day) included: house cleaning; laundry; cooking; yard maintenance and landscaping; tending a vegetable garden and canning; cleaning flooded basements; transportation; medical supervision; all personal scheduling and services; hospital visits; dressing; bathing; personal hygiene care after be become incontinent; and all services required to allow him to remain in his own home and avoid nursing home care. George's children were unaware of the full extent of his medical conditions, and never made or attempted to make arrangements for his care.

2. Over those years, George and Nadene spent more time together, vacationed together, went out socially as a couple, entertained as a couple, attended church as a couple, attended funerals together, jointly signed Christmas cards, and celebrated holidays together. George occasionally referred to Nadene as his girlfriend, but said he did not need to marry her and that she would be taken care of when he passed. Nadene was listed in George's obituary as his loving companion. Nadene and her daughter often questioned George about the lack of payment, and he protested that he was providing her with food and that something would be done for her in the future. Nadene cried about working without pay, but said she could not turn her back on George.

3. George practiced law into his mid-80s and died at age 92. Nadene filed a claim against the estate for fourteen years of unpaid service, in the amount of $381,000. The estate denied the claim, the trial court allowed the claim in the amount of $125,400, and the estate appealed. On appeal, the Indiana court of appeals affirmed on the following grounds:

a) A person who cohabits with another person without ever marrying is entitled to a claim for services performed without donative intent, if the person establishes an express contract, an implied contract, or unjust enrichment.

b) There is no family relationship here that would give rise to a presumption that Nadene performed the services gratuitously. While the trial court found that they "operated as a family and were a family", the trial court's holding related to social conduct and this was not sufficient to establish an actual family relationship that gives rise to the presumption, because there was no evidence of a biological, marital, or adoptive relationship.

c) The facts are sufficient to support Nadene's claims under either implied contract or unjust enrichment. George requested the services and Nadene never intended to provide 14 years of services gratuitously. Nadene attended to the needs of an elderly man who, despite two heart attacks, obesity, incontinence, and bed sores, was never admitted to a nursing facility, and whose assets were never depleted to pay for care. It would be unjust to permit the estate to retain all of its assets without making payments to Nadene.

4. A concurring opinion would find the existence of a family relationship and presumption of gratuitousness, but that the presumption was adequately rebutted.

XXVI. SPOUSAL RIGHTS & CLAIMS

A. *Estate of Tito*, 2016 PA Super 245 (2016). Late filed spousal election by alleged common law wife is time barred.

1. Ralph died unmarried and testate in 2013. He left his entire estate to his children, and nothing to his long-time romantic partner, Carol (they had also entered into a cohabitation agreement). After the estate rejected and defended against various other claims alleging failure to provide her property Ralph intended for her, Carol claimed a right to elect against the estate as Ralph's common law wife. Although the 6 month limitations period for the claim had run, Carol claimed tolling of the limitations period under the doctrines of fraudulent concealment and the discovery rule. She alleged that Ralph's children told her she was only his girlfriend and had no spousal rights. The trial court granted summary judgment dismissing the claims and Carol appealed.

2. On appeal, the superior court affirmed on the following grounds: (a) Carol's assertion of fraudulent concealment and the discovery rule are premised on the notion that she was unaware she was in a marriage and was prevented from discovering she was married; (b) proof of common law marriage is based on an agreement between the parties to the marriage, and an agreement requires knowledge by both parties; (c) the tolling claims are therefore completely at odds with her claim of common law marriage; and (d) Carol's positions are illogical, irreconcilable, and legally untenable.

B. ***Heartland Trust Company v. Kaiser-Asmu,* 295 Neb. 532 (2017).** Conservator for wife cannot claim elective share in husband's estate where she did not need assets for her care and the elective share would frustrate husband's estate plan.

1. Albert and Loyola married for decades and had one child together, Paula. Loyola had two children from a prior marriage, James and Carol. They executed mirror estate plans that left their assets to all three children after their deaths. In 2014, Albert revised his estate planning documents to disinherit Loyola and her son James, and leave all of his assets to Paula and Carol. In 2014, Loyola was declared incapacitated and a bank was appointed as conservator.

2. Albert died in 2015 and the conservator petitioned for permission to file an elective share claim against Albert's estate (and also filed an elective share petition with the probate court within the statutory time period to preserve Loyola's rights). The trial court rejected the petition for permission to file an elective share and the conservator appealed.

3. On appeal, the Nebraska Supreme Court affirmed the trial court on the following grounds:

a) Under a 1975 case, Nebraska previously determined whether an elective share by a conservator was proper under a "pecuniary approach" that focused on whether the elective share would provide the spouse with the most money. The pecuniary approach is used in a minority of jurisdictions. A majority of jurisdictions take into account all of the surrounding facts and circumstances to determine whether to authorize the elective share. After the 1975 case, the legislature amended state law to include numerous factors that are to be considered by the court before ordering that a protected person may exercise the right of election, and thereby rejected the minority pecuniary approach. The factors to be considered by statute include the other assets and resources of the protected person, the decedent's estate planning, and the tax consequences of the exercise or non-exercise.

b) The trial court's decision correctly considered the statutory factors and was not arbitrary, capricious, or unreasonable because: (i) at the time of election, Loyola was 88 years old with a life expectancy of 6 years and in hospice care; (ii) she had assets of over $1 million and not debts; (iii) her annual include exceeded $90,000 and her annual expenses were $82,500; and (iv) Albert intended to exclude Loyola as a beneficiary, and presumably considered her interests in other assets and income-generating recourses that were accessible to her.

C. ***Williams v. Williams*, 2017 Colo. App. LEXUS 1256 (2017).** Premarital agreement did not sufficiently override the presumption that spouse support payment obligations end on the death of the obligor spouse.

1. Before their marriage in 1988, Carl and Diane executed a premarital agreement that provided for certain monthly payments by Carl to Diane for her lifetime in the event of their divorce. They divorced in 1996, and the separation agreement provided for monthly payments to Diane of $4,379 until her remarriage or death. Carl consistently made the payments until his death in 2015. Diane claimed that the estate was obligated to make the payments and the estate objected.

2. The trial court held that the premarital agreement and separation agreement obligated the estate to continue making the payments to Diane and that Diane was entitled to attorneys' fees under the prevailing parties clause in the agreements, on the grounds that the agreement provided that Carl must make the payments to Diane "during her lifetime" or "for her lifetime" and because the agreements stated that they were binding on the parties' heirs, assigns, and personal representatives. The estate appealed.

3. On appeal, the Colorado Court of Appeals reversed on the grounds that: (a) under the relevant premarital act provision that applied to the agreement here, and consistent with the common law before the act, the obligation to pay maintenance is purely personal and does not survive the death of the obligor spouse, absent an express writing or court decree to the contrary; and (b) under pre-act Colorado cases and cases from other jurisdictions, neither agreement terms referring to payments lasting for the spouse's lifetime, nor a "general binding on heirs provision", are sufficiently express to override the presumption that the obligation to make payments ends on the obligor spouse's death – there must be an express or much clearer implication that the payments would continue beyond death. Accordingly, the court ordered Diane to return the post-death payments received from the estate and also refund the attorneys' fees she received under the "prevailing party" provision in the agreements.

D. ***Estes v. Young,* 2016 Miss. App. LEXIS 225 (2016); 2-17 Miss. LEXIS 223 (2017).** Court of appeals holds that spousal intestate share claims were extinguished by desertion and abandonment. Mississippi Supreme Court reverses.

1. Sarah Young worked as a caregiver to the sick. She married Joe Estes in 2006 after dating for 6 months. Each had children from prior relationships, and Sarah was also caring for her minor grandchildren. Three days after the marriage, Joe entered the hospital. In May of 2007, Joe died. Joe's will did not provide for Sarah and she filed a claim for an intestate share (called a "child's share") against the estate. Joe's family contested the claim on the grounds of desertion and abandonment. The trial court allowed Sarah's claim, and the family appealed.

2. On appeal, the court of appeals reversed the trial court and found desertion and abandonment on the following grounds:

a) Sarah always maintained her separate home (where she was raising her minor grandchildren) and they never resided together. In tax papers, she filed as head of household and living apart from her spouse, and listed her separate home as her primary residence.

b) Joe entered the hospital 3 days after the marriage with an injury that would not heal, and which led to amputation of his leg and further complications and surgery. Joe's family provided for his care, Sarah's visits decreased substantially upon his sickness, and, despite working as a caregiver professionally, she stated she would not care for him and "did not have time to care for a cripple".

c) In November 2006, Sarah petitioned unsuccessfully to have Joe involuntarily committed for alleged violent rage, threats to harm Sarah and accusing her of having an affair, and sitting in his wheelchair wearing only his underwear and shooting birds through an open window in the house.

d) Immediately after being released from psychiatric care upon a finding that he was no danger to himself or others, Joe sought a restraining order against Sarah, she filed for divorce and sought half of his assets, and he counterclaimed for divorce. In May 2007, Joe received notice of the final divorce hearing and then shot and killed himself.

3. On appeal, the Mississippi Supreme Court reversed the court of appeals and held that desertion was not adequately proved on the following grounds:

a) Prior Mississippi cases focus on a legal marital status change beyond the mere filing for divorce or an adulterous relationship, such as securing a divorce or bigamy, in order to establish abandonment or desertion.

b) The children had the burden to prove clear abandonment. Because there was no legal status change, the chancellor was not clearly wrong under the evidence in granting Sarah Young a share of the estate. The evidence that was contrary to a finding of abandonment included: (i) after his hospital, Joe acted irrationally, and accused Sarah of infidelity and stealing groceries; (ii) Sarah consulted with Joe's doctor before filing a police complaint against Joe, creating an inference she was trying to help him; (iii) Joe's mental difficulties and bizarre behavior; (iv) Joe knew Sarah had responsibility for her grandchildren before marrying; (v) Sarah tried to have Joe committed before filing for divorce, and efforts to get a spouse professional help should not be used against that spouse; and (vi) Sarah filed for divorce after Joe filed for a restraining order against her.

XXVII. FIDUCIARY APPOINTMENT & SUCCESSION

A. *Trust U/A Edward Winslow Taylor,* 2015 PA Super 199 (2015); 2017 Pa. LEXIS 1692 (2017). Divided Pennsylvania Superior Court allows beneficiaries to petition under UTC Section 411 (modification by consent) to modify trust to give beneficiaries power to remove and replace the corporate trustee. Pennsylvania Supreme Court reverses and denies this use of the modification statute, consistent with the NCCUSL comments to the UTC.

1. Edward Winslow Taylor died in 1939. Under his revocable trust, he created a trust for the lifetime benefit of his daughter, gave her a testamentary power of appointment, and named her to serve as co-trustee along with a bank trustee. The daughter exercised her power of appointment to create a trust for her son during his lifetime, with the remainder in trust for the son's children. Upon the son's death, the bank petitioned to divide the trust into 4 separate trusts for the children (each funded with $1.8 million), with each child serving as co-trustee with the bank, which the court granted in 2009.

2. In 2013, three of the four children petitioned to modify the trusts under the Pennsylvania version of UTC Section 411 (modification by consent) to grant the adult income beneficiaries the right to remove and replace the bank trustee without going to court, which the beneficiaries noted was standard in modern trust drafting but omitted under Edward's trust. The bank opposed the petition. The court granted the bank's motion for judgment based on its interpretation of the intersection of UTC Section 411 (modification by consent) and UTC Section 706 (removal of trustee), which the court found ambiguous, and using statutory construction rules (including reference to the UTC comments that provide that modification by consent is not available to remove trustees). The children appealed.

3. On appeal, a divided Pennsylvania Superior Court reversed and remanded on the following grounds: (a) the children were not currently seeking to remove the bank as trustee, and there was no support in the record for imputing motives to them and to do so was inappropriate speculation and conjecture; (b) there is no support for interpreting Section 411 as not being available to reform a trust to provide trustee removal provisions; (c) had the legislature intended this limitation, it could have provided for it in Section 411, which was done in Ohio; and (d) heavy reliance on the UTC comments was misplaced because the text of Section 411 is clear and unambiguous on its face.

4. A dissenting judge would favor the specific provisions of Section 706 over the general reformation provisions of Section 411, since where a general provision and specific provision conflict, the specific provision must control, and the decision renders meaningless the legislature's decision not to enact portions of the UTC that would allow all beneficiaries to remove a trustee by agreement.

5. On appeal, the Pennsylvania Supreme Court reversed the Superior Court, consistent with the decision in *In re McKinney*, 67 A. 3d 824 (2013), on the following grounds:

a) The Pennsylvania versions of UTC Section 411 (modification by consent) and UTC Section 706 (removal of trustee) must be read together with reference to the entire Pennsylvania version of the UTC, to determine whether any ambiguity exists requiring the application of principles of statutory construction, and doing so shows that ambiguities exist. There are at least two reasonable interpretations of the Pennsylvania UTC, and neither of the sections at issue contain explicit language addressing the issue (whereas both the Iowa and Ohio version of the UTC have added language expressly addressing the issue). In addition, modification by consent would be a form of beneficiary modification of a statute (in addition to a modification of the trust), and the act does not expressly authorize beneficiaries to modify statutorily imposed requirements.

b) Canons of statutory construction presume that the General Assembly intended the entire act to be effective. Permitting beneficiaries to modify a trust by consent in this manner would have the effect of nullifying, excluding, and cancelling the removal of trustee statute and evade its substantial evidentiary hurdles, and the burden on the court to make findings of fact and conclusions of law.

c) Pennsylvania has a long history in prior statutes and cases of imposing some limits on the removal and replacement of trustees, and the enactment of the act reflects a legislative intent (by curtailing some of the uniform act provisions) to retain the principle of there being limitations on removal and replacement. There is no evidence of a generalized legislative intent to give beneficiaries under default law the unfettered control over removal and replacement of trustees.

d) The NSSUCL comments to the UTC state that Section 706 is the exclusive UTC provision on removal of trustees. While the Restatement (Third) of Trusts allows beneficiaries to use modification to amend a trust to allow removal of a trustee, Section 411 of the UTC is not intended to be used for that purpose.

B. ***Matter of Hildebrandt,* 2017 Kan. App. LEXIS 5 (2017).** Reformation to remove law firm as named successor trustee does not violate a material trust purpose.

1. In 2002, Clarence and his brother, Wayne, each executed identical trusts. The trusts held their interests in their joint farming operation and provided for family members. Clarence amended his trust to add a no contest clause. In 2004, Clarence died, and Wayne became sole trustee and sole current beneficiary (with their siblings, nieces, and nephews as remainder beneficiaries). The trust named the drafting lawyer as successor trustee, with two senior partners of the drafting lawyer's firm as alternate successor trustees. The drafting lawyer was deceased. Wayne petitioned, with the consent of all of the beneficiaries, to modify the trust to replace the senior partners as successor trustees upon his later ceasing to serve, and to name his nice as successor trustee. The trial court granted the petition and the law firm appealed.

2. On appeal, the court of appeals affirmed the trial court on the following grounds: (a) a noncharitable trust may be modified under the UTC on the consent of all beneficiaries where the modification is not inconsistent with a material trust purpose; (b) material trust purpose is not defined, and there is no case law holding that the mere naming of a specific successor trustee is a material trust purpose; (c) the trust does not explain the reason for naming of the successor trustee, and Wayne testified it was the drafting lawyer's choice and not Clarence's (and that he had the same provision in his trust agreement); and (d) the adding of a standard no-contest provision by amendment does not somehow convert all of the trust terms into material trust purposes.

C. ***du Pont v. Wilmington Trust Co.*, 2017 Del. Ch. LEXIS 768 (2017).** Beneficiary and director fails to sufficiently plead grounds for removal of corporate trustee of directed trust under UTC-style no-fault removal statute.

1. Douglas du Pont was the beneficiary of five trusts with a bank as sole trustee that provided for a 4% annual unitrust payment to him, along with principal for the "essential needs" of him and his descendants if his other assets are not adequate for those needs. At his request, the bank agreed to a judicial modification of the trust to make it a wholly directed trust as to investments, with Douglas as director. The bank had separately provided Douglas with a loan that was secured by his individual assets and also his unitrust payment. When he struggled to repay the loan, he was required to liquidate assets (and incur a taxable gain) and his unitrust payout was impacted.

2. Douglas asked the bank to resign as trustee, the bank refused, and Douglas petitioned the court to remove the bank and appoint a successor based on the following allegations: (a) the bank had once miscalculated his 4% unitrust payment; (b) minimal contact with the bank; (c) as lender, the bank required him to repay his loan; (d) the bank failed to inform him that the trust would not benefit his wife after his passing, and he would not have made gifts to trusts for his children with the bank as trustee if he understood this; and (e) after the 2008 financial crisis and the acquisition of the bank by another New York based bank, the bank was not the same bank once managed by members of the du Pont family.

3. On the bank's motion, the Chancery Court summarily dismissed the complaint on the following grounds:

> **a)** The no-fault trustee removal statute, which is based on the UTC provision, allows for removal of a trustee without a showing of fault only where there has been a substantial change of circumstances, the trustee is unfit, unwilling, or unable to properly administer the trust, or hostility threatens efficient trust administration. Douglas's did not sufficiently allege any of these grounds for removal.
>
> **b)** The allegations about federal-government investigations, lawsuits, and indictments do allege or suggest any connection between the bank's legal tribulations and the delivery of trustee services, or that the persons involved were associated with the bank's trust services business or were involved with the trusts, and therefore are not a substantial change in circumstances justifying removal. The acquisition of the bank by another bank does not justify removal as a change in circumstances where there is no allegation that the acquisition affected the services provided or that the trustee is less available. The trust modifications to make the trust a directed trust, while limiting the bank's discretion and role, do not justify its removal as trustee.
>
> **c)** When making a decision about removal, the court must have due regard for the expressed intent of the settlor. Here, the trusts expressly name the bank as trustee and do not provide for its removal, the trust modifications do not change this, and the allegations fail to show how removing the bank is consistent with a due regard for the settlor's expressed intention.
>
> **d)** The bank has not refused to serve as trustee, and exercising its discretion to deny Douglas a distribution for tax payments does not amount to "unwillingness" to act as trustee. A conclusory allegation of trustee indifference is not adequate to support removal, and a single incident of an incorrect unitrust calculation does not suggest a pattern of indifference. A single unitrust miscalculation also fails to support an allegation that the bank is generally unable to perform its function as trustee.
>
> **e)** The bank's alleged actions, not as trustee but separately as lender and estate planner to Douglas, do not support the allegation that the bank is unfit to serve as trustee, where (i) Douglas requested and consented to the providing of those services; (ii) it is commercially reasonable and common practice to require collateral for a loan, and it is hardly remarkable for a lender to expect a borrower to repay a

loan, and a reduction in the unitrust payment incidental to the secured credit arrangement does not support an inference of unfairness; and (iii) the allegations do not support an inference that the bank negligently failed to disclose trust terms to Douglas in connection with estate planning advice, and even if so, mere negligence (as opposed to knowing withholding of information) would not justify removal of the trustee because the conduct as an estate planner (even if negligent) does not render a bank unfit to serve as trustee.

f) Even if there is hostility between Douglas and the trustee, it does not follow that any hostility would prevent the bank from properly acting as trustee or threaten the efficient trust administration, and the allegations fail to show either.

D. *Matter of Sinzheimer,* 2017 NY Slip Op 31379 (2017). Corporate trustee acted properly when, after its removal, it refused to turn over trust assets to individual co-trustee that intended to terminate the trust, where trust terms clearly required appointment of successor corporate co-trustee.

1. Ronald Sinzheimer and his wife Marsha created an irrevocable trust in 1997. Ronald died and the trust provided for discretionary distributions for Marsha's lifetime benefit by an ascertainable standard, with the assets retained in trust for remainder beneficiaries upon her death. The co-trustees were an individual and a bank trustee. Ronald and Marsha's son Andrew and Marsha requested a discretionary distribution to Marsha of all of the trust assets. A bank trust officer asked them to provide a tax return and budget for Marsha, which they refused to provide. Andrew's predecessor individual trustee removed the bank trustee (which was authorized under the trust terms) without appointing a successor bank, and then resigned as co-trustee and appointed Andrew as his successor. Andrew demanded the transfer of all trust assets to him, and announced his intention to distribute the assets to Marsha and terminate the trust.

2. Andrew and Marsha sued the bank trustee to compel the assets transfer, for money damaged equal to the trust assets with interest, surcharge for commissioner, costs, and expenses, and $400,000 in punitive damages. The bank trustee counterclaimed for an order directing Andrew to appoint a successor bank co-trustee, or alternatively to order the transfer of assets to Andrew.

3. The surrogate denied all of Andrew and Marsha's claims against the bank, and ordered Andrew to appoint a successor corporate co-trustee, on the following grounds:

a) The trust terms clearly and unambiguously required the appointment of a corporate co-trustee at all times after Ronald's death by providing that "[i]f after the death of Ronald, the individual Trustee removes the corporate Trustee or there is otherwise no corporate Trustee, the individual *shall appoint* another bank or trust company…to serve in its place" (emphasis added). The subsequent trust term that the settlor intended that there at all times be one individual co-trustee serving does not negate the corporate co-trustee requirement, particularly where the corporate co-trustee has the ability to appoint the individual co-trustee where one is not otherwise appointed. Nothing in the trust terms supports the view that a corporate trustee is unnecessary; and

b) No claim for conversion is stated where the bank did not assert title to the funds, but rather temporarily withheld delivery of funds until Andrew first appointed a corporate co-trustee. The bank's position was reasonable in view of Andrew's stated intent to terminate the trust and the duties owed to the remainder beneficiaries, and the bank sought court directions just 4 months after Andrew made clear his plan not to appoint a new corporate trustee. The punitive damage claims must be dismissed for failure to support any underlying cause of action against the bank.

E. *Berlinger v. Wells Fargo, N.A.*, 2014 U.S. Dist. LEXIS 114571, 125872 & 134643 (M.D. Florida, 2014); 2017 U.S. Dist. LEXIS 21976 (2017). In a claim that trust distributions to satisfy divorce obligations of primary trust beneficiary were improper, court refuses to dismiss trustee's third party complaint against ex-spouse, dismissed $18 million claim of civil theft for 45 day delay in transfer of assets to successor trustee, and sustains objection to testimony seeking communications between trust officer and in-house counsel. The suit by the beneficiaries against the bank was unsuccessful. The special trustee's $19.4 million civil theft suit against the bank for the alleged delay in transferring assets to the successor was dismissed for failure to prove harm or felonious intent.

1. The children of Bruce Berlinger and Sue Casselberry were the beneficiaries of three family trusts, with Bruce as primary beneficiary, and Bruce and the bank as co-trustees. The beneficiaries sued the co-trustees for allegedly improper distribution out of the trusts to satisfy millions of dollars in equitable distribution, alimony, and support obligations imposed on Bruce in the settlement of his divorce from Sue.

2. The bank filed third party complaints for contribution and unjust enrichment against Bruce, and unjust enrichment against Sue. Sue moved to dismiss the third party claim against her, which the court refused on the grounds that: (1) impleader of Sue as a party is proper; (2) the bank properly plead a claim for unjust enrichment; (3) the bank has standing because if it is held individually liable for the distributions, it would be inequitable to allow Sue to retain the funds; and (4) it is not clear from the face of the pleadings that the limitations period on the claims has expired.

3. The beneficiaries exercised their right to remove the bank and appoint a successor corporate trustee, and demanded he transfer of assets to the successor within 30 days. The beneficiaries sued the bank 45 days later for civil theft and sought treble damages exceeding $19 million. A month later, the trustee had transferred the funds to a successor corporate trustee. The beneficiaries then sought $6 million in damages for the delay. The bank moved to dismiss the claim of civil theft for failure to state a claim, and the entire Second Amended Complaint as a shotgun pleading. The court dismissed the civil theft claim because the trust terms did not provide for distribution of the assets to the beneficiaries, and therefore they did not have a sufficient property interest to support the claim. The court dismissed claims that the bank had a felonious intent on the grounds that the beneficiaries knew the funds were with the bank and therefore the location of the funds was not concealed. The court dismissed the claims for over $6 million in damages for the delay in transferring the funds for lack of proof of harm since they were not entitled to distributions under the trust instrument and there was no proof of a distribution approved by the successor trustee that was frustrated by the delay in the transfer. The court allowed corrections to the pleadings to cure the concerns about a shotgun pleading.

4. In a dispute over the deposition of a trust officer assigned to the account, the court: (1) sustained an objection to questions that sought communications between the trust officer assigned to the account and in-house counsel concerning the distributions; (2) held that disagreeing with the deponent's answer is not grounds for reopening a deposition where the witness was not noticed under Rule 30(b)(6) and was not required to be knowledgeable about the subject of inquiry; (3) refused sanctions; and (4) admonished counsel to conduct themselves in a more civil manner in future depositions.

5. The state court appointed a Special Trustee for the trusts. The case proceeded, without the civil theft claim and without the involvement of the Special Trustee, and in 2016 judgment was entered in favor of the bank and the appeal remains pending.

6. In 2014, the Special Trustee filed a separate one-count civil theft claim against the bank, alleging that the bank intentionally delayed the transfer of trust assets to the successor trustee to extract additional fees and frustrating attempts to sue the bank for breach of trust (or run out the limitations period), and seeking $19.4 million in treble damages plus attorneys' fees and costs. The court granted the bank's motion to dismiss the Special Trustee's civil theft claims on the following grounds:

a) All of the trust assets were transferred to the successor corporate trustee within 75 days.

b) The Special Trustee could not show by clear and convincing evidence that there was an injury supporting a cause of action because all $6.4 million of the assets were transferred to the successor corporate trustee, the delay did not cause any pecuniary damage, and without a monetary injury there is no factual basis for a claim of treble damages.

c) The delay in transferring assets did not injure the beneficiaries by depriving them of the right to sue the bank or lose a cause of action, as evidenced by the fact that by 2011 the beneficiaries had already filed suit against the bank. A civil theft cause of action requires an actual injury, not just an inchoate intent to injure.

d) The claim concerning an additional $41,000 in charged management fees is not sufficient to support the civil theft claim because the only relevant time period is from August 2011 until November 2011, and the complaint does not allege the fees charged during that time. In the absence of any actual injuries from the delay in the transfer after notification of removal, the Special Trustee cannot meet its burden of proof.

e) There was no felonious intent by the bank with regard to the alleged delay. Florida law allows a trustee a reasonable time to deliver trust assets after its removal, and no reasonable jury could find that the time period for the transfer in this case was indicative of a felonious intent to deprive the trust beneficiaries of a benefit. The bank maintained contact with its successor, never tried to conceal assets or use them for its own purpose, and began the transfer process upon receipt of the requests.

F. *Application of Opinsky*, 2017 NYLJ LEXIS 2825 (2017). Court rejects uncontested petition to modify requirement of corporate successor trustee due to lack of proof that successor could not be located.

1. Lady Daphne Margarita Straight created a trust for the benefit of her daughter, Amanda, under a 1984 trust agreement. The individual co-trustee died in 1995 and since that time a bank served as sole trustee. The bank declared its intent to resign as trustee of the trust with assets at that time of $465,000. The trust terms provided that the resignation would be effective upon appointment of a successor corporate trustee selected by Amanda.

2. Amanda filed an uncontested petition to modify under the doctrine of equitable deviation to allow the appointment of an individual, rather than a corporate, successor trustee. The court denied the petition, without prejudice, on the grounds that: (a) the record did not set forth any unforeseen change in circumstances that justified the modification; (b) there was no proof of an absence of a corporate trustee willing to act or that any efforts had been made to secure a corporate trustee; and (c) the petition fails to provide sufficient basis to conclude that the grantor's direction for the appointment of a corporate successor could not be honored.

G. *Delp v. Delp,* 2017 Ohio App. LEXIS 4128 (2017). Wrongful taking of trust assets, despite being returned by trustee after being caught, and FINRA sanctions justify removal of individual trustee.

1. John formed a trust for his wife and, after her death, for his daughters, their children, and the children of his sons (but not his sons unless all other descendants of John had died). The primary purpose was the support of daughter Roberta who had medical issues and could not support herself. John named his sons Cleves and Bradley as trustees. Cleves withdrew as trustee in 2012.

2. After multiple transfers of trust assets to Bradley's individual account, the beneficiaries asked Brandley for an accounting, which he failed to provide, and the beneficiaries sued Bradley to compel an accounting. While the action was pending, Bradley requested excessive information and delayed providing a beneficiary with funds for college (despite providing the funds the prior year) and another beneficiary raised questions about a life insurance policy acquired by the trust that was interfering with her own personal insurance transactions. The beneficiaries caught and questioned a $205,000 transfer from the trust to Bradley's personal account, which Bradley blamed on his wife and then rectified.

3. The beneficiaries amended their complaint to add counts for breach of trust and removal of Bradley as trustee, and justified removal in part on: (a) findings in other intra-family litigation about other trusts that Bradley had wrongfully taken documents and attempted to conceal his actions; and (b) suspension and fines imposed against Bradley by FINRA. The trial court removed Bradley as trustee and Bradley appealed.

4. On appeal, the Ohio Court of Appeals affirmed the removal on the following grounds: (a) the trustee removal order was a final and appealable order; (b) a court's decision to remove a trustee is reviewed for abuse of discretion; (c) the $205,000 transfer to his personal account is a serious breach of trust, despite the fact that the trustee returned the funds after being caught, because the trial court did not find Bradley's explanation and shifting blame to his wife to be credible and was in the best position to assess the credibility of the parties; and (d) the FINRA sanctions, and the fact that there was incurable communication breakdown between the parties, additionally support the court's decision.

H. ***Matter of Kemper*, 2017 NYLJ LEXIS 2497 (2017).** Executor removed for concealing felony convictions, incurring estate tax penalties and interest, and distribution to person whose status as heir was not yet determined.

1. Augusta Kemper died testate in 2013, survived by 7 nieces and nephews, one of whom (Gary) later died. Gary died unmarried and without issue, and his girlfriend Patricia sued to be posthumously declared Gary's common law spouse (but that suit was still pending). Augusta's friend, William, qualified as executor. Niece Lynn, a primary legatee under the will, sued to remove the executor and appoint herself and nephew Kevin (also a beneficiary) as administrators c.t.a.

2. The court granted summary judgment removing the executor on the following grounds:

a) A testator's choice of executor is given great deference, and not every breach of duty will warrant removal. In this case, however, there are numerous and troubling demonstrations that the executor does not understand, or is disregarding, his duties.

b) The executor distributed $1.7 million to Patricia even though she was not Gary's executor and her status as his common law spouse was not yet determined. He took no actions to recover the assets for the estate.

c) The executor failed to timely file estate tax returns, incurring interest and penalties of $200,000 and a New York State tax lien, and made distributions leaving a $4 million shortfall in the assets needed to pay to taxing authorities, necessitating a clawing back of distributions. He was operating under the false premise that distributing the estate assets before the alternate valuation date meant the assets were removed from the taxable estate.

d) The executor did not disclose to the court the fact that in the 1960s he received felony convictions for manslaughter, credit card fraud, and passing counterfeit bills, which Lynn discovered through the executor's FINRA disclosure for his broker's license. While the executor received (an also undisclosed) Certificate of Relief from Liabilities in 1985 and the executor knew about the convictions, these do not relieve the court of its ability to suspend the executor and the court was concerned that the executor did not disclose these matters to the court. Lack of candor to the court justifies removal, especially where the lack of candor goes to the ability of the executor to serve and under state law convicted felons are disqualified from serving as executor.

I. ***Parvataneni v. Veeragandham-Anne,* 2017 Mich. App. LEXIS 557 (2017).** Trust terms authoring "then beneficiaries" to remove and replace trustees means only current distributees may exercise the power.

1. Settlor created a revocable that provided at his death for a marital trust and a family trust. His wife was the sole current distribute of the income and principal of both trusts during her lifetime, with the remainder passing at her death to settlor's sister, niece, and parents. The trusts terms authorized the "then beneficiaries" (an undefined terms) of the trusts to remove and replace the trustee.

2. The beneficiaries disagreed about who was authorized to remove and replace trustees. The trial court held that only the wife could exercise these powers, and the other family members appealed. On appeal, the court of appeals affirmed on the following grounds: (a) there is no dispute that other beneficiaries are vested remainder beneficiaries of the trusts; (b) when a trust has been prepared by a skilled draftsmen, such as is the case here, the court must construe technical terms consistent with their technical meaning; (c) "then beneficiary" does not mean the same thing as beneficiary or qualified beneficiary under the UTC, because that would not give effect to the word "then", it would essentially mean all beneficiaries and render the word "then" meaningless and superfluous; (d) a trust must be construed so that each word has meaning; (e) the word "then" must serve the purpose of creating distinction between classes of beneficiaries; (f) the word "then" deals with time, the trust's distinction must be based on time, and the word "then" makes a natural distinction between those that are "then" eligible to receive distributions and those that are not "then" eligible; and (g) there are therefore only two classes of beneficiaries, those that are current eligible distributees that can remove trustees, and those that are not and cannot.

J. ***Rodowicz v. Bernard.* 2017 Conn. Super. LEXIS 3957 (2017).** Absent a showing of fraud, duress, or coercion, the court will not invalidate an imprudent trust amendment that appointing a co-trustee, and adding a co-trustee did not affect the fundamental interests of the beneficiaries.

1. A family nursing home business was held in trust for the lifetime benefit of the 87-year old family matriarch, Alma, who suffered from dementia. Her children were the remainder beneficiaries, and her grandchildren the contingent remainder beneficiaries. Her son Carter and daughter Deborah were in a dispute with their brother Joseph (and his son Joseph Jr., a Florida lawyer) over control of the family business and trust. With respect to the dispute, the court observed: "This story of sibling rivalry is as familiar as Cain and Abel and as ancient as Jacob's machinations upon Esau. Its wastefulness suggests the fruitlessness of human experience".

2. In the middle of this dispute, Joseph signed a trust amendment that added Carter as a co-trustee to serve along with Deborah and Joseph, thereby diluting his power as trustee. Shortly after he signed the papers he expressed regrets about reducing his power in the middle of a dispute about the trust, and his son gave him "quite a scolding". Joseph Jr. sued the other family members to void his father's appointment of Carter as co-trustee, alleging that Carter duped or bullied his father into signing the papers.

3. The court refused to void the appointment on the following grounds:

a) "The law may undo frauds, but it doesn't fix bad judgment….…[t]he evidence to support the claims isn't enough to void the amendments. The evidence only shows that – in light of the family conflict – [Joseph] signed foolishly, and the law can't undo every foolish act. The courts haven't' the resources for the job. And even if the courts had the resources, fixing every mistaken agreement would eviscerate the notion of liberty of contract and, in our legal system, we usually hold people responsible for their own bad agreements."

b) Carter's pleas that Joseph honor his mother's wishes (Alma had signed the paperwork for no reason) could not coerce Joseph's actions because Joseph was in equal contact with his mother, and the whole family "knew from long experience that Alma…wanted whatever any of her children asked of her at any given moment. They all agree she would sign anything they put in front of her". Joseph was able to resist family pressure, just as he had done for years in a previous fight with his brother Stanley where Joseph stood his ground, and Stanley was eventually arrested for embezzlement that forced the company into bankruptcy. It is more likely that Joseph's son, who filed this action against his father and the rest of his family, saw his father's actions (which followed his improving relations with his siblings after his successful feud with Stanley) as being to his own indirect personal disadvantage and sought reasons to void the document, after "vowing to bury the rest of the family in litigation". The arguments crafted for court by Joseph Jr. are less compelling than Joseph's writings right after the appointment that show Joseph was not concerned about being coerced, but rather about his loss of power in a family dispute that his son scolded him about. Simple regret over having yielded power is not a basis for voiding a legal act.

c) The trust terms that prevented amending the trust to affect any beneficiary's "fundamental interest" in the trust does not invalidate the amendment to add a co-trustee, because distributions are subject to the same discretionary authority regardless whether the discretion is exercised by two trustees or three.

d) The trust amendment is not void if the appointment of Carter would violate HUD regulations (the trust owned HUD housing, and Carter had filed bankruptcy and had unresolved tax liabilities), because HUD's remedy is not to void the appointment, but rather to exercise its punitive rights in the financing agreement to do things like force immediate repayment of the loan or other similar consequences.

e) Joseph's signature "was a blunder and not the product of fraud, duress, or other vitiating circumstances. He strengthened his opponents' hands at his – or more to the point – his son's expense. Having seen the wrath this exposed [him] to we might feel sorry for him, but the law does not intrude so far into choices as to undo all the imprudent ones."

XXVIII. CAPACITY, UNDUE INFLUENCE & CONTESTS

A. ***Meadows v. Beam,* S17A1305 (Ga. Supreme Court 2017).** Severe delusions, where challengers admit they are not insane delusions, are not of the correct type of delusion to support jury verdict of lack of testamentary capacity.

1. In 2004, Dorothy executed a will leaving her estate equally to her four children. She had expressed to her sister a desire to leave her estate equally to her children to avoid estate dispute like the one she had experienced when her own mother died. In 2014 at age 90, she executed a new will that left most of her estate to her daughter, Marian, and then died shortly after. Her other children challenged the will for lack of capacity on the grounds that Dorothy suffered from delusions, and also alleged fraud, duress, and undue influence by Marian. The jury found that Dorothy lacked capacity, and Marian appealed. The jury rejected the claims of fraud, duress, and undue influence, but that decision was not appealed.

2. On appeal, the Georgia Supreme Court reversed the jury's decision on lack of capacity, and held that, viewing the evidence in the light most favorable to the challengers, the following facts were not sufficient to establish lack of testamentary capacity:

a) Dorothy had heart failure, diabetes, hypertension, confusion, and forgetfulness.

b) She incorrectly claimed she was: (i) offered a job at a lumber company she worked at many years earlier; (ii) offered a job at a Kroger grocery store where she plays bingo with her (deceased) husband (and where bingo was no longer played); (iii) offered a job at H&R Block because she did a good job preparing her taxes (that were prepared by a third party); (iv) suffering from a broken ankle; and (v) scheduled for gallbladder surgery.

c) She mistakenly accused: (i) her daughter Jayne of stealing clothing that she had asked Jayne to donate for her; (ii) her son John of stealing original documents and revoked his power of attorney, when he had accessed her safety deposition box only to retrieve the original agency documents requested by the hospital in connection with her admission; and (iii) her sister who had been deceased for 15 years of causing her recent medical problems.

d) She asked her daughter (who had graduated college 40 years earlier) to move home and finish college. She confused her family members, and estranged herself from the three children that had actually taken care of her. Her sister testified that she was confused and had memory failure and had become a different person as a result. A board-certified forensic psychiatrist testified that had a potentially weakened state of mind and lacked capacity due to a fixed false belief that her children were stealing from her.

3. The Georgia Supreme Court rendered its decision on the following grounds:

a) The challengers expressly disclaimed that Dorothy was insane and failed to claim she was not of sound mind, and rather merely argued that she suffered from delusions. The challengers effectively conceded that none of the delusions were of the insane variety.

b) Not every delusion deprives a person of testamentary capacity – it must be an insane one. Dorothy's delusions may have caused her to sign a new will, and the evidence shows that she came to those false beliefs based on false information Marian provided. But the fact that Dorothy was duped by Marian does not establish that her mind was unsound, and the claims based on Marian's actions were rejected by the jury and the challengers did not appeal that decision.

XXIX. CREATION, VALIDITY & FUNDING

A. *Kelly v. Lindenau,* 2017 Fla. App. LEXUS 6959 (2017). UTC reformation statute cannot be used to cure failure to execute trust amendment with requisite formalities, despite clear intent of the settlor.

1. Ralph created a valid revocable trust while living in Illinois. The trust provided for his children after his death. After his wife passed away, Ralph moved to Florida and met Donna. His Illinois lawyer prepared a trust amendment leaving the house he shared with Donna to her after his death. The amendment complied with Illinois law, but did not meet the Florida requirement that the trust amendment be signed by two witnesses. Ralph died, his daughter as successor trustee asked the court to determine the validity of the amendment, and Donna sought reformation of the trust to respect the gift of the house to her under the Florida UTC due to a "mistake of law", or alternatively for a constructive trust transferring the house to her. The trial court reformed the trust, and the trustee appealed.

2. On appeal, the court of appeals revised the trial court, refused to reform the trust, and rejected imposition of a constructive trust on the following grounds:

a) There was no dispute that Ralph intended to leave the residence to Donna, but there was also no dispute that the amendment was only signed by one witness, rather than two as required by Florida law. The execution formalities for revocable trusts are strictly construed.

b) The failure to obtain the second signature was not a mistake of law that justifies trust reformation under the Florida UTC. Where there is a mistake of law and reformation is necessary to conform the trust to the settlor's intent, the UTC allows reformation "of the terms of the trust" and not on the execution of the trust. While reformation is liberally allowed to carry out the settlor's intent, reformation is available where the trust terms are not clear because of a mistake or inadvertence. Here, there were no trust terms that needed reformation, the amendment itself was invalid, and reformation is only allowed to remedy mistakes that affect both the settlor's intent and the terms of the trust.

c) Under prior case law, while imposition of a constructive trust might be available where a will or trust is validly executed, that remedy is not appropriate where there is an error in the execution of the document.

B. *Attia v. Hassan,* 2016 Mich. App. LEXIS 2075 (2016). State curing statute allows a court probate a will without a signature upon clear and convincing evidence that the testator intended the unsigned document to be his will.

1. Sabry Attia executed a will and two codicils. Under the second codicil, Sabry left nothing to daughter, Mervat, because she had been provided for and was not in need. Before his death, Sabry instructed his attorney to prepare a new will and told others his intent to sign a new will. The lawyer drafted the new will and scheduled the signing for September 11, 2014, but Sabry died that same day without signing the new will. The trial court held that the state statute that would allow probate of a will that did not comply with the formalities of execution could not be used to cure the absence of a signature, and therefore refused probate of the new will as a matter of law. Mervat appealed.

2. On appeal, the court of appeals reversed and remanded on the following grounds: (a) a state statute provides that a document that is not executed in compliance with the statutory formalities for will execution can be admitted to probate if there is clear and convincing evidence that the decedent intended the document to be a will (or revocation or codicil); (b) the signature requirement is part of the statutory formalities, and is therefore a matter that can be cured upon clear and convincing proof of intent; and (c) the curing statute allows a probate court to admit a will without a signature upon clear and convincing evidence that the testator intended the unsigned document to be his will.

C. ***Estate of Pluhacek,*** **296 Neb. 528 (2017).** A fill-in-the-blank document that is partially type-written and partially handwritten is not a holographic will.

1. Dorothy died in 2015 at age 100. She left behind a pre-printed fill-in-the-blank will, where she wrote in by hand her name, identified her sole beneficiary as the School Sisters, de N.D. (Notre Dame), Inc. at Omaha, Nebraska, and named as her executor the Provincial Superioress of the School Sisters de N.D, Inc. Dorothy signed the will in 1936 in the presence of two attesting witnesses. The current Provincial Superioress applied for informal probate which the court denied; she could not appeal the action because it was not final; and then the trial denied probate of the will in formal proceedings as an invalid holographic will. The Provincial Superioress appealed.

2. On appeal, the Nebraska Supreme Court reversed the trial court on the ground that a document purporting to be a will, that satisfies the other signature and witness requirements for valid execution, will satisfy the "in writing" requirement whether it is completely handwritten, partly written in ink and partly written in pencil, partly typewritten and partly printed, or on a printed form, as well as other combinations of comparable permanent techniques of writing that substantively evidence testamentary intent. Therefore, it was not necessary that the will meet the requirements of a holographic will because it was a valid attested will.

D. ***Pickens v. Estate of Fenn,*** **2017 Ala. LEXIS 100 (2017).** Signature of notary meets second witness requirement for will execution.

1. Donald went into the law office where Janet, a notary public was working, and asked Janet to notarize "something" for him (the "something" was his will in which he left all of his estate to Janice). He noticed a witness signature line and asked Tracy to act as witness (she did not notice the second witness line). Tracy witnessed Donald sign his will and signed as attesting witness, and Janet signed as notary. After Donald's death, Donald's friend contested the will as lacking a second signature. The probate court rejected the will, and Janice appealed.

2. On appeal, the Alabama Supreme Court reversed on the following grounds: (a) the statute requires that the will be signed by two witnesses; (b) the legislative intent is to validate wills meeting the minimum statutory formalities; (c) the statute requires witnessing by two persons, and that any competent person is generally competent to be a witness; (d) nothing in the statute prohibits a notary public from serving as a witness; (e) the statute does not require the will to be notarized; (f) the important fact is not the capacity in which a person signs, but rather that she witnessed the testator's act of signing and signed the instrument; and (g) although Janet may not have intended to act as an official witness, she observed the signing and then signed the will herself, thereby meeting the statutory requirements.

XXX. WILLS & PROBATE

A. ***Laws v. State,*** **2017 Md. App. LEXIS 968 (2017).** Probate court orders were not properly admissible as support for criminal perjury conviction.

1.

William died after being hit by a car while in a highway median. His primary asset was a $450,000 wrongful death settlement. A few days after his death, his live-in girlfriend filed an alleged will that named her as primary beneficiary, executor, and as guardian for William's 16-year old son. She signed the petition probate under oath claiming the right to serve as executor under the will. After discovering the probate administration and having concerns about the copy of the alleged will received, William's adult daughter and minor son, by his ex-wife, contested the will. The court entered an order that the will was "found to have no force and effect" without additional factual findings, and ordered the estate to be administered as an intestate estate, with the daughter as personal representative.

2. The girlfriend was thereafter charged with filing a false document (the will) and perjury by affidavit (the probate petition), the prosecutors believing that she filed a fraudulent will to try to receive or control future wrongful death settlement funds. The court admitted into evidence the orders removing the girlfriend as executor and holding the will to be of no effect, and took judicial notice of the orders, with an instruction to the jury that they may, but are not required to, accept as conclusive any judicially noticed fact adverse to the accused. The jury acquitted on the charge of filing a false document but convicted her of perjury by affidavit. She was sentenced to ten years in prison (suspending all but 93 days) and $15,000 in restitution to the estate. The girlfriend appealed.

3. On appeal, the court of special appeals reversed on the following grounds:

a) Judicial notice can substitute for formal proof of a fact when formal fact-finding is clearly unnecessary, and court documents can fall under the umbrella of judicial notice. However, proper judicial notice does not typically extend to facts relating directly to the parties involved. Also, a civil judgment is not admissible in a criminal prosecution as evidence of the facts determined in that judgment, because the parties are different and the burden of proof in a civil case is lower than in a criminal one. The purpose of the doctrine is to conserve judicial resources, but that purpose is not served unless the fact to be proven by notice in a material fact.

b) It is not material to the criminal case that, a year and a half after probate, the will was found to be invalid or that the girlfriend was removed as executor. A will can be found invalid, and an executor can be removed, for many reasons having nothing to do with whether the document itself was false at the time of probate and petition under oath. The issue was whether she intentionally misrepresented in the petition that she was named as executor under the will. The state could not properly use the probate orders to prove any of the essential elements of its criminal case. The findings in a civil case under a different evidentiary standard, from evidence not disclosed on appeal, cannot be proof beyond a reasonable doubt in a criminal case. The trial court's error was not harmless beyond a reasonable doubt, and the prosecution improperly argued that where a will is later found to be of no effect in a civil matter, it must have been false at the time offered for probate in support of a perjury conviction. The court also noted it was perplexed how, on remand, there could be evidence that supports a jury finding of perjury in the filing of the petition, where the jury found for the defendant that the defendant had not filed the will as a false document.

B. ***Matter of Crain,* 2017 Ohio App. LEXIS 1731 (2017).** Objections that estate inventory failed to include six strongboxes, each with $160,000 in cash, were dismissed for lack of proof.

1. Ralph operated a small truck farm and sold produce at a produce stand and earned income annually of $15,000. He lived very frugally and was private about his financial affairs, which he ran from a small locked office in the farmhouse. In 2010 and 2011, Ralph (or his wife that predeceased him) showed each of his six children the six strongboxes that he kept in his office. They told the children that each strongbox contained $130,000 in cash, intended to be each child's future inheritance. He variously showed or counted with the children the cash contents of one or more of the strongboxes and announced that this was their inheritance, but never the contents of all at once. In 2013, Ralph brought four strongboxes to his son Frederick who locked them in his safe.

2. Ralph died in 2014 at age 91 and an attorney was appointed as special administrator. Frederick brought the four strongboxes to the attorney. The attorney offered to open the boxes in front of the children, but none attended the opening. The children filed exceptions to the estate inventory and claimed that $760,000 in cash was missing from the estate. The attorney testified that the boxes contained legal documents and $20,379.80 only in cash. The objectants also suggested that Frederick isolated and unduly influenced Ralph, but they did not bring any claims against him. The trial court overruled the objections and an appeal followed.

3. On appeal, the court of appealed affirmed the dismissal of the objections on the following grounds: (a) the attorney inspected Ralph's home on several occasions and had a professional appraise its contents; (b) he invited the children to be present when he opened and counted the money in the four strongboxes delivered by Frederick, but none of the objectants attended; (c) if the objectants believed Frederick wrongfully took the missing money, they could have filed claims against him but never have; and (d) while there was testimony about the existence of the strongboxes in 2010 and 2011, there was no evidence or testimony that six strongboxes containing $130,000 each existed at the time of Ralph's death.

C. ***Ray v. Oroke,* 2017 Kan. App. Unpub. LEXIS 222 (2017).** Misplacement of will by court clerk does not justify allowing it to be probated 5 months after statutory deadline.

1. Ray told his stepdaughter he placed his will either in his safety deposit box or at the courthouse. After his death in 2014, his daughter and step-daughter searched for the will unsuccessfully at the bank or at the house. They asked the court clerk, who at first didn't know anything about will storage, then said they didn't do that anymore and sent the family to the deed room, where a will index was not located. The daughter opened an intestate estate. The stepdaughter hired counsel, who located the will at the courthouse 5 months after the 6 month statutory deadline for probate.

2. The court allowed probate of the will after the deadline (allowing tolling for the period of limitations while the will was misplaced at the courthouse), and the daughter appealed. On appeal, the Kansas Supreme Court reversed the order of probate on the following grounds: (a) the state statute requires probate within 6 months, unless it can be shown that the will was knowingly withheld from the district court; (b) the state supreme court recently held that a will that has simply been lost or misplaced is not admissible after the deadline, and the court rejected any interpretation that created additional exceptions for untimely admission of wills where a will is mistakenly withheld; and (c) the statutory duty of the clerk to keep the will cannot be used to impute to the clerk "knowledge" that amounts to knowing withholding of the will from the court, because that would read a new exception into the statute.

XXXI. ISSUE, BENEFICIARIES, PATERNITY & ADOPTION

A. ***In re George 1907 Trust,* 2017 ME 188 (2017).** Divided Maine Supreme Court holds that limitations period on challenge to nonmarital child's status as trust beneficiaries has expired because trustee does not have a continuing duty to determine the trust beneficiaries.

1. George Parsons created a trust in 1907 and died shortly thereafter. The trust provided for income distributions to his issue until the perpetuities termination date in 2023, at which time the trust assets would be distributed outright to the beneficiaries. George's descendant, Phillippa Wistrand, had a child out of wedlock named Thomas who was later adopted by her sister, Sylvie, and then died in 1990. The question then arose whether Phillippa's 10% trust share would pass to Thomas as her issue despite being a nonmarital child, or lapse in favor of her siblings. In 1990, Sylvie released any rights she had to Phillippa's share and assigned the rights to Thomas, and the trustees began making income distributions to Thomas. In 1994 in a suit unrelated to Thomas and in which he did not participate, the court determined that adopted persons were not included as trust beneficiaries.

2. In 1996, the trustees passed a formal resolution recognizing Thomas as his mother's issue and including him as a trust beneficiary. In 2014, David Gourevitch (a trust beneficiary in the same family branch as Phillippa and Sylvie, who had also served as trustee from 1999 to 2002) sued to declare that Thomas was not a trust beneficiary because he was a nonmarital child. Following the decision of the U.S. Supreme Court in *Tibble v. Edison Int'l, 135 S/ Ct/ 1823 (2015)*, the trial court entered summary judgment in David's favor and held that the statute of limitations on David's claims had not run, and that as a matter of law Thomas was not a trust beneficiary. Thomas appealed.

3. On appeal, a divided Maine Supreme Court (with two dissenting justices) reversed the trial court on the following grounds:

> **a)** In some circumstances, such as with respect to investments, determining the date of breach may be complicated, and for good reason the U.S. Supreme Court has held that a trustee has an ongoing duty to monitor investments which may bring the accrual of a cause of action within the statute of limitations.
>
> **b)** There is no legal basis to support a continuing duty to monitor a person's status as a beneficiary of a heritable trust. Limitations begin to run when discrete events make potential litigants aware of possible claims. Maine's statutes do not establish any continuing duty to determine who is a beneficiary. A trustee may fulfill the duty to administer a trust in accordance with its terms and purposes and considering its distributional requirements by determining, upon the death of a beneficiary, whether there are any new beneficiaries and who those beneficiaries are. The determination of beneficiaries is not a decision that requires repeated reconsideration simply because the trust calls for periodic distribution of trust income. Having a fixed accrual date is consistent with the purpose of statutes of limitations to provide eventual repose and avoid defending of stale claims. To hold to the contrary would allow a trust beneficiary to initiate a court challenge at any time after another beneficiary is determined, as long as income distributions are being made, and would improperly elevate each ordinary income distribution to a fresh determination of beneficiary status and would result in limitations that, for no meaningful reason, may apply differently to trusts that call for income distributions as compared with trusts that do not.
>
> **c)** Any cause of action that Thomas was not a beneficiary accrued (and the 6-year limitations period began running) no later than 1996 when a trustee resolution was passed recognizing him as Philippa's biological son and therefore a beneficiary and began distributions to him. These circumstances existed when David become trustee in 1999, while trustee had had the full ability to know why Thomas was receiving distributions, and he participated in making distributions to Thomas during his trusteeship. David cannot benefit from tolling because of his access to this knowledge, and he failed to bring his action until 2014 – 12 years after the end of his trusteeship and 18 years after the trustee resolution.

4. The dissenting justices would hold that: (a) a trustee has continuing duty to determine the identity of the beneficiaries that resulted in the claims not being barred by the statute of limitations; and (b) the case should be remanded to determine whether a nonmarital child is a trust beneficiary because the term "issue" is ambiguous, the intent of the settlor should be determined, and the choice of Maine law provision is also ambiguous because it does not distinguish between Maine statutory law at the of trust creation (such as the intestate succession laws that might be applicable by analogy and would include nonmarital children as beneficiaries) and Maine common law at the time of trust creation (that would exclude nonmarital children from class gifts to "issue"). The Maine statute that expressly included nonmarital children in class gifts was not enacted until 1981 and could not be applied retroactively to a 1907 trust.

B. *Matter of Eder*, 2017 Conn. App. LEXIS 400 (2017). Adult adoption adds to class of trust beneficiaries where trust terms included adopted persons and adoption was not a mere sham to disinherit natural child.

1. In 1991, at the urging of his father, John created an irrevocable Connecticut trust that paid him an annuity of $114,000 per year for 20 years, with the remainder passing on October 21, 2011 to John's then living children. The trust terms expressly defined John's descendants as including his children "whether so related by blood or legal adoption, including any of the aforesaid born or adopted after the signing of this trust". John had a biological son, David, when he was 18, he divorced David's mother soon thereafter, David grew up with his mother and stepfather, and John had little involvement with David.

2. David met a woman in 1972 and lived with her and her sons (the Richter brothers) until she moved back to England in 1985. During and after that time, David continued his relationship with the Richter brothers. He was a father figure to them, supported them financially then and after living with them, taught them to ride bikes, attended parent-teacher conferences, started them with artistic activity that led to their adult careers as artists and photographers, and brought them to meet his own parents. They travelled together, John was a part of their weddings, and their children called him "grandpa". They remained in close contact at all times.

3. In 2009, John and David had a falling out and John sought to disinherit him. In 2010, John wished to legalize his parental relationship with the Richter brothers (who were then adults), they agreed to be adopted by John, and the Massachusetts court approved the adult adoptions on June 30, 2010. The trust terminated on October 21, 201 and the trustees petitioned to determine the trust beneficiaries. The probate court held that David and the Richter brothers were all trust beneficiaries, and the trial court affirmed the probate court findings.

4. David appealed, and on appeal the appellate court affirmed on the following grounds: (a) the trust terms expressly include adopted children as beneficiaries; (b) Connecticut law allows adult adoption; (c) the adoption was not a sham or subterfuge for the sole purpose of making the Richter brothers heirs or beneficiaries under a testamentary instrument and thwarting the intent of the settlor; (d) the intent of the settlor is not thwarted where an adoptee who was a natural object of the adopter's affections in a parental relationship over the years was a trust beneficiary despite the fact that the adoption took place after the parental relationship commenced and when the adoptee was an adult; (e) the adoption was a natural expression of a desire to recognize a preexisting familial bond with the natural objects of the settlor's bounty, and the settlor and the Richter brothers desired to continue that bond; and (f) while John's problems with David may have been a catalyst for him to consider the adoption, common sense dictated that the adoptions were not a sham or subterfuge to just hurt David, but were consistent with Jon's affectionate and long-term relationship with the Richter brothers.

C. *Estate of Campbell*, 2017 Cal. App. Unpub. LEXIS 7442 (2017). Where there are competing statutory presumptions of paternity for purposes of intestate succession, the trial court could properly give greater weight to the presumed paternity by the person who raised the children, gave them love and affection, publicly acknowledged them as his children, and had a stable family relationship with them.

1. Joan married James in 1957, had two children (Joanne and James), and then divorced James in 1966 by a Mexican divorce decree that identified their two minor children. The children had no future contact with James who died in 1999. In 1966, Joan married Anthony who treated Joan's children as an inconvenience, and they began living apart in 1970 but remained married. After separating and while Joan's children were ages 10 and 12, Joan began cohabitating with Bill, and during the cohabitation (a) both Joan and Bill had multiple sexual partners and (b) Joan had two additional children (Rainbow and Nadine). Their birth certificates list Bill has their natural father. In 1981, Joan finally divorced Anthony, the divorce decree listed Rainbow as a child of the marriage and ordered Anthony to pay child support, but Anthony never paid support and considered Rainbow and Nadine as part of Joan and Bill's family. Joan married Bill in 1983 and they were married for 31 years until Joan's death in 2014, intestate. Bill died the next year, also intestate.

2. Nadine was appointed administrator of Bill's estate and asserted that she was the only heir to his intestate estate. The other three children claimed heirship on the basis that Bill was their natural father. After a 5-day bench trial, the trial court ordered that all four children were Bill's natural children and entitled to inherit. Nadine appealed.

3. On appeal, the court of appeals affirmed on the following grounds:

a) Under the probate code, a parent-child relationship exists between a person and the person's natural parents. A natural parent relationship is established where presumed under the Uniform Parentage Act and not rebutted. Under the UPA, a man is presumed the natural father of a child born during his marriage to the mother. A man also attains the status of presumed father if he receives the child into his home and openly holds the child out as his natural child.

b) Joan was married to James when her first two children were born, and was married to Anthony when Rainbow was born. Therefore James and Anthony are presumed fathers. There was, however, also substantial and overwhelming evidence that Bill was the presumed father of all four children. He welcomed all of the children into his home, treated them as his own children, supported them financially and emotionally (including giving the daughters away at their weddings and finding jobs for the sons), and developed a parent-child relationship that should not be lightly dissolved.

c) Although more than one person can give rise to a presumption of paternity, there can be only one presumed father. Where two presumptions arise, the presumption which on the facts is founded on the weightier consideration of policy and logic controls. Nadine had the burden to rebut the presumption of Bill's paternity by clear and convincing evidence, and failed to meet that burden. The divorce decrees that merely lists Rainbow as a child of the marriage to Anthony does not rise to the level of parentage judgment that rebuts the presumption.

d) The lack of a blood relationship between the children and Bill does not require a different result, because the statutory presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and integrity of the family. Where there are competing statutory presumptions of paternity for purposes of intestate succession, the trial court could properly give greater weight to the presumed paternity by the person who raised the children, gave them love and affection, publicly acknowledged them as his children, and had a stable family relationship with them.

XXXII. DISCLAIMERS & POWERS

A. *Matter of Bruce*, 2017 NY Slip Op 30967(U)(2017). Court applies rules of construction to cure flagrant fraud on a power of appointment.

1. Ellen created two trusts for the benefit of Louise, one under agreement and one under will. The trust terms gave Louise a testamentary limited power to appoint the trust assets to anyone other than herself, her estate, or the creditors of either, and in default of appointment the trust assets passed to Ellen's issue. Under her will, Louise gave her estate to a foundation to be created in her name, and exercised her limited powers of appointment "to my Executor, to be added to my residuary estate".

2. Ellen's heirs challenged the validity of the exercise (as an invalid fraud on the power), and the surrogate granted summary judgment that the exercise of the power was valid on the following grounds:

a) The exercise of the power must be read in the context of the trust as a whole, and "must not be taken literally unless the daughter's intention or purpose is to be sacrificed in a process by which the court doffs its common sense".

b) It is untenable to argue that a donee of a power would take the trouble to purport to exercise it in a manner that she knew would be a nullity – this is a simple question of whether the daughter intended to say that she appointed the remainders to her estate despite her knowledge that her saying so had to be useless.

c) This mandates construction of the exercise to distribute the assets to the "executor" not as agent for the daughter's estate, but as agent for the foundation that her will commissioned him to establish. The direction to "add" the assets to the residuary estate can "plausibly" be recognized as a maladroit way of directing the executor to give the remainders directly to the entity designated as the residuary legatee, as supplements to the benefits it were to receive as estate beneficiary.

d) This is an instance wherein a literal fulfillment of the language found would lead to a setting at naught of dispositions which, beyond any reasonable doubt, we know were intended by the donee of the power.

B. *Hornung v. Stockall,* 296 Neb. 565 (2017). Exercise of limited power of appointment in favor of revocable trust is invalid as a fraud on the power.

1. Under his revocable trust, upon his death Robert created a trust for his wife Betty's lifetime benefit. The trust held Robert's interest in the family cattle company. Robert granted Betty a limited testamentary power to appoint the trust assets to his issue, their spouses, and charity. In default of the appointment, the assets would pass to their two daughters, Jane and Sandra. Betty died and under will exercised the power of appointment to add the trust assets to her revocable trust to be administered as part of her revocable trust assets. Under Betty's trust agreement, she disinherited Jane and left all of her assets to Sandra and her family.

2. Jane challenged the validity of the exercise of the power and the trial court held that the exercise was invalid. Sandra appealed. On appeal, the Nebraska Supreme Court affirmed the trial court on the following grounds:

a) The donee of a power of appointment must keep within the terms dictated by the donor of the power. Even though the ultimate beneficiaries of Betty's revocable trust were within the class of permissible donees, by exercising the power in favor of her revocable trust generally, and not directing that the assets should be segregated and not co-mingled with Betty's individual assets, the exercise of the power was improper because the assets could be reached by her estate, her creditors, or the creditors of her estate. Therefore, the exercise of the power was ineffective.

b) The court will not apply the "selective allocation" rule of the Restatement (Second and Third) of Property, which would construe the appointment and allocate assets in the manner that best carries out the donee's intent, because: (i) the doctrine has never been recognized in Nebraska; (ii) only Massachusetts, Pennsylvania, and

New York have recognized the doctrine judicially; (iii) some states have recognized the doctrine legislatively through enactment of the Uniform Power of Appointment Act, but Nebraska has not yet done so; and (iv) selective allocation is a rule of construction, and rules of construction are not available where the trust terms are unambiguous and Betty directed that the appointed assets be co-mingled with her individual assets.

c) The court will not apply the rule of "substantial compliance" recognized in the Restatement (Second and Third) of Property, because that doctrine relates to the manner of appointment, and not flaws in the substance of the appointment. In this case, there were no errors in the manner of appointment and the invalidity was the result of a substantive error.

d) By transferring assets to Betty's revocable trust despite the exercise of the power being invalid, the trustee of Robert's trust breached its fiduciary duties and the court could properly direct the trustee to recover the distributed assets.

XXXIII.INSURANCE

A. *Jo Ann Howard & Associates v. Cassity,* 2017 U.S. App. LEXUS 15621 (8th Cir. 2017). Trustee of preneed funeral insurance trusts owes duties to funeral homes and consumers who have standing to sue, and claims against the trustee arise under trust law, are tried to the court and not a jury, and the damage measure is determined by trust law. Claims for aiding and abetting a fraud are rejected as not having been recognized under Missouri law.

1. The Cassity family owned National Prearranged Services, Inc. (NPS), a Missouri-based company that engaged in a nationwide fraud scheme involving selling of preneed funeral insurance contracts. The Cassity family also owned two Texas insurance companies. The preneed contracts required the current payment of money (at a fixed price) in consideration for later provided funeral services at the time of death, at the funeral home of the purchaser's choosing. NPS sold the contracts, and under state law was allowed to keep 20% of the proceeds and was required to place 80% in a trust with a corporate trustee (the trust terms were largely dictated by state law). The trustee was to invest the funds, but where the assets exceeded $250,000, NPS was allowed to appoint an independent qualified investment advisor. After a funeral, the funeral home would certify it provided services, NPS would pay the home the amount in the contract plus a "growth" payment to adjust for inflation, and then NPS was entitled to a trust distribution equal to all deposits made with respect to that contract purchaser.

2. Bank become trustee of the NPS trusts in 1998. At that time, NPS had already appointed Wulf Bates & Murphy (Wulf) as investment advisor, and Wulf remainder as advisor for the duration of the bank's trusteeship. Wulf used the trust assets to purchase life insurance on the lives of NPS's preneed consumers so that when one died (and NPS would have to pay for funeral services), the life insurance companies also owned by the Cassity family would pay life insurance proceeds into the NPS trusts. The bank was acquired by a larger national bank that did not want to become trustee of the NPS trusts, so the trusteeship was assigned to another bank that assumed duties in 2004. At the time the national bank acquired the trustee bank, the trusts held $122.9 million in deposits and $159.8 million in insurance coverage. In 2009, yet another large national bank acquired the prior national bank, and the acquiring national bank's liability in this case was derived solely from its acquisition of the prior national bank that had acquired the liability of the original bank trustee.

3. In 2007, insurance regulators discovered that NPS had engaged in a massive national fraud for serval years in which: (a) the insurance company issued loans to NPS without trustee approval and despite the fact that loans should only have been issued to the trusts, depleting the trust assets; (b) NPS manipulated the payment amounts on policy applications allowing it

to retain most of the money that should have been sent to the trust (i.e. where a consumer paid $1500, NPS changed the amount to $5, send $5 in, and keep the balance). As a result of the fraud, a Texas court places NPS and the insurance companies into receivership, which triggered coverage by the state guaranty associations that made sure the obligations to consumers to pay funeral expenses were met. The entities agreed to a liquidation plan as well.

4. In 2009, parties on behalf of NPS (in receivership), the funeral homes, and consumers sued the final acquiring national bank for the alleged breaches by the original bank trustee, alleging negligence, breach of duties as trustee, aiding and abetting fraud, allowing the fraudulent loans, failure to account and keep accurate trust records, allowing NPS to manipulate trust assets and siphon millions of dollars from the trusts, and aiding and abetting the breaches of duty by Wulf and fraud by NPS.

5. The bank moved to strike the jury demand, asserted that all claims should be brought only under trust law, and claimed that only NPS was a trust beneficiary allowed to bring claims (and had waived those claims by giving consent). The district court rejected all of the bank's positions (other than dismissing the aiding abetting claims as not being recognized under Missouri law) and allowed the case to proceed to a jury trial. The jury awarded the plaintiffs $355.5 million in compensatory damages and $35.55 million in punitive damages. The bank's post-trial motions were rejected and the district court entered judgment on the jury verdict. Both sides appealed.

6. On appeal, the 8th Circuit Court of appeals affirmed in part, reversed in part, and remanded the case on the following grounds:

> **a)** The trust beneficiaries are NPS, consumers in Missouri, and the funeral homes that were to provide services to those consumers under the preneed contracts, because: (i) a beneficiary is a person who benefits from a trust, is intended to benefit from the trust, or who has a right or expectancy in a trust; (ii) under the statutory scheme, trust principal was distributed only to NPS, but the whole purpose of the trusts was to ensure funding for funeral services, 80% of the contract sales were placed in the trusts to guarantee that money would be available to pay for funerals, and funeral homes would likely not agree to perform services without a guarantee of funds for payment; (iii) if NPS failed to make any payments, the consumers and funeral homes were entitled to a trust distribution in an amount equal to all deposits made for the preneed contract, making the consumers and funeral homes more than mere "incidental beneficiaries"; (iv) if NPS were both settlor and sole beneficiary, NPS could unilaterally compel trust termination contrary to the trust purposes; and (v) any defense that the trustee's actions were authorized by a beneficiary does not apply to the consumers and funeral homes, and was properly rejected by the district court.
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> **b)** The bank cannot escape liability because of the involvement of an investment advisor because: (i) the statutes also provide that control of investments shall not be divested from the trustee and investments must not be beyond the authority of a reasonable prudent trustee to invest in; and (ii) the bank could not be relieved of all investment responsibility because that would not give effect to the statutory requirements, and a trustee has a duty to ensure the trust assets are prudently invested, regardless whether the trustee is investing or monitoring the investment decisions of the investment advisor, and the trustee is only relieved of liability where Wulf invested the assets in the manner of a prudent trustee.
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> **c)** The claims against the trustee were trust law claims, and should have been tried to the court rather than to a jury. There is an exception for a claim of indebtedness where a trustee has a duty to pay money or property immediately and without conditions to a beneficiary and fails to do so, but that does not apply here,

and a breach of trust claim does not become an indebtedness claim merely because the trust has since terminated. Prior cases that allow jury trials arising from "deeds of trust" are irrelevant because a deed of trust is a mortgage and not an actual trust.

d) The claims against the trustee for aiding and abetting fraud and breaches of duty were properly dismissed because Missouri has not yet clearly recognized those causes of action, and the federal courts of appeals are cautious in expanding state-law theories of liability. Here, the plaintiffs are attempting to use this new theory of liability to circumvent the damages limitations of trust law as applied to the same conduct, and the court will not recognize the new cause of action in that context.

XXXIV. TORTS, SLAYERS, & BAD ACTORS

A. *Kinsel v. Lindsey,* 2017 Tex. LEXIS 477 (2017). Texas Supreme Court declines to recognize cause of action for tortious interference with inheritance.

1. Lesey owned 60% of a family ranch in her revocable trust, with her step-children and step-grandchildren owning various shares of the rest. Under the trust terms, at her death the ranch surface and mineral interests would pass to the step-children and step-grandchildren, with the residue passing to Lesey's only nice, Jane. The trust was silent on sale of the ranch interests during Lesey's lifetime, meaning that a sale would cause the gift of the ranch interests to be subject to ademption and the sales proceeds to be added to the residue.

2. At age 92 and losing her eyesight, Lesey moved to a facility in a new town. Jane and Lesey's nephew Bob (her only blood relatives) helped with her care, wrote checks to pay her bills, and opened her mail and read it to her. In 2006, Jane contacted Lesey's counsel about changing her estate plan to leave the mineral interests to Jane and Bob, the lawyer drafted the document, and through Bob's actions a local lawyer was retained to supervise the execution of the amendment. Jane and Bob brought Lesey to meet alone with the new local counsel, who spent 1.5 hours alone with Lesey, was convinced of her capacity and intent, and supervised the execution of the document.

3. Jane and Bob expressed concern about Lesey having funds to provide for her care (even though at that time she had liquid assets of $1.5 million), and various owners concluded it was a good time to sell the ranch (some because Jane told Lesey she was running out of money). Lesey was concerned about her inability to visit the ranch and the costs of maintaining it (which she largely paid without help from the other owners), and agreed to the sale. The property was appraised, marketed, and a buyer located. The local counsel met again with Lesey to review the sale, the tax consequence of sale, and the other assets at her disposal, and Lesey agreed to the sale.

4. Some family members refused to agree to the sale unless Lesey ensured the sale would not cause the loss of their future inheritance from Lesey's trust, visited her often to discuss it, and threatened to upend the sale unless the trust was amended to preserve their inheritance. Lesey told her local counsel to stop discussing her estate plan with those family members, and that she did not want to make changes to her estate plan at that time. The objections to the sale were eventually withdrawn, the property sold, and Lesey's trust received $3 million from the sale (with other family members receiving $1 million). Shortly after the sale, Lesey met with her local counsel and amended her trust to largely disinherit her step-children and step-grandchildren because they had received money from the sale and she was upset by all of the contacts during the sales process. Lesey signed the new trust amendment on August 12, 2008 and died 10 days later.

5. The step-children and step-grandchildren sued Jane, Bob, and the local attorney, alleging undue influence and lack of capacity, and seeking damages for tortious interference with inheritance, fraud, and conspiracy, and seeking imposition of a constructive trust on

Lesey's share of the ranch sales proceedings that passed to Jane as residual beneficiary. The jury found for the plaintiffs on all of the claims and awarded $3 million for tortious interference, fraud, and conspiracy. The trial court entered judgment on the jury's verdict, imposed a constructive trust on Jane's interest in Lesey's trust, and awarded the plaintiffs $800,000 in attorneys' fees but no appellate fees. On appeal, the court of appeals reversed the award of tort, fraud, and conspiracy damages, but upheld the finding of lack of capacity and the imposition of a narrower constructive trust over any interest actually obtained by Jane in the ranch and its proceeds (rather than any interest Jane had in the entire revocable trust). The parties, other than the local attorney, appealed.

6. On appeal, the Texas Supreme Court affirmed the court of appeals on the following grounds:

> **a)** The evidence was sufficient to support the jury's finding that Lesey lacked capacity to consent to the sale and amend her revocable trust, including evidence that at the time of the sale and amendment Lesey: (i) was legally blind; (ii) needed others to manage her financial and personal care; (iii) needed assistance with all activities of daily life; (iv) was incontinent, confused, agitated, had heart failure and renal failure that affected cognition, had moderate dementia, and lacked capacity to transact business or sign legal documents; and (v) had handwriting that deteriorated over the course of the various documents she signed, and by the time of the trust amendment could only scribble three letters.
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> **b)** Fraud damages are not appropriate, because the jury's fraud damage award was based on the value of an expectancy and not actual out-of-pocket damages suffered at the time of the alleged fraud. Actual out-of-pocket damages would be the difference between the value of their interest in the land and the value of what they received from the sale at the time of the fraud. By the time of trial, the plaintiffs had no present ownership in a ranch sold in 2008 or a future interest in the ranch, they only had an expectancy that they would inherit portions of Lesey's share of the ranch. Here, the only possible amount of fraud damages would be zero.
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> **c)** While a handful of Texas courts of appeals have expressly recognized tortious interference with inheritance as a cause of action, and a couple have not, neither the Texas Supreme Court nor the Texas legislature have recognized the tort. The viability of the tort in Texas remains an open question. Here, the trial court imposed a constructive trust on the funds Jane received from the trust (which the court of appeals narrowed to the proceeds of the ranch sale), and as narrowed the constructive trust imposed exactly the same remedy that the jury believed the plaintiffs were entitled to under any theory of recovery. While some of those funds were depleted by Jane's payment of attorneys' fees (and the plaintiffs were in part unsuccessful in challenging those fees before the court, and did not appeal the ruling), the constructive trust remains an adequate remedy because the plaintiffs had a full chance to be heard, even though they did not receive the full measure of damages awarded by the jury. The law provided the plaintiffs with other avenues for relief (even if they are partially unsuccessful in collecting that relief) and the constructive trust provides redress for the injuries. The ability to argue for relief sought demonstrates the adequacy of the constructive trust as a remedy, regardless of the only partial success of that argument. Because the law provides an adequate remedy in this case, the court will decline to recognize a cause of action.
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> **d)** The court was within its discretion to impose a constructive trust, despite the absence of a fiduciary relationship or fraud, because "the specific instances in which equity impressed a constructive trust are numberless – as numberless as the modes by which property may be obtained through bad faith and unconscientious acts". Jane cannot argue the plaintiffs' claims are barred by unclean hands because

she cannot show she was harmed by their decision to sell the ranch. The finding of lack of mental capacity (upheld on appeal) and the finding of undue influence (which was not appealed) provided a more than adequate basis for imposition of a constructive trust.

B. *Rice v. Rice,* 2017 Tex. App. LEXIS 9017 (2017). Texas appellate courts remain divided on whether to recognize cause of action for tortious interference with inheritance.

1. Emily and Olivia sued their stepmother Peggy for tortious interference with their right to inherit from their father. The trial court refuses to recognize the claim and dismissed the suit. The children appealed and, after briefs were filed in the appeal, the Texas Supreme Court held in *Kinsel v. Lindsey, 2017 Tex. LEXIS 477 (2017)* that it would not recognize the new tort in that case and that whether the tort is viable in Texas is still an "open question". Peggy moved to dismiss the appeal as moot.

2. On appeal, the Fourteenth District Court of Appeals of Texas affirmed the dismissal of the children's claims on the following grounds: (a) the validity of the tort is still an open question and the appeal is not moot; (b) under vertical *stare decisis*, the trial court would be bound by the prior decision of the First and Fourteenth Courts of Appeals which have recognized the tort, but that doctrine must yield when a prior appellate court decision is contract to a holding of the state supreme court; (c) the Texas Supreme Court pronouncement in *Kinsel* that the viability of the tort is an "open question" contradicts the earlier appellate holdings that the tort exists in Texas and therefore *stare decisis* no longer applies; (d) the question is whether the court should recognize a *new* cause of action for tortious interference with inheritance, and the case does not warrant an extension of current law because the parties did not brief the issue, because the parties have another adequate remedy through a will contest action (which the children successful brought), and the court will not recognize a new cause of action solely as a vehicle for exemplary tort damages that are not available in the successful will contest.

C. *Hanna v. Williams,* 2017 Mass. Super. LEXIS 39 (2017). Settlement of estate dispute among family members does not preclude tortious interference with expectancy and other claims against financial advisor and lawyers whose wrongful conduct caused the intra-family litigation.

1. Natalie did not have children and her husband predeceased her. In 1961, Natalie signed a will drafted by her first cousin Ralph's law firm. The will left her tangibles to Ralph and the residue to her deceased brother Sidney's children, the Berkowitz siblings. In 2013, at age 91, Natalie broke her hip and was hospitalized for two weeks before dying in the hospital, and during that time also suffered from heart failure, kidney failure, low blood pressure, dizziness, poor concentration, cognitive impairment from morphine and dopamine, disorientation, delusions, and confusion.

2. During her hospitalization, Ralph and his wife visited Natalie, and then contacted Natalie's newly assigned financial advisor at RBC Capital Markets where Natalie had a $9 million account (her total estate was worth $12 million). The advisor visited Natalie in the hospital, told Natalie she needed to sign new estate planning documents (and allegedly intentionally falsely told Natalie her estate would pass to her brother Henry if she did not), and claimed that Natalie expressed the intent to give a portion of her estate to her new financial advisor (she had been a client of RBC for years but this advisor was only recently assigned to the account). The advisor selected his attorney friend to draft a new will and trust. Natalie had no relationship with that law firm or attorney. The lawyer and a colleague at his firm drafted the documents without meeting or talking with Natalie, and then the attorneys and the advisor went to the hospital where Natalie signed the new documents. The new documents gave $2 million to the advisor and named the law firm as trustee of a well-funded long term trust. No family members or independent persons were present for the signing, no evaluation of capacity was made, the lawyers did not talk with Natalie, Natalie signed them without reading them, extraordinary steps were taken to have the document signed before Natalie underwent surgery, and then the lawyers took the documents back to their office to be notarized even though the notary was not present and did not witness the signing. Natalie died shortly thereafter.

3. When the family members learned about the new estate plan and complained, the advisor disclaimed his interest in the estate and the law firm resigned as trustee. The validity of the plan being clouded by their conduct, the family members retained separate counsel and engaged in protracted litigation over the validity of the 1961 will and the deathbed planning documents. The court appointed an independent personal representative of the estate. In 2014, the family reached a court-approved settlement under which the Berkowitz siblings received 71% of the estate (rather than the 100% they would have received under the 1961 will). The court approved payment of the legal fees of all family members out of the estate, totaling $1,240,000. The settlement admitted a "compromise" will to probate without any finding about the validity of the 1961 will or the deathbed documents.

4. The personal representative and the Berkowitz siblings brought an eight count complaint against the financial advisor, the lawyers, and each of their firms, and the defendants moved to dismiss the claims. The trial court generally denied the motions to dismiss the claims on the following grounds:

> ***a)*** *Jurisdiction.* The court has jurisdiction to hear the tort claim even though there has been an adjudicated will contest that resulted in a settlement, because that claim does not require adjudication of the validity of the 1961 will or deathbed estate plan and the claim would not be an attack on the probate court's prior orders. The plaintiffs must only show that there was a reasonable probability, whether under the 1961 will or otherwise, that they would have received legacies greater than what they received under the settlement absent the tortious interference, and they have adequately alleged the required likelihood of expectancy. A tort claim is different in nature than a will contest. While some courts have disallowed a separate tort claim where there was adequate remedy at law through a will contest, this concern does not apply here because the claim is against third parties not involved in the will contest litigation, and if the will contest decree precluded tort recovery, the plaintiffs would have no remedy at law. The plaintiffs could not have asserted their claims, including their claims under business law and for emotional distress, against these defendants in the probate case. The probate orders adopted the settlement, but did not adjudicate the validity of any estate planning documents, and therefore the court approval of the settlement did not determine the settlor's intent and the tort claim is not an attack on the probate court orders.
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> ***b)*** *Tortious interference with expectancy.* Even if the defendants were unaware of the 1961 will, the tort claim survives dismissal because the tort only requires that they intentionally interfered with an expectancy, not that they knew the details of the expectancy. They knew as a matter of law that the new documents would revoke old documents, and intentionally interfered by inserting a $2 million gift to the financial advisor. That the exact magnitude of the harm caused may be greater than what the defendants contemplated is not fatal to the claim. A tortfeasor is responsible for all of the harm that flows from the tortious conduct. The settlement agreement does not defeat causation, because the plaintiffs allege that they entered into the settlement because of the uncertainty caused by the defendants' wrongful conduct. Where tortious action causes settlement of a lawsuit for less than what would otherwise be received, a valid claim is stated.
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> ***c)*** *Professional negligence.* The Berkowitz siblings' claims for professional negligence against the financial advisor and lawyers were dismissed for lack of

contractual privity. The estate's claims for professional negligence survive the settlor's death.

d) *Unlawful business practices.* Claims for engaging in unlawful practices in trade or commerce were not dismissed because professional legal and financial services were "commerce", it was foreseeable the plaintiffs would suffer injury if the services were found to be tortious, and cases dismissing claims against counsel by mere "disappointed heirs" are distinguishable where the lawyers become involved at the request of the financial advisor, had no prior relationship with the settlor, and their alleged actions were a combined commercial venture to earn more fees. This was not a private matter between counsel and a client, it was an alleged used of commercial positions to advance a scheme to injure third persons.

e) *Civil conspiracy.* The allegations rise to the level of an alleged common plan to commit a tortious act to support the claim of civil conspiracy.

f) *Respondeat Superior.* The defendants do not argue that they were acting outside the scope of their employment, and therefore the claims against their employers survive dismissal.

g) *Executor's claim for attorneys' fees.* The claims by the executor for the litigation fees and costs paid by the estate survive dismissal because the fees were actually paid, the complaint alleges adequately that the conduct of the defendants caused the fees.

h) *Arbitration denied.* The investment advisor's (and his firm's) motion to compel arbitration is denied and deferred where: (i) the motion is based only on unsigned copies of the alleged account agreement with an arbitration clause (and language that would bind successors and heirs) and an affidavit by a firm employee that the agreement governed the relationship with Natalie; (ii) there is no support cited for binding the Berkowitz siblings, who were not signatories to the unsigned agreements, to the alleged arbitration agreement; (iii) it is not clear the agreement covers the estate's claims; and (iv) the advisor did not assert the alleged arbitration agreement early in the litigation and waited for the result of other rulings before asserting arbitration rights.

***D. Morrow v. Pappas,* 2017 IL. App. (3d) 160393 (2017).** Where there is a failure to pursue a will contest, bare allegation of prior will is not adequate to plead tortious interference with expectancy claim.

1. In her March 2012 will, Dorelle named six individuals and one charity as beneficiaries, and the drafting attorney as executor (he also served as her agent under a power of attorney). She owned and operated a hotel, two bed and breakfast establishments, and a restaurant. A trust officer at the bank had managed all of her business affairs. In May 2012, she broke her hip and was hospitalized; she was found unresponsive and returned to the hospital in June, and moved between hospitals and rehab until August 2012.

2. In August 2012, Dorelle called the trust officer and requested changes to her will. That same day, the trust officer and another attorney (with the same name as her long-time attorney and from the same firm) met with her to discuss the changes. The drafts were ready the next day but were not signed due to her health. Two weeks later, Dorelle called the trust officer and told him she wanted to sign her new will and get her affairs in order. Neither of the lawyers were available but they provided the trust officer with instructions. The trust officer picked up the new will, brought it to Dorelle to sign in her room, and arranged for two independent witnesses. Just before signing the will, Dorelle's doctor confirmed her capacity and had her sign a DNR order. Dorelle then signed her new will right after.

3. The new will removed all but one of the individual beneficiaries and remove the charity, added one of her employees as a beneficiary, and named the bank as executor. The removed beneficiaries did not contest the will. Rather, they sued the two individual beneficiaries in the later will, the drafting lawyer, the trust officer, and the bank, alleging intentional interference with expectancy, conspiracy, fraud, malpractice, and breach of fiduciary duty. Following pre-trial motions, re-pleading, and discovery rulings, the trial court granted summary judgment for the defendants on all counts, and the plaintiffs appealed.

4. On appeal, the court of appeals (with one dissenting justice) affirmed the trial court dismissal of all of the claims on the following grounds:

> ***a)*** *Tortious interference with expectancy.* The plaintiffs did not file a will contest to challenge the September will, and the 6-month limitations on filing a will contest operates to prohibit the filing of the tort claim, unless the plaintiffs can demonstrate that the probate proceedings were not available to them due to the tortious conduct of the defendants and the probate proceedings would not have provided them with complete relief. Because of the absence of the contest claim, the validity of the will has been established for all purposes. The plaintiffs failed to show any tortious conduct that intentionally interfered with plaintiffs' expectancy. They have not shown that the defendants knew that the March will existed (or if it existed, its contents) or devised property to the plaintiffs, or that the defendants fraudulently concealed the March will from the plaintiffs or mislead the settlor. Therefore, the plaintiffs cannot show an expectancy, and their claim is subject to dismissal.
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> ***b)*** *Evidentiary rulings.* The trust officer and bank asserted attorney-client privilege on the basis that they were acting as agents for the settlor and the attorneys, and following an *in camera* review the court held that the privilege applied. The issue of agency was not contested. The court was correct in ruling that the "will contest" exception to the attorney-client privilege (which applies where an attorney prepares a will or revocable trust and witnesses the document, and exists so as to allow critical testimony by the lawyer to give effect to the settlor's intentions) did not apply in this case, because this limited exception does not apply outside a case contesting a will or revocable trust, no contest was brought and only a tort claim was brought, no testamentary document is being contested, and in the absence of such a contest the court will not expand this privilege exception. The trial court also correctly: (i) quashed the attempt to subpoena the personal phone records of the trust officer that would reveal private information about bank clients, because the plaintiffs had access to information about relevant calls by other means; and (ii) rejected attempts to bar testimony under the Dead Man's Act because the plaintiffs are not representatives of the decedent and lacked standing to assert the Act, and the conversations between the decedent and the trust officer were not conversations with an interested person.
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> ***c)*** *Civil conspiracy and fraud; sanctions.* The claims for conspiracy and fraud were properly dismissed for failure to properly replead following dismissal without prejudice. The defense attorneys could not be sanctioned for talking with the decedent's physician in advance of his deposition, because that doctrine applies to the plaintiff's physician, and that doctrine has not been expanded to apply to any physician who may be called to testify in litigation.

5. One dissenting justice would have held that the tort claim was adequately pleaded by alleging the existence of the March will, and would also apply the testamentary exception to the privilege to this cause of action.

***E. Hauser v. Hauser*, 2017 N.C. App. LEXIS 92 (2017).** Claim for tortious interference with expectancy cannot be brought while testatrix is alive and competent.

1. In 2011, Robin began caring for her elderly mother-in-law, Hilda. Hilda began transferring cash from the trust for her benefit created by her late husband (with Edward Jones as trustee, and for the benefit of Hilda and her children) to her personal account, and then withdrawing the cash in the total amount of $20,000. Hilda's daughter, Teresa, after being alerted to this, used Hilda's power of attorney to transfer $12,000 of Hilda's assets to herself. In 2012, Hilda revoked the power of attorney, executed a new power of attorney naming her son (and Robin's husband) Darrell as agent, and executed a new will and irrevocable trust that gave Darrell a pre-residuary gift of real estate to Darrell (with the residue still passing equally to both children).

2. Teresa sued Robin and Darrell for constructive fraud, breach of fiduciary duty, tortious interference with an expected inheritance, and undue influence. The court dismissed all of the claims and Teresa appealed. On appeal, the court of appeals affirmed on the following grounds:

a) No North Carolina case allows an expected beneficiary to bring a claim for tortious interference with expectancy during the lifetime of the testator. A child possesses no interest whatever in the property of a living parent. All of the allegation relate to Hilda's property and not her own, and Teresa sued in her own name rather than in any representative capacity for Hilda. There has been no allegation that Hilda has ever been adjudicated to be incompetent.

b) Teresa lacks standing to sue for breach of duty, because Teresa only alleged fiduciary duties owed to Hilda and none actually owed to her. Teresa cannot bring claims based solely on her theory that her expected inheritance will be reduced by alleged breaches of duties owed to Hilda and not to her. While Hilda is alive, any claim arising out of a fiduciary relationship between Hilda and Robin and Darrell can only be brought by Hilda or someone acting on her behalf.

c) Teresa's claim that the power of attorney authorized her to sue to compel an accounting was dismissed because she did not attach the document or reference any actual provision that granted her standing, and the court refused to infer it. Also, her status as a potential estate beneficiary does not alone authorize her to sue to compel an accounting.

***F. Elderkin v. Mahoney,* 2017 Conn. Super. LEXIS 4572 (2017).** Estate of fetus aborted as a result of defendant's negligence may maintain wrongful death action if fetus reached quickening.

1. Susan learned she was pregnant at age 44 and become a patient of two doctors, Yale-New Haven Hospital, Yale University, and the Yale School of Medicine. The medical defendants informed her that the unborn child had a life-threatening genetic disorder called Trisomy 18, as a result Susan decided to have an abortion when the fetus was 17 weeks old. Three days later, the medical defendants discovered that their diagnosis was incorrect and the fetus was normal, they informed Susan, and Susan and her husband as administrators for the estate of "Baby Ranpura" brought suit for wrongful death against the medical defendants. The medical defendants moved for summary judgment dismissing the claims on the basis that the fetus had not reached the point of viability, and therefore did not have a legally recognized claim for wrongful death.

2. The court refused to grant summary judgment dismissing the claims on the following grounds:

a) Unlike many other states, the Connecticut wrongful death statute does not expressly refer to a "person" and define who must be the decedent. The statute focuses on "death" and not the death of a person. At the time of the original 1877 and 1903 statutes, it was accepted wisdom that wrongful death actions could be brought only to recover damages for deaths resulting from postnatal injuries to living persons. However, in 1962 the courts held that a wrongful death action could be brought by a child that died two weeks before birth, because the fetus had reached the point of viability. The prior case shows that the text of the wrongful death act does not categorically prevent the court from applying the act to at least some unborn children. Most jurisdictions allow recovery for the deaths of at least some unborn children.

b) In will construction, a child is considered "in being" from the moment of conception. The constitutional right to abortion, balancing the privacy interests of the mother, draws the line at the moment of viability. State murder law has for hundreds of year drawn the line at being born alive, because the statutes specifically refer to a person. It is impossible to draw a uniform line across all legal areas, and the line must be drawn based on the legal interests to be protected in the particular case. The law of wrongful death is designed to make the conduct of negligent actors more careful and circumspect by making them liable for damages as a consequence of that negligence, it is primarily punitive or penal, and it is mainly designed to make some compensation on money for the "mere loss of life".

c) The main purpose of wrongful death is to make compensation in money for mere loss of life. Because the issue deeply touches the lives of real human beings, the decision should be comprehensible to ordinary people with ordinary human experiences. The common law concept of human life, with its ancient pedigree and enduring common sense (citing Blackstone), is that life is the immediate gift from God and a right inherent by nature in every person, that begins as soon as an infant is able to stir in the womb – the quickening. The point of quickening is intelligible and understood by lay persons, the first movement of an unborn child is an unforgettable moment for mothers, and an emailed sonogram of an unborn child's movements can thrill expectant grandparents far away. While "viability" is not fixed and precise - some children live before it, some die after it, and medical advances will impact it making it a moving goal post - "quickening" is in contrast a recognizable human phenomenon that can be physically felt and readily understood by an ordinary person. Accordingly, an unborn fetus that has reached quickening may maintain a wrongful death action. On remand, the court must determine whether the child reached quickening, which almost certainly had occurred in this case.