The Past Year's Most Significant, Curious, or Downright Fascinating Fiduciary Cases*

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

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Dana G. Fitzsimons Jr.
Principal and Fiduciary Counsel, Bessemer Trust
3455 Peachtree Road, N.E., Suite 850, Atlanta, Georgia 30326-3257
Phone: (404) 965-9318
fitzsimons@bessemer.com

With contributions from:

Stephen R. Akers, Bessemer Trust, Dallas, Texas
Mary Beth Anderson, Wyatt Tarrant & Combs LLP, Louisville, Kentucky
David C. Blickenstaff, Schiff Hardin LLP, Chicago, Illinois
Meghan G. Hubbard, McGuireWoods LLP, Richmond, Virginia

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I. STATE TAXATION.

A. *Bank of America, N.A. v. Massachusetts Commissioner of Revenue,* C314596-8; 314606-36 (Massachusetts Appellate Tax Board, June 10, 2015). State tax board holds that national bank with offices in state is a resident of Massachusetts and trusts for which bank serves as trustee are resident trusts for state income tax purposes.

1. A national bank was the surviving entity following a merger in 2008. The bank and the merged entity were combining operations during the tax year at issues, and the merged entity served as sole trustee or co-trustee of the trusts at issue during the tax year. The bank filed the fiduciary income tax returns for the trusts and tax years at issue as the successor entity following the merger. The bank then filed 2,987 applications for abatement of tax, and four trusts were selected as representative parties to litigation with the state taxing authority over whether the state could tax the trusts as resident trusts based on the activities of the bank in the state.

2. Each of the trusts was created by a state inhabitant, became irrevocable before the tax year, had the bank as either sole trustee or a co-trustee along with an out-of-state resident, and had beneficiaries outside the state. The bank is a national banking association with its main office in North Carolina, with the merged entity being a national bank with its main office in New York. The Tax Board found that the bank as trustee was an inhabitant of the state and that the trusts were therefore resident *inter vivos* trusts subject to state income tax. The bank appealed.

3. On appeal, the state appellate tax board affirmed on the following grounds:

   a. The state imposes fiduciary income taxes on trusts based in part on the inhabitancy of the settlor (which was Massachusetts for each trust at issue, meeting that requirement) and the trustee.

   b. The statutory provisions provide that corporations serving as trustee are subject to the taxation provisions in the same manner as individual trustees, but do not define inhabitancy for corporations. The statute defines inhabitance for an individual trustee by reference to a permanent place of abode in the state and spending more than 183 days in the state.

   c. Despite the limitation of the "place of abode" provision in the statute to individual trustees, the court held that a corporation will qualify as an inhabitant of the state if it maintains a permanent place in the state where it continues to be and is stable in some state or constant in some relationship for more than 183 days of a taxable year.

d. The presence and activities of the bank in the state that satisfy these criteria, and reflect maintenance of a permanent "abode", include: (i) developing banking, commercial, and lending relationships; (ii) conducting business in 200 branch offices staffed by resident employees and contractors; (iii) advertising and operating as a financial institution in the state; (iv) maintaining relationships with the trust beneficiaries, administering trust assets, and administering trusts and a trust business generally.

e. The board rejected the argument that the new test could mean that a national bank serving as trustee could be a resident of every state and subject to double taxation, on the grounds that: (1) the statute applies only to trusts created by an in-state domiciliary; and (2) there is a statutory credit for taxes due another state.

B. *Comptroller of the Treasury of Maryland v. Wynne,* 135 S. Ct. 1787 (2015). Divided U.S. Supreme Court finds that failure to provide a credit against county level taxes on S corporation income for taxes paid to another state violates the dormant Commerce Clause.

1. Maryland residents had taxable income from an S corporation that was sourced in several other states. They paid taxes to those states accordingly, and sought a credit for the taxes paid against their Maryland state and county income taxes. They received a credit against their state income tax, but not against their county level tax.

2. The Maryland Court of Appeals held that the failure to provide the credit at the country level unconstitutionally discriminated against interstate commerce. On appeal, the majority of a divided U.S. Supreme Court (with Justice Scalia joining in Justice Ginsberg's dissent) affirmed on the grounds that: (a) failure to provide the credit violates the dormant Commerce Clause by burdening out of state business with double taxation; and (b) the dormant Commerce Clause, previously thought of as a corporate tax doctrine, applies to S corporations and other pass through entities and individual income taxes.

C. *Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue,* 2015 NCBC LEXIS 39 (2015). Taxation of wholly discretionary trust based on residence of beneficiaries, without other contacts, violates the Due Process and Commerce Clauses.

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 taxes 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.

4. 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.

D. *Kassner v. Division of Taxation,* 2013 N.J. Tax LEXIS 1 (January 3, 2013); 2015 N.J. Tax LEXIS 11 (2015). Undistributed income of a trust created under will of New Jersey domiciliary, but that has an out of state trustee and is administered out of state, is not subject to New Jersey income taxation for out of state income.

1. Fred Kassner, a New Jersey domiciliary, died in 1998 and created a trust under his will. In 2006, the trust had a New York trustee and was administered exclusively outside New Jersey. In that year, the trust owned stock in four S corporations. The S corporations owned New Jersey assets and conducted part of their business in New Jersey. The trust did not make distributions to beneficiaries in 2006.

2. The trust filed a 2006 New Jersey fiduciary income tax return, and paid tax on the portion of S corporation income allocated to New Jersey, but not on the balance of the S corporation income.

3. The state Director of the Division of Taxation noticed a deficiency of $192,370 along with interest and penalties, claiming that the trust was taxable on 100% of its undistributed income. The trustee filed a notice of protest, but the Director's final determination imposed the tax on all income on the grounds that the trust held assets in New Jersey (i.e. because the trust held S corporation stock and the S corporations held New Jersey assets). The trustee appealed to the New Jersey Tax Court.

4. Relying on its prior decision in *Pennoyer v. Taxation Div. Dir.*, 5 N.J. Tax 386 (1983), the Tax Court granted summary judgment for the trustee, and held that New Jersey could not impose the tax in this case, on the grounds that: (1) the U.S. Constitution bars New Jersey from taxing the undistributed income of a trust if the trustee, assets, and beneficiaries are located outside New Jersey; (2) simply (and incorrectly) using a New Jersey address on a state tax return does not created sufficient contacts with the state for taxation purposes; (3) the creation of the trust in New Jersey and the resultant jurisdiction of the New Jersey courts does not create sufficient contacts for taxation; (4) the trust was not administered in New Jersey and the trustee is out of state, and therefore New Jersey can only tax undistributed trust income if the trust owned New Jersey assets; (5) owning stock in an S corporation does not mean the trust owns the assets of the S corporation for the purposes of determining contacts with the state, and it is not proper to conflate pass-through taxation with ownership of underlying assets; and (6) there are not sufficient constitutional due process contacts with the state to subject the trust to taxation on its out of state income.

5. On appeal, the New Jersey Superior Court, Appellate Division, affirmed on the grounds that:

   a. It is not necessary to reach the constitutional questions because the tax court decision may be properly affirmed on the "square corners" doctrine, because the tax division attempted to impose tax on a taxpayer in 2006 based on a policy change the division did not announce to taxpayers until 2011. Since 1888, the division's official guidance advised that undistributed trust income would not be taxable if the trustee was not a state resident and the trust had no state assets. The tax court rejected, and the division abandoned, its position that this trust had state assets.

   b. The square corners doctrine requires the government to deal fairly with its citizens. The division cannot, under this doctrine, tax a trust in 2006 under a change of policy that was not announced until 2011. An agency may not spring upon the regulated community a new policy and apply it retroactively. The square corners doctrine is important to taxation because trusts must be able to reliably engage in tax planning, without fear of unfair retroactive tax policy changes.

E. *McNeil v. Commonwealth of Pennsylvania,* 2013 Pa. Commw. LEXIS 168 (2013). Imposition of state income tax on trust created state domiciliary, but that is administered outside state, violates the Commerce Clause of the U.S. Constitution.

1. In 1959, Robert McNeil, while domiciled in Pennsylvania, created irrevocable trusts to be governed by Delaware law, with Wilmington Trust Company as administrative trustee and with three general trustees residing outside of Pennsylvania. For 2007 (the tax year in question in the case), the trusts did not have Pennsylvania assets or income, but all of the discretionary beneficiaries resided in the state. The trusts did not provide for mandatory distributions to any beneficiary.
2. For 2007, the Pennsylvania Department of Taxation assessed taxes, interest, and penalties on the trusts for all of the trust income, on the grounds that the trusts were resident trusts because the settlor resided in the state when the trusts were created. The trustees filed an unsuccessful administrative appeal, and then appealed to the Commonwealth Court.
3. On appeal, the Commonwealth Court held that the application of the state income tax to the trusts violated the Commerce Clause of the U.S. Constitution on the grounds that: (1) the trusts lack the physical presence in the state to establish a nexus with the state, and the residency of the settlor and beneficiaries is not enough to create that nexus where the beneficiaries have only a discretionary interest and the settlor did not retain powers over the trusts; (2) the imposition of the tax on all trust income would be out of proportion to the trusts' business activities in the state, thereby failing the fair apportionment test under the Commerce Clause; (3) the taxes are not fairly related to the state because the trusts have no physical presence in the state, have no in-state assets or income, are governed under Delaware law, and do not benefit from the state's roadways, bridges, police, fire protection, economic markets, workforce, courts, or laws.

F. *Linn v. Department of Revenue,* 2013 Il. App. (4th) 121055 (December. 18, 2013). After Illinois trust decanted to Texas trust that lacked contacts with Illinois, imposition of Illinois state income tax on trust income violated the Due Process Clause.

1. In 1961, A.N. Pritzker, an Illinois resident until his death in 1986, created 20 *inter vivos* trusts, governed by Illinois law, with Illinois assets, and with an Illinois trustee. One of the trusts was for the benefit of his daughter Linda.
2. In 1968, other beneficiaries (not including Linda) obtained the approval of the Illinois court for the trustee of their trusts to exercise the power under the trust agreement to decant the trust assets to new trusts.
3. In 2002, the trustees of Linda's trust exercised their power under the trust agreement to decant the assets of Linda's trust to a new Texas trust for Linda's benefit, with a new Texas trustee. The original Illinois trust protector of Linda's new trust was later replaced with a Connecticut protector. The new trust provided that it was governed by Texas law, other than with respect to the definitions of income, principal, and power of appointment, which would still be defined under Illinois law. In 2004, a Texas court approved

reformation of the new trust to define all terms under Texas law, conditioned on a favorable IRS ruling that the reformation would not cause the loss of the trust's grandfathered GST-exempt status.

4. In 2006, all trust beneficiaries resided outside Illinois, there were no Illinois assets, and all fiduciaries were outside Illinois. The trustee filed a non-resident return in Illinois. The Illinois Department of Taxation reclassified the trust as a resident trust, taxed the trust income, and imposed a deficiency liability of $2,729. After paying the tax under protest, the trustee sued the Illinois Department of Taxation contesting the constitutionality of the state taxation of the trust income. The trial court granted summary judgment for the Department, and the trustee appealed.

5. On appeal, the Illinois Appellate Court reversed the trial court, granted summary judgment for the trustee, and declared that the income tax applied to this trust violated the Due Process Clause of the U.S. Constitution due to lack of contacts with Illinois, on the grounds that: (1) unlike in *Chase Manhattan Bank v. Gavin, 733 A. 2d 782 (Conn. 1999)*, the trust is not testamentary, and an *inter vivos* trust has a more attenuated connection with the state, does not owe its existence to the grantor's state law, and does not have the same tie to the state; (2) the trust resulted from the trustee's exercise of its power of appointment; (3) with income tax, the focus is on the tax year in question, and therefore what happened historically with the trust in Illinois has no bearing on the tax year; (4) the trust was not part of the probate estate of an Illinois resident and the Illinois probate court has no jurisdiction over the trust; (5) the trust is governed by Texas law and does not have the benefits and protections of Illinois law; (6) the trust has nothing and has sought nothing from Illinois, all business is conducted in Texas, and all beneficiaries and property are outside Illinois.

II. CHARITY.

A. ***Christ Church Cathedral of Indianapolis v. JP Morgan Chase,* 2015 U.S. Dist. LEXIS 66373 (2015).** Constructive fraud and state securities law claims by beneficiary of charitable trusts created by Eli Lilly related to trust investments dismissed for pleading and standing deficiencies.

1. Eli Lilly created charitable trusts for the benefit of Christ Church Cathedral of Indianapolis, with local banks as trustee. The trust terms gave the trustee broad investment authority, including the ability to invest in the bank's own stock, and exonerated the trustee other than for willful breach of trust. While originally a net income trust, the trust was modified to pay out of a 5% unitrust amount annually. The church appeared to concede that it had no authority to make investment decisions for the trusts and could not terminate the trusteeship. Through mergers, JP Morgan Chase became trustee in 2004. The church carefully monitored the trust investments.

2. Starting in 2007 and through 2013, the trustee invested the trust assets in: (1) structured notes with an affiliate as sole placement agent; (2) proprietary off-shore hedge funds; (3) proprietary off-shore private equity funds; (4) losing hedge funds by an acquired subsidiary; and (5) twenty-five other proprietary

mutual funds that were dissolved for poor performance and the bank's inability to sell them to non-captive intelligent investors.

3. The church alleged that the investments were: (1) over-diversified, illogical, and inconsistent with a coordinated investment strategy; (2) high fee funds from which the bank profited from the sale to the trusts; (3) pursuant to a concealed plan to encourage bank employees to steer clients to the bank's manufactured products; (4) impossible to understand, unmarketable, not transparent, high risk, criticized by the SEC, and subject to retrocession ("kick back") agreements; (5) responsible for a $13.5 million loss to the trusts at the same time that the bank's annual fee doubled in size; and (6) largely concealed from the church as to their details.

4. The court granted the bank's motion for summary dismissal of the constructive fraud (without prejudice) and state securities law claims (with prejudice) on the grounds that: (1) the claims lump together the various bank entities, and lack specifics about who met with the church to discuss the investments, and lack the particularity needed for the court to determine the "duty owed" element of a constructive fraud claim; (2) the claims omit facts as to the decisions made by the church in reliance on any alleged misrepresentation or material missing information that proximately caused injury to the church; (3) the church admits it had no investment authority over the trusts and could not take steps to terminate the trusteeship; (4) the Indiana Securities Act claims are only available to parties to the transaction, and the church as trust beneficiary was not a party since it had no investment authority.

B. *In re: Geisinger-Bloomsburg Hospital,* 2015 Pa. Super. LEXIS 245 (2015). Appellate court reverses trial court *cy pres* conditions on charitable trust distributions and creation of pour-over trust to receive distributions.

1. The Bloomsburg Hospital was created in 1905 for the purpose of caring for the sick in and around the Town of Bloomsburg. Through a series of complex transactions, the hospital was acquired by an integrated health care system operated under the umbrella of Geisinger Health System Foundation. The trustee of several charitable trusts for the hospital's benefit sought aid and direction to determine: (1) whether it was still proper to distribute trust income to the hospital; and (2) whether conditions or restrictions on distributions were appropriate. The trustee was concerned about trust funds being diverted to other charitable entities under the same parent control that did not benefit the Bloomsburg area. The state attorney general's position was that the hospital could still receive funds, but that the funds be restricted and used only for the hospital in Bloomsburg.

2. Purporting to use its *cy pres* power, the trial court found that restrictions were needed to ensure the parent company would not divert trust funds away from the settlor's intent to benefit the Bloomsburg community, and ordered that: (1) a pour-over trust would be created, with bank as trustee and subject to monitoring by the attorney general, and income would be distributed to the pour-over trust; (2) if the hospital has operating surpluses for the year, the

hospital would not receive trust income; (3) if the hospital has losses for the year, trust income will be distributed to the hospital to the extent of the operating losses; (4) if losses exceed income for the year, any funds in the pour-over trust may be used to offset losses; (5) additional distributions are permitted to avoid federal tax penalties; (6) distributions to the hospital are conditioned on the hospital amending its corporate documents to require use of trust funds in a manner consistent with the intent of the donors: and (7) the corporate parent must file annual reports with the attorney general concerning the hospital's operating budget and services, along with all the withdrawal of any trust assets.

3. On appeal by the hospital, the court reversed the trial court on the grounds that there had been no failure of the trust that justified the application of the *cy pres,* the settlor's objectives had not become impossible or impractical, and the court erred by creating the pour over trust and imposing conditions on the receipt of the funds (i.e. requiring that the hospital have operating losses) by the hospital that went beyond those imposed by the settlors. Over the hospital's objection, the court affirmed the requirement that the hospital amend its corporate documents to require use of the funds in a manner consistent with the intent of the settlors.

C. *Lahnston v. Williamson,* 2015 Mass. App. Unpub. LEXIS 413 (2015). Suit claiming attorney malpractice in drafting scholarship trust dismissed under statute of limitations.

1. In 1994, Frank Lahnston and his siblings created a trust, in honor of their parents, to provide scholarships to local high school students. The trust awarded its first scholarship in 1996, and its second in 2000, but the second recipient never received funds. In 2004, the state attorney general sued the trustee for failure to file required disclosures and compelled an accounting. In 2007, the judge ruled the trust was a charitable trust and not a private one, and removed the trustee for violating the trust terms.

2. In 2010, the trustee sued the drafting lawyer claiming malpractice for not drafting the trust properly. The court dismissed the suit under the 3-year statute of limitations, which the court found began to run when the attorney general contacted the trustee in 2004.

D. *Covenant Presbytery v. First Baptist Church,* 2015 Ark. App. 233 (2015); 2015 Ark. App. 417 (2015). Will providing income from farmland to family members, with remainder of estate passing to two charities, along with various private gifts, is not a charitable trust to which a court may apply the *cy pres* doctrine.

1. Stanley Carpenter died in 1967. His will provided for numerous non-charitable gifts, and also held farmland in trust, with the net income paid to four relatives for their lifetimes, with the remainder passing back to his estate after their deaths. His estate passed equally to First Presbyterian Church and First Baptist Church.

2. First Presbyterian Church existed from the 1800s until 2004, when it dissolved and its assets were transferred to Covenant Presbytery. Upon its dissolution,

the bank trustee began paying its portion of farm income (the share for the private beneficiaries that had died, which had been allocated to the charities) to Covenant. Covenant and First Baptist disputed whether Covenant could succeed to the other church's interest in the property.

3. The trustee petitioned for instructions, and First Baptist sued the trustee for wrongfully distributing income to Covenant. The trial held that the trust was a charitable trust, and applied the *cy pres* doctrine to reform the trust to transfer First Presbyterian's share of the trust to First Baptist, rather than to Covenant, on the grounds that the settlor intended to benefit churches in his hometown, and not Covenant which operates churches in multiple states.

4. On appeal, the court of appeals reversed on the grounds that, reading the will as a whole, the trust was not a charitable trust because it was not purely charitable, and the court could not use the *cy pres* doctrine to reform it. The interests of the churches were remainders in fee that vested indefeasibly at Mr. Carpenter's death, and Covenant properly succeeded to First Presbyterian's interest in the property. The failure of First Presbyterian to issue a deed to Covenant is immaterial, since the interests were held in trust and only the trustee, and not First Presbyterian, could issue the deed. On petition for rehearing, the court of appeals denied rehearing, and issued a substituted decision.

E. *In re: Perelman Charitable Remainder Unitrust*, 2015 PA Super 53 (2015). Executor of estate of deceased trustee has standing to seek information about charitable trusts to determine whether estate is entitled to claim back compensation and determine extent of potential liability for alleged mismanagement of trusts.

1. In 1995, Raymond and Ruth Perelman created several charitable entities under trust agreements, including foundations and charitable remainder unitrusts. The assets included a $34 million stake in Revlon, Inc. and Revlon Worldwide, which were entities that were largely owned by Raymond's son, Ronald. Raymond and Ruth served as initial trustees.

2. Ruth died, and Jeffrey was named as both executor and a beneficiary under her will. Using the power to amend granted to him under the documents, Raymond then amended the charitable trust documents several times to exclude Jeffrey from having an involvement in the charities.

3. As executor, Jeffrey sued to compel his father to produce records for inspection and copying related to the family charitable foundations and a charitable remainder unitrust, which is claimed was for purpose of determining whether the estate was due back compensation for Ruth's service as trustee, and to determine whether the estate would be exposed to IRS liability for alleged mismanagement of the charitable entities. Jeffrey also sought to inspect the books and records of the private entities that entered into transactions with the charities. Raymond alleged Jeffrey was motivated by a desire to increase his interest in Ruth's estate and to try and take control of the family charities away from Raymond (who had created and funded them). Jeffrey alleged various types of self-dealing including failing to collect

rents owed by the company to the charities (which owned land, building, and equipment leased to the company) in excess of $150 million.

4. The trial court held that Jeffrey lacked standing to seek the information on the grounds that: (1) Jeffrey was not a beneficiary; (2) Ruth had not sought compensation during her lifetime; (3) there was no present threat of any tax liability, so any claimed exposure was speculative; and (4) Raymond has committed to individually indemnify Ruth's estate for any future liabilities. Jeffrey appealed.

5. On appeal, the appellate court reversed and remanded on the following grounds: (1) if Ruth's estate might be liable to the IRS for excise taxes, it would be a prudent course to contact the IRS and work out an agreement; (2) Raymond's putative indemnification of the estate is immaterial, as it may not include attorneys' fees, and Raymond could later dispute its enforcement or scope; (3) Jeffrey's concerns meet the threshold requirement to establish standing; (4) Ruth was entitled to compensation under the governing instruments; (5) the court must determine the amount of reasonable compensation, and whether Ruth waived the right to compensation; and (6) declining compensation is not a waiver of the right to later seek it.

F. *Matter of Sister George Marie Attea,* 2015 NY Slip Op (Erie County Surrogate, 2015). Nun's possible violation of vow of poverty is not a reason to deny probate of will that gives property to both charitable and non-charitable recipients.

1. Sister George Marie Attea entered the Congregation of the Sisters of St. Joseph in 1950 and resided there until her death in 2014 at age 82. In 1959, she executed a declaration of final profession that included a vow of poverty. In 1979, she executed a will leaving all of her property to the congregation. In 1982, she was severely injured as a passenger in a congregation vehicle, her biological sister Mary was appointed her guardian and conservator, and Mary sued and obtained a settlement of $1.7 million for the conservatorship estate. Sister Attea was cared for by the other nuns and outside providers during her lifetime. On petitions by the congregation, the congregation received annual payments from the money for the costs of the care, starting at $20,000, then increasing over time to $80,000, along with one lump sum $275,000 reimbursement.

2. Sister Attea died in 2014, and under her 1994 will she left her property partially to family, partially to the congregation, and partially to other Roman Catholic charities. The congregation objected to probate. In addition to allegations of improper execution, lack of capacity, and undue influence, the congregation claims probate should be barred because the 1994 will violated Sister Attea's vow of poverty and her contract with the congregation. The congregation moved for summary judgment. The surrogate denied summary judgment and dismissed, with prejudice, the claim that the vow of poverty should be a reason to deny probate, on the grounds that the existence of a possible contract purporting to govern testamentary disposition has no effect on whether a will is valid. The surrogate expressed no opinion on the validity of the congregation's claims of a contract to make a will.

III. BUSINESS INTERESTS.

A. *Rollins v. Rollins*, 2013 Ga. App. LEXIS 332 (March 29, 2013); 20 Ga. LEXIS 179 (March 3, 2014); 329 Ga. App. LEXIS 780 (2015); 2015 Ga. LEXIS 230 (2015). Appellate court holds that trustees must account for corporate level activities of entities held in trust where they have the individual control over the entities, and are subject to trustee duties for their entity level actions; Georgia Supreme Court reverses.

1. In 1968, O. Wayne Rollins created the Rollins Children's Trust (RCT Trust) for the benefit of his nine grandchildren and his great-grandchildren. His sons, Gary and Randall, were named as trustees along with his friend Tippie. The trust terms provided for the distribution of part of the trust principal to the grandchildren at ages 25 and 30, with the remainder distributed after their deaths to Mr. Rollins's great-grandchildren. The trust was funded with stock in Rollins, Inc.
2. In the 1970s and 1980s, Mr. Rollins created several family entities to hold the trust assets primarily for the purpose of reducing taxes.
3. In 1986, again to limit tax liability, Mr. Rollins established separate Subchapter S Trusts for each of his nine grandchildren, with his son Gary as trustee of the trusts for his children and Randall as trustee of the trusts for his children. These trusts were initially funded with one of the entities created by Mr. Rollins, and the trusts later purchased additional shares of the same entity from other family entities created by Mr. Rollins. In 1988, Mr. Rollins created another family entity held within the S trusts, again to minimize tax liability. The S trusts required annual distribution of trust income, and required outright distribution of the trust assets upon the beneficiary reaching age 45.
4. Gary's four children sued the trustees for breaches of fiduciary duty for allegedly changing the business entities held in the trusts to shift power to themselves, making trust assets illiquid and nontransferable, and implementing a non-pro rata distribution system that is contrary to the trust terms.
5. The trial court granted summary judgment for the trustees. The trial court held that the trustees were not required to account for the entities held in the trust because the interests were minority interests, and that trustee fiduciary duties did not attach to actions taken at the entity level. The beneficiaries appealed.
6. On appeal, the Georgia Court of Appeals reversed the trial court and held that the trustees were required to account for entity level actions on the grounds that: (1) the minority interests in this case did not mean the trustees lacked control over the entity making it impossible to produce information about entity level transactions, because the trustees are controlling members of the various family entities; (2) the trustee is obligated as fiduciary to provide beneficiaries information that is within his control; (3) a trustee with a controlling interest in an asset held in a trust is required to account for the entity.

7. The Georgia Court of Appeals reversed the trial court and held that trustee fiduciary duties attached to the trustee's entity level actions on the grounds that: (1) trustees may not shed their fiduciary duties in their management of, and distributions from, entities held in their control within a trust; (2) fiduciary duties may adhere to a non-trustee whose control of entities within a trust is such that his actions may be attributed to the trustee itself; (3) the trustees acquired legal authority to manage the family businesses by virtue of their trusteeships; (4) even when they do not hold minority interests, the trustees exercise control of the entities; (5) once a trust relationship is established between a beneficiary and a trustee managing a corporation for a trustee, the fiduciary standard of care applies to his conduct regarding the affairs of the corporation; (6) where trustees elect themselves as officers and directors, they actually operate the business as representatives of the estate; and (7) therefore the trustees may be held to the fiduciary standards of care as to their actions related to the family entities which they control and which are held in the trusts.

8. The court refused to grant summary judgment for the beneficiaries on their claims, finding that issues of fact existed that required the involvement of a jury and precluded summary judgment. The beneficiaries claimed breaches of trust arising out of the following alleged actions by the trustees taken at the entity level:

   a. Amending the partnership agreement for one of the family entities to take management power from the partners and placing it exclusively with themselves as managing partners;

   b. Six months after the beneficiaries sued the trustees, distributing $9 million out of the partnership to the S Trusts for those other beneficiaries that did not join in the suit; and

   c. Imposing, at the entity level, a "code of conduct" establishing conditions on distributions to the trust beneficiaries, which considered (1) attendance and meaningful participation at family business meetings, (2) engaging in "serious pursuits that are meaningful, respectable, and worthwhile in the opinion of the trustees", (3) investment performance, and (4) contributions to the family, and (5) the beneficiaries personal conduct, none of which were part of the trust terms.

9. The Georgia Supreme Court granted *certiorari* in the case, and held that the Court of Appeals erred as follows:

   a. With respect to the issue of accountings, the Court of Appeals failed to consider the impact of and give deference to the trial court's equitable discretion to require or excuse an accounting for a trust, and therefore the court vacated the decision and remanded the case to the Court of Appeals to "place the sound discretion of the trial court on the scales".

   b. With respect to whether the trustee's duties attach to corporate level activities, the court reversed the Court of Appeals and held that trustee duties did not attach to corporate level activities in this case, on the grounds that: (1) by making one son the sole trustee of the Subchapter S Trusts, but giving that son shared control over the businesses with his brother (who was not co-trustee of those trusts), and because Mr. Rollins was an experienced business man who understand the roles he gave to his sons, Mr. Rollins clearly must have intended that the trustees would not be held to higher fiduciary standards when carrying out their corporate duties; (2) the intent of the settlor controls issue of trust construction; and (3) the trust only holds minority interests in the entities, and it is generally best to allow the corporate directors to act in the interests of all shareholders, and not just the trust beneficiaries, and be held to a corporate level fiduciary standard when acting as directors.

10. On remand from the Supreme Court, the Court of Appeals again reversed the trial court on the following grounds:

   a. The trial court erred by granting summary judgment for the trustees on the breach of fiduciary duty claims because: (i) the alleged wrongful amendment of the corporate documents was signed by Gary and Randall as "trustees"; (ii) facts are needed on whether the partnership amendment was an act taken as directors (which the Supreme Court held are subject to corporate duties), or as trustee; (iii) there is a factual dispute as to whether Gary and Randall exercised good faith in amending the partnership; (iv) partners owe a duty to disclose material information to each other, and the amendment of the partnership documents, allegedly done in secret, was likely a material act, and the concealment of that act may give rise to a claim requiring a factual record; (v) because of their statements and documents indicating they were acting through their authority as trustees with respect to the family conduct code imposition, it is necessary to determine as a matter of fact whether they acted as trustees with respect to the conduct code, as directors, or as a combination of the two; and

   b. The trial court granted summary judgment on the accounting issue based on its determination that facts were not needed on the fiduciary duty claims. However, because the Court of Appeals is remanding to the trial court to determine a full factual record on the fiduciary duty claims, the trial court must reconsider its accounting decision to determine whether the factual requirements of those claims justify a change to its decision on whether the trustees must account for corporate level activities.

11. The Georgia Supreme Court has granted certiorari to hear appeal of the Court of Appeals decision.

B. *Blechman v. Blechman,* 2015 Fla. App. LEXIS 4808 (2015). Gift of LLC interest to trust, with one-half of LLC distributions payable to girlfriend, violated operating agreement and caused the non-probate transfer of LLC interest to member's heirs at law under default provisions of operating agreement.

1. In 2009, Bertram Blechman formed an LLC with his sister. The operating agreement restricted transfers of interests in the LLC to the children and issue of the members, and prohibited transfers to parents, spouses, stepchildren,

and paramours. In default of an approved transfer, the operating agreement provided that at the death of a member the members' interest would pass and immediately vest in the member's then living descendants, *per stirpes*.

2. Bertram died in 2011, leaving behind his estranged wife of 60 years and two adult children. His will poured-over to a revocable trust that gave one-half of the distributions from the LLC to a trust to provide $5,000 per month to his girlfriend to cover the costs of real property he also devised to her in trust. Son Robert, as personal representative, originally listed the LLC interest as an estate asset, changed this in a final accounting, and sought reimbursement from the girlfriend of the $89,500 that had been placed into the estate account. The trial court confirmed the LLC interest was an estate asset, and the children appealed.

3. On appeal, the court of appeals reversed on the following grounds: (1) the operating agreement limited the transfer of LLC interests to family members; (2) upon Bertram's death, the girlfriend's interest in the trust became vested; (3) the clear intent of the operating agreement was to keep the LLC in the family bloodline: (4) the gift of a lifetime trust interest in the LLC violated the operating agreement terms and intent, regardless of the fact that the remainder interest in the trust passed to Bertram's children at the girlfriend's death; and (5) by violating the operating agreement, Bertram triggered the default immediate transfer of the interest to Bertram's children, outside of probate, and resulting in the LLC interest not being an estate asset.

C. *Braunstein v. Braunstein,* 2015 NY Slip Op 01703 (2015). Ademption of specific devises of real property under will by lifetime transfer of land to family partnership.

1. In 2004, Bernard executed his will that specifically devised real property to his daughter, and names his son as executor. In 2007, Bernard gave the land to a family limited partnership (with a 1% corporate general partner) and took back a 99% limited partnership interest. Bernard died in 2012, and daughter sought to compel the transfer of the land to her, which the surrogate's court ordered.

2. On appeal, the appellate division reversed and found ademption of the devise to daughter on the following grounds: (1) Bernard transferred all of his interest to the partnership and no longer owned them since a limited partner has no interest in specific partnership property; and (2) while the partnership transfer was part of estate planning, Bernard's intent is irrelevant to the analysis of ademption.

IV. DIRECTED TRUSTS, PROTECTORS & SPECIAL FIDUCIARIES.

A. *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). 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 3 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.

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 purposed 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 3 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. 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.

11. 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.

B. ***Minassian v. Rachins,*** **No. 4D13-2241 (December 3, 2014).** Drafting lawyer appointed as trust protector could validly amend trust to clarify settlor's intent in the middle of litigation between beneficiaries over ambiguous provisions.

1. Zaven Minassian created a revocable trust with himself and his wife as trustees, for the primary purpose of taking care of himself and his wife. He died in 2010, and because of the 1-year repeal of the estate tax in 2010, only the family trust was funded at his death pursuant to the trust terms. Wife served as trustee of the family trust, which provided the wife with discretionary income and principal by a standard, and directed that the primary concern was the care of the wife, and not preservation of corpus. The trust provided that the family trust would terminate at the wife's death, and that Zaven did not desire to create a common trust for his beneficiaries. After the wife's death, the trust assets would pass to separate trust shares for Zaven's children by a prior marriage, with a bank as trustee. His lawyer (who was later named as trust protector), testified that Zaven wanted to provide his wife with the lifestyle of horse racing and legal gambling that they enjoyed together, did not want to create a common trust for his wife and children, and was concerned that his estranged children would challenge his wife's use of the trust assets.
2. The children sued the wife for breach of duty, the wife moved to dismiss on the grounds that the children were not beneficiaries of the family trust, but rather of new trusts that were not yet created. The court denied the motion, finding that the use of the term "trust shares" meant the children likely had standing to bring their claims.
3. The wife, under the trust terms, then appointed the husband's drafting lawyer as trust protector with the power to amend the trust. The trust protector then amended the trust terms to clarify that a new trust would be created at the wife's death, and that the children were not beneficiaries of the family trust.
4. The children challenged the validity of the amendments, both parties moved for summary judgment on the issue, and the trial court granted the children summary judgment and found the amendment was improper for favoring the wife and not leaving the children with the ability to question the wife's actions as trustee, and the wife appealed.
5. On appeal, the court of appeals reversed on the grounds that: (1) the Florida Uniform Trust Code (Section 808) allows the settlor to give a non-trustee the power to modify the trust; (2) this section overrides any conflicting common law principles of non-delegation, and permit the appointment of a trust protector with the power to modify the trust terms; (3) the trust was ambiguous as to husband's intent as to whether a new trust was created at wife's death; (4) the trial court's "single trust" interpretation is not unambiguously supported in the trust terms; (5) the trust protector's affidavit showed that the amendments were made to carry out the settlor's intent and were therefore within his powers; and (6) removing the authority from the trust protector and assigning it to the court would violate the settlor's intent.

C. *In re Eleanor Pierce Marshall Stevens Living Trust,* 2015 La. App. LEXIS 284 (2015). Trust protectors are not void for violating Louisiana's public policy.

1. Eleanor established a trust in 1979, with Finley Hilliard serving as trustee starting in 2000. In 2006, the trust was amended to appoint Preston Marshall as trust protector, with the power to remove the trustee. Finley successfully petitioned to modify the trust to resign as trustee and appoint the trust protector as successor trustee. Preston became trustee in 2009.

2. J. Howard Marshall, II and Eleanor were married from 1931 until 1960. As part of the divorce settlement, Eleanor received shares of Marshall Petroleum, Inc., and she placed the shares into trust. In 1995, Marshall sold stock back to the company for below market value, and the IRS determined the sale to be an indirect gift to the shareholders, including Eleanor and the trusts. Marshall didn't pay gift taxes, his estate didn't pay the gift taxes, and the government sought payment from the donees including Eleanor's estate, claimed that Finley Hilliard and Eleanor's executor E. Pierce Marshall, Jr. made transfers of assets that violated the federal priority statute, and the federal court found them liable for $1.1 million. They asked the trust to pay bond premiums and legal appeals for their appeal (the IRS position was that payment would further violate the priority statute), and Finley attempted to rescind his resignation as trustee by ex parte petition. The trial court granted the ex parte petition, the trust moved to vacate for lack of notice to Preston as trustee, the court vacated its judgment, and following a new motion to rescind his resignation, the court ruled that the trust protector ad effectively removed and replaced Finley as trustee.

3. Finley appealed and, in part, claimed that the trial court erred be because the position of trust protector violates public policy and cannot be recognized until the state recognizes the position and defines its duties. The court of appeals held that: (1) there is a strong public policy of carrying out the settlor's intent as set forth in the trust; (2) while not expressly addressed in the trust code, there is no law that forbids a trust protector term in a trust instrument, and there is nothing in the code incompatible with recognition of the office of trust protector; (3) the concept is recognized in the civil law treatise; (4) a trust protector can serve important functions in the administration of an estate, may protect a beneficiary's interest better than the beneficiary himself can do, and can be the living embodiment of the dead settlor; (5) recognizing the office of trust protector does not violate the public policy of Louisiana; and (6) Preston therefore did remove Finley as trustee.

V. INVESTMENTS.

A. *Moss v. Northern Trust Company,* No. 07 CH 24749 (Cook County, Illinois, Circuit Court, 2015). Trustee breached duty in failing to diversify 100% ownership of family printing and newspaper businesses because trustee did not adequately consider the effect of selling the company and investing in a diversified portfolio, but beneficiaries failed to adequately prove damages.

1. Benjamin Flower Shaw started Shaw Printing Company in 1851. After his death in 1909, his daughter-in-law and her three sons ran the company, and

acquired community newspapers. In 1936, they created a trust to hold 100% of the stock. The trust was for the benefit of Shaw family members, provided only for the distribution of income (and not corpus), continued until the expiration of the rule against perpetuities period, and allowed termination of the trust upon the agreement of all of the adult income beneficiaries. The bank become sole trustee of the trust in 1987 (when the trust still held 100% of Shaw Printing, community newspapers, and real estate), and served until its resignation in 2009, at which time the beneficiaries appointed family member Peter Shaw as successor trustee. Shaw family members served as directors and officers of Shaw Printing, including Tom Shaw who served as president and CEO, and Shaw Printing allowed all family members an opportunity to work in the company, and members of every generation of the family worked in the company.

2. The bank trustee managed the trust through its family business division, with an experienced asset manager and trust administrator. The trustee met with the beneficiaries annually, and reviewed the trust annually to determine whether to retain Shaw Printing as a trust asset and prepared annual Regulation 9 Corporate Reviews (the suit only reviewed the Reg 9s from 2004 forward, since any claims before 2004 were barred by the statute of limitations). The Reg 9s were reviewed by two asset managers, the trust administrator, the family business subcommittee, the concentration subcommittee of the personal investment compliance committee (PICC), the full PICC, and the trust investment review committee (a high level committee that included the trustee's chairman). The Reg 9s discussed variously: (a) the newspaper business; (b) Shaw Printing's performance (which compared favorably to the S&P 500; (c) the wishes of the beneficiaries that the company not be sold; (d) general guidelines on concentrations; (e) conclusions that the company should not be sold; (f) in 2006, consideration of the Christine Urban Report on the future of the newspaper business; (g) in 2008 after the suit was brought against the trustee, and for the first time, a discussion of selling the company; (h) the effect of S corporation conversion; and (i) the tax cost of a sale. The Reg 9s up until 2008 did not include an analysis of the anticipated effect of selling Shaw Printing and investing the trust assets in a diverse portfolio.

3. In 1991, the state passed new statutes that included a duty to diversify, and the following occurred thereafter: (1) the PICC met to consider diversification of the trust, recommended diversification, and approached the Shaw board about diversification; (2) the board obtained a legal opinion stating why the bank did not need to diversify the trust; (3) the trustee's in-house counsel prepared an internal memo that contradicted the board counsel's memo; (4) the trustee met with the board and continued to press for diversification, and eventually settled on obtaining virtual representation agreements from the beneficiaries approving the retention; (5) in 1999, the trustee obtained legal advice that the trust terms authorized the retention, noted that the trustee determined that retention was in the best interests of the beneficiaries, and

advised the trustee to get releases from the beneficiaries (but the Reg 9s from 2004 to 2009 did not reference or show reliance on this opinion).

4. In 2000, Shaw Printing elected to convert to an S corporation for income tax benefits (with the 10-year holding period expiring in 2010). The company provided an analysis of the tax benefits of the conversion, which the trustee relied on in determining whether to sell the company during the holding period). That same year, a new asset manager was assigned to the trust, and he escalated the importance of diversification because two beneficiaries refused to sign the retention agreements, and Hollinger outbid Shaw to buy certain newspapers. The new asset manager escalated his plans to explore sale, the board had a very negative reaction, and the manager allowed Tom Shaw, then the CEO, time to construct a plan to address the lack of diversification. In 2001, the CEO presented a plan to sell the suburban newspapers within 2-3 years to "cut off the arm to save the body". The trustee's asset manager supported the plan, but then following a change in PICC guidelines on diversification recommended retention of the assets in view of the trust terms, wishes of the beneficiaries, tax consequences of a sale (although the trustee never actually performed a tax calculation, but the asset manager testified he had done the complex calculation in his head, and had some handwritten notations on a company balance sheet that had numbers that were too conservative), and best interests of the beneficiaries (many of whom worked in the company), and noted that the overwhelming majority of beneficiaries wanted the company retained, the board opposed a sale, and the trustee's insistence on a sale would like result in litigation with the board.

5. The manager's position did not include a detailed analysis of the tax costs of a sale, the effects of selling and investing in a diverse portfolio, the impact on the income beneficiaries, or the impact on the trust principal. The PICC chairman immediately approved the recommendation to retain, and expedited email approval of the retention by the PICC without discussion. The asset manager then informed the board that the trustee was now willing to retain the company without diversification, and was no longer considering the CEO's plan to diversify within 2-3 years, and that the issue of diversification was resolved from the trustee's perspective.

6. The trustee devoted substantial resources to the company, elected board members, appointed an independent board member as chairman in 2003, and had regular calls with the chairman. E. K. Shaw retired as chairman of the board in 2003. By 2005, a majority of the board was independent of the family. In the trustee's trust investment committee, the trustee with only one exception did not compare the company's performance with investments outside of the newspaper industry, and did not compare the company's income with other income-generating investments (although the trustee's investment manager testified he did this in his head and concluded nothing could match the company's income).

7. The trustee received reports about the newspaper industry being in decline, and in 2006 E.K. Shaw hired Christine Urban to prepare a report that provided negative views of the newspaper industry. The trustee received the report, and the trustee discussed the report with the CEO (who did not agree with the report). The board had an executive session, immediately terminated E.K. as chairman emeritus, and threatened to sue E.K. if he ever disclosed company financials again. Certain trust beneficiaries flew Christine Urban to meet with the trustee, the trustee had a litigator present along with others, and E.K.'s counsel attended. In 2007, the trustee asked the board to form a special committee to address diversification after the expiration of the S corporation conversion holding period, and in 2008 the committee met for 4 hours and the trustee's manager believed a process was in place to achieve a diversification plan.

8. Certain current trust beneficiaries (representing 30% of the current income interests in the trust) sued the bank for failing to diversify the trust assets and investigate a sale of two newspapers to the Chicago Tribune at a premium price. They also sued the bank's successor, Peter Shaw, for failing to diversify, but settled their claims against Peter and only litigated their claims against the bank. Following a 36-day trial, the court found the trustee breached its duty to diversify on the following grounds:

   a. a trustee may consider the special relationship of an asset to the interests of some or all of the beneficiaries and the trust purposes throughout the administration, and not just at inception;

   b. the trust terms that authorized the trustee generally to retain inception assets regardless of legal restrictions on trust assets, and gave the settlors a right of first refusal to purchase the company stock, do not rise to the level of eliminating the trustee's duty to diversify the trust assets (which is not a "restriction"), and merely waive restrictions of the type that were in existence in 1936 at the trust's inception;

   c. the opinion of the trustee's counsel does not exempt the trustee from the duty to diversify since the opinion does not conclude that the trust terms expressly relieved the trustee of the duty to diversify, and the trustee did not clearly rely on the opinion;

   d. the trustee abused its discretion and acted unreasonably and arbitrarily in retaining Shaw Printing;

   e. it was reasonable for the trustee to consider the wishes of the beneficiaries, but this is only one factor;

   f. the trustee's success in managing the company to generate sizeable income does alone exonerate the trustee;

   g. the trustee failed to consider the anticipated effect of selling and investing in a diverse portfolio, gave this only cursory consideration, and should have given great weight to the merits of a diversified portfolio;

h. the trustee failed to calculate the actual tax burden of sale, or calculate the risk of waiting 6 years to sell;

i. as a result of these failures, the trustee acted unreasonably and arbitrarily, and breached its fiduciary duty.

9. However, the court ultimately ruled in favor of the trustee and found that the beneficiaries failed to meet their burden of proving damages on the following grounds:

a. the time frame for damages started on January 1, 2004 (claims before that point were barred by the statute of limitations) and ended at the trustee's resignation in February of 2009;

b. the beneficiaries' hypothetical investment model would generate $7.7 million in income for the period, whereas the trust actually generated $13.6 million in income;

c. the beneficiaries could not adequately prove harm to the value of the trust principal, because their expert failed to credibly and to a fair degree of probability prove that the value of Shaw Printing was less than the beneficiaries' hypothetical diversified portfolio, because the expert use of improper comparable sales and only a comparable sales approach (and not at least two different approaches), failure to meet acceptable standards of valuation, and reliance on transactions after the trustee's resignation.

10. The court held that the trustee did not breach its duties with respect to a 1999 "offer" from the Chicago Tribune to purchase certain suburban newspapers for a premium value on the grounds that:

a. the letter expressing interest in buying the papers was addressed to the board and not the trustee, and was therefore a board decision to respond and not a trustee decision;

b. the price offered was subject to multiple conditions and would likely be reduced, and was too speculative to support proof of damages;

c. the trustee's employee who sat on the board participated in a board meeting where the entire board rejected the offer in view of the tax costs during the S corporation conversion waiting period; and

d. the trustee board member discussed with his supervisor that, despite the high price, the tax considerations supported rejecting the inquiry.

11. The issues of the trustee's fees and attorneys' fees were retained for a later hearing.

B. ***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).** 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 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. Master recommends $97 million surcharge against individual co-trustee.

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 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 beneficairies' 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.

7. 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.

8. 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.

9. *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 restatements lacking citation are not support for the 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.

10. *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 used his brother's trust as a piggy bank 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 Jeff 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, 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 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 paying on 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.

C. *Matter of Mary Moeder,* 2015 Ind. App. LEXIS 131 (2015). Successor trustee did not breach duty from delay in diversifying concentration of bank stock where prior trustee delayed in providing tax basis information, and where delay in selling stock was justified by financial crisis in 2008.

1. May Moeder created a trust for the benefit of her son (who was blind and subject to guardianship), with her daughter as trustee and remainder beneficiary after son's death. In 2006, local bank took over as successor to the daughter as trustee, and the trust assets at that time included an 85% concentration of JP Morgan bank stock. Daughter did not immediately provide the bank as successor with information about the tax basis of the trust assets. In 2007, once the bank received this information, it developed a plan to diversify the stock over two years, and sold half the stock. Because of the market down turn, the bank delayed its plan to sell the rest of the stock, waited for the market to start improving in 2009, and then started selling 500 shares of the stock every two months. While there were two sales at modest

losses, most of the sales resulted in gains. In 2011, the bank petitioned to approve its accountings and resign. Daughter sued the bank claiming the bank breached its duties to prudently invest the trust assets. The court scheduled a 3-day hearing, continued the matter on the first day to accommodate the judge's one-day medical issue, and started the trial the next day. The court found that the claims were time barred or brought without evidence, and ordered the daughter to personally pay the bank's attorneys' fees of $106,000. Daughter appealed.

2. On appeal, the court of appeals affirmed on the following grounds: (1) the court did not err by granting a one-day continuance, as the daughter had ample time to present her evidence; (2) the daughter presented no credible evidence of breaches by the trustee; (3) while the bank usually conducts an investment review within 60 days of appointment, the delay in this case was caused by the daughter's failure to provide tax basis information as prior trustee; (4) the trustee's actions are not determined by hindsight; (5) daughter's testimony that the stock was imprudently sold in 2009 because of the TV interview she saw with Jamie Dimon, where he predicted JP Morgan would weather the crisis well, was not adequate proof of a breach of duty; (6) the bank's expert testified that the plan to sell the stock was prudent; (7) the trust assets actually increased by $64,000 during the bank's tenure, while still distributing $156,000 to the son; and (8) because daughter brought her claims with no support, and her claims eroded the trust by forcing the trustee to defend against the claims, the court did not err by ordering that the trustees' fees should be paid by the daughter personally.

D. *Matter of Wellington Trusts,* 2015 NY Slip Op 31294(U) (Nassau County Surrogate, 2015). Bank co-trustee did not breach duties by retaining concentrated positions in U.S. large-cap securities during a market down turn, where co-trustee refused diversification, had power to remove bank trustee, and was not clearly incapacitated, the trust terms permitted the investments, and the investments were part of a successful long-term family investment philosophy.

1. Herbert Wellington, Sr. and Elizabeth Wellington created trusts for their son Thomas. Thomas died in 2000, and part of the trust assets passed by their terms or by Thomas's exercise of his power of appointment to trusts for the benefit of Thomas's daughter Sarah Wellington. Bank served as co-trustee for more than 50 years, usually along with a family co-trustee, and the trust assets increased from $2 million to $36 million. During the time period at issue in the case, the co-trustee on all but one of the trusts was Herbert Wellington, Jr. Herb had the power to remove and replace the bank at any time. At Thomas's death, the trust assets were almost entirely invested in equities, and included a 29% concentration of Merck, a 19% concentration of GE, and other large positions. Thereafter, the value of Sarah's trusts had a sharp downturn in value. Herb resigned as co-trustee in 2005 and died a few months later. The bank began diversifying the trust where it served as sole trustee in 2003, but Herb refused to consent to diversification of the trusts where he served as co-trustee. The trust terms authorized the trustees to retain inception assets without any need to diversify the investments

2. Sarah objected to the accountings of the co-trustees for only the time period after Thomas's death, and claimed the bank breached its duties by failing to diversify the trust and failing to make appropriate distributions to her, and sought relief only from the bank co-trustee. Sarah settled with Herb's estate for $100,000. Sarah claimed Herb lacked capacity from a series of strokes, and that the bank had failed to seek his removal as co-trustee.

3. The surrogate dismissed the claims against the bank on the following grounds:

   a. the bank's conduct during this time was in compliance with the prudent investor standard;

   b. the conduct was consistent with the settlor's intent under the trust terms, and as indicated by appointing Herb as trustee to carry out the family investment philosophy, with the power to remove the bank at any time;

   c. the success of these trusts by implementing the family investment philosophy, and the fact that the objections were limited to one short time period during a market down turn, and did not include the years of success from the investments, and did not take into account the long-term investment strategy the bank put in place for the Sarah trusts on account of her age;

   d. the disputed stocks were all on the bank's approved list; (5) the bank complied with its own internal policy of diversification within 5 years for this type of investment;

   e. there were regular investment reviews and the bank had a long-term 50 year investment strategy for Sarah's trusts;

   f. Sarah failed to provide proof of inadequate distributions, and she received regular and increasing distributions, including a unitrust conversion and large principal distributions at her request; and

   g. Herb's position on investments remained consistent, and despite a decline in his physical ability and mental acuity following a series of strokes, he was not declared incapacitated, no one notified the bank claiming he lacked capacity, and the bank could reasonably rely on his capacity.

E. *In re Militello,* Cause No. DC-10-06211 (Dallas County District Court, 2015). Over $8.6 million awarded to settlor and beneficiary of revocable trust for bank's sake of trust oil and gas interest for below market value to allegedly lure in a high-profile banking prospect.

1. *Facts below excerpted from article by Korri Kezar in Dallas Business Journal (July 9, 2015).*

2. After losing both of her parents at age 7, Angela Militello was given several trusts made up of oil and gas assets. A national bank was appointed trustee, and a trust officer with the bank's oil and gas department served as Militello's personal trustee. In 1999, as one of the trusts was set to expire, the trust officer convinced Militello to keep the trust's properties in a bank account to be managed by the bank's oil and gas department. Without explaining why,

the trust officer urged Militello to sign documents allowing him to use her assets to create a revocable trust with the bank as trustee. The trust officer later admitted he encouraged Militello to keep her assets with the bank because it stood to profit from managing her assets.

3. In December 2005, Militello, in the midst of a divorce and mounting medical bills from an experimental lupus treatment, approached the trust officer to see if she could pull $200,000 from her assets. Miletello said she planned to use the money to pay down her debt and buy a home. The trust officer presented her with one option, to sell half of the interests in the trust he had set up for her in 1999. The trust officer told Militello he could sell the interests for around $300,000, although he later admitted that figure was only a guess. He rushed Militello to make a decision, telling her "the market is hot right now, but may not stay that way." Despite Militello being the beneficiary of five other trust accounts at Wells Fargo, the trust officer did not give her any other options to get the cash she needed, such as a loan, trust depletion, or trust investment. During 2006 and 2007, the bank sold all of Militello's revocable trust assets for a total of $530,000. The lawsuit alleged that the assets were undervalued and sold at a discounted rate to lure in a high-profile banking prospect.

4. Just over a year after buying the assets, that unnamed bank prospect sold them for more than $5 million. After the sales were made, the bank allegedly failed to finish the transactions, did not provide written sales or purchase agreements, and did not finish deeds for some of the properties sold until three years after the transaction. During that time period, the bank used Militello's account to accumulate income from the trust's assets for the assets' buyer. Although Militello did not receive the income, she was required to pay taxes on the money because it was kept under her name in the trust. Ultimately, Miletello spent $150,000 to resolve tax issues with the Internal Revenue Service stemming from the trust.

5. Militello's trust account was kept open until 2009, two years after the last asset was sold. Between 2007 and 2009, the bank allegedly took steps to conceal its activity in Miltello's account, refusing to provide statements or to answer her questions. The lawsuit estimated that the bank's activity cost Militello around $1.36 million, and it asked that Militello be compensated for exemplary damages, attorney's fees, and other non-economic damages such as mental and emotional pain and anguish.

6. The Dallas County, Texas district court entered judgment for Militello, found the bank had breached its fiduciary duties under the Trust Code, the common law, and under standards of both negligence and gross negligence, and awarded damages as follows: (1) actual damages of $1.3 million; (2) disgorgement of trustee fees of $30,000; (3) mental anguish damages of $1 million; (4) exemplary damages of $3.5 million; (5) attorneys' fees of $470,000; (6) if the bank unsuccessfully appeals, appellate attorneys' fees of $30,000; (7) if the bank unsuccessfully seeks review by the state supreme

court, additional attorneys' fees of $20,000; (8) prejudgment interest of $2.3 million; and (9) post-judgment interest at 5% annually.

F. ***Watkins v. PNC Bank,* 2015 Ky. App. Unpub. LEXIS 76 (2015).** Trust terms authorized bank trustee to retain, and acquire, bank's own stock in trust, and state law permitted investment in mutual funds.

1. Under her will, Nora created trusts for each of her children and their spouses, with local bank (that was eventually merged into a national bank) as trustee. She also directed that the trust for her son Thomas, who was a director of the bank, be funded with bank stock. After Thomas and his wife died without issue, Thomas's trust assets were added to the trusts for the other siblings, and the surviving child of a deceased sibling (then a trust beneficiary) sued the bank for retaining bank stock in the trust, acquiring additional bank stock, and investing in BlackRock mutual funds. The trial court granted summary judgment for the bank, and the beneficiary appealed.
2. On appeal, the Court of Appeals affirmed on the following grounds: (1) Nora directed the funding of the trust for Thomas with bank stock and gave the trustee the powers to invest in any type of securities and retain inception assets without regard to diversification; (2) the prudent investor rule recognizes any investment powers granted by the settlor; (3) because of the directives in the will, the bank did not violate the prudent investor rule in purchasing or retaining bank stock (including stock in the bank that was the successor in interest to the originally named bank); and (4) state law allows the trustee invest in a company established, owned, or controlled by the trustee or an affiliate, and therefore does not bar the bank from investing in the mutual funds even if it has an interest in the funds.

G. ***In re Morriss Trust,* Case No. 12SL-PR03035 (St. Louis, Missouri Probate Court, September 30, 2015).** All co-trustees breached their fiduciary duties by enabling a beneficiary co-trustee, who was prohibited by the trust terms from making trust decisions for his own benefit, to pledge all of the trust assets as collateral for a personal loan to finance his personal private equity investments.

1. Mary Burton created a trust that became irrevocable upon her death in 1983 (the Burton Trust), after which Mary's daughter, Barbara, Barbara's husband Reuben, and a local bank served as co-trustees. In 1998, Barbara and Reuben appointed a national bank (or its predecessor banks) as successor corporate co-trustee, and in 1999 Barbara's son, Douglas, succeeded Reuben as co-trustee. Barbara's daughter did not serve as a co-trustee.
2. The trust provided for discretionary distributions to Barbara, her husband, and her descendants, with primary consideration given to Barbara's needs, and granted Barbara a testamentary limited power of appointment (with unappointed assets in continued trusts for her descendants). The trust terms granted the trustees broad fiduciary powers, but provided that "no individual Trustee…shall have the power to participate in any decision concerning payment, use or application of principal or income..for his or her own benefit".

3. Starting in 1996 (before the national bank was appointed as co-trustee), Barbara and Reuben invested in private equity investments organized by Douglas, the web of which was referred to as the "Morriss Family Office", and either signed the papers directly or expressly authorized Douglas to sign on their behalf. In connection with their personal investments, they obtained millions of dollars in loans that they secured with the trust assets. From 1997 until 2001, Barbara and Reuben signed numerous documents that authorized Douglas to make investments on their behalf personally and for the Burton Trust, including a 1999 power of attorney giving Douglas complete authority over Barbara's affairs.
4. In 1999, after being appointed as successor co-trustee, the bank hosted several meetings to discuss the trust activities, the investment strategies, and the related risks variously with the family, their financial and accounting advisors, their spouses, the CFO of the Morriss Family Office, and the family's counsel. Memoranda of the meetings noted the family's approval of Douglas's ability to manage the proposed leverages investment program established for the trust despite the risks, although the family later disputed the details of the many meetings.
5. In 2000 and just three months after Douglas became co-trustee, the bank gave Douglas personally a line of credit of up to $40 million so that he could finance his personal investments in private equity investments. The loan was secured by the assets of both the Burton Trust and the Morriss Trust. Douglas alone signed the agreement securing the loan by the trusts. Barbara and the bank, as co-trustees, did not sign the security agreement. Douglas promptly withdrew $20 million, $14 million of which refinanced another debt secured by the trust assets owed to Bank of New York, with the balance paid to the national bank to retire other debt, to pay margin calls on investments owed to the bank, and to pay the bank $40,000 in fees. Douglas caused his lawyers to write to the bank opining that the trustees had the authority to pledge the trust assets as security for the debt, provided (a) the trustees comply with the Prudent Investor Act, (b) the loan is an arm's length transaction and generates a reasonable return, and (c) the trustees determine a sufficiently low risk of non-payment.
6. At that time, the trust assets were made up of marketable securities and bonds, all of which were liquidated incurring significant capital gains tax liability, with the proceeds reinvested in money market investments that diminished the income realized by the trust. Barbara and Douglas as co-trustees directed in writing the liquidation and confirmed authorization of prior sales, and Barbara granted Douglas permission to direct the sale of the equities.
7. The loan was renewed in 2001 and 2002, with Douglas alone signing the new security agreements. The loan was renewed in 2004, but this time with Barbara and the bank signing the replacement security agreement. Barbara certified in writing her authority to pledge the trust assets, and the family's counsel gave the bank a legal opinion that the trustees could pledge the trust

assets as security for the personal loan to Douglas, but excluded any opinion of the issue of compliance with fiduciary duty requirements. The loan was renewed in 2005, four times in 2006, and in 2007, 2008, and 2009, each time with the security agreements signed by Barbara and the bank. During this time, the loan balance decreased, including in 2005 when, on Douglas's instructions, the bank debited the trust account to pay the loan down by $10 million, leaving a balance of $15.7 million. In 2006, both Barbara and Douglas in writing ratified the $10 million debit. By 2010, the loan was in default, and in 2011 the bank exercised the right of set-off and applied all of the remaining Morriss Trust assets against the balances, but did not seize the Burton Trust assets (but classified them as restricted assets). The bank was removed and replaced as corporate co-trustee in 2013, at which time the Burton Trust assets were reduced to $2 million, having sustained a loss of $17.8 million.

8. In 2012, Barbara sued the bank as both beneficiary and co-trustee of the Burton Trust. The bank counterclaimed against Barbara for contribution. Barbara also brought claims at law arising out of the same transactions against the bank for breach of fiduciary duty, conspiracy, and breach of the Uniform Fiduciaries Law, in connection with her own revocable trust (the Morriss Trust), for which the bank was not a trustee. The Morriss Trust claims were tried to a jury that awarded the Morriss Trust $45 million in actual damages and $32 million of punitive damages. The court denied a jury trial for the claims against the bank as co-trustee of the Burton Trust on the grounds that: (1) trusts are creations of equity, the UTC incorporates the court's equitable jurisdiction, and the remedies of trust beneficiaries are generally equitable in nature for which a jury trial has not historically been available or guaranteed by the Missouri Constitution.

9. The court held that the claims were not barred by any limitations on the grounds that: (1) credible evidence that financial statements were sent to Douglas at his business address, and not to Barbara directly; (2) the trust and the bank's position as trustee did not end prior to the filing of the suit; and (3) the suit was filed within the 22-year limitations period following the earliest possible "repudiation" of the trust in 2004, in the form of a "hostile conveyance of the trust assets", when the bank first executed the renewed security agreement pledging the trust assets as security for the loan.

10. The court concluded that Douglas breached his duties as co-trustee of the Burton Trust on the grounds that:

    a. he pledged the trust assets as collateral for a personal loan and breached his duty of loyalty to the trust, other than to the extent of the $14 million of the loan proceeds that were applied to retire a prior existing debt also secured by the loan assets;

    b. the record was silent on any benefit to the Burton Trust from the loan; (3) the trust terms prohibited Douglas from participating in any trustee action for his own personal benefit;

    c. Barbara and the bank did not participate in the original loan documents (and their later signing of replacement agreements was in the court's opinion "too little, too late" due to the substantial funding of the loan and already present risk of default);

d. the loan did not further a trust purpose, there were no notes evidencing a loan from the trust to Douglas, the trusts were not granted an interest in Douglas's investments, and no benefits inuring to the trust as consideration for the security interest;

e. the legal advice provided about the need for an arm's length transaction, a reasonable rate of interest, and low risk of non-payment was not followed; and

f. Douglas "simply took Trust assets as his own".

11. The court held that the complaint concerning the imprudence of liquidating the trust investments does not add to the disposition of the case because the loss to the trust was the result of the security interest, but concluded that the liquidation was a breach of the duty to impartially and prudently invest the trust assets on the grounds that: (1) the only credible explanation for the complete liquidation of the trust assets was evidence that the money market investments increased the amount that Douglas could borrow using the trust assets as collateral; and (2) the liquidation was another aspect of the loan transaction, and was a breach of Douglas's duties of good faith and loyalty.

12. The court held that the bank breached its duties as co-trustee of the Burton Trust on the grounds that:

a. the bank participated in Douglas's breach of trust by allowing him to act as co-trustee contrary to the trust terms and without participation by the co-trustees;

b. failing to consider the risk to the other beneficiaries from pledging the trust assets as security to finance Douglas's personal private equity program;

c. protecting its position as lender rather than protecting the beneficiaries;

d. failing to follow legal advice provided;

e. allowing the transactions despite harboring reservations as evidenced by the multiple meetings held with the family and their advisors;

f. the absence of any credible justification for making the loan to Douglas personally;

g. Barbara's own breaches as co-trustee rendered it impossible for her to bind other beneficiaries to any ratification of the bank's actions by her, which the bank could have reliably discovered by communicating with her, but the bank failed or refused to communicate directly with Barbara, and only communicated with Douglass or his employees;

h. as a professional fiduciary, the bank was required to exercise a higher standard of care and avoid enabling Douglas to commit a breach of trust, or to prevent it; and

i. the bank participated in, approved, acquiesced in, and neglected to compel Douglas to redress the breach of trust by Douglas.

13. The court held that Barbara breached her duties as co-trustee of the Burton Trust on the grounds that:

a. no evidence suggested Barbara lacked capacity at any time;

b. she abdicated performance of her duties and responsibilities as co-trustee, including her non-delegable duties to review the actions of co-trustees and redress a serious breach of trust;

c. she did not properly delegate any duties as co-trustee to the bank due to a lack of any formalities in the claimed delegation and lack of agreement by the bank to accept a delegation;

d. she delegated broad power to Douglas without any limitations on that power, contrary to the trust terms, the intent of the settlor, and trust law that does not contemplate a complete abdication of a co-trustee's duties without limit or definition, including a broad power of attorney signed just 3 months before the loan to Douglas;

e. the power of attorney authorized Douglas to take action that was contrary to the trust terms expressly limiting his powers; and

f. Barbara enabled Douglas to breach the trust and participated in his breach through numerous signed direction letters (despite her claims that she never read any of the documents, no one explained them to her, and she was only presented signature pages and not complete documents).

14. The court barred Barbara from recovering from the bank as a trust beneficiary. Douglas was not joined as a defendant in the action, and purportedly disclaimed his interest in the trust. The court held that any liability awarded would run in favor of Barbara's daughter and grandchildren (including Douglas's descendants). The court allowed Barbara to represent the trust beneficiaries as a party to the litigation despite her breaches as co-trustee because she sought payment into the trust and not to herself personally, and denied dismissal for failure to join indispensable parties.

15. Douglas obtained Federal bankruptcy protection, and Barbara elected to pursue recovery only from the bank (although the bank counterclaimed for contribution). Following the jury's allocation of 25% of fault to Barbara on related Morriss Trust claims, the court allocated 25% of the bank's fault to Barbara. The court also found against Barbara, Douglas, and the bank as co-trustees on the claims of civil conspiracy. The court dismissed claims under the Uniform Fiduciaries Law because the pledge was governed by the UCC and that law. The court rejected claims for punitive damages on the grounds that: (1) the private equity program commenced before the bank's appointment; (2) some loan proceeds retired prior loans to another institution; (3) the bank met several times with the family and their advisors; (4) legal opinions were received; (5) the trust terms authorized loans generally; (6) Barbara signed numerous documents purporting to authorize

the bank's actions; and (7) there was not convincing evidence that the bank acted with an evil motive or reckless indifference.

16. The court entered judgment against the bank in the favor of the trust in the amount of $17.8 million, and ordered that Barbara be excluded from participating in those assets as beneficiary due to her breaches of trust. The court awarded the bank contribution from Barbara in the amount of $5.9 million.

VI. DISTRIBUTIONS.

A. *Wells Fargo Bank v. Cook,* 332 Ga. App. 834 (2015). Trustee not liable for exhaustion of CRAT assets from payment of annuity to settlors, where regular statements ran short statute of limitations, there was no evidence of breach of duty and the depletion came from the annuity payments and market conditions, and the trust terms eliminate any claim of a contract to guarantee the annuity payments would last for the lifetime of the settlors.

1. Gail Cook (who had an MBA and was a certified financial planner) and her husband Lance Lipman received gifts of 12,000 shares of Analog Devices stock from Gail's uncle, with a 2000 market value of $1.9 million. After talking with their lawyer, they decided to put the stock into a CRAT. The bank recommended a 7.5% annuity payable to the settlors, they agreed, and the attorney drafted the trust accordingly. The CRAT was funded on February 25, 2000 with the stock at a value of $1.9 million, and with an annuity payment of $142,818 annually. Three days later the bank, as trustee of the CRAT, sold all of the stock and diversified the investments, and at that time the stock had already dropped $225,000 in value. The settlors deferred $335,796 in federal income taxes and received a charitable deduction of $203,012. The trustee distributed $142,818 annually to the settlors until 2011, when the trustee distributed the final $76,000 of trust assets to the settlors and closed the trust account upon trust exhaustion. Throughout the administration, the bank sent trust statements to the settlors, quarterly, sometimes monthly, and annual basis.

2. In 2002, Gail expressed concern about the decline in the trust and retained counsel. Counsel wrote to the bank in 2003 with concerns, and claimed that the bank had guaranteed that the trust would provide the annuity payments to the settlors for their entire lifetimes, which the bank rejected. The settlors and their counsel met with the bank in 2004, and the bank continued to reject the claim that the bank had guaranteed the lifetime payments. The settlors sued the bank in 2012, the bank denied liability, and the trial court denied both sides' motions for summary judgment.

3. On appeal, the Georgia Court of Appeals reversed the trial court in part and granted summary judgment for the bank on all claims, on the following grounds:

    a. Georgia, like a comparable provision of the Uniform Trust Code (the state has enacted parts, but not all of the UTC), provides for a 2 year statute of limitations upon adequate disclosure of a claim against the trustee for breach of trust, and provides that a written report adequately discloses the claim if it provides sufficient information so that the beneficiary knows of such claim or reasonably should have inquired into the claim;

b. while the limitations may be tolled for fraudulent conduct, there were no claims of tolling in the case;

c. a "report" is not defined in the code, but Georgia courts have established standards requiring showing the assets, liabilities, receipts, disbursements, actions, and other details;

d. the bank's detailed trust statements, sent regularly, stated the investments, all transactions and disbursements, an account summary, all gains and losses, income and dividend receipts, yields of the funds, and beginning and ending balances, all of which showed the value of the trust declining over time;

e. the statements contained sufficiently detailed information to inform the beneficiaries of potential claims based on the alleged failure to follow their investment objectives and mismanagement of the trusts;

f. the beneficiaries' own conduct, in hiring counsel and approaching the bank with complaints, evidences that the adequacy of the notice;

g. the regular periodic trust statements met the requirements of a report to run the shortened 2-year statute of limitations on claims, and all claims beyond that time period are barred (and the court rejected the theory that the harm was not suffered until the trust ran out of money, and that there was some sort of continuing tort);

h. any breach claim related to investments accrued when the stock was sold in 2000 after the sharp decline immediately after funding of the CRAT, or when the proceeds were reinvested;

i. the claims that are not time barred fail to state a claim, because a trustee is not a guarantor of the value of the trust and is not liable for depreciation unless caused by a breach of duty;

j. the decline in value came from trust distributions to the settlors and general market conditions, and there was no proof of any other causes, or proof that the losses could have been avoided; and

k. the trust terms preclude any claim that the bank had contractually promised to pay the annuity payments to the settlors for their lifetimes, regardless of the assets available in the trust.

B. *Hamady v. Hamady,* 2015 Mich. App. LEXIS 1515 (Unpublished, 2015). Beneficiary's power of withdrawal is not subject to trustee's discretion unless trustee properly exercises power to postpone granted under trust terms.

1. Ernest and Sona Hamaday established trusts for their son Charles, with their other son Bruce as sole trustee. The trustee had discretion to distribute trust principal, and the trust terms also provided that the trustee was authorized (but not required based on the power to postpone distributions) to distribute

trust principal to Charles, even to the point of exhaustion, as Charles requested in writing during his lifetime. The trust authorized the trustee to postpone the withdrawal right if the trustee, in its discretion, determined a compelling reason to postpone, such as disability, divorce, creditors, serious tax disadvantage to Charles or his family, or similar substantial causes.

2. Charles sued to remove Bruce as trustee, and exercised his right to withdraw $5,000 per month until the trust was exhausted. The trustee asserted that Charles's withdrawal right was subject to his discretion as trustee. Charles petitioned the court, and the court agreed that the withdrawal right was subject to the trustee's discretion. Charles appealed, and the court of appeals reversed on the following grounds:

   a. once Charles made a request for distribution, the trustee must grant the request unless the trustee reasonably determines under the power to postpone that there is a compelling reason to postpone;

   b. it would render the withdrawal right meaningless to superimpose the discretionary distribution standard onto the withdrawal right;

   c. only the power to postpone applies as a limit on the withdrawal right;

   d. the beneficiary does not have to justify his withdrawal, but the trustee must justify postponement;

   e. the estate planning concerns of Charles are not a reason to postpone, since the distribution itself would not cause an estate planning problem, and the speculative effect of estate tax law at Charles's death is not adequate to justify postponement; and

   f. whether this interpretation of the trust would cause Charles to have a general power of appointment for estate tax purposes it not grounds for a different interpretation that varies from the plain reading of the trust terms.

C. *Engle v. Regions Bank,* 2015 U.S. Dist. LEXIS 389 (S.D. Miss. 2015). Directions of non-beneficiary mother of minor beneficiaries do not bar claims against trustee for distributing trust assets to mother contrary to trust terms.

1. Paul Engle died in 1996, and under his will created a trust for his minor children with bank as trustee. The trust assets were exhausted by 2009. In 2013, the children sued the trustee, alleging the trustee had provided their mother (not a beneficiary and not named as trustee) with monthly income from the trust that bore no relation to their needs, did not assess their needs, and did not follow the trust terms. The children did not know about the trust until 2012 when their grandmother told them about it.

2. The trustee removed the case to federal court on diversity grounds, and moved for summary judgment dismissing the claims. The court refused summary judgment on the following grounds:

   a. The statue of limitations was tolled while the children were minors;

b. The statute was further tolled by the discovery rule until the grandmother informed them about the trust;

c. Notices provided to and directions to distribute by their mother do not (under a now repealed state statute providing that notice to a parent or a direction by a parent binds a minor child) bar the claims where the trustee failed to give notice even after the children turned age 21, it is not clear the statute applied when the interests of the parent diverge from the child, the settlor may not have trusted the mother with financial affairs (by not naming her as trustee), and the intent of the settlor is controlling; and

d. Bank trustee fees are earned in exchange for promising settlors that their intent will be honored, and banks cannot disregard a settlor's intent and allow a surviving parent to draw down funds to the detriment of the beneficiaries.

D. *Daniel L. Hemphill v. Jay F. Shore*, Trustee of the Shore Family, 2015 Kan. App. Unpub. LEXIS 51 (Court of Appeals of Kansas January 23, 2015). Trust liquidation and distribution to purchase house for beneficiary was not constructive fraud.

1. In 1984, Lee and Linna Shore created the Shore Family Trust with their children Jay and Susan as Co-Trustees. The beneficiaries of the Trust were Jay, Susan, their spouses, and any children subsequently born to them. The trust terms provided that the trustee could make distributions to the beneficiaries for their health, education, maintenance, or support. In 1992, Susan died survived by her son, Daniel, who was born in 1987. Jay as surviving Trustee had a discussion with Lee and Linna, and the three of them decided to liquidate the trust. Jay then used the liquidated trust proceeds to purchase a house for himself. In 2009, Daniel discovered there once was a trust and that the trust was liquidated.

2. Daniel filed a claim for breach of trust against Jay for selling all of the assets and buying a house without providing notice to Daniel. The district court found that Daniel's action was barred by the statute of limitations. The Supreme Court reversed and directed the district court to review whether a constructive fraud had occurred in liquidating the trust.

3. On remand, the district court found that although the action was not time-barred for constructive fraud because Daniel had filed his claim within two years of his knowledge that the trust had existed, the liquidation and purchase of the house was an acceptable distribution under the trustee's discretion, on the grounds that the house purchased provided shelter, and the trustee could distribute trust assets for support and maintenance. Jay moved to have his attorney's fees assessed against Daniel, and the district court issued attorney's fees in the amount of $35,000 against Daniel.

4. Daniel appealed, and the court of appeals reversed the attorney's fees award on the grounds that: (1) under the Kansas Uniform Trust Code, a court may award attorney's fees, costs, and expenses to any party to be paid by another party or from the trust that is the subject of controversy as justice and equity may require; (2) Daniel brought a case that the Supreme Court of Kansas

deemed to be appropriate and the district court found was timely, and to award attorney's fees in this type of action would have a chilling effect on those persons seeking access to the court as a legal remedy to justifiable claims.

VII. REVOCABLE TRUSTS.

A. ***Trzop v. Hudson,* 2015 IL App. (1st) 150419 (2015).** Court recognizes standing by remainder beneficiaries of revocable trust to bring tort claims against daughter during settlor's lifetime, arising out of father's trust amendment, despite father's motion to dismiss claims for lack of standing.

1. In 2007, Zygmunt and his wife Jadwiga created a joint revocable trust. After his wife's passing, Zygmunt, who was 92, amended the trust to eliminate all but two of the remainder beneficiaries, leaving only his daughter Anna and son Marian as remainder beneficiaries, and eliminating nine other remainder beneficiaries. The primary trust asset was the family home, which passed to Anna under the original trust, and passed to Anna and Marian under the amended trust. The amended trust eliminated the cash gifts to other family members at Zygmunt's death, and at the time of the amendment the trust only held the family home. The amended trust also included a no-contest clause.

2. Zygmunt's signature on the amendment was "shaky", and the amendment was prepared by Anna's attorney. Zygmunt only spoke Polish, and communicated with the attorney through Anna, and relied on Anna to read the documents to him. The document execution was videotaped. A month after the amendment, the excluded beneficiaries sued Anna (without naming Zygmunt as a party) to declare the amendment void, seeking damages from Anna, and for appointment of a successor trustee other than Anna, and included counts of undue influence, tortious interference with inheritance, and fiduciary fraud. The excluded beneficiaries alleged Zygmunt's poor health, residence with and dependence on Anna for care, and Anna's isolation of her father from the other family members. Zygmunt's deposition included some confusion about his family, eyesight problems, his language barriers, and his reliance on Anna now that his wife had passed. Zygmunt said he amended the trust because the trust assets no longer included cash for the cash gifts to other family members, his other children wanted to take everything from him, and because Anna took care of him and his son Marian was always good to him and his wife.

3. Zygmunt was granted leave to intervene in the suit, moved for summary judgment dismissing all of the claims against Anna claiming a lack of standing. Zygmunt later filed a motion to dismiss for lack of standing. The trial court dismissed all of the claims for lack of standing.

4. On appeal, the court of appeals reversed on the grounds that: (1) Zygmunt's motion to dismiss (the correct pleading for raising a lack of standing) followed his motion for summary judgment and discovery, and was not timely; (2) Anna did not plead lack of standing as the defendant of the claims for damages against her, and since Anna was the only defendant the time for

pleading lack of standing was based on Anna's pleading deadlines; and (3) even if Zygmunt's motion was timely, the excluded beneficiaries had an interest in the trust the moment it was created (the court completely failed to address Zygmunt's power to revoke the trust), notwithstanding it being contingent on the settlor's death; the fact that the settlor has not been proven to be incompetent does not control because that is a fact in contention in the case; and "a trust document by adults, who, everyone agrees, were competent when the trust was created, should be enough to confer standing".

B. *Tseng v. Tseng,* Case No. 120891165; A153639 (Oregon Court of Appeals, 2015). Under Oregon UTC, after death of settlor, the beneficiaries have the right to certain information about the administration of the trust before the settlor's death.

1. Patrick Tseng was originally from China, married Sunyun, and had 5 children in China from the marriage. In 1954, Patrick moved to the U.S., and believing his wife and children were dead, married Stella and had two children from the marriage. In 1979, Patrick discovered his family in China was alive, reconnected with them, and created a revocable trust naming his American children as trustees, and Stella and all seven of his children as beneficiaries.

2. Patrick died in 2009, the children from his first marriage learned from the trustees that most of the trust assets ($1.8 million) had been transferred out of the trust during Patrick's lifetime, and asked for information. Specifically, the children wanted to know whether the settlor authorized the lifetime time transfer (which would preclude any claims). The trustees refused to provide information, and the children sued to compel accountings and remove and surcharge the trustees. The probate court dismissed the claims and the children appealed.

3. On appeal, the Oregon Court of Appeals reversed the probate court and remanded the case on the following grounds:

    a. once a revocable trust becomes irrevocable, the Oregon UTC statute providing that only the settlor is entitled to trust information no longer applies;

    b. once the settlor dies, the trustee's general obligations under the UTC are no longer overridden and the trustee must provide the trust beneficiaries with whatever the UTC generally requires the trustee to provide to beneficiaries;

    c. as qualified beneficiaries, the children are entitled to be reasonably informed about the trust administration and the material facts to protect their interests;

    d. the beneficiaries have a statutory interest in the trust accrued before the settlor's death (despite not being a property interest), they have standing to enforce their rights after the death of the settlor, and the UTC defers their right to enforce those rights during the settlor's lifetime but does not preclude that enforcement after the settlor's death;

e. the beneficiaries' rights are simply deferred or postponed during the lifetime of the settlor;

f. the choices of the settlor may circumscribe those rights, since the settlor may bind all beneficiaries by his directions, consent, or ratification; and

g. the case should be remanded to determine what information is necessary for the children to protect their interests.

VIII. LIFE INSURANCE.

A. *Rafert v. Meyer,* 290 Neb. 219 (2015). ILIT terms cannot eliminate mandatory duties under UTC, and beneficiaries stated claim for breach of duties where drafting attorney serving as trustee gave insurance companies a false address for the trust, resulting in lapse of policies.

1. Jlee Rafert directed her attorney to prepare an ILIT to hold $8.5 million in insurance policies. The attorney did not meet with her to explain the trust terms. The attorney was named as trustee, and the trust terms purported to provide that the trustee had no duty to pay the insurance premiums or notify the beneficiaries of nonpayment of premiums, and no liability for nonpayment. Despite living in Nebraska, the attorney gave the insurance companies a false South Dakota address for the attorney as trustee. The attorney never received mail at the South Dakota address. Jlee paid the initial premiums totaling $260,000 in 2009. In 2010, the insurance companies sent premium due and risk of lapse notices to the trustee at the false address, and thereafter the policies lapsed. Following the lapses, Jlee paid an additional $250,000 to a corporation owned by the insurance agent, but the premiums were never sent to the insurers by the agent and the location of those assets was unknown. Jlee's children, as trust beneficiaries, sued the trustee, and the district court dismissed the suit on summary judgment based on the trust terms waiving the trustee's duties. The children appealed.

2. On appeal, the Nebraska Supreme Court reversed summary judgment for the trustee on the following grounds:

   a. under the Nebraska UTC, the trustee has non-waivable duties to act in good faith and to keep the trust beneficiaries reasonably informed, an exculpatory clause is unenforceable to excuse actions taken in bad faith or with reckless indifference despite the trust terms, and an exculpatory clause inserted by the trustee is invalid unless the trustee proves it is fair and was adequately communicated to the settlor, despite the trust terms;

   b. notice of nonpayment of premiums would have had a profound effect on the interest of the beneficiaries;

   c. the trustee admitted providing the insurance companies with a false address, with the result being notices of lapse not reaching the parties;

   d. the beneficiaries have alleged sufficient facts for claim of bad faith action or reckless indifference;

e. this is not a situation where a gratuitous trustee with no involvement in the trust drafting or the trust administration, and the trustee's duties must be viewed in light of the trustee's involvement as the drafting lawyer;

f. the trustee as attorney did not adequately communicate any exculpatory provisions to the settlor;

g. a trustee acting in good faith would inform the beneficiaries of the risk of lapse, and his actions prevented the beneficiaries from acting to protect their interests; and

h. the duty to inform the beneficiaries arose when the insurers issued notices of nonpayment.

IX. DAMAGES & REMEDIES.

A. *Miller v. Bank of America, N.A.,* 2014 NMCA 053 (New Mexico Court of Appeals 2014); 2015 N.M. LEXIS 159 (2015). Trustee breached duties by investing in nonproductive commercial real estate and borrowing from an affiliate to generate phantom income to distribute to the beneficiaries, and measure of damages should include both inflation adjustments and prejudgment interest without reduction for the phantom interest distributed to the beneficiaries. On appeal to the state supreme court expanded the damages to also include disgorgement of profits, which the court of appeals had rejected.

1. Under his will, Rudolph Miller created a marital trust and a family trust. The bank became trustee in 1985 and administered them until they terminated in 2004.

2. In 1991, the trust assets consisted of real property in Virginia, Hawaii, and New Mexico. Although the trustee had little experience with commercial property management, in 1991 the trustee acquired a commercial building in Albuquerque for the trust. The will provided that the trustee could not invest in unproductive property, but could retain unproductive inception assets. Before 1995, the purchased property became unproductive and a drain on the other trust assets. The drain on the trust assets was not communicated to the beneficiaries.

3. Despite the trust officer suggesting exploring sale of the property, the bank ultimately recommended borrowing $395,000 to renovate the building, and advocated selling the other properties to reduce the loan balance. The beneficiaries did not object to the plan. The bank borrowed from its affiliate more than the $395,000 disclosed to the beneficiaries, sold the other properties, but did not apply the sales proceeds to reduce the debt. Rather, the bank invested $800,000 into the building and generated "phantom income" that it distributed to the beneficiaries (the trust terms did not permit distribution of principal).

4. The trial court found that the trustee breached its duties and awarded a surcharge, but for less than the amount sought by the beneficiaries. Both parties appealed.

5. On appeal, the court of appeals affirmed the determination of liability but reversed the court on the measure of damages on the following grounds:

   a. The trial court based its findings on at least eight trustee duties, the bank only contested four of them and conceded its duty to not invest in unproductive property, the trial court did not correlate any particular breach with a portion of the damage award, and a breach of any one was sufficient to cause the damages to the beneficiaries;

   b. The bank could not establish consent or ratification by the beneficiaries because they had limited information about the bank's actions, had many unanswered questions, the bank misrepresented the value of the property on the books, the bank did not communicate that the property was draining trust assets, did not communicate its lack of experience in managing commercial real estate, and did not challenge the trial court's findings supporting the inference that the beneficiaries did not give informed consent; the trial court erred by not including in the damage award an inflation adjustment of 33.5% (set by expert testimony) for 1991 to 2003 to restore the trust to its position in the absence of the trustee's breach, and the inflation adjustment is not duplicative of prejudgment interest. Inflation adjustments keep the beneficiaries whole for the changes in the value or purchasing power of the dollar, whereas interest compensates beneficiaries for the lost use of the property;

   c. The trial court erred by reducing the compensatory damages by the amount of income (or $400,000 in phantom income) distributed to the beneficiaries because the trustee breached the trust terms by distributing the phantom income (which was actually principal) to the beneficiaries, the real return on the assets was negative, no evidence was offered to show that the $400,000 in phantom income exceeded the amount that would have been distributed to the beneficiaries in the absence of the breach, and the beneficiaries did not pursue damages for lost income in which case income actually received would be part of the damage calculation; and

   d. The court correctly denied additional damages for disgorgement of profits made by the bank through its loan from its affiliated lender because the disgorgement would be double recovery under the damages calculation as adjusted by the court of appeals to include inflation adjustment.

6. All parties appealed, the New Mexico Supreme Court granted only the beneficiaries appeal, and then reversed the Court of Appeals on the denial of disgorgement of profits damages, and remanded to the trial court on the following grounds:

   a. The New Mexico UTC, consistent with the uniform law and its comments, requires in Section 802 (Duty of Loyalty) that a self-dealing transaction is voidable by the beneficiaries, and voiding the transaction will require the trustee to disgorge profits from the transaction;

b. UTC Section 1003(A) provides that a trustee is accountable to the beneficiaries for any profits made from the administration, even absent breach of trust, which is consistent with the Restatement (Second) of Trusts;

c. UTC Section 1002(A) (Remedies for breach) does not conflict with this conclusion, despite the use of the word "or" in between the listing of remedies;

d. Therefore, the UTC prohibits a trustee from retaining personal profits and requires a trustee to disgorge all personal profits;

e. Loss to the beneficiaries and profit by the bank are distinct harms that give rise to different damages, each has its own remedial purpose, disgorgement is not intended to compensate beneficiaries bur rather to prevent unjust enrichment and deter misconduct, and disgorgement is not limited to the beneficiary's losses;

f. A damage award including both loss in value from breach and disgorgement of profit if not a double recovery and may be justified, but it is not a punitive remedy and must be premised on wrongful conduct and extends only to the amount of gain the defendant derived from the conduct; and

g. Because the trial court's method of calculating damages was unclear, the case must be remanded to determine whether the calculations already took into account the $540,000 of mortgage interest and loan fees, which would be the measure of disgorged profits.

B. *Myers v. Myers,* 2015 U.S. Dist. LEXIS 142339 (2015). Federal judge imposes gate keeping order to bar repetitive suits over probate estate.

1. Bernard Myers filed four lawsuits related to his claim that his father's estate was stolen from him through allegedly forged documents. He sued the executor for presenting the documents for probate, family members for forgery or allowing the forgery, the city for notarizing the documents, and lawyers for withholding the documents or failing to investigate his claims. All of the claims were dismissed either through summary judgment, for being time barred, or for various other defects. Bernard then brought his claims again against all of the defendants in a fifth lawsuit, and the defendants moved to dismiss the claims and impose filing restrictions. Court orders charging Bernard with attorneys' fees did not deter the repetitive filings.

2. Bernard moved to withdraw his lawsuit voluntarily and promised not to file additional claims, and the defendants opposed voluntary dismissal and insisted on sanctions. The court dismissed all of the claims with prejudice. The court imposed restrictions on Bernard's ability to file future claims on the grounds that:

   a. courts may regulate repetitive, successive, and meritless filings;

   b. restrictions are warranted to address an abusive and lengthy litigation history, so long as the restrictions provide the plaintiff with guidance on what he must do to file an additional suit, and give him an opportunity to object to the restrictions before they are imposed;

c. Bernard has filed repetitive lawsuits that have been dismissed with prejudice, has not been deterred by court admonitions or attorney fee awards;

d. the court does not have to accept his promises not to file additional suits, and to avoid unnecessary and abusive future litigation, Bernard may not file a future *pro se* lawsuit in this court without advance permission obtained upon petition to the court; and

e. in the petition for permission, Bernard must provide the complaint he desires to file, a list of all other lawsuits he has filed in any court and their underlying facts, and a list of all outstanding injunctions or other orders limiting his access to any court.

X. THIRD PARTY LIABILITY.

A. *Bain v. McIntosh*, No. 14-13836 (11th Cir. Mar. 2, 2015). An attorney retained to represent a trustee does not owe a fiduciary duty to the trust beneficiaries.

1. Dorothy Walther was the income beneficiary of the James Walther Revocable Life Insurance Trust. One of her sons, Patrick Walther, had been the sole trustee of the trust since 1994. Another of Dorothy's sons, Howard Walther, was a contingent remainder beneficiary of the trust.

2. Beginning in 2009, following a family dispute, Dorothy and Howard brought multiple suits against Patrick in state court, including a 2010 action to remove Patrick as trustee and require that he make income payments to Dorothy from the trust. Dorothy and Howard alleged that Patrick failed to file annual accountings, as required by Florida law, for 17 years. They also alleged that Patrick transferred $702,000 from the trust to himself, his brother Robert Walther, and other family members in violation of his fiduciary duties, and that his trustee's fee exceeded the 5% rate provided for by the trust. Attorney Steven Kane represented Patrick in his capacity as trustee and was paid with funds from the trust.

3. Dorothy and Howard also filed suit in federal court against Mr. Kane and his firm, claiming that Mr. Kane breached his fiduciary duty by failing to render true and honest accountings about the activities and transactions of the trust.

4. The district court granted summary judgment to the defendants. It held that Mr. Kane and his law firm owed no fiduciary duty to Dorothy and Howard as beneficiaries of the trust. The court noted that the undisputed evidence indicated that Mr. Kane was retained solely by the trustee.

5. Dorothy and Howard argued that the fiduciary exception to a trustee's assertion of attorney-client privilege established a duty owed to them by Mr. Kane. The court rejected this argument because Florida does not recognize the fiduciary exception. Fla. Stat. § 90.5021(2) ("[O]nly the person or entity acting as a [trustee] is considered a client of the lawyer.").

6. The Eleventh Circuit affirmed the district court's decision. It cited the Florida statute identified by the district court, as well as the Rules Regulating the Florida Bar, which indicate that the attorney for the personal representative does not also represent the beneficiaries, and an American Bar Association opinion stating that "[t]he majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries." The court therefore held that Mr. Kane did not owe a fiduciary duty to Dorothy and Howard as beneficiaries of the trust.

XI. LIMITATIONS AND VARIOUS OTHER DEFENSES.

A. *Litevich v. Legalzoom,* 2015 Conn. Super. LEXIS 1702 (2015). Beneficiary under unexecuted online will has standing to bring tort claims against Legalzoom arising out of alleged incorrect instructions accompanying online will.

1. Carole Berger was a clinical researcher at Yale medical school. She used Legalzoom to prepare a will giving her estate equally to a contractor with whom she had become friendly and to a co-worker. The will was mailed to her on July 11, 2011 along with instructions for execution. On July 14th, Carole become ill, was admitted to Yale hospital, and asked her co-worker to bring the will to her so that she could execute it, and assist with the execution. Based on the instructions provided by Legalzoom, Carole and her co-worker assumed they needed to have the self-proving affidavit notarized in order to validly execute the will. They were unable to find a notary before Carole become incapacitated, and Carole died on July 25th without executing the Legalzoom will. Carole's previous will was probated, and probate of the Legalzoom will was denied by the probate and appeal of that decision was denied.

2. The contractor sued Legalzoom for the unauthorized practice of law, and for tort claims and violation of the unfair trade practice act arising out of the allegedly erroneous execution instructions. Legalzoom moved to dismiss all of the claims for lack of standing. The court dismissed the unauthorized practice of law claims for lack of standing because the claims were not brought by a member of the state bar in that capacity (rather than as representing the contractor). The court refused to dismiss the balance of the claims, and found that the contractor had alleged standing to bring the claims as an intended or foreseeable beneficiary, on the grounds that he has alleged a specific, personal, and legal interest, namely the alleged inheritance, that has been injuriously affected by Legalzoom's alleged failure to properly advise Carole about what was required to execute the will.

B. *Foiles v. Foiles (In re Estate of Foiles)*, 2014 Colo. App. LEXIS 1334 (Colo. Ct. App. 2014). Ratification by independent co-trustee does not cure actions by beneficiary co-trustee for his own benefit, and contrary to trust terms.

1. Ruth and Clyde Foiles created the Ruth Foiles Trust and the Clyde Foiles Trust, respectively, each holding one-half interests in certain jointly held real property along with other assets. Ruth Foiles served as trustee of the Ruth Foiles Trust. After Clyde Foiles death, Ruth Foiles, Ruth and Clyde's son, Larry Foiles and Farmers State Bank of Fort Morgan (the "Bank") became co-

trustees of the Clyde Foiles Trust. Larry Foiles, Larry's children, and the settlors' grandson, Gregory Foiles (and Larry's nephew) were named as beneficiaries of both Trusts.

2. The Clyde Foiles trust instrument prohibited Larry from exercising any powers as trustee that were directly or indirectly for his own benefit, requiring instead that any such actions be taken by the Bank. Gregory Foiles brought suit contesting two transactions made by Larry Foiles, in his capacity as co-trustee of the Clyde Foiles Trust, wherein the two trusts exchanged farm property of the trusts for an apartment property, and later, exchanged the apartment property owned by the trusts for farm property owned individually by Larry Foiles (IRC Section 1031 exchanges). The trust instrument provided that when the trusts terminated, Larry Foiles would receive all farm property held in the trusts and the co-beneficiaries would receive all non-farm property. After a trial, the lower court held that neither transaction constituted a breach of fiduciary duty by Larry Foiles. Gregory Foiles appealed.

3. The Court of Appeals of Colorado held that Gregory Foiles established a *prima facie* case of breach of fiduciary duty because Larry Foiles was prohibited from effectuating the transaction under the terms of the Clyde Foiles Trust. The court found that the Bank had in fact ratified its co-trustee's actions but that this did not preclude a finding that Larry had breached his fiduciary duties. The court noted that the second 1031 Section Exchange could potentially benefit Larry by allowing him to transfer property that was not farm property out of the trust to himself, in exchange for transferring farm property into the trust, which Larry would ultimately receive on termination of the Clyde Foiles Trust. Accordingly, Larry was prohibited from participating in such a transaction under the terms of the Clyde Foiles Trust and the Bank was required to undertake the transaction in order for it to be validly exercised under the trust instrument.

4. The court then examined whether the after-the-fact consent of a co-trustee to a transaction that would contravene the terms of a trust instrument if not conducted by the co-trustee, could constitute ratification of the transaction and, if so, if the after-the-fact ratification by a co-trustee could cure non-compliance with the terms of the trust agreement in the absence of ratification by the trust beneficiaries, both issues of first impression in Colorado.

5. The court held that "in the absence of a trust provision allowing ratification by a co-trustee of otherwise invalid actions, only the consent of all beneficiaries who have proper capacity and are fully informed of the facts can ratify an action taken in violation of a trust agreement, and that ratification by a co-trustee is insufficient." The court found no authority indicating that a co-trustee can ratify an action of a trustee that violates the terms of the trust and was prohibited in the first place. The court reversed and remanded the matter for the trial court to make additional findings as to whether Larry Foiles met his burden to go forward with some evidence that the Section

1031 Exchange was fair and reasonable and ultimately whether he was liable for breach of fiduciary duty in connection with that transaction.

C. *Benson v. Rosenthal,* 2015 U.S. Dist. LEXIS 89238 (E.D. La. 2015). In dispute about ability of Louisiana settlor of Texas trust to substitute New Orleans trust assets for promissory note, Texas trustee has sufficient jurisdictional contacts with Louisiana.

1. Thomas Benson created various irrevocable Texas trusts for the benefit of his daughter Renee and his grandchildren. The trusts were funded with interests in LLCs that own New Orleans assets, such as the New Orleans Saints and Pelicans, the local Fox affiliate, local automobile dealerships, Benson Tower, Champions Square, the Smoothie King Center, and a lease of the Superdome. Thomas created the trusts while living in Texas, and named a Texas lawyer as trustee.
2. In 2005, Thomas sought to exercise his right to exchange the trust assets for unsecured promissory notes, and the trustee objected on the basis that the assets were not of equivalent value. Thomas sued in federal court in Louisiana to compel the exchange, and the trustee moved to dismiss for lack of personal jurisdiction.
3. The federal court in Louisiana found that the court had specific personal jurisdiction over the trustee on the following grounds: (1) the trustee attended monthly meetings with the trust beneficiaries in Louisiana; (2) the New Orleans Saints and Pelicans paid the lawyer's firm a monthly retainer of $25,000 as payment in part for the service as trustee; (3) the trustee sent his notice of refusal to substitute assets to the settlor's attorney in Louisiana; (4) the trust assets are located in Louisiana; (5) the business assets were not publicly traded stocks, but 100% interests in LLCs holding Louisiana assets; (6) the trustee purposefully availed himself of the state benefits by accepting the trusteeship of these assets, and could reasonably expect he would have contacts with the state; (7) as trustee he signed the agreements to purchase the interest from the settlor; (8) but for agreeing to serve as trustee, this cause of action would not have arisen, and the action arose from his refusal to exchange assets which was by communications sent to Louisiana; and (9) the trustee traveled to the state on several occasions to attend meetings regarding trust assets, and cannot now say he would be unduly burdened by traveling to the state to defend himself in the litigation.

D. *Risk Management Strategies, Inc. v. Texas Workforce Commission*, No. 03-13-00560-CV (Tex. Ct. App. May 22, 2015). State workforce commission retained sovereign immunity for decision regarding which entity employed caregivers for beneficiaries of special needs trusts.

1. Risk Management Strategies ("RMS") works with financial institutions serving as trustees of special needs trusts to manage employment-related services for in-home caregivers. These caregivers are often family members of the trust beneficiaries who may be compensated by the trust for their time and services.

2. RMS's services include processing and paying wages; collecting, reporting, and paying payroll taxes; and paying unemployment insurance. RMS charges the trusts $100 per caregiver per month for these services.
3. The Texas Workforce Commission contacted RMS because it believed RMS was engaging in unauthorized "payrolling" by paying unemployment taxes for individual caregivers, whom the Commission considered employees of RMS's bank trust clients. RMS responded that it, not the banks, was the employer of the caregivers. The Commission rejected that position and issued a written determination that RMS was not the employer of the caregivers, and that each bank trust client must report and pay unemployment taxes for its own caregivers.
4. RMS requested a review of the Commission's tax determination. The Commission issued a decision again concluding that the caregivers were employed by the banks, not RMS.
5. RMS filed an action for judicial review and included a request for a declaration that the commissioners had misconstrued Texas law by concluding that the banks were responsible for paying unemployment taxes for the caregivers. The Commission claimed that sovereign immunity barred RMS's claims. The trial court agreed and dismissed the suit.
6. The appellate court upheld the trial court's decision on sovereign immunity grounds. It held that the Texas Labor Code provided for a waiver of sovereign immunity only in cases arising from an employee's claim for unemployment benefits. That provision was inapplicable to this case.
7. RMS also argued that the commissioners lacked legal authority to determine that the caregivers were employed by the banks instead of RMS, and therefore RMS's claims fell within the *ultra vires* exception to sovereign immunity. Specifically, RMS claimed that Chapter 201 of the Texas Labor Code required the commissioners to apply a "control test" to determine who employed the caregivers, and by failing to do so, they acted outside their statutory authority. The court rejected this argument as well. It held that the "control test" applies to determining whether an activity constitutes "employment" (e.g. as opposed to an individual contractor position), not whether an individual or entity is an "employer."
8. The court concluded that the Labor Code did not require the commissioners to limit their inquiry to the "control test," and therefore they did not exceed the scope of their authority by considering other factors (e.g. who benefitted from the caregivers' services and who paid their wages). It remanded the case to provide RMS an opportunity to amend its pleadings to state a proper *ultra vires* claim.

E. *In re Estate of Agnew,* 2015 Pa Super 22 (2015). Pennsylvania court recognizes standing of beneficiaries of unexecuted trust amendment to bring breach of contract claims against drafting lawyer.

1. In November 2003, Robert Agnew retained attorney Daniel Ross to draft a Revocable Trust and Will. Over the next several years, Ross prepared various amendments to the Trust and the Will, as requested by Mr. Agnew.
2. As of 2010, Mr. Agnew's estate plan was comprised of specific gifts of cash and property to selected family members, friends and five scholarship funds to four different colleges. The residue of his Trust was to be divided between several colleges.
3. In March 2010, Mr. Agnew was diagnosed with inoperable brain cancer and admitted to a hospice program. In the summer of 2010, Mr. Agnew's niece contacted Ross to tell him that Mr. Agnew wanted to make changes to his estate plan. Ross met with Mr. Agnew and they discussed amendments to the will and the Revocable Trust and to a separate trust holding Florida property (the "Florida Trust"). Mr. Agnew and Ross discussed amending the Revocable Trust to direct that the residue pass to his nieces and nephews.
4. Ross drafted a new will, the Florida Trust and an amendment to the Revocable Trust (the "2010 Trust Amendment") that directed distribution of the residue of the Trust among Mr. Agnew's nieces and nephews. Ross sent the drafts to Mr. Agnew's niece for delivery to Mr. Agnew. Later in September of 2010, Ross met with Mr. Agnew himself to execute the documents. Mr. Agnew executed the revised will and an amendment to the Florida Trust. Mr. Agnew did not execute the 2010 Trust Amendment. After the September 2010 meeting, Ross did not mention the 2010 Trust Amendment again. Mr. Agnew died in January of 2011.
5. Letters testamentary were granted to Mr. Agnew's niece and his will was admitted to probate. On August 31, 2012, Mr. Agnew's nieces and nephews commenced an action for breach of contract and negligence against Ross and his law firm on the basis of *respondeat superior*.
6. The trial court dismissed the nieces' and nephews' claims of negligence and *respondeat superior* finding that the nieces and nephews did not have an attorney-client relationship with Ross and his firm. The trial court concluded that the nieces and nephews did not have standing as third-party beneficiaries to bring their claim related to breach of contract. The nieces and nephews appealed.
7. On appeal, the Superior Court of Pennsylvania reversed the order of the trial court and remanded the case for further proceedings. The court reviewed its precedent and found that under *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983), the Superior Court left open the possibility that beneficiaries not named in a will could have standing to pursue a breach of contract action against an attorney. The court found that the trial court incorrectly held that an otherwise valid document was a prerequisite for obtaining standing as a third-party beneficiary to a contract (the trial court concluded that the nieces and nephews did not have standing because the 2010 Trust Amendment was never executed and therefore not a valid document). Rather, the court found that a beneficiary who is not named may still bring suit and that the trial court must determine whether it would be appropriate and whether circumstances

indicate an intent to benefit unnamed beneficiaries. The court found that the record supported an inference that Ross intended to give the nieces and nephews the benefit of his contract with Mr. Agnew. Accordingly, the court held that the nieces and nephews had satisfied the standing requirement and remanded the case for further proceedings on their breach of contract claim.

F. ***Evan Auld Susott, as Trustee, Plaintiff and Respondent, v. Daniel C. Susott, Defendant and Appellant*****. No. H040321. Court of Appeal of California, Sixth Appellate District. 2015 Cal. App. Unpub. LEXIS 3653 (2015).** No relief from default judgment because elder abuses could not show excusable neglect.

1. Decedent Kathryn Susott had two sons, Daniel C. Susott and John L. Susott. Kathryn lived in Hawaii until 1995, when she moved to California to be closer to her family. From approximately 1995 to 2009, Daniel lived in Kathryn's home without paying rent or contributing to living expenses. He physically abused her. He also convinced her to give him $200,000 to purchase investment property in Cambodia; he successfully urged her to give him cash in the amount of $771,939; she made gifts and forgave loans to Daniel's friends and colleagues of $169,704; she loaned Daniel $60,000 that he did not repay; and at Daniel's urging, she donated approximately $362,210 to a charity that Daniel operated.
2. In 2005, Kathryn was diagnosed with Alzheimer's-related dementia, and in 2009 she was moved to an assisted living facility. While she was residing in the assisted living facility, one night Daniel entered the facility at 3:30 am, took her emerald ring off her hand, sold it, and kept the proceeds for himself.
3. Kathryn passed away in 2009. In 2011, John, in his individual capacity and also as the executor of the Estate of Kathryn Susott, as trustee of The Kathryn C. Susott Living Trust, and as trustee of the John L. Susott Non-Exempt Marital Trust, filed a complaint against Daniel. The first amended complaint included cause of action for financial elder abuse, conversion, constructive trust, neglect, and physical elder abuse.
4. Daniel demurred to the first amended complaint. John filed a second amended complaint in September 2012, and again included financial elder abuse, conversion, constructive trust, neglect, and physical elder abuse. The second amended complaint was mail-served on Daniel at his address in Hawaii on September 25, 2012.
5. Daniel did not respond to the second amended complaint, and on November 9, 2012, John filed a request for entry of default. The request for default was mail-served on Daniel at his address in Hawaii on November 9, 2012. Daniel's default was entered the same day. The file-endorsed entry of default was not served on Daniel.
6. John then requested a default judgment in the amount of $851,296, prejudgment interest of $727,412.67, post-judgment interest of $178.44 per day, and attorney's fees of $43,868.75. The default prove-up hearing was held on April 10, 2013. Daniel was present at the hearing. A court judgment in the total amount of $1,624,125.07 was entered on April 17, 2013.

7. On April 5, 2013, Daniel filed a motion seeking relief from default and requesting leave to file a demurrer to the second amended complaint. He sought relief on the primary ground of excusable neglect. He included a declaration stating that when he received the second amended complaint, he was severely depressed and unable to deal with anything. He also included a declaration of his neighbor, a doctor, who stated that Daniel was exhibiting signs of a very serious depression, and that he would not have been capable of handling a serious legal matter without the assistance of an attorney.
8. The trial court denied Daniel's motion. The issue on appeal was whether the trial court clearly abused its discretion in denying Daniel's motion for relief from default after finding that Daniel's evidence was insufficient to establish excusable neglect.
9. The appellate court affirmed. The party seeking relief must prove excusable neglect by a preponderance of the evidence. Excusable neglect may be based upon the disability of the party moving for relief, but the party must show that the disability *caused* the party's failure to act. The trial court did not unreasonably reject the expert opinion of the doctor, given that he was Daniel's longtime neighbor and did not start treating Daniel for depression until some unspecified date after Daniel received the second amended complaint. Further, the trial court's determination of Daniel's credibility was not subject to reassessment by the appellate court.
10. The court held that Daniel did not show that the trial court abused its discretion in denying his motion for relief from default. Finally, the court held that Daniel had notice of his potential exposure to a judgment in excess of $1.6 million in that the body of the second amended complaint included specific dollar allegations. Further, Daniel also had knowledge of the dollar amounts of the misappropriated funds and the value of the stolen ring.

G. *Soorani v. Simon,* 2015 Cal App. Unpub. LEXIS 1809 (2015). Conservator entitled to quasi-judicial immunity.

1. Beginning in 2003 and 2004, Beatrice Burk saw a number of doctors for various ailments, including dementia. Beatrice's daughters, Edlyn, Celine and Francesca, had a history of family disputes and disagreed over the appropriate care for Beatrice. As early as 2005, Edlyn sought court intervention to establish a conservatorship over Beatrice's assets. On February 2, 2009, over the opposition of Celine and Francesca, the probate court appointed Frumeh Labow as temporary conservator over Beatrice's person and granted Labow medical decision making authority. In January 2009, a geriatric psychiatrist working for a court-appointed attorney Clark Byam in the context of the conservatorship proceedings, conducted an independent medical evaluation of Beatrice and recommended placing her in a setting with around-the-clock nursing care in a program with experience with patients suffering from advanced dementia. On February 18, 2009, Beatrice was transferred to the Rehabilitation Center of Beverly Hills Rehabilitation and after complications exacerbated by her dementia, ultimately died there on February 26, 2009.

2. After Beatrice's death, Celine and Francesca filed suit against several medical facilities and doctors alleging wrongful death and elder abuse during the final weeks of Beatrice's life. Edlyn then filed suit against her sisters, Francesca and Celine, and Celine's husband, Dr. Robert Simon, and various healthcare providers alleging wrongful death, seeking intentional infliction of emotional distress and two causes of action for elder abuse.

3. The trial court ultimately held that Edlyn lacked standing to bring an elder abuse claim on behalf of her deceased mother because she was not an interested person under Welfare and Institutions Code section 15657.3(d)(1)(c). Rather, after the death of the individual protected, the right to commence an action for elder abuse rests with the personal representative. If the personal representative refuses to commence an action, the statute then describes several categories of individuals who may commence such action. The trial court, following the rule articulated in *Lickter v. Lickter*, 189 Cal. App. 4th 712 [Oct. 27, 2010], found that Edlyn lacked standing because she was to receive a fixed sum of money from her mother's trust and not a proportionate share of the trust estate, therefore she did not have a claim against Beatrice's estate that would be affected by the elder abuse claims. The trial court also dismissed Edlyn's claims for wrongful death and her claims of intentional infliction of emotional distress because of defects in her expert's declaration. On appeal, the Court of Appeal of California affirmed the trial court's ruling on Edlyn's claims.

4. Celine and Francesca sought recovery from Labow based on wrongful death and elder abuse. Celine and Francesca argued that Labow acted in breach of her fiduciary duties to Beatrice, and so neglected and ignored her medical needs, that they foreseeably brought on her untimely death. They alleged that Labow owed Beatrice, a dependent elder adult, a fiduciary duty to provide for her medical care and to care for her daily needs. Labow filed a motion for summary judgment arguing she was protected by the doctrine of quasi-judicial immunity because she was fulfilling adjudicatory functions that were intimately related to the judicial process. Alternatively, Labow argued that if she was not protected by quasi-judicial immunity, there was no evidence of a causal connection between her actions as Beatrice's conservator and Beatrice's death, which was attributed to overwhelming sepsis.

5. The trial court concluded that Labow was entitled to quasi-judicial immunity finding that she was "well within the reasonable discretion that the court would have expected of her appointment. And that, therefore, her activities were part of a quasi-judicial function, and therefore entitled to immunity." Celine and Francesca appealed, contending that Labow was not protected by quasi-judicial immunity, and even if some conservators may be protected, no case in California has found the immunity to apply in the medical decision-making context.

6. On appeal, the Court of Appeal of California affirmed that trial court's conclusion that the quasi-judicial immunity doctrine applied and protected

Labow, the court-appointed conservator authorized to make medical decisions for Beatrice, from wrongful death and elder abuse claims asserted by Celine and Francesca. The court held that a court-appointed conservator who acts within the scope of his or her appointment is protected by quasi-judicial immunity. The court noted that when empowering a conservator to make medical decisions, the court is required to make specific findings before doing so and the probate court imposes strict limitations on how the conservator may exercise the authority granted. The court held that had there been no petition and no court involvement, Labow would have had no role in Beatrice's care. Her decisions were directly the result of her a court appointment. To deny Labow immunity in a situation like Beatrice's would discourage any qualified professional conservator from accepting court appointments in cases where family members disagree about medical decision making, thus denying the incapacitated person any protection from the state. Without immunity, the conservator would be subject to second-guessing when a conservatee takes a turn for the worse, regardless of the quality of the care provided.

7. The court held that so long as the letter of appointment delineates the conservator's powers and duties, and those include medical decision-making, the conservator is entitled to quasi-judicial immunity. To conclude otherwise would render meaningless the sections of the Probate Code that permit the court to appoint a conservator to make medical decisions or exercise statutory powers to care for a person with dementia.

H. Jordan v. Lyles, 2015 Tex. App. LEXIS 911 (January 30, 2015). Estate heirs may bring action on behalf of decedent where there is no estate administration pending and none is necessary.

1. Melvin "Bud" Jordan and Joy Jordan married and both had children from a prior marriage. In 2001, Bud and Joy executed wills that were identical to one another. Each left his or her estate to the other and in the event the decedent was not survived by a spouse, one-half of his or her estate would pass to the decedent's own children and one-half to the decedent's spouse's children. In March 2004, Bud executed a codicil changing the disposition of his estate in the event Joy predeceased him by leaving one-half of his estate to his two then living sons as follows: 20 percent to Gilbert outright and 80 percent to Melvin Jr. in trust with Cyndi, one of Joy's children, serving as trustee.

2. Joy died on December 14, 2004. The next day, Bud signed a power of attorney form appointing Cyndi as his attorney in fact. In January 2006, Bud executed change forms making Cyndi the sole beneficiary of three annuities worth in excess of $249, 000. Cyndi filled out portions of the form at Bud's direction, Bud signed, and then Cyndi mailed the forms to the respective financial institutions.

3. On February 25, 2009, Melvin Jr. died. Two days later, Cyndi drove Bud to a bank in Texas where Bud and Melvin Jr. had maintained a joint money market account and had Bud sign a form making Cyndi a joint account holder

with right of survivorship. On March 1, 2009, Bud died and Cyndi used her beneficiary designations and right of survivorship to withdraw $275,000 from Bud's annuities and bank accounts. Bud's probate estate comprised less than $30,000 in assets.

4. On February 25, 2011, Bud's, Melvin Jr.'s and Joy's issue ("Appellants") filed suit against Cyndi for breach of fiduciary duty and interference with inheritance rights. The matter proceeded to a jury trial. The jury determined that Cyndi failed to comply with her fiduciary duty to Bud and interfered with Appellants' inheritance rights. The Jury awarded Appellants $156,016 in compensatory damages and $50,000 in exemplary damages. Cyndi moved for judgment notwithstanding the verdict. The trial court granted the motion and rendered judgment that Appellants take nothing by their suit. The Appellants appealed.
5. In her brief on appeal, Cyndi challenged Appellants standing to assert their claim for breach of fiduciary duty. Cyndi argued that the fiduciary duty she owed was personal to Bud and, as a result, his heirs lacked standing to sue on his behalf.
6. The court noted that ordinarily to recover for breach of fiduciary duty the plaintiff must show that the defendant was the plaintiffs' fiduciary. Further, when an estate is pending, an heir does not have standing to sue on behalf of an estate because the estate's personal representative has the exclusive right to bring suits that belong to the decedent. The court held that Appellants did have standing because of the exception to these general rules that allows an heir to sue on behalf of a decedent where an heir pleads and proves that there is no estate administration pending and none is necessary. In this case, Cyndi admitted Bud's will and codicil to probate as a muniment of title and the order admitting the will and codicil contains an express finding that there is no necessity for administration of the estate. The court held that for purposes of determining Appellants standing, the trial court's order admitting Bud's will and codicil to probate as a muniment of title was the functional equivalent of the closing of an independent administration. Accordingly the Appellants had standing as heirs to sue Cyndi for breach of fiduciary duty.
7. The court then examined that trial court's entry of judgment in favor of Cyndi notwithstanding the jury's verdict. The court found that the Cyndi failed to meet her burden of proving she complied with her fiduciary duty to Bud when she carried out various transactions for her benefit. Because she failed to meet this burden, the trial court erred in granting Cyndi's motion for judgment notwithstanding the verdict. The court reversed the trial court and rendered judgment in accordance with the jury's verdict.

I. *In re Estate of Boyle,* 2014 Tex. App. LEXIS 13553 (2014). Order closing estate and discharging fiduciary bars later claims.

1. In 1996, Sweetie J. Boyle died leaving a will which named various relatives as beneficiaries under the will, including her grandson, Richard Jones ("Jones"). On February 24, 1999, Chase Bank of Texas, a predecessor of JP Morgan Chase filed a petition in Texas probate court for declaratory judgment seeking

approval of its final accounting, discharge from all liability for its administration of the estate, discharge from all liability to the beneficiaries and contingent beneficiaries under the will and discharge as executor. On that same date, Chase also filed a petition in District Court in Midland County seeking an order of discharge from further fiduciary duties or liabilities to the beneficiaries of trusts created by Sweetie before her death. The district court petition was not the subject of this appeal.

2. On February 17, 2000, Jones and Angela Simpson (another trust beneficiary who later nonsuited her claims) filed a combined counterclaim and original petition in the probate proceeding alleging claims against Chase for breach of fiduciary and against Chase's lawyers. The trial court entered an order granting partial summary judgment in favor of Chase and the lawyer defendants on grounds that the claims were barred because the statute of limitations period had run. Jones appealed and the El Paso Court of Appeals affirmed the summary judgment order in part, reversed it in part and remanded the case to the trial court for further proceedings.

3. In September 2008, JP Morgan, as successor to Chase, filed a no-evidence motion for summary judgment as to Jones' remaining claims against it in the probate proceedings. Jones filed an amended petition and counterclaims against JP Morgan which were essentially the same as his 2000 counterclaim. JP Morgan renewed its no-evidence motion for summary judgment. Jones then nonsuited his counterclaims before a hearing on the motion for summary judgment was held.

4. On January 26, 2012, Jones filed an amended petition and amended counterclaim against JP Morgan in the probate court proceeding alleging claims and allegations identical to his 2008 counterclaim – including but not limited to, breach of fiduciary duties, engaging in self-dealing and mismanaging estate and trust assets. Jones sought to recover actual damages of $25 million along with punitive damages.

5. JP Morgan answered Jones' counterclaim by filing a traditional motion for summary judgment based on affirmative defenses and a separate no-evidence motion for summary judgment on all of Jones' claims. The trial court granted JP Morgan's motions for summary judgment issuing an order that was general in nature and without specifying the grounds on which it relied in granting the motion. Jones appealed, arguing that the trial court's order was not a final appealable order and even if it were, that the trial court erred in granting JP Morgan traditional summary judgment on its affirmative defenses and in granting JP Morgan's no-evidence motion for summary judgment.

6. The Court of Appeals first noted that in probate cases, multiple final judgments may be rendered on certain discrete issues and may be final for purposes of appeal. The court found that Chase's initial petition for declaratory judgment sought discharge from its duties as executor and a declaration that it had no liability to any of the beneficiaries as a result of its administration of the estate. JP Morgan did not seek attorneys' fees or to

recover damages from any party. The court found that because the trial court disposed of all Jones' claims for affirmative relief, the order necessarily disposed of JP Morgan's request for declaratory relief that it had no liability to Jones. The court concluded that the trial court's summary judgment order concluded the phase of the proceedings related to the discrete issue of JP Morgan's liability to Jones, accordingly the order was final and appealable.

7. Next the court found that JP Morgan's no-evidence motion complied with the Requirements of Texas R. Civ. P. 166a(i) because it distinctly and explicitly challenged each of the elements of Jones' claims, was not a conclusory motion and did not constitute a general no-evidence challenge to Jones' claims.

8. The court found that the trial court's grant of JP Morgan's no-evidence motion for summary judgment was proper because Jones merely incorporated over two hundred pages of earlier summary judgment evidence (from his response in 2001) taken from his deposition and did not cite any specific evidence or point out any specific evidence that he contended raised a fact issue on any of the elements of his claims. The court concluded that Jones' deposition testimony provided no more than conclusory testimony and mere speculation on his part that JP Morgan breached its fiduciary duties to him and caused him any damages. The court noted that conclusory testimony is not competent summary judgment evidence and is insufficient to create a question of fact to defeat summary judgment.

XII. FEES & COSTS.

A. ***In re Trusts under Deeds of Louise E. W. Jones,* 2015 Phila. Ct. Com. Pl. LEXIS 110 (2015).** Beneficiaries who either consented in writing to trustee fee increase, or were barred by laches for failing to seek an accounting or object for decades, cannot object to trustee fee changes that deviates from trust terms.

1. Louise Jones created trusts in 1923 for the benefit of her daughters, with a bank as co-trustee along with an individual co-trustee. The individual co-trustee died in 1932, and his successor died in 1969. No substitute co-trustee was appointed until 2013, when a 5% current income beneficiary became co-trustee, along with the national bank that had succeeded to the original local bank trustee.

2. Incident to the appointment of a new co-trustee, the bank filed accountings for 1972 through 2013 for the trusts, which had combined assets at that time of approximately $35 million. Four trust beneficiaries filed objections to the bank's fees. The trust terms limited the fees to 4% of trust income. The objections arose out of the bank's change, without court approval, to a 6% fee in 1976, a change to a published fee schedule in 1989 (but with a 30% discount). The beneficiaries also objected to the bank's proposal to move to its undiscounted fee schedule, and to reallocate the fees from being paid 100% out of principal to 65% from principal and 35% from income.

3. With respect to its past fees, the court granted the bank summary judgment on the following grounds: (1) in 1976, the bank sent consent letters to the

then income beneficiaries, and all three beneficiaries approved the increase to a 6% fee in writing; (2) in 1989 when again seeking to change its fees to a fee schedule with discounts, the bank contacted all of the income beneficiaries, eight of the then 10 income beneficiaries explicitly approved the change (two of whom were the current objectors), and the bank sent 3 follow-up letter to the two beneficiaries that did not explicitly approve the change; (3) the claims by beneficiaries that approved of the objections filed by the 5 objecting beneficiaries, but did not timely file their own objections, are barred for failing to file their own objections; (4) the beneficiaries that explicitly approved the fee changes in writing are barred by their consent from bringing objections; (5) the claims by beneficiaries that succeeded to the interest of other beneficiaries upon their deaths are barred by acquiescence and laches because their predecessors had approved the fee changes in writing, they failed to seek an accounting despite having an affirmative duty to inquire upon succeeding to a trust interest, and they allowed as many as 42 years to elapse before seeking an accounting; and (6) the claims by the beneficiaries that refused to consent to the fee change, and who received 3 additional letters, are barred by laches or acquiescence for failing to seek an accounting for 42 years.

B. *Matter of Speyer*, 2014 N.Y. Misc. LEXIS 4870 (N.Y. Sup. Ct. Nov. 13, 2014). Corporate trustee that facilitated settlement of 20 years of litigation entitled to have attorneys' fees paid out of trusts, but co-trustee that acted for personal benefit through numerous lawyers was not.

1. After more than twenty years of hostility and litigation related to four trusts (the "Trusts") and ultimately settlement and resolution of various disputes, the corporate co-trustee of the Trusts and two individual co-trustees of the Trusts, Hugo Beit and Erwin Beit (also beneficiaries of the Trusts), sought payment of their attorneys' fees incurred in connection with the litigation. The beneficiaries of the Trusts generally objected to the payment of all of the trustees' attorneys fees from the Trusts and the individual co-fiduciaries joined in the objection to payment of the bank's payment of attorneys' fees from the Trusts.

2. The Supreme Court of New York noted that SCPA 2110(1) grants the court authority to fix and determine fees for services rendered by fiduciaries and *In re Freeman*, 34 NY 2d 1, 211 N.E.2d 480, 355 N.Y.S.2d 336 (1974) and *In re Matter of Hyde*, 15 NY 3d 179, 933 N.E. 2d 194, 906 N.Y.S. 2d 796 (2010) provide the factors to be considered and the assessment to be made of both the objecting beneficiaries motivations and the fiduciary's behavior when setting fees.

3. With the exception of certain tasks that were not clearly identified in the bills as attributable to the Trust proceedings, the court found the bank's fees to be reasonable and directed that its fees of $658,517 be assessed equally against each of the Trusts. In so holding, the court found that the bank's attorneys expended substantial labor requiring a great deal of billable time for legal work associated with the Trusts. The court found that the bank's principal

attorneys had the skills, experience, ability and reputation in keeping with their billing rates. The court found that the bank did not act solely for its benefit in the proceedings; rather, all parties participated actively in the litigation and the bank made none of its claims in bad faith. The court found that all parties benefited from the work of the independent trustee, whose efforts promoted resolution of the dispute among family members.

4. The court rejected the beneficiaries' argument that the bank failed to utilize the availability of its own in-house counsel finding that the bank was entitled to decide how to manage its litigation.
5. The court found that the same factors supported Erwin Beit's claim for fees and awarded his estate total fees of $286,462 from the four Trusts.
6. The court disallowed Hugo Beit's attorneys' fees finding that due to his various disagreements with his counsel and his change of attorneys 13 times, much of the work was duplicative. Further, many of the arguments Hugo raised were virtually entirely for his personal benefit, including his false claim to the Holocaust Tribunal that he was the sole distributee of his grandmother, and were not properly payable from the Trusts.

C. *In the Matter of William Dankworth Trust,* 2014 Ohio App. LEXIS 5641 (Court of Appeals of Ohio 7th Appellate District December 29, 2014). Court refuses to vacate judgment dismissing trustee without a termination fee where trustee failed to timely appeal the judgment.

1. In 2005, William Dankworth created a trust with individual and corporate co-trustees. Eight years later, William sought to remove and replace the corporate trustee. William's attorney filed an application for an appointment of successor trustee with the court, and attached as an exhibit to the application a prior settlement agreement that set forth the terms as to how the resigning trustee would resign and the successor trustee agreed would be appointed. In that private settlement agreement there was no discussion of waiver of termination fees, and the trust document provided for a corporate trustee's ordinary and reasonable fees. Each page of the petition was time stamped and the resigning corporate trustee was required to sign the petition in two places.
2. The court issued an order stating that no termination fees or other fees were due or payable to the resigning corporate trustee. After court appearance, William's attorney sent resigning corporate trustee a copy of the application and order approving the resignation and appointment. The corporate trustee did not timely file an appeal, and instead filed a motion for relief from judgment and a motion for reconsideration. The probate court issued an order denying the motion to vacate. After the motion to vacate was denied, the corporate trustee filed an appeal listing the two judgments against them, the September 19th order with no termination fees and the denial of the motion to vacate. The September 19th order was dismissed because it was untimely, and the only action that could be appealed was the motion to vacate judgment.

3. The court was unsympathetic to the corporate trustee that claimed (1) it did not have an opportunity to read the documents before they were filed, (2) did not know what was in the documents, and (3) would never have waived termination fees had it known about it. The Appellate Court affirmed the trial court's decision on the grounds that: (1) the motion was inappropriate; (2) the motion could not be used as a substitute for an appeal; (3) the resigning trustee could not satisfy any of the grounds for relief; (4) time stamping of the petition and the agreement indicated that the corporate trustee representative had an opportunity to read the documents; (5) once filed the documents were public records available for retrieval from the court record; (6) although the issue of whether William was required to and did give actual notice of the resignation proceedings to the trustee may have been grounds for reversal and could have been presented on appeal, the trustee had waived those issues by not timely filing an appeal; (7) nothing in the documents indicated William had committed fraud or misrepresentation or misconduct to the court or to the resigning corporate trustee and nothing in the record indicated that the corporate trustee had voluntarily waived these fees or had agreed to waive termination fees; (8) the matter of termination fees was presented during the initial court proceeding and the order was issued with no termination fees; and (9) because the record was void of any fraud or misrepresentation, the corporate trustee did not have grounds to bring a motion to vacate.

XIII. DISCLOSURE TO BENEFICIARIES.

A. *Wells Fargo Bank v. Cook,* 332 Ga. App. 834 (2015). Trustee not liable for exhaustion of CRAT assets from payment of annuity to settlors, where regular statements ran short statute of limitations, there was no evidence of breach of duty and the depletion came from the annuity payments and market conditions, and the trust terms eliminate any claim of a contract to guarantee the annuity payments would last for the lifetime of the settlors.

1. Gail Cook (who had an MBA and was a certified financial planner) and her husband Lance Lipman received gifts of 12,000 shares of Analog Devices stock from Gail's uncle, with a 2000 market value of $1.9 million. After talking with their lawyer, they decided to put the stock into a CRAT. The bank recommended a 7.5% annuity payable to the settlors, they agreed, and the attorney drafted the trust accordingly. The CRAT was funded on February 25, 2000 with the stock at a value of $1.9 million, and with an annuity payment of $142,818 annually. Three days later the bank, as trustee of the CRAT, sold all of the stock and diversified the investments, and at that time the stock had already dropped $225,000 in value. The settlors deferred $335,796 in federal income taxes and received a charitable deduction of $203,012. The trustee distributed $142,818 annually to the settlors until 2011, when the trustee distributed the final $76,000 of trust assets to the settlors and closed the trust account upon trust exhaustion. Throughout the administration, the bank sent trust statements to the settlors, quarterly, sometimes monthly, and annual basis.

2. In 2002, Gail expressed concern about the decline in the trust and retained counsel. Counsel wrote to the bank in 2003 with concerns, and claimed that the bank had guaranteed that the trust would provide the annuity payments to the settlors for their entire lifetimes, which the bank rejected. The settlors and their counsel met with the bank in 2004, and the bank continued to reject the claim that the bank had guaranteed the lifetime payments. The settlors sued the bank in 2012, the bank denied liability, and the trial court denied both sides' motions for summary judgment.

3. On appeal, the Georgia Court of Appeals reversed the trial court in part and granted summary judgment for the bank on all claims, on the following grounds:

    a. Georgia, like a comparable provision of the Uniform Trust Code (the state has enacted parts, but not all of the UTC), provides for a 2 year statute of limitations upon adequate disclosure of a claim against the trustee for breach of trust, and provides that a written report adequately discloses the claim if it provides sufficient information so that the beneficiary knows of such claim or reasonably should have inquired into the claim;

    b. while the limitations may be tolled for fraudulent conduct, there were no claims of tolling in the case;

    c. a "report" is not defined in the code, but Georgia courts have established standards requiring showing the assets, liabilities, receipts, disbursements, actions, and other details;

    d. the bank's detailed trust statements, sent regularly, stated the investments, all transactions and disbursements, an account summary, all gains and losses, income and dividend receipts, yields of the funds, and beginning and ending balances, all of which showed the value of the trust declining over time;

    e. the statements contained sufficiently detailed information to inform the beneficiaries of potential claims based on the alleged failure to follow their investment objectives and mismanagement of the trusts;

    f. the beneficiaries' own conduct, in hiring counsel and approaching the bank with complaints, evidences that the adequacy of the notice;

    g. the regular periodic trust statements met the requirements of a report to run the shortened 2-year statute of limitations on claims, and all claims beyond that time period are barred (and the court rejected the theory that the harm was not suffered until the trust ran out of money, and that there was some sort of continuing tort);

    h. any breach claim related to investments accrued when the stock was sold in 2000 after the sharp decline immediately after funding of the CRAT, or when the proceeds were reinvested;

    i. the claims that are not time barred fail to state a claim, because a trustee is not a guarantor of the value of the trust and is not liable for depreciation unless caused by a breach of duty;

j. the decline in value came from trust distributions to the settlors and general market conditions, and there was no proof of any other causes, or proof that the losses could have been avoided; and

k. the trust terms preclude any claim that the bank had contractually promised to pay the annuity payments to the settlors for their lifetimes, regardless of the assets available in the trust.

B. *Corya v. Sanders*, 2015 Fla. App. LEXIS 1846 (Fla. Dist. Ct. App. 4th Dist. 2015). Statutory laches provisions apply to limit suit against trustee for failure to file required accountings.

1. Doris Corya ("Doris") served as sole trustee of the Sanders Trust, the John P. Corya Irrevocable Trust and the John P. Corya Revocable Trust. Doris and Paul Saunders served as co-trustees of the Eleanor M. Rich Trust (collectively, the "Trusts"). Doris was also a beneficiary of each of the Trusts.

2. Roy Sanders, Doris's grandson, filed a complaint seeking to compel an annual accounting of the four Trusts. Doris answered, asserting various affirmative defenses, including statute of limitations, waiver, laches and estoppel arguing that the Trusts had been in existence for thirty years and by his conduct Roy should be estopped from demanding any accounting prior to 2008. After discovery, Roy moved for summary judgment. The trial court granted the motion finding that Doris had a duty to provide Roy with periodic written accountings and that she failed to do so for the Trusts. The trial court ordered Doris to provide accountings for all of the Trusts from the date she assumed duties as trustee and granted Roy's motion for attorneys' fees, which Doris was not permitted to use funds from the Trusts to pay. The trial court determined that Doris's affirmative defenses of statutory laches did not apply. The trial court also ordered Doris to reimburse the Trusts for her attorneys' fees. The trustees appealed.

3. On appeal, the Fourth District Court of Appeal noted that the Trusts had been around for decades before suit was filed and examined the trustees' statutory duty to account under current and former Florida law. The court found that the duty to account to qualified beneficiaries under current Florida statutes section 736.0813 effective as of July 1, 2007 was virtually identical to the duty to account to "beneficiaries" prior to July 1, 2007 under former Florida statutes section 737.303. Accordingly, the court rejected Doris' argument on appeal that there was not statutory duty to provide accountings to Sanders prior to July 1, 2007.

4. The court then examined Doris' affirmative defenses of statutory laches. Florida Statutes section 95.11(6) provides that "Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of a lack of knowledge by the person sought to be held liable that the person alleging the liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay."

5. The court noted that statutory laches does apply to an action for an accounting by a trustee. The court found that regardless of whether the breach of fiduciary duty to provide an accounting was the result of negligence or an intentional act, the statute of limitations for breach of fiduciary is four years. Because an action for breach of fiduciary duty entitles a beneficiary to damages, the application of statutory laches bars an action seeking an accounting from a trustee more than four years before the action was filed.
6. The court rejected the trial court's finding that Doris was required to account from inception of the Trusts on grounds that such an approach would negate the statutory laches defense. The court further noted that a trustee's statutory duty to account is limited by Florida statutes section 736.08135(3) which does not require accountings prior to January 1, 2003. Lastly, the court found that its analysis that statutory laches limits the right to an accounting when no accounting has been done also applied to Sanders' claims that Doris had engaged in misconduct as trustee because he had knowledge of Doris' actions as trustee more than four years before filing suit. The court reversed and remanded the case for further proceedings.

XIV. PRIVILEGES & EXCEPTIONS.

A. *Collautt v. Li,* 2014 U.S. Dist. LEXIS 171763 (December 11, 2014). Testamentary exception to attorney-client privilege does not apply to suit about beneficiary designations under life insurance policies.

1. Plaintiffs Catherine and Alexander Collautt, the children of Allan Collautt, challenged non-party decedent, Allan Collautt's, beneficiary designations on various life insurance policies. Allan revised his will and trust to bequeath his estate to Defendant Lijie Li and changed the named beneficiaries on his life insurance policies from Catherine and Alexander to Li. Plaintiffs alleged that the beneficiary designations were changed subject to undue influence by Li.
2. In connection with the proceedings, Li sought an order directing non-party Joseph Lastowka, who served as Allan's attorney but who was not the executor of his estate, to comply with a subpoena seeking production of Allan's estate planning documents, including drafts, and all other documents relating to Allan Collautt in his files. Li argued that the information requested was vital to her defense of the beneficiary designation case because discussions concerning beneficiary designations on non-probate assets are an integral part of a decedent's estate plan and are routinely discussed with the attorney during the estate planning process.
3. Attorney Lastowka asserted privilege as the reason for non-compliance with the subpoena. Lastowka responded that he lacked the power to waive the expectation of confidentiality held by Allan, his client, or Allan's executor, neither of whom were made parties to the lawsuit nor persons given notice of the proceedings.
4. In reviewing the Motion to Compel production, the court found that Lastowka had properly invoked the attorney-client privilege and that as a general rule

the attorney-client privilege continues after death unless some exception applies. The court found that because the privilege applied, the burden shifted to Li as the party seeking disclosure to show that disclosure would not violate the attorney-client privilege because some exception applied. The district court denied the motion holding that even though in Pennsylvania a testamentary exception to the attorney-client privilege exists, the exception does not apply to exempt the information Li sought to discover – information regarding testamentary documents that would not be used in a will contest but as extrinsic evidence regarding Allan's mental state when he modified his life insurance beneficiary designation. Under Pennsylvania law, the designation of beneficiaries of life insurance is not considered testamentary and is not subject to any law governing the transfer of property by will. Further, the court noted that parties to a contract must have the ability to rely on the terms of their contract and should not have to speculate about testamentary clauses in documents of which they have no awareness.

B. ***In re Levien,* 2015 Tex. App. LEXIS 4391 (April 30, 2015).** Email evidencing intent to gain access to the trust funds through adult adoption does not give rise to the crime-fraud exception to the attorney-client privilege.

1. Arnold Levien created a family trust for the benefit of his children, grandchildren and great grand-children. Under the terms of the trust, income payments were made to Arnold's children and then to his grand-children with the remainder of the funds to be disbursed to Arnold's great-grandchildren when the last great-grandchild living at the time of Arnold's death turned 35. The trust also allowed the trustees to make discretionary distributions of principal to the beneficiaries of the trust. Harlan Levien and Stephen Levien, brothers and grand-children of Arnold, were entitled to income payments under the trust instrument. Both brothers were diagnosed with muscular dystrophy and sought funds from the trust in order to cover their health care costs. The trustees initially denied their requests and Harlan and Stephen filed suit against the trustees. The parties ultimately entered into a settlement agreement under which the trust gave Harlan and Stephen $350,000 and, in exchange, they each agreed to relinquish their rights to income as beneficiaries of the trust and agreed to make no further requests from the trust. The settlement was finalized in July 2012.

2. Subsequent to the settlement being reached, Harlan and Stephen each initiated adoption proceedings to adopt an adult in the district court of Bastrow County, Texas. Final adoption orders were issued in October 2012. After the adoptions were finalized, the adoptees, Johnson and Ives, sought to obtain access to the funds that were available to the great-grandchildren of Arnold under the trust. In response, the trustees filed lawsuits in Bastrow County and in New York against Harlan, Stephen, Johnson and Ives (the "Leviens") urging that Johnson and Ives were not eligible to receive distributions under the Trust because the adoptions were a sham and Harlan and Stephen had a duty to disclose the proposed adoptions when they negotiated the prior settlement.

3. The Leviens obtained a stay of the Bastrow County proceedings pending resolution of the trial court proceedings in New York. The New York trial court dismissed most of the trustees' claims and rejected the idea that Johnson and Ives could not be beneficiaries of the trust because their adoptions were a sham. The trail court explained that the only way the adopters would benefit from distributions to Johnson and Ives is if the adoptees voluntarily share their assets with the adopters, a circumstance the court had no power to restrict. The trial court rejected the trustees' claims related to the Leviens alleged failure to disclose finding that the trustees' claimed loss did not flow from the settlement agreement but from the decedent's will, which did not exclude adopted children as beneficiaries. Lastly, the trial court held that to the extent the trustees claimed fraud existed in the adoptions, the issue must be addressed by the courts which ordered the adoptions in Texas. The trial court found that it must accord the Texas adoption orders full faith and credit unless they were obtained by fraudulent misrepresentation.

4. After the New York court's ruling, the district court reinstated the Bastrow County proceeding. The trustees issued discovery requests seeking notes and emails regarding the adult adoption and any potential interest under the will of Arnold Levien. The Leviens objected to the request on grounds that it impermissibly sought discovery of attorney-client communications. The district court determined that the crime-fraud exception to the attorney-client privilege applied to an email that was sent on August 20, 2012 because it demonstrated fraud pertaining to the adoption proceeding. After the district court's ruling, the Leviens filed a petition for writ of mandamus which was conditionally granted by the Court of Appeals of Texas.

5. The court first noted that the crime-fraud exception to the attorney-client privilege applies when legal communications or services are obtained in order to commit or plan to commit fraud. The court found that the email at issue was sent weeks after the settlement agreement was finalized and the information that Ives sought to convey to his attorney occurred well after any alleged fraud was committed by Harlan and Stephen. The court rejected the trustees' argument that the parties' intent to gain access to the funds through the improper adoptions was a relevant consideration that should have granted them access to the email at issue. The court held that none of the provisions of the Family Code governing adult adoptions specify that the intent of the parties involved in the adoption proceeding is a relevant consideration, that the trial court may inquire into the parties intent or that the trial court may deny the request for an adoption if the reason for the request is somehow improper. Rather, if the requirements of the Texas statute are met, the court must grant the adoption. The intent of the parties to the adoption does not bear on the adoption process, and for that reason, evidence establishing the Leviens' purpose for pursuing the adult adoptions cannot establish a prima facie showing that the Leviens were contemplating the commission of a fraudulent adoption. The court found that the district court abused its discretion when it ordered the Leviens to disclose the contents of the email under the crime-fraud exception.

XV. FIDUCIARY SUCCESSION.

A. ***Matter of Levitin,* 2015 NY Slip Op 25184 (Westchester County Surrogate, 2015).** In suit to remove co-trustee, court can order co-trustee to submit to psychiatric examination.

1. Michael Silberkleit and his partner Richard Goldwater equally owned and ran Archie Comics. Michael died in 2008, and under his estate plan he created a marital trust and family trust. The family trust benefitted his wife, Nancy, during her lifetime, with the remainder passing 75% to Nancy's daughter Alexandria, and 25% to Michael's children from his first marriage, Susan, Amy, and David, when Alexandria reached age 40. Nancy and Michael's friend, Eugene, petitioned for probate and they received preliminary letters testamentary.

2. Nancy became co-CEO of Archie Comics along with Richard's successor, Jonathan Goldwater, under an employment agreement. In 2009, Susan objected to probate which commenced 4 years of litigation. In 2011, Archie Comics sued Nancy and obtained a TRO restraining her from abusing Archie employees, attending Comic Con, or talking with company vendors, the court noting that Nancy could destroy the company and didn't seem to care that she could. Nancy was found in contempt for violating the TRO, and attending Comic Con at which her conduct caused her to be expelled by security, and banned from future conventions. Nancy was sued to remove her as director and co-CEO of Archie Comics. Eugene sued to revoke Nancy's preliminary letters, deny her trusteeship, and revoke her authority to deal with Archie Comics shares. The parties settled by Michael's children from a prior marriage renouncing their interest in the trust for $775,000, Eugene resigning as co-executor and co-trustee in exchange for $150,000 plus attorneys' fees, and the appointment of Samuel Levitin as co-trustee with Nancy.

3. Several months later, Samuel sued to revoke Nancy's letters and remove her as co-trustee alleging she was abusive, hostile, and lacked concentration and comprehension, and that the survival of Archie Comics was precarious as a result of her involvement. Nancy countersued to remove Samuel. Samuel provided an affidavit of a psychiatrist stating that Nancy may suffer from mental illness, as demonstrated by her Comic Con incident, use of sexually explicit language at the office, yelling and disruptive behavior, and lack of personal hygiene. Samuel moved to compel Nancy to submit to a mental exam, which the court granted on the following grounds: (1) the state has a vested interest in requiring fiduciaries to comply with court orders, and her civil contempt was a concern to the court; (2) the evidence in the record of her conduct is troubling, and the exam will aid the court in determining whether Nancy has the capacity to carry out her fiduciary duties; and (3) appointment of a neutral physician to conduct the exam us an appropriate means to conduct the exam, and Nancy's failure to submit will result in an adverse inference.

B. ***Bank of the Ozarks v. Cossey,* 2015 Ark. 367 (2015).** Despite repeated letters declining trusteeship, trustee accepted trusteeship under the Uniform Trust Code by exercising the powers of the trustee and disbursing assets.

1. Frank and Margaret created a revocable trust and named bank as successor trustee, with son and daughter as remainder beneficiaries. Bank was custodian for the securities held in the trust during the settlors' lives. After their deaths, the bank sent the son six letters, in each declining the appointment as successor trustee and asking the beneficiaries to find a successor trustee. Although the bank's letters were addressed to the son as personal representative of his mother's estate, no estate was actually opened. The bank reimbursed the son out of trust assets held in custody for expenses he incurred in the administration of his mother's estate, such as funeral expenses, expenses for a car that was not held in the trust, and utility payments for a home not held in the trust. The bank also liquidated securities at the son's direction. The daughter sued the bank for an accounting as trustee, which the bank opposed citing its repeated letters declining the trusteeship. The trial court ordered the accounting and surcharged the bank for the daughter's attorneys' fees. The bank appealed.
2. On appeal, the Arkansas Supreme Court affirmed on the grounds that: (1) under the Uniform Trust Code, the bank could decline the trusteeship but still act to preserve the trust property, or could accept the trusteeship by exercising powers or performing duties as trustee; (2) the distributions for the car and home were not for the preservation of trust assets; (3) distributions for estate expenses and liquidation of assets went beyond mere preservation of trust assets, and were outside the UTC safe harbor; (4) rather, the bank exercised the powers of the trustee and therefore accepted the trusteeship; (5) the UTC allows the award of attorneys' fees as justice and equity may require, and the award was appropriate because the fees were only incurred because the bank refused to render an accounting.

C. ***Ulinski v. Byers,* 2015 Ohio App. LEXIS (January 28, 2015).** Court may remove a trustee on its own initiative so long as the fiduciary has an opportunity to defend his conduct.

1. Lewis and Gwendolyn Radar executed the Radar Trust, and named its drafter, Mr. Ulinski, as trustee. The trust provided that Mr. Ulinski would divide and distribute its funds into separate, equal shares for each of the Radars' grandchildren upon the Radars' deaths, with the exception of two grandchildren. The Radar Trust specifically named five of the Raders' grandchildren as the primary beneficiaries of the trust (the "Primary Beneficiaries"), and excluded two grandchildren by name. Upon the Radars' deaths, Mr. Ulinski took the position that the Primary Beneficiaries were not the only beneficiaries who would receive a share of the trust and read the document to entitle all of the Radar's surviving grandchildren to a share, with the exception of the two specifically named. Consequently, Mr. Ulinski did not distribute funds to the Primary Beneficiaries and hired a search firm to identify all of the Raders' surviving grandchildren.

2. The search uncovered 26 grandchildren including the Primary Beneficiaries.

3. Two of the Primary Beneficiaries filed a complaint for declaratory judgment seeking a declaration that the Primary Beneficiaries were the only persons entitled to receive Trust assets upon distribution. Mr. Ulinski answered the complaint and cross-claimed against the potential beneficiaries alleging that he had identified all the surviving grandchildren and that the Radar Trust contained conflicting language, such that it was unclear to him, whether he was to distribute trust assets strictly to the Primary Beneficiaries or to all surviving grandchildren. He asked the court to declare the beneficiaries of the Radar Trust and the manner in which he should distribute the assets.

4. Mr. Byers, one of the Primary Beneficiaries filed a motion to remove Mr. Ulinksi as trustee alleging that he had demonstrated incompetence and negligence as trustee. Mr. Ulinksi filed a brief in opposition. At the same time the motion to remove was pending, the Primary Beneficiaries and the potential beneficiaries reached a settlement in which each of the potential beneficiaries would receive $5,000. They asked the court to issue an order effectuating the settlement. Mr. Ulinksi objected to the settlement but the court entered an order approving the settlement over his objection and ordering him to distribute the Radar Trust funds in accordance therewith.

5. Mr. Ulinski then filed a motion for summary judgment (after the deadline for filing dispositive motions) seeking an order that his trustee's fees and attorneys' fees were reasonable and should be paid out of the trust prior to distribution of the remaining balance to the Primary Beneficiaries. The Primary Beneficiaries filed an objection to the summary judgment motion and renewed their motion to remove him as trustee on grounds that Mr. Ulinski's actions failed to benefit the beneficiaries and had depleted the trust assets by 25 percent. Mr. Ulinski was not served with a copy of the objection or renewed motion to remove him as trustee. The trial court found Mr. Ulinski's motion to be untimely and granted the motion to remove him as trustee. Mr. Ulinski appealed.

6. On appeal, Mr. Ulinski argued that the trial court erred in removing him: (1) pursuant to a motion with which he had not been served; (2) prior to the expiration of the 14-day response period triggered by local rule; (3) without holding a hearing; and (4) based, in part on an erroneous factual finding.

7. The Court of Appeals of Ohio rejected Mr. Ulinski's procedural assignments of error finding that a probate court may remove a trustee on its own initiative so long as the fiduciary has an opportunity to defend his conduct. The court noted that it is acceptable for a trial court to dispose of a motion without a formal hearing so long as due process rights are afforded. The court found that Mr. Ulinski had an opportunity to defend his conduct in the papers before it including his brief in opposition to the original motion to remove him as trustee. Lastly, the court found that Mr. Ulinski's alleged error as to the trial court's factual finding that he had spent $25,000 in trust assets to search for potential heirs, did not affect Mr. Ulinski's substantial rights. The court affirmed the trial court's judgment which heavily emphasized the

fact that Mr. Ulinski drafted the Radar Trust instrument. The trial court was unable to understand how a lawyer or a trustee acting within the reasonable standard of care could be unable to interpret his own document and instead spend $25,000 of trust assets to ascertain the beneficiaries of the trust he drafted and oversaw and trigger a lawsuit to understand his own document. The court found that while Mr. Ulinski was correct that the record did not support the trial court's solitary finding that he expended $25,000 of the trust's assets strictly on the national search for heirs, Mr. Ulinski had not shown that the trial court's erroneous factual findings prejudiced his substantial rights in any way.

D. *In re Estate of Dennis Lawlor*, 2015 MT 54 (February 24, 2015). Heir at law does not have standing to seek removal of personal representative during pendency of will contest and before will declare invalid.

1. Dennis Lawlor executed a will on December 6, 2012 and died the following day leaving no issue. Dennis was survived by his three siblings, Antoinette Wagner, Mary McPherson and John Lawlor. One of his siblings had predeceased him, Joan, but left a surviving daughter, Audrey Stoican, and grandson, John Stoican. The will devised all of Dennis' estate to his living sisters, Antoinette and Mary, did not mention his deceased sister, and specifically excluded his brother John. The will appointed Antoinette's son, Mark Wagner, as personal representative of Dennis' estate.

2. Mark submitted the will to the District Court asking for informal probate and was appointed as personal representative of the estate. On May 16, 2013, Audrey filed a petition asking the court to convert informal probate to formal probate and in support of her request, filed a brief questioning the competence of Dennis at the time he executed his will and claiming that the will was invalid. Formal probate began on January 3, 2014.

3. On October 13, 2013, Audrey and John Stoican filed a complaint contesting the will on grounds of lack of testamentary capacity and undue influence. The complaint asked that the will be set aside, that probate be conducted in intestacy and that damages and fees be awarded to Audrey and John. The complaint did not ask for removal of Mark as personal representative. On October 21, 2013, Audrey and John filed a separate motion asking the court to remove Mark as personal representative and John Wagner as the estate's attorney citing MCA section 72-3-526 and alleging that the Wagners had conflicts of interests with the estate. They did not ask for removal based on any change of testacy status that might result from resolution of the will contest.

4. John Wagner moved the district court to determine whether Audrey, John Stoican and John Lawlor (added as a plaintiff by an amended complaint) had standing to bring their motion to remove the personal representative and the estate's attorney. John Wagner argued that the Plaintiffs lacked standing because they were not persons interested in the estate under MCA section 72-3-526. The District Court entered an order finding that Audrey and John Stoican lacked standing to contest the will or to petition for removal of the

personal representative or the estate's attorney. The Plaintiffs appealed the District Court's determination that Audrey did not have standing.

5. On appeal, the Supreme Court of Montana noted that to have standing to contest a will, a party must be an interested person as defined in the Uniform Probate Code. The court reversed the lower court and found that Audrey was an "interested persona" for purposes of contesting the will because she had a pecuniary interest in setting aside the will and stood to gain if the contest proved successful.

6. The court then examined Audrey's standing to seek removal of the personal representative of the estate. The court noted that standing for each type of action is controlled by separate statutory provisions and must be analyzed separately and independently from the other in light of the statute controlling the action. Under MCA section 72-3-526 "a person interested in the estate may petition for removal of a personal representative for cause at any time." MCA section 72-1-103(25) provides that the "meaning of [interested person] as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of a matter involved in any proceeding."

7. The court held that Audrey did not have standing to petition for removal for cause on grounds that: (1) she did not have a claim against the estate; (2) she did not have a property interest in the estate because the will was admitted to probate prior to Audrey filing her petition and a presumption of testacy arose; (3) the pending will contest did not change the presumption of testacy and did not otherwise create a property right upon which standing could be based; (4) conditional standing is only appropriate where no presumption of testacy had arisen; (5) she did not have priority to appoint herself as personal representative; and (6) she had no other interest in the outcome of the petition for removal for cause because she was not a successor to the estate and the personal representative owed her no fiduciary duties.

XVI. MEDIATION, SETTLEMENT, RELEASES & INDEMNIFICATION.

A. ***Lawson v. Lawson,*** **2015 U.S. Dist. LEXIS 142454 (Nevada, 2015).** Court refuses beneficiary's claim to rescind settlement agreement negotiated by beneficiary's counsel, and dismisses claims barred by the settlement.

1. John and his daughter Tiffany were beneficiaries of an irrevocable trust created by John's father, William Lawson (who died in 2004), with John's brother William Lawson, Jr. (an attorney) and Sharon Ondreyco (a doctor) as co-trustees. All trust distributions were discretionary during the settlor's lifetime. The trust terms provided for trust termination and distribution of the trust assets to Tiffany upon her reaching age 35. John was partially physically disabled, didn't work, and had constant health problems. John was also the beneficiary, and received regular distributions from other trusts created by his father, such as the William Lawson Maritime Trust and Captain Bill's Descendants' Trust.

2. The trust terms were silent on trust distributions for the time period from the settlor's death in 2004 until Tiffany reached age 35. The trustees petitioned for instructions regarding distribution to John, after John asserted his emergency dental needs. John and his daughter engaged separate counsel, with John objecting to Tiffany's request that the trust be terminated and the assets distributed to her. An Arizona court reformed the trust to permit discretionary distributions to John before the trust terminated, but only for "verified and dire circumstances" and not in an amount to exceed 20% of the initial funding of the trust.
3. In 2009, the trustees agreed to resign conditioned on receiving a release, but John refused to sign the release and the resignation never went into effect. In 2011, John informed one co-trustee that he had a brain tumor and demanded $120,000 from the trust (despite the trust holding only $30,000, and notwithstanding the court order). Despite request by the co-trustees, John never produced any documentation verifying his claims of a brain tumor. William as co-trustee informed John's counsel that he would not make additional distributions to John without legal advice, since John had consistently threatened him with ethics complaints and lawsuit for several years. In 2011, the Maritime Trust distributed $120,000 into the irrevocable trust.
4. John then retained new counsel and sued in a Los Angeles to transfer the trust to California, rescind the settlement agreement and bring multiple claims against the co-trustees, including claims for financial abuse, intentional infliction of emotional distress, breach of duty, and fraud. The trustees retained counsel to make a special appearance to contest jurisdiction in Los Angeles.
5. In the hallway of the Los Angeles Superior Court, John and his counsel talked with counsel for the trustees. John claimed that trustees' counsel said there would no more distributions without releases, that John and his counsel responded that conditioning a distribution on a release was illegal, and that John's lawyer "schooled" trustees' counsel who then backed down. Trustees' counsel stated that the request for release for in connection with the trustees' resigning, and not in exchange for distributions. In response to John's claim that trustees' counsel said the trustees would "spend the trust to zero" rather than make distributions, the court found credible the testimony of trustees' counsel that he cautioned that protracted litigation would reduce the value of the trust.
6. John's counsel proposed terms for settlement, and following subsequent negotiations, settlement was reached, a settlement agreement was signed (John signed in his lawyer's office), and the agreement was filed with the court. Under the settlement, John and Tiffany would be appointed as trustees, the prior trustees would account and be released, the trustees' attorneys' fees for the motion to quash would be paid out of the trust, and the trust assets would be distributed among John and Tiffany as they jointly directed (John received $106,000, with $40,000 to Tiffany).

7. The court upheld the settlement agreement, and enforced the settlement agreement to dismiss the balance of the claims, on the grounds that:

    a. the probate code section that makes it unlawful for a trustee to condition a distribution on a release only applies to required distributions, and not discretionary distributions, and since all trust distributions were discretionary the probate code section does not apply; and there was therefore no illegality that undermines the settlement agreement;

    b. the evidence reflects that the trustees never conditioned a disbursement on a release, and only requested a release when John and Tiffany demanded that the trustees resign;

    c. there was no undue influence where (a) John had his own counsel and was mentally competent, (b) where the only reason he did not receive distributions for medical care was that he failed or refused to provide documentation supporting the bills, (c) where distributions from other trusts fully provided for all of his costs of living and documented actual medical costs, and (d) where there were no unusual circumstances surrounding the settlement agreement;

    d. John was not under economic distress, and the statement by trustees' counsel that litigation would adversely impact the trust was an accurate statement of trust law, which could not be claimed to be a wrongful act under the economic distress doctrine;

    e. John had other options, other than settlement, including litigating his claims, even where "it would cost him money" to litigate;

    f. there was no evidence of wrongful conduct by the trustees in connection with the settlement, there was no secrecy, and no credible evidence of economic threats by the trustees; and

    g. John received nearly all the relief he wanted other than the right to sue the trustees, which is gave up in exchange for not having to incur the costs of litigation.

B. *Jacob Harrison v. Roseann Dixon*, Court of Chancery of Delaware, 2014 Del. Ch. LEXIS 277 (Dec. 8, 2014). Settlement with others does not reduce claims against remaining executor under the collateral source rule.

1. Mr. and Mrs. Harrison had six children all of whom either survived or predeceased them with living issue who survived. Mrs. Harrison passed away in May of 2014 and her husband passed away 10 months later; both died intestate. Under the intestate laws of Maryland, each then living child or deceased child with descendants then living would receive a one-sixth share of the estates; however, daughter Roseann petitioned and opened probate of the estates claiming she was a sole descendant of Mr. and Mrs. Harrison.

2. Upon discovering what his sister had done, brother Jacob filed a claim to receive his share, and Roseann argued that Jacob's share should be reduced (1) by the expenses Roseann incurred in the maintenance and upkeep of the residence and (2) by the amount he received as a settlement from two other

defendants who were initially named as parties to these claims but settled before the trial began.

3. The court dismissed Roseann's request to reduce her brother's share by the expenses she incurred in the upkeep of the house because she had no receipts or evidence to support any of the claimed expenses and because she was the sole person responsible for the house and those expenses were to the detriment of the other joint owners because she specifically excluded them and they should not have to share in her expenses.
4. Whether Jacob's share should be reduced by the amount he received as a settlement required analysis of the collateral source rule. Roseann argued that the share should be reduced because otherwise Jacob would receive more than his 1/6 intestate share. However, Jacob argued that the settlement was a collateral source and to have his share reduced by that amount would grant a windfall to the tort feasor, i.e., Roseann, for her breach of fiduciary duty.
5. Under the collateral source rule a tort feasor cannot receive a benefit when an independent third party pays for a victim's liabilities for which the tort feasor should have been responsible. Under the common law rules of equity, if a windfall is a result of such payment, then the benefit should be to the victim. Here the tort was a breach of fiduciary duties because Roseann as executor of the estate had a duty to marshal and collect the assets and distribute them to the heirs at law. She breached that duty by claiming that she was the sole heir and as such should not benefit from the settlement agreement that occurred prior to the trial.

XVII. CONSTRUCTION & CONDITIONS.

A. *In re Estate of Gary Roberts,* 2015 Ind. App. LEXIS 146 (Ct. App. IN, March 11, 2015).

Large gun collection is not tangible personal property.

1. Elizabeth and Gary Roberts were married for 31 years. Over the years and prior to his death, Gary had been an avid collector of firearms and his estate contained roughly 330 guns, bayonets, knives, gun powder, magazines, ammunition and other assorted weaponry and munitions. While the majority of his collection was stored in the gun room in the basement of their house, some guns were mixed into the common areas of the house such as the kitchen, bedroom and living room. In the beginning, Elizabeth had helped Gary purchase some of his guns, but over time she was less involved in the collection process; although, she did have a shotgun on the kitchen table and two guns in the bedroom.
2. Gary died intestate on September 27, 2013, when Elizabeth shot him in order to protect the police who were entering their property. Elizabeth was Gary's sole heir at law and she recommend that the court appoint Eric Allen as personal representative of Gary's estate. In October of 2013, Martha Belvins filed a personal injury claim against Gary's estate stating that he had caused an auto accident in which she had been injured. Eric disallowed the claim. In November 2013, Elizabeth died testate and Eric was appointed as personal

representative under her will. Eric sold the gun collection for $500,000 and asked the court to determine how the assets should be divided among the estates.

3. Under Indiana probate statutes, household goods owned by husband and wife carry survivorship rights but other jointly owned tangible personal property is held as tenants in common. At issue is whether the gun collection can be defined as household goods in which case, Elizabeth's estate would own 100% of the sales proceeds as the surviving spouse's estate.

4. The lower court determined that the gun collection did fall into the household goods classification. Martha Blevins filed an interlocutory appeal of that determination, and the court of appeals reversed. The court of appeals noted that some gun collections could be classified as household good if the collection was used for recreational purposes or practical uses, such as personal protection, but when the collection is so large, varied and stored in a manner that was not part of the common area of the house, then the collection cannot not be identified as household goods. The court further noted that it did not approve of both estates having the same personal representative because there may have been additional arguments available to Gary's estate that were in conflict with Elizabeth's estate – the slayer exemption for example.

B. *In re: Estate of Joyce Gail Blohm,* 2014 Mich. App. LEXIS 2335 (Court of Appeals of Michigan December 2, 2014). Purchase of annuities for one daughter during lifetime does not create ambiguity in residuary clause of will passing equally to all daughters.

1. Joyce was survived by several daughters, and her will directed that the residue of her estate be divided in equal shares among her daughters. Throughout her life, as part of her regular planning and money management, Joyce held several joint accounts with one of her daughters, Angela. In her will, Joyce acknowledged that those accounts existed and were jointly held for convenience and directed that all money market, checking, and other bank accounts were to be treated as part of the residue of her estate.

2. Shortly before her death, Joyce purchased several annuities listing Angela as the sole beneficiary of those annuities. When the bank attendant questioned Joyce naming only one of her daughters as beneficiary, Joyce responded "she knows what to do with it. I know what I'm doing." At her death, the other daughters who were not named as the annuitant beneficiaries brought a motion to the court to determine whether there was ambiguity in the will that would allow the annuities to become part of the residue of the estate.

3. The lower court granted summary judgment for the daughters finding that Joyce had always intended to share her money equally with all of her children, and the paragraph acknowledging that there were several joint accounts was an ambiguity that was clarified by intrinsic evidence showing Joyce's intent that the annuities were to be shared equally.

4. Angela appealed, and the court of appeals reversed on the grounds that: (1) an annuity is not a bank account; (2) there is no latent ambiguity in the document because the document clearly shows Joyce knew there were several joint bank accounts; and (3) assets that would have been included in the residue of her estate that were instead used to purchase the annuities are not estate assets because the annuities were purchased and owned solely by Joyce and have a sole remainder beneficiary and therefore pass outside of the estate.

C. *In the Matter of the Estate of Fred F. Rosen,* 2014 Mass. App. LEXIS 170 (Appeals Court of Massachusetts December 30, 2014). Direction to executor to distribute tangibles among friends and charity was a valid grant of a power of appointment.

1. This is an appeal from a summary judgment matter in which petitioner brought a claim to have a will vacated for lack of testamentary capacity and to have beneficiary designations voided for the same action and to vacate attorney's fees that were awarded. The Court of Appeals affirmed all three counts.

2. Fred Rosen was a doctor who had never married, had no children or siblings, and both of his parents were deceased. During his life, he had close friendships with various colleagues and their families. Two of those families were a couple of brothers, William and John Gerard, and the Geha sisters. Mr. Rosen spent a lot of time with William. He advised him on school, education choices, job choices, he helped him financially. William often visited Mr. Rosen. William drove him to doctor's appointments, collected his mail, helped out around the house, and at one point quit his job and was taking care of Mr. Rosen fulltime.

3. In March of 2005, Mr. Rosen was hospitalized for surgery to remove a tumor and was later transferred to a rehabilitation center in May where he eventually passed away. Just prior to this hospitalization, William and Mr. Rosen had an argument in which Mr. Rosen questioned William's financial decisions and lack of earning power of his own. After the argument William did not visit Mr. Rosen until his death.

4. While hospitalized Mr. Rosen continued to have doubts about William's ability to manage Mr. Rosen's house and whether he could maintain any financial status or stability, so Mr. Rosen met with an attorney to change his will and put his property into a land trust. The changes also removed William from all beneficial status and replaced him with the Geha sisters. Mr. Rosen also changed his beneficiary designation form on his TIAA-CREF accounts to name the sisters instead of William. The will also directed that his tangible personal property was to be distributed to or among one or more of his friends including his executor or to such one or more charitable organizations as his executor should decide in the executor's sole and absolute discretion.

5. After Mr. Rosen's death, the Geha sisters as co-executors admitted the will to probate, and William challenged the will for lack of testamentary capacity. The court found that at all times during the execution process Mr. Rosen had full testamentary capacity, he understood what he was doing and there was

no challenge to his mental capacity at the time of the execution of the will, the execution of the trust, or the change of beneficiary forms.

6. Next the court analyzed whether or not the executors could dispose of the tangible personal property as directed or if this was an invalid direction that lacked specific beneficiaries. The court determined that the direction to the executor to distribute the property to and among one or more of my friends was not a trust or a constructive trust because the beneficiaries were not defined as a closed class of beneficiaries. However, the court did find that this direction was a valid power of appointment, and Mr. Rosen intended for the co-executors to make decisions to distribute to the particular friends or charitable organizations, and that this intent was a proper execution of a power of appointment that was not expressly referenced in the will.

D. *Dennis J. Kelly, Jr. v. George W. Duvall, Jr., et al.,* Court of Appeals of Maryland 2015 Md. LEXIS 11 (Jan. 27, 2015). Boilerplate 30-day survivorship language does not condition residuary gift on survivorship, and anti-lapse provision applies.

1. May 17, 2001, Miss Elizabeth Duvall created her Last Will and Testament in which she specifically bequeathed her house and all of its household contents and furnishings to her son Dennis and the residue of her estate in equal shares to her four sons, George, Alfred, Dennis and David. April 16, 2011, Ms. Duvall died preceded in death by her son, Dennis. Her three surviving children filed an action in the lower court requesting construction of the will to provide that only the sons who survived Ms. Duvall should take in the estate.

2. Although the article of her will that devised her property did not contains any language regarding survivorship or lapses if a child predeceased her there was a separate, Item 3 in her Will, that provided that if any beneficiary named in the will did not survive her by a period of 30 days then that beneficiary would be deemed to predecease her. Dennis did in fact predecease Ms. Duvall and by a period of less than 30 days, but he was living at the time of the execution of the will.

3. Dennis's son, Dennis, Jr., contested his uncles' petition arguing that there was no survivorship presumption, and the paragraph requiring surviving for more than 30 days was merely an indication that Ms. Duvall did not want her estate to pass through multiple successor estates.

4. The lower court agreed with the three surviving sons that there was a survivorship requirement and because Dennis did not in fact survive Ms. Duvall, his heirs did not have an interest under the will. Dennis, Jr. appealed to the Court of Special Appeals who also sided in a split decision with the surviving three sons, but the dissent sided with Dennis, Jr. in that the testator's intent was to avoid multiple estates and not to create a survivorship presumption. The Court of Appeals granted Dennis, Jr.'s petition for writ and reversed the lower court's decision.

5. The Court of Appeals analyzed the two articles in the will as well as the anti-lapse and death of legatee statutes under Maryland law. In order to avoid

invoking the anti-lapse statute a will must have expressed contrary intent to and without such expressed contrary intent the anti-lapse statute applies and prevents a bequest from lapsing if the beneficiary was (1) alive at the time the will was created, (2) specifically named in the will, and (3) died before the death of the testator.

6. The court found that the 30 day survivorship language was not an expressed intent of survivorship, but merely a restatement of section 4-401 of the Maryland statutes which was crafted to avoid the multiple administration and taxation of states, and was not crafted with the intent to create a survivorship requirement. Because there was no survivorship requirement in the will the anti-lapse statute applied, and (1) Dennis was alive at the time the will was created, (2) Dennis was specifically named in the will, and (3) Dennis predeceased his mother. Therefore, his heirs could inherit his share under the will.

E. *Matter of Linder*, 47 Misc. 3d 239 (Surrogates Court Nassau County, December 15, 2014). Court rejects settlement and construes trust to avoid intestacy.

1. This is decision regarding the construction of a testamentary trust. In 1963, Bess Linder created a Will that left the residue of her estate in fee to her son, Beltram, if he survived her, but if not then Article 8 divided the assets in equal shares to be held in trust for his two children, Robert and Denise. Articles 9 and 10 provided that if Bertram predeceased Bess and if Robert and Denise died without issue, then Bess's estate would be distributed 10% to Bertram's wife if she was still living, 50% to the Albert A. and Bertram N. Linder Foundation, and the balance in equal shares to Bess's then living nieces and nephews. In 1970, Bess amended her Will by Codicil to change the outright distribution to Beltram to a lifetime trust. Later that same year, Bess died and Beltram's trust was established.

2. The Codicil only revoked the article that established the distribution to Beltram. It did not change the later articles that created the contingent trusts for Robert and Denise or the ultimate distribution that was subject to two conditions – Beltram predeceasing Bess and Robert and Denise dying without issue. Beltram's son Robert predeceased him in 1992; Beltram died in 2009, and Denise died in 2012. Neither Robert nor Denise had children, but Bess was survived by two nieces. If Article 8 of the Codicil was followed the trust assets would be paid to Bertram's estate as Bess's intestate taker, and if Article 9 and 10 of the Will were followed the trust assets would be divided 50% to the Foundation and 25% to each then living niece. After Denise's death, the current trustee of the trust petitioned the court to determine to whom the trust assets should be distributed.

3. The Executor of Bertram's estate and the Trustee of the Foundation entered into a settlement agreement to divide the assets 60/40 between the Foundation and the estate. The Court denied approval of that agreement and instead concluded that Bess's intentions, although convoluted by the drafting, were clear in that she did not intend for her estate to pass by intestacy but instead intended to (1) replace the outright bequest to Bertram

for a bequest in trust for his life, and (2) keep the remainder beneficiaries as the Foundation and the nieces and nephews in the event that her heirs eventually died out. The Court interpreted the Will to uphold the ultimate distributions 50% to the Foundation and 25% to each of the then living nieces.

F. ***In the Matter of the Donald L. Colbert Living Trust,* 2015 Ind. App. LEXIS 242 (Court App. Indiana March 30, 2015).** Funding formula that failed to fund marital trust is not ambiguous.

1. In 2008 Donald created The Donald L. Colbert Living Trust in which upon his death the trust would divide and be funded in one of two ways depending on whether or not the federal estate tax was in effect at the time of his death. If the federal estate tax is not in effect, then the trust assets are divided to utilize section 1022 of the Code. If the estate tax is in effect at the time of his death, then the trust assets are divided by formula allocation between the marital and non-marital trusts. Donald died in June 2013 survived by his wife, Barbro, and daughter, Katherine. The value of his estate was roughly $2 million.
2. Barbro petitioned the court to determine the proper funding of the marital and non-marital trusts. The lower court found that because the federal estate tax was in effect at the time of Donald's death the terms of the trust provided for the $2 million to be allocated to the non-martial trust solely for the benefit of Katherine, and the marital trust was not funded.
3. Barbro appealed claiming that there was an ambiguity under the funding language of the trust, and that the marital share should have been funded. The court found no ambiguity in the way the terms were written and affirmed the lower court's funding of the non-martial trust.

XVIII. DISCLAIMERS & POWERS.

A. ***Estate of Zucker,* 2015 PA Super 190 (2015).** Donee of a power of appointment does not have a fiduciary duty to exercise the power in good faith.

1. Under his will, Carl Zucker created a trust for his wife, Syma, and gave her a testamentary special power of appointment. Under her will, Syma exercised the power to create trusts for two of their three children, and excluding Wendy. Wendy sued claiming that Syma acted in bad faith, out of malice towards her, and contract to Carl's intent. The trial court granted summary judgment for the included children, and Wendy appealed. On appeal, the superior court affirmed on the grounds that: (1) Syma has the power to exclude Wendy in exercising the power; (2) nothing in the statutes or cases suggests that the donee of a power of appointment owes any duty to potential appointees; (3) Syma was a beneficiary of the trust, and not a trustee, and as the holder of a power only owed a duty to the decedent to comply with his directives on the scope of the power and not appoint the assets outside those limits; and (4) the donee has the right to select some potential appointees to the exclusion of others.

B. ***BMO Harris Bank, N.A. v. Towers,* 2015 IL App (1^{st}) 133351 (2015).** Exercise of limited power of appointment to donee's revocable trust, where assets could be used to pay donee's debts, was an invalid exercise of the power, and trustee correctly sought instructions to resolve dispute over validity of the exercise.

1. Mary and Martin created trusts for the lifetime benefit of their son, Martin Jr., with bank as trustee, and gave him testamentary limited powers of appointment over the trusts (the powers prohibited him from appointing the trust assets to himself). In default of the exercise, the trust assets would pass to Martin Jr.'s then living descendants.
2. Martin Jr. died in 2006, and under his will exercised the powers in favor of his revocable living trust. Under the terms of his trust, the trust assets would ultimately be divided into marital and credit shelter shares, but Martin Jr. excluded two of his children as trust beneficiaries. The trust directed the payment of Martin Jr.'s debts out of the "original trust" assets upon Martin's death, meaning the trust before division into the marital and family shares. The trust also permitted distribution of the original trust assets to the probate estate to pay charges. Upon the estate being closed, the bank trustee was contacted for transfer of the trust assets to the revocable trust.
3. The bank filed a petition for instructions on the validity of the exercise of the power of appointment, the beneficiaries of the revocable trust sued the bank claiming it breached its duties by filing the petition and running up legal fees, and the takers in default of the exercise moved for summary judgment alleging improper exercise of the power. The trial court found that the power was not validly exercised, granted summary judgment for the takers in default and for the bank, and awarded the taker in default that brought the claims payment of his attorneys' fees payable out of the trust. The revocable trust beneficiaries appealed.
4. On appeal, the appellate court affirmed the trial court on the following grounds: (1) the plain language of the trusts establishes that Martin Jr. could not appoint the trust assets to himself; (2) the plain language of Martin Jr.'s will and revocable trust provide that the appointed property would be co-mingled and blended with his personal assets and that the trustee could pay "all debts" from the assets, no trust language segregated the appointed assets, and Martin Jr.'s creditors could reach the assets (despite the fact that his debts were paid by his widow and no actual creditors attempted to reach the assets); (3) Martin Jr. therefore appointed the trust assets to himself, and he was not in the class of permissible appointees; (4) the trustee acted precisely as a trustee is asked to act when seeking instructions from the court; (5) the taker in default who brought claims was properly awarded his attorneys' fees of $50,000 where there was an ambiguity about the exercise of the power, and his actions helped the trial court resolve the ambiguity.

C. ***Thomas W. Sefton, Jr., Plaintiff and Appellant, v. Harley K. Sefton, as Trustee, Defendant and Respondent; Wells Fargo Bank, N.A., as Successor Trustee, Objector and Respondent*****. Court of Appeal, Fourth Appellate District, Division One, State of California. No. D065898.** The invalid exercise of a nonexclusive power of appointment results in the default of appointment, and the appointive property passes according to the donor's testamentary scheme, without regard for the donee's attempted appointment.

1. Joseph W. Sefton, Jr. died in 1966. In his will executed September 7, 1955, he created a testamentary trust for the benefit of his son, Thomas W. Sefton, for his son's life. Upon Thomas's death, the trust terminated and the assets were to be distributed.
2. The will included a power of appointment as follows: "three quarters (3/4) [of the trust estate] shall be distributed to [Thomas's] then living issue as [Thomas] shall by his Last Will and Testament appoint, and in default of appointment, to his then living issue on the principle of representation."
3. Thomas died in 2006. In his will executed August 26, 1994, he exercised the power of appointment by leaving two-thirds in trust for the benefit of one son and his children, and the other one-third in trust for the benefit of his daughter and her child. Thomas did not appoint any of the property to his other son.
4. The excluded son brought a petition in probate court challenging the distribution of Joseph's estate, alleging that the power of appointment was nonexclusive, and that he could not be excluded from at least a substantial distribution.
5. In a previous appeal, the appellate court agreed. The court held that the power of appointment conferred on Thomas was nonexclusive, meaning that Thomas was required to make at least a substantial distribution of the trust estate to each permissible object, including the son he had attempted to exclude. The case was remanded to the trial court for a determination of what constitutes a "substantial" share of the estate.
6. On remand, the trial court held a trial to determine the amount of a "substantial" share, and eventually calculated that dividing the appointive property equally would result in seven shares because Thomas had seven then living issue at the time of his death. The trial court concluded that seven percent of such a one-seventh share would be substantial, and awarded $565,350, plus interest, to the excluded son. On appeal, the issue was the proper remedy for the excluded son.
7. Relying heavily upon *Estate of Sloan,* 7 Cal.App.2d 319 (1935), the appellate court reviewed the common law governing powers of appointment. In *Sloan*, a nonexclusive power of appointment was invalidly exercised because the donee excluded two of his heirs from any distribution. The *Sloan* court remanded the case with instructions to identify those persons who were entitled to a distribution of the estate as heirs of the donee of the power, and to order distribution of the trust estate to those heirs, in accordance with their respective rights as such heirs.
8. The court then reviewed the traditional English equity rule regarding the exercise of a power of appointment. Historically, if the share given to any one of the objects of a nonexclusive power of appointment was so small as not to be in accordance with such presumed intention, it was to be deemed

merely illusory, so as to render the attempted exercise of the power wholly invalid. In other words, if each permissible appointee did not receive at least a substantial distribution from the appointive property, the power of appointment was invalidly exercised and the attempted appointment failed.

9. At common law as under *Sloan*, the remedy for such an invalid exercise of the power of appointment was to disregard the donee's attempted appointment and distribute the property according to the donor's testamentary scheme, if any.

10. Here, Thomas's attempted appointment, which completely excluded one of his sons, was invalid and void. The appointive property therefore passes according to Joseph's will, which provided that in default of appointment the appointive property should pass to Thomas's then living issue, on the principle of representation. Accordingly, under common law, the excluded son was entitled to a third of the trust estate (not a "substantial share").

11. Note that the California Powers of Appointment Act, which took effect in 1970 (after Joseph died), changed the law so that a power such as the one in Joseph's will would be exclusive, meaning that Thomas could exclude any of the permissible appointees. However, in light of the CPAA's provisions regarding retroactivity, as well as the presumption that testators intend their wills to be governed by the law in effect at the time they create them, the common law presumption of nonexclusivety continued to govern Joseph's power of appointment.

XIX. CREATION, VALIDITY & FUNDING.

A. *Dishman v. Dougherty,* No. 2013-CA-000558 & 9-MR (Kentucky Court of Appeals, 2015). Power of attorney did not authorize wise to create irrevocable trust for husband without specific grant of authority, and wife must reimburse husband's estate for assets of his used to create trust and petition for guardianship over husband.

1. Anne and Charles Dishman were married in 1997 when both were multimillionaires. They signed a premarital agreement stating each would retain control over their own separate property. In 2001, they signed reciprocal powers of appoint that authorized the other as agent to " convey any real or personal property to the trustee of any trust agreement between me and said trustee and entered into either before or after the date of this instrument" . In 2003 Charles was diagnosed with a fatal neurological disease, and his physicians advised he was mentally unable to make financial decisions. Anne met with an attorney, and used the power of attorney to create an irrevocable trust for all of Charles's assets, with herself as co-trustee along with Charles's financial advisor. The trust provided for lifetime management of Charles's assets, with the assets passing to his estate at his death. The trust terms protected any trustee actions taken in good faith, and allowed payment of attorneys' fees from the trust.

2. The next year, Anne sought to be appointed as guardian for Charles, which his children from a prior marriage contested, and which was ultimately dismissed. In 2005, Charles revoked the power of attorney, and sued to

divorce Anne which was awarded that year, the court finding competent. The financial advisor resigned as co-trustee. Charles then sued to remove Anne as trustee of the trust and challenged her payment of attorneys' fees exceeding $125,000 out of the trust assets for the trust creation and guardianship action. Anne was willing to resign, objected to the children being appointed as trustees, and sought a release and additional attorneys' fees.

3. Charles died in 2006, and his daughter as executrix was substituted as a party. The trial court held the power of attorney authorized the trust creation, and the dispute continued on the issues of whether Anne acted in good faith and was entitled to attorneys' fees. Both Anne and Susan saw themselves as protecting Charles against the greed of the other. The trial court found Anne acted in good faith and was entitled to most of the attorneys' fees.

4. On appeal, the court of appeals reversed, and held the power of attorney did not authorize the creation of the trust, and Anne must reimburse the attorneys' fees, on the grounds that: (1) the power of attorney did not specifically authorize the agent to create a trust, and therefore the trust was void *ab initio*; (2) in order for an attorney-in-fact to create a trust, the authority must be expressly provided; and (3) the premarital agreement specifically and deliberately kept assets separate, and if the power to create a trust was desired it would need to be specifically granted, especially for an irrevocable trust.

B. *In re Mardigian Estate,* 2015 Mich. App. LEXIS 1852 (2015). A revocable trust favoring the drafting attorney is not void as a matter of public policy, but it is presumptively the product of undue influence.

1. In August of 2010, Robert Mardigian executed a revocable trust that passed at his death the bulk of his estate to his long-time friend who was also the attorney that drafted the trust and the attorney's children. In 2011, he signed a will with similar provisions, and then died in 2012. The attorney sought to probate and qualify under the will, and Robert's brother, nieces, nephews, and girlfriend objected. The trail court granted summary judgment voiding all of the gifts to the attorney and his children as a matter of public policy because the attorney's conduct violated Model Rule of Professional Conduct 1.8(C)(prohibiting preparing a testamentary gift instrument in favor of the drafting attorney in the absence of a family relationship). The attorney ceased participating in the jury trial, and the other parties ultimately settled in the middle of a jury trial. The attorney, acting as executor under the will, appealed.

2. On appeal, a divided Michigan Court of Appeals reversed and remanded on the following grounds:

   a. in a 1965 decision that predated the enactment of the MRPC, the state supreme court held that a will favoring the drafting attorney is not necessarily invalid, but undue influence is rebuttably presumed to have been exerted;

   b. rules of professional conduct may also constitute definitive indicator of public policy, but not always;

c. while the MRPC violation was clearly unethical, it was not clearly against public policy;

d. the contracts addressed in a prior 1969 decision are different than wills which are not contracts, and the same rules are applied to construe revocable trusts as are applied to wills;

e. the devises to the attorney and his children are not definitively against public policy, and the intent to gift to the attorney is not per se unlawful, and the letter and spirit of the professional rules rather raises a suspicion of undue influence;

f. despite the later enactment of the MRPC, there are valid policy reasons why the state supreme court could continue to embrace its 1965 decision, and treat a will or revocable trust drafted in violation of the MRPC as different than a contract in violation of the MRPC, including that a rule rendering the gifts void as a matter of public policy could defeat the intent of the settlor; and

g. the proper remedy for a rule violation of this type is to follow normal procedures to carry out the actual intent, but apply a rebuttable presumption of undue influence, rather than to declare the gifts void on their face.

3. A dissenting judge would be to void the will and revocable trust for violation of MRPC 1.8(c), and under the Trust Code provision that would cause termination of trust where the trust purposes are contrary to public policy.

C. *Jo Ann Ward v. Mark Fogel and William Wright, Jr. as Co-Trustees, Robert E. Ward, III and Robert E. Ward, IV,* 2014 N.C. App. LEXIS 1248 (Ct App N.C. Sept. 23, 2014). Court allows certain claims to challenge validity of trust by nominal grantor where grantor may not have had advice of her own counsel, and trust was arranged by husband prior to filing for divorce.

1. This is an appeal from a summary judgment in which the lower court dismissed all actions in favor of defendant, ex-husband, Robert Ward, III. His wife, Jo Ann, appealed and the court of appeals affirmed in part and reversed in part.

2. Jo Ann and Robert wed in 1987 in North Carolina. In the 1990s, Robert was part owner of a business called Environmental Protection Services, Inc. (EPS) which is based in West Virginia. In 2005, he transferred his business interest to the REW Trust. Under the terms of the trust, Jo Ann would receive income and principal distributions so long as she was married to Robert, and after her death or divorce, their son, Robert, IV and any of his children were the remainder beneficiaries. Jo Ann took no part in the drafting of the trust and the trust terms were not explained to her.

3. In 2006, Robert decided to create another trust, but with himself as the beneficiary and Jo Ann as the grantor. The WF trust was funded by interests in LLCs that were spun off from the EPS business which were gifted to Jo Ann with the understanding that she would then transfer them to the trust.

Along with the grantor and beneficiary swap, the other key difference in this trust was that it did not have a "divorce clause" terminating Robert's interest in the trust in the event of divorce.

4. At all times during their marriage, Robert handled the finances and did not communicate to Jo Ann about the terms of the trusts or other financial matters.
5. In 2009, Jo Ann and Robert separated, and in 2010 Robert filed an action in Florida, their domiciliary state since 2002, for divorce and equitable distribution of their property. In 2011, Jo Ann filed an action for fraudulent inducement, constructive fraud, and breach of fiduciary duty in the creation of the REW and WF Trusts. Her action was filed in North Carolina because it was the state where the trustees were located and the assets were being held and administered.
6. Robert filed a motion for summary judgment which the lower court granted stating that North Carolina did not have jurisdiction. Jo Ann appealed.
7. The court of appeals reversed the lower court's holding that North Carolina did not have subject matter jurisdiction over the actions. Although Jo Ann and Robert both lived in Florida currently and at the time the trusts were created, the trustees and trust assets were located in North Carolina. Further, the court distinguished the Florida case *Beers* because here there was a specific transaction (the creation of the trusts) between the spouses that the fraud claims are the subject of, and, therefore, the statute governing equitable distribution of property is not the exclusive remedy for dissipation of marital property.
8. As to the REW trust, the court affirmed the lower court's dismissal of the claims because as a beneficiary of the trust, Jo Ann was not induced to comply with its terms and suffered no harm from its creation. Furthermore, no one owed her a fiduciary duty to explain how the trust operated.
9. The court reversed the dismissal of claims for the WF trust because Jo Ann was the grantor of this trust, and she did present facts that should have been reviewed by a jury to determine whether there were misrepresentations by the drafting attorney who explained the trust as protecting the assets from EPA claims and other third party creditors and stated that now it was her turn to create a trust, but the attorney failed to clarify that he did not represent her interests and that she should seek independent counsel.
10. Lastly, the court upheld the general use of divorce clauses as valid clauses that did not violate public policy.

XX. DECANTING.

A. *Harrell v. Badger,* 2015 Fla. App. LEXIS 11183 (2015). Decanting to special needs trust, with fraudulent pooled special needs trust as remainder beneficiary, and without notice to the beneficiaries, is void and a breach of fiduciary duty.

1. Under her will, Rita Wilson created a trusts for the lifetime benefit of her adopted son David, with the remainder at David's death passing to Rita's two

natural children. Various family members (including Rita's son) resigned or were removed as trustee, and David's neighbor Badger was appointed as trustee by a court order that required him to post bond and file semi-annual accountings. Badger delayed in posting bond, failed to file accountings, and sought to have the court approve hiring his wife as realtor to sell trust property (which was not granted by the court).

2. Badger hired Linda Littlefield as counsel (Linda was later disbarred), and on her advice agreed to decant the trust assets to a sub account for David of the Florida Foundation for Special Needs Trusts, a pooled trust administered by Littlefield and her husband, with the husband as trustee, designed to qualify David for government benefits, and with the remainder passing at David's death to the pooled trust for the benefit of other beneficiaries (and not Rita's natural children).

3. Badger, his wife, and Wilson entered into a care agreement to pay Badger and his wife for care of Wilson, Badger sold the house in the trust with his wife as realtor without court approval, and then wired the sales proceeds to the subaccount of the pooled special needs trust. Rita's children did not receive notice of any of this. The Littlefields were convicted and sentenced to prison for stealing the funds in their pooled special needs trust. Badger moved to terminate the trust, when he notified Rita's children for the first time of all of this, and the children sued Badger. The trial court dismissed the claims against Badger and awarded Badger $85,000 in attorneys' fees against the children. The children appealed.

4. On appeal, the court of appeals reversed and remanded on the following grounds: (1) the Florida decanting statute required notice to Rita's children as qualified beneficiaries, and Badger acted improperly by not giving them notice; (2) the decanting statute also requires that the beneficiaries of the new trust only include beneficiaries of the current trust, the remainder provisions to the pooled trust violated this requirement, and the decanting was therefore invalid; (3) the trial court must determine the monetary harm to the trust from Badger's actions, and order the return of that value to the trust; (4) commissions paid to Badger's wife as realtor must be returned to the trust; (5) Badger must be removed as trustee; (6) Badger could not defend his actions by claiming advice of counsel where his misconduct resulted from failure to comply with clear statutory requirements, and not from faulty advice of counsel; and (7) the equities of the case do not support awarding Badger his attorneys' fees, and the trial court based its award on the erroneous conclusion that the children had no evidence to support their claims.

B. **Petition of Katharine A. Johnson to Nullify the Decanting of the Trust Created under an Agreement made by Michael L. Johnson, 2015 NY Slip Op 30017(U); 2015 N.Y. Misc. LEXIS 51 (2015).** The relevant New York decanting statute did not authorize a trustee to decant a trust if the result was to broaden the class of successor and remainder beneficiaries.

1. Katharine Johnson was the beneficiary of two trusts at issue: (1) a trust created by her mother under an agreement dated May 8, 1985 (the "1985 Trust"); and (2) a trust created by her father under an agreement dated April 21, 1997 (the "1997 Trust").
2. Under the 1985 Trust, if Ms. Johnson died before the termination of the trust, she had a limited power of appointment. If any descendant of Ms. Johnson's mother was living, the power of appointment could be exercised only in favor of the descendants of Ms. Johnson's mother. If the power of appointment was not exercised, the 1985 Trust principal would be distributed to Ms. Johnson's issue, per stirpes, otherwise Ms. Johnson's mother's issue, per stirpes, otherwise Ms. Johnson and her husband, or the survivor of them, otherwise to the New York City Ballet.
3. Under the 1997 Trust, if Ms. Johnson died before the termination of the trust, she could exercise her limited power of appointment in favor of her spouse and issue.
4. In 1997, Ms. Johnson's parents divorced. In 1998, Robert D. Lowenfish was appointed as co-trustee of the 1985 Trust with Ms. Johnson's father, who was the initial trustee. Mr. Lowenfish became sole trustee of the 1997 Trust in 1999.
5. On July 25, 2011, Mr. Lowenfish decanted the 1985 Trust into a new trust created by Ms. Johnson's father (the "appointed trust"). Under the terms of the appointed trust, (1) the permissible appointees of Ms. Johnson's limited power of appointment were the issue of Ms. Johnson's father rather than the issue of Ms. Johnson's mother and (2) the remainder beneficiaries of the trust were different – for example, the ultimate contingent beneficiaries of the appointed trust were the heirs at law of Ms. Johnson's father rather than the New York City Ballet.
6. On the same day, Mr. Lowenfish decanted the 1997 Trust into the appointed trust, as he had done with the 1985 Trust. Under the terms of the appointed trust, the permissible appointees of Ms. Johnson's limited power of appointment were the issue of Ms. Johnson's father rather than the issue of Ms. Johnson (and her spouse).
7. At issue was the requirement under the New York decanting statute in effect at the time of the decanting that a decanting be "in favor of the proper objects of the exercise of the power." After examining the legislative history, the court interpreted this language to mean that while the class of successor and remainder beneficiaries of an appointed trust could be narrower than under the original trust, it could not be broader. Therefore the decanting of both trusts was impermissible.

C. *Ferri v. Powell-Ferri,* 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161 (Ct. Supreme Court, 2105). Applying Massachusetts law, court invalidates 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 distribution and beneficiary had right to withdraw trust assets upon reaching certain ages. The state supreme court refuses to impose duty on beneficiary to oppose decanting and protect marital assets.

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: (1) the court will not consider the affidavit of the settlor, and will construe the trust on its terms; (2) 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; (3) the decanting occurred after Paul obtained an absolute right to the trust assets; (4) the trust terms that allow the trustee to segregate assets for Paul does not amount to the level of "absolute and uncontrolled discretion" required to recognizes the power to decant; (4) the fact that Paul had not asked for the trust principal does not affect his uncontrolled right to the assets; (5) the decanting frustrated Paul's rights and cannot stand; and (6) 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 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: (1) 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; (2) the public policy of Connecticut supports such a cause of action, and injured spouses should have a remedy in these circumstances; (3) however, because damages cannot be calculated or quantified in this case, the court should not recognize this new tort in this case; (4) 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.

XXI. AMENDMENT, REVOCATION, REFORMATION & TERMINATION.

A. ***Trust U/W Wallace B. Flint FBO Katherine F. Shadek,* 118 A. 3d 182 (Del. Chancery Court, 2015).** Court refuses to modify unambiguous testamentary trust holding concentration of IBM stock to create a Delaware directed trust with remainder beneficiaries as investment directors.

1. Upon his death in New York in 1938, Wallace Flint established a trust for the lifetime benefit, and thereafter for the lifetime benefit of his daughter Katherine. The trust was funded with a concentration of IBM stock, and the trust terms authorized the retention of inception assets. After his wife's death, the trust terms provided Katherine with discretionary income, a right to withdraw 25% of the trust assets at each of ages 35 and 40 (which she did not exercise), discretionary principal of only $10,000 per year, and a testamentary power of appointing that she voluntarily restricted into a limited power in 1949. Wallace named individual non-family trustees along with a bank co-trustee. The New York courts eventually named Katherine as co-trustee to serve with the bank trustee, in 2001 a consent order was entered in Delaware accepting jurisdiction over the trust upon release from a New York court, and the New York court ordered the transfer of the trust to Delaware in 2002, with an accompanying consent order in Delaware.

2. Katherine and her children did not want to diversify the trust's 81% concentration of IBM stock. The family approved a bank designed monetization strategy called "PrISM" as a hedge against declines in the stock value. The trustees delegated to two of Katherine's adult children all investment powers for the trust, and all of the adult beneficiaries authorized the delegation for themselves and their descendants. The adult beneficiaries also entered into annual release and indemnification agreements with the bank and the delegated investment managers.

3. In 2014, Katherine sought to modify the trust to make it a Delaware directed trust (and make accompanying choice of law changes to the prior court

orders), with one of Katherine's children as investment advisor, and with the adult beneficiaries having the power to appoint a new investment advisor. The court refused the modification on the following grounds:

a. the modifications conflict with the settlor's intent, he did not create a directed trust, he contemplated that the trustees would use their judgment on investments, and he did not intend to give this control to the beneficiaries;

b. the settlor intended that the trust would benefit from the involvement of a corporate trustee to provide meaningful protection against mismanagement and self-dealing;

c. lower trustee fees do not justify the change;

d. while recent statutes like the UTC favor beneficiary control, in Delaware the intent of the settlor controls as a matter of state policy, and it would be duplicitous to say settlor intent controls while enabling beneficiaries to rewrite documents after death;

e. while Delaware law permits the creation of a new directed trust, it does not allow rewriting a will to add those features contrary to the settlor's intent;

f. prior consent orders, before the court's *Peierls* decisions, have no precedential value;

g. other doctrines, such as reformation, *cy pres*, deviation, and statutory medication, do not support the relief requested because they exist to give effect to intent, and not to make changes that violate it; and

h. in *dicta*, the court also questioned whether the common law lack of equitable power to reform a will would be an obstacle to the relief requested.

B. *Radin v. Jewish National Fund,* Ct. App. 2/4 B227954 (Cal. S. Ct. 2015). In case construing the will of Irving Duke, California Supreme Court reverses rule barring extrinsic evidence to reform an unambiguous will.

1. When Irving Duke was 72, he executed a holographic will that left his property to his wife, and provided that if he and his wife died at the same time, the property would pass to two charities. The will did not address what would happen if Irving survived his wife, but did specifically disinherit any persons claiming to be Irving's heirs at law, and included a no-contest clause. Irving amended the will 13 years later to provide that all assets are community property. Irving survived his wife, and died in 2007 without a surviving spouse or children.

2. The charities named in the will petitioned to probate the will, and Irving's nephews petitioned to receive the estate assets claiming the right to Irving's assets as his intestate heirs. The trial court granted the nephews summary judgment, on the grounds that the will was unambiguous, failed to address Irving surviving his wife and left Irving intestate, and extrinsic evidence of

intent to benefit the charities was inadmissible where the will is unambiguous. The Court of Appeals affirmed applying the *Estate of Barnes, 63 Ca. 2d 580 (1965)* principle that extrinsic evidence is not admissible to reform an unambiguous will.

3. On appeal, the California Supreme Court reversed the Court of Appeals and the *Barnes* rule, remanded the case, held that the categorical bar on reformation of unambiguous wills is not justified, and held that reformation is permissible if clear and convincing evidence establishes an error in the expression of the testator's intent and establishes the testator's actual specific intent at the time the will was drafted, on the following grounds:

   a. the legislature has not restricted the ability of the courts to develop common law in this area, and statutory enactments have largely codified common law development;

   b. the legislature has not specifically addressed reformation of wills;

   c. extrinsic evidence is admissible to correct errors in other donative documents, correct attorney drafting errors, to determine the validity of a will, and in construction cases where the remedy essentially reforms a will, and extrinsic evidence is not inherently more reliable in those case than in reformation of a will;

   d. imposing a clear and convincing burden of proof resolves any evidentiary concerns;

   e. denying a remedy of reformation defeats testator's intent and result in unjust enrichment of unintended beneficiaries, and would defeat the ultimate purpose of the statute of wills which is to transfer an estate consistent with the testator's intent; and

   f. allowing reformation is consistent with the legislature's efforts to apply the same rules of construction to all donative documents, and despite the lack of a similar rule in other states, follows the recommendation of the Restatement (Third) of Property and the Uniform Probate Code.

C. *In re Estate of Regan,* 2015 Miss App. LEXIS 179 (April 7, 2015). Will that fails to name beneficiaries is unambiguous and not subject to reformation.

1. Ramon Regan resided in a personal care home operated by June Swilley and her husband. In 2008, Swilley arranged for a local notary public, Susan Beckham, to assist Regan in preparing a will. During the meeting, Beckham filled out a preprinted form titled "Last Will and Testament" pursuant to Regan's instructions. Regan signed the document in front of four witnesses. The document stated that Regan never married or had children and that his parents had predeceased him.

2. Following Regan's death, Swilley filed a petition to probate Regan's will. A search of Regan's heirs-at-law revealed that Regan's aunt, Elsie LeBlanc survived him. Mrs. LeBlanc passed away and her son, Kenneth LeBlanc, filed a caveat against probate of the will and filed a motion to declare Regan's will

invalid because of the document's failure to name a beneficiary and properly devise Regan's property.

3. Regan's will stated that upon his death, he wanted to distribute all his estate, including his monetary and real property. However, the document failed to designate a beneficiary to whom Regan wished to distribute his property. Swilley asserted that, due to a scrivener's error by Beckham in filling out the blank form, the document failed to name Swilley and her husband as Regan's beneficiaries. Swilley asserted that the document still met the statutory requirements for a will and clearly reflected Regan's intent to devise his property. She therefore argued that the chancellor should consider parole evidence to determine Regan's intent. LeBlanc, on behalf of his mother's estate (the "Estate") argued that the failure to name a beneficiary made it impossible to determine Regan's intent by reviewing the document alone.

4. The chancellor entered an order granting the Estate's motion finding the will an invalid testamentary instrument on grounds that (1) the document failed to name a beneficiary; (2) the document was not subject to multiple interpretations; (3) there was nothing in the document to interpret; and (4) considering parole evidence regarding testamentary intent was inappropriate. Swilley appealed.

5. On appeal, the Court of Appeals of Mississippi affirmed the chancellor's decision finding that the document lacked ambiguity and simply failed to designate, describe or otherwise identify any beneficiaries. Accordingly, the chancellor did not err when he refused to admit parole evidence because there was no ambiguous language capable of clarification. To give the will effect, the court would have to insert a beneficiary's name where the will completely failed to provide one, an inappropriate addition to a will by the court.

D. *Megiel-Rollo v. Megiel,* No. 2D14-4037 (2nd Dist. Florida Court of Appels, 2015). Reformation under the UTC is available to supply missing remainder beneficiaries of revocable trust that were omitted by scrivener's error.

1. Peggy Megiel died in 2012 survived by 3 children. Under her 1992 will, she left her estate equally to her 3 children. In 1997, however, she executed a revocable trust and deeded her Punta Gorda residence to the trust. The trust and deed were prepared by her daughter Denise's husband (an attorney), and named Denise as successor trustee. The trust terms left the property at Peggy's death to the beneficiaries as defined on an attached schedule of beneficial interests, but no schedule was ever attached to the trust. After Peggy's death, daughter Sharon sued to declare the trust and deed void for lacking beneficiaries, and that the residence should pass equally to the children under the will. Denise opposed, her husband the drafting attorney provided an affidavit that Peggy intended to exclude Sharon as a beneficiary and that the failure to include the schedule was his error, and Denise sought reformation of the trust to include the missing schedule that excluded Sharon. The trial court found on summary judgment that the trust was never

validly created for lack of any definite beneficiaries, and ordered the transfer of the residence to Peggy's estate. Denise appealed.

2. On appeal, the court of appeals reversed and remanded on the following grounds: (1) the Florida UTC allows reformation of a trust to correct mistakes; (2) the trust was not void for lack of beneficiaries, because Peggy herself was a beneficiary; (3) while, absent reformation, the doctrine of merger would apply to cause a resulting trust in favor of Peggy's estate, the existence of the doctrine of merger does not mean that the remedy of reformation is not available; (4) under the plain language of the UTC, reformation is not limited to correcting simple scrivener's errors and reformation is available to avoid a merger, the statute is remedial and should be liberally construed, and it would be impossible to try and distinguish between "simple" and substantive errors; and (5) Florida has long had a liberal policy towards reformation to carry out the settlor's intent.

E. *Trupp v. Naughton,* No. 320843 (Mich. Court of Appeals, unpublished, 2015). Unwillingness of co-trustees to follow trust terms justified judicial termination of trust.

1. Paul and Elaine Trupp created a trust for 3 of their 5 children that become irrevocable upon Elaine's death in 2008. The trust named all 3 beneficiaries as co-trustees, and included a lake house and a residence. The trust terms required the beneficiaries to agree to a schedule of equal use of the lake house and share the expenses, and gave the residence to the son with a direction to appraise the property and pay one of the daughters cash in the amount of the "fair market value". The children never agreed on a use schedule for the lake house, the son paid the expenses for 2 years and then walked away from using it, at which time one daughter paid the expenses although both daughters used the property. The son took possession of the residence (which was subject to a mortgage), but never appraised the property or paid anything to the daughter. The son petitioned to terminate the trust, sell the lake house, and order reimbursements, which the daughters opposed. The probate court ordered the termination of the trust and the sale of the lake house. For the residence, the court heard testimony from the drafting attorney that Elaine meant for "fair market value" to take the mortgage debt into account, and then ordered the son to pay the daughter an amount equal to the sales price of $160,000 minus the amount of the mortgage debt. The daughters appealed.

2. On appeal, the Michigan Court of Appeals affirmed on the following grounds: (1) the trust terms authorized termination of the trust by the trustees where justified, no longer economically sound, or in the best interests of the beneficiaries; (2) the trustees understood the trust terms, were present when it was amended, and made no attempt to implement the trust terms, and used the property in total disregard of the trust terms; (3) the state trust code allows termination when a trust has become impossible to achieve; (4) the court reasonably found that the purposes could not be met where none of the parties would follow the trust terms; (5) extrinsic evidence by the drafting

attorney was appropriate to resolve the latent ambiguity in the meaning of "fair market value"; and (6) the judge did not err in refusing to disqualify himself.

F. *Nancy Crowe et al. v. Leonard M. Tweten*, 2014 Cal. App. Unpub. LEXIS 9292 (Ct. App. Cal. December 29, 2014). Reformation permitted to address unintended result of funding formula from 2010 death.

1. Leonard and Eileen Tweten had four children, Jim, Scott, Nancy and Janet, and a successful AV empire that they sold to Best Buy in 2002 for $90 million. Each child was a part owner of the AV business and received $6 million from the sale to Best Buy. Leonard and Eileen's estate plan left the residue of their estate to the survivor of them and then at the survivor's death the remaining assets would be divided among their children, with Scott's interest in further trust for his protection. Every time they updated their estate plan, the intent to benefit the surviving spouse took precedence over estate taxes and the benefit of their children. The only significant difference in the plan was that at the death of the survivor, Leonard's estate would divide among the children and a charity whereas Eileen's estate did not include the charity.
2. In 2007 and 2008, Leonard and Eileen updated their estate plan to include a formula funding clause to utilize the exclusion amount for estate taxes and to provide a "token gift" to the children at the death of the first spouse. That exclusion amount would be divided and distributed in fee to the children with the remainder benefiting the surviving spouse. The drafting attorney discussed how the exclusion amount was increasing to 3.5 million in 2009 and was subject to sunset in 2010. In the event that the estate tax was repealed in 2010, their estate plan would need to be revised. The attorney's drafting software did not contain a saving clause in the event there was no estate tax in 2010 nor did he draft a savings provision into the documents. Without an estate tax, the formula clause resulted in all of the assets being distributed among the children and none of the assets being retained for the surviving spouse.
3. In April of 2010, Scott passed away and Eileen was admitted into hospice. Leonard tried to contact his attorney, but he was unfortunately out of the office on vacation. Another attorney within the firm reviewed Leonard's and Eileen's documents and drafted an amendment to their trusts to treat a death in 2010 as if it had occurred in 2009. The amendments were signed by Leonard and Eileen but were not notarized, which was a requirement under the terms of their revocable trusts. Eileen died later that month. In total, Leonard lost his wife, son, brother and two beloved dogs all in April 2010.
4. In September 2010, Nancy and Janet filed a petition to invalidate the trust amendments because they did not meet the notary requirement and to distribute the trust assets under the formula clause as written. Leonard also filed a petition requesting the court to forgive the non-compliance of the amendment or to reform the trust to effectuate the grantor's intentions. The court found that the trust amendment did not meet the requirements as stated in the terms of the trust for a valid amendment and therefore could not

be enforced; however, based on the evidence of Eileen's intent the court could reform the trust under its equitable power. The daughters appealed the court's decision to amend the trust.

5. The court of appeals affirmed the lower court's use of its equitable power to amend the trust because in viewing the trust as a whole the formula clause in 2010 created an ambiguity with the rest of the trust provisions, and extrinsic evidence clearly showed the grantor's intent was to benefit the surviving spouse for life then the children. In order to effectuate the grantor's intent the court had the authority to modify the trust to correct the drafting error.

G. *Rocke v. American Research Bureau,* 2015 Fla. App. ALEXIS 16740 (2015). Florida applies a broad definition of similarity and allows extrinsic evidence for purposes of applying the doctrine of dependent relative revocation in cases of undue influence.

1. Virginia Murphy dies in 1006 at age 107, leaving an estate of $12 million but not living parents, spouse, or descendants. In the 5 years before her death, Virginia revised her will 6 times, each drafted by her longtime lawyer. The 1989 will left cash gifts to her cousin Jackie (with whom she remained close since the 1960s), her lawyer, her lawyer's legal assistant, and her accountant, and left the residue to a medical school. The 1991 will increased the cash gifts and added a cash gift to the medical school, but removed the medical school from the residue and left the residue of her estate to the same four individuals. The first 1992 will was similar to the 1991 will. The second 1992 will changed the residue to pass to only the accountant, lawyer, and legal assistant, and excluded Jackie. The 1993 will increased the pre-residuary gifts to the legal assistant. The 1994 will increased the pre-residuary gift to the medical school.

2. The lawyer submitted the final will to probate, and Jackie brought claims of undue influence against the lawyer and his legal assistant. The probate court found that the lawyer and legal assistant had exerted undue influence on Virginia, voided the residuary gifts under the 1994 will, and ordered the residue to pass by intestacy. On appeals, the Florida Court of Appeals reversed the intestacy order, and remanded to the probate court to consider the doctrine of dependent relative revocation (DRR). The probate court held that DRR did not apply based only on its review of the various wills, and declined to consider any extrinsic evidence. The probate court's order was not entered for 4 years, since it had to retain an heir search firm to locate the 48 distant heirs of Virginia, none of whom were aware of their relationship to Virginia.

3. On appeal, the Florida Court of Appeals reversed the probate court on the following grounds:

    a. DRR allows revocation of a former will where revocation of the former will was dependent on the validity of the new one, and the testator preferring the old will to intestacy;

    b. to apply, it must be determined that the revoked prior will was sufficiently similar to the later will;

c. in the context of undue influence, there should be a broader definition of similarity that takes into account both the instruments themselves and any relevant admissible evidence;

d. any construction of similarity must be broader to account for the intrusion of another's intentions in cases of undue influence, and to promote testacy over intestacy;

e. a narrow construction of similarity would consign DRR to a minute corner of irrelevance in cases of undue influence;

f. in cases of undue influence, the probate court is not confined to the testamentary documents when determining whether to apply DRR and the court may consider extrinsic evidence, as it may be essential to determining intent, and be the only viable way to show similarity between the tainted and untainted portions of the documents;

g. the documents in this case are similar enough to apply DRR, and no one seriously disputes that Virginia favored testacy over intestacy;

h. removing the gifts to the lawyer, legal assistant, and accountant that were voided by undue influence, the choice becomes between the gift to the medical school and Jackie, since Virginia never knew her intestate heirs;

i. no evidence was offered that would rebut the application of DRR and preserve the effect of the revocation clause, which was (a) boilerplate, (b) contained no statement of intent to sever its application from the rest of the tainted will, and (c) which was drafted the lawyer found guilty of undue influence;

j. the 1992 will contains the last residuary clause with a portion that was not tainted by undue influence, and that last remaining residuary gift was to Jackie and not the medical school; and

k. the residue should pass to Jackie to honor the last uninfluenced residuary devise that Virginia made.

H. *Lesanto v. Lesanto,* 2015 Mass. App. Unpub. LEXIS 318 (April 21, 2015). Reforming trust is not a valid remedy for failure to execute new pour-over will that distributes residue to new trust, rather than former trust.

1. On October 17, 2005, Paul Lesanto executed estate documents drafted by Attorney Peter Bella, including a will and the Paul Lesanto 2005 Revocable Trust (the "First 2005 Trust"). Pursuant to the will's residuary bequest, the bulk of Paul's estate poured into the First 2005 Trust "executed earlier this day." Paul retained the right to amend or revoke the trust during his lifetime. Upon Paul's death, the First 2005 Trust provided for the creation of a QTIP trust naming his wife, Donna Lesanto, as the lifetime beneficiary with a special power of appointment over the trust assets at her death. A credit shelter trust was to be created with the balance of the trust property for Paul's two children, Gary and Dianna.

2. In June of 2010, Paul met with attorney John Mahaney to assist him in settling a dispute with his ex-wife Theresa, Gary's and Dianna's mother, regarding the lapse of a life insurance policy he was obligated to hold for her benefit. After the dispute was resolved, Paul engaged Attorney Mahaney to revise his estate plan explaining that he wanted to disinherit his two children because he was angry and disappointed that they had taken their mother's side during the insurance dispute.

3. Attorney Mahaney drafted a trust document retaining the name the Paul Lesanto 2005 Revocable Trust (the "Second 2005 Trust"). The Second 2005 Trust provided that the "Grantor wishes to establish a trust which may receive property which the grantor may transfer to it. The Grantor hereby revokes all prior trusts." The Second 2005 Trust named Donna as the primary beneficiary and named her children as contingent beneficiaries. The Second 2005 Trust made no provisions for Gary or Dianna.

4. Attorney Mahaney also drafted a new will for Paul which contained no provisions for Paul's children. Attorney Mahaney testified that Paul's intent was for his new will to work with his Second 2005 Trust to implement Paul's estate plan.

5. Paul executed the Second 2005 Trust; however, the will was never executed. Paul did not execute the will because there were no witnesses available and he planned to come back another day. Before he returned to execute the new will, Paul died without making additional changes to his estate plan.

6. Gary filed a petition for probate seeking the allowance of Paul's will and the appointment of an executor. Gary was appointed as temporary executor and filed a complaint in equity seeking a declaration of whether the First 2005 Trust or the Second 2005 Trust should receive the residuary bequest under Paul's will or whether the residuary bequest had lapsed because the Second 2005 Trust revoked the First 2005 Trust and the residue could not pour over to a trust created after the will pursuant to G. L. c. 203 § 3B.

7. Following a trial, the trial court found that the clear and convincing evidence showed that it was Paul's intention to disinherit his children. The trial court found that an amendment to the trust did not offend G. L. c. 203 § 3B and a devise or bequest can pour-over into a trust that has been amended following the date the will was executed. The trial court concluded that the "Will, First 2005 Trust and Second 2005 Trust" together formed a cohesive estate plan, and when viewed in conjunction with the evidence presented at trial, including the testimony of Attorney Mahaney, there was proof that Paul intended to amend the dispositive provisions of the Second 2005 Trust to remove Gary and Diana. The trial court found that the inclusion of language purporting to revoke all other trusts was a drafting error on the part of Attorney Mahaney to the extent that he allowed such instrument to be executed by Paul without contemporaneously amending the will or executing a new will referencing the Second 2005 Trust. Lastly, the trial court found that the Second 2005 Trust was intended to be an instrument in the nature of an amendment to the First 2005 Trust and thus should be reformed to reflect

the settlor's actual intent. Judgment was entered reforming the Second 2005 Trust by striking the clause that revoked all prior trusts and inserting a clause stating that the First 2005 Trust was thereby amended. Gary appealed.

8. On appeal, the Appeals Court of Massachusetts concluded that the trial court erred in reforming the Second 2005 Trust to have it amend rather than revoke the First 2005 Trust because the reason the estate plan did not effectuate Paul's intent was not due to a scrivener's error and instead was due to the fact that Paul died before executing the new will which would pour over into the second trust. The court held that reforming the trust was not a remedy for failing to complete an estate plan and specifically for failing to execute a will. The court noted that where Paul had anticipated executing a new will thereby completing his estate plan, it was not the role of the court to step in to render the additional step of completing the estate plan unnecessary and even less to anticipate the form his will ultimately would have taken when he signed.

I. *Strange v. Towns et al,* A14A0983 Court of Appeals of Georgia (2015). Power of attorney was a valid trust amendment.

1. In March 2001, Pauline Strange created the Pauline Strange Inter Vivos Trust naming herself as trustee. On May 2, 2011, Pauline executed her last will and testament devising the entire residue of her estate to the Trust. The same day Pauline amended the Trust naming her son, Tony, her nephew, Raymond Town, and her sister, Bertha Town, to serve as successor co-trustees.
2. On July 9, 2012, Pauline executed a General Durable Financial Power of Attorney stating that she wished for Tony to be executor of her estate and the Trust. The document further stated that "this agreement is for the sole benefit of Mr. Tony Strange in the management of the Trust in which he has full ownership pursuant to the final wishes of Pauline Strange." The document was signed by Pauline and Tony.
3. In August 2012, Pauline wrote a letter to Scott Lowry, a lawyer at the law firm that revised the Trust in 2011, explaining that the law firm misunderstood her true intent. Pauline asked the firm to revise the Trust to name Tony as trustee of the Trust and as executor of her estate and name the Towns as alternate trustees and executors, respectively. Pauline further stated that she had already executed a document to reflect the revisions to the Trust should the law firm fail to amend the Trust prior to her death. Pauline died in October 2012 prior to the completion of any new documents by Scott Lowry.
4. Upon Pauline's death, a suit was instituted to determine whether Pauline validly amended the Trust to make Tony sole trustee. The trial court found that she had not. Tony appealed.
5. On appeal, the Court of Appeals of Georgia reversed the lower court's decision and held that the Power of Attorney constituted a valid amendment to the Trust. The court found that the Power of Attorney unambiguously expressed Pauline's intent to name Tony as the executor of her estate and Trust and relied on O.G.C.A. section 53-12-40(a) which requires only that a

trust modification be in writing and signed by the settlor. Further, the requirement under the terms of the Trust that any amendment be "duly executed" had been met because the Power of Attorney was notarized. The court found that despite Pauline's use of the word "revoked" she clearly intended to modify rather than revoke the Trust, because she further explained that she wanted Tony to be the executor of her estate and Trust. Although Pauline used the title "executor," it was clear that she meant to name Tony as trustee, because she expressed that Tony had full ownership of the Trust.

J. ***Rouner v. Wise,* 446 S.W.3d 242 (Mo. 2014).** Handwritten letter is not a valid trust amendment.

1. Dr. Conklin created a revocable trust in 1996 for his lifetime benefit and for the benefit of his children after his death. In 2002, while on his way to the Kansas City airport with his wife on a trip to Arizona, he handwrote a letter addressed to his children and his wife's children in which he set out what he wanted to happen to his property in the event he did not return from Phoenix alive. Dr. Conklin did return from Phoenix alive, but did not make any changes to his trust. The letter was found with his important papers after his death in 2009.

2. Upon Dr. Conklin's death, his children became trustees of his trust. Dr. Conklin's wife's children brought an action against his children alleging that the 2002 letter was an amendment to Dr. Conklin's Trust, making his stepchildren beneficiaries of the trust, changing the dispositive terms of the trust and adding new property to the trust.

3. Because Dr. Conklin served as the sole Trustee of the 1996 Trust, the stepchildren argued that the 2002 letter was a writing that he had delivered to himself as Trustee, and therefore, was a trust amendment. The court rejected this argument noting that this description would render everything Dr. Conklin wrote or possessed an amendment to the 1996 Trust.

4. The court held that under R.S.Mo.§ 456.6-602.3 the proof introduced by the stepchildren fell far short of proving by clear and convincing evidence that Dr. Conklin intended the 2002 letter to be an amendment to the 1996 Trust. The 2002 letter did not contain any words indicating that the 2002 letter would amend, alter, add or change anything in relation to the 1996 Trust. Rather, the letter contained precatory rather than mandatory language and was a total departure from the earlier dispositive scheme.

K. ***Trust U/A Edward Winslow Taylor,* 2015 PA Super 199 (2015).** 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.

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 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 (with 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 (4) 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.

L. ***In re Rutgers Trust,* 2014 NY Slip Op 32863(U) (2015).** Division of trust permitted, but trust could not be reformed to give beneficiaries power to remove trustees or grantee trustee powers.

1. Frederick and Katherine Rutgers created a trust under agreement dated January 22, 1965 for the benefit of their descendants (the "Trust"). The trust agreement provided for payment of income to the grantors' three grandchildren and distribution of principal to the grandchildren and their issue for certain emergency situations in the discretion of the trustees. Upon termination of the Trust, the Trust was to be distributed to the grandchildren and the children of any predeceased grandchild in equal shares, *per stirpes*.

2. The current beneficiaries, the contingent remainder beneficiaries and the trustees of the Trust filed a consent petition seeking to modify or reform the Trust in three respects. Petitioners asked the court to: (1) split the Trust into three separate trusts, one for the current benefit of each income beneficiary pursuant to EPTL 4-1.13(a)(3); (2) modify the trust agreement to allow the current beneficiary of the sub-divided trust, or their descendant, to appoint a successor trustee of the sub-trust; and (3) reform the Trust to add a power to remove a trustee and extend trustee appointment powers, not contemplated by the trust agreement.

3. The court allowed the division of the Trust finding that the proposed split was consistent with the grantors' intent to provide regular income distributions to their grandchildren in equal shares. The court found the effect of the reduced pool of funds for principal distributions for emergency situations *de minimus* given that the distributions were to be made at the trustee's discretion and in any event were outweighed by the petitioners' assertions that each of the income beneficiaries had different investment goals and financial needs better served by separate trusts. The court found that the division of the administrative powers and process for appointment of a successor trustee also appropriate as a natural extension of the trust split and did not contravene the purpose of the original Trust.

4. Lastly, the court denied the requested modification of the power to remove the trustee, not originally contemplated by the trust agreement. The court found that the petitioners failed to provide justification or basis in law for granting reformation. The court found that no showing was made that reforming the terms of the agreement to add an extra-judicial mechanism to remove trustees or provide additional individuals with trustee-appointment powers advanced or, was at least in accordance with, the settlors' intent.

XXII. NO-CONTEST CLAUSES.

A. *Doolittle v. Exchange Bank,* 2015 Cal. App. LEXIS 922 (2015). A direction to a trustee to defend against a contest to a trust is not a no-contest provision that is unenforceable where the contest is brought with probable cause, and may be enforced even before a determination of the validity of the document including the direction.

1. In 1999, Connie Doolittle created her revocable trust with herself a trustee, and naming her daughters as remainder beneficiaries of her $8.5 million estate. In 2000, she amended the trust to provide $500,000 gifts to a friend and a caregiver. In 2004, Connie hired Juan Amador as her gardener, and a few months later restated her trust to include a large real estate gift to Juan and inclusion of Juan and other friends and caregivers as additional remainder beneficiaries. That same year, Connie used the trust assets to defend against her daughters' claims to invalidate her gifts to Juan.

2. In 2005, Connie restated the trust to replace the remainder gifts to her daughters with $500,000 gifts, and to name Juan as the primary remainder beneficiary, with other friends and caregivers as the other remainder beneficiaries. The trust terms also included both a no-contest clause, a

direction to the trustee to defend against contests at the expense of the trust, and a direction that if the defense was unsuccessful the costs of the defense should be charged to the contestant. The same day she signed the restated trust, Connie signed written instructions to her agents and successor trustees to pay attorneys and witnesses to defend her trust at their normal hourly rates. Connie received confirmations of her capacity to sign her new documents by a neuropsychologist and estate planning lawyer. She then resigned as trustee and Exchange Bank was appointed as successor trustee.

3. Connie died in 2014, and thereafter her daughter Susan sued Juan for elder financial abuse, undue influence, and fraud in connection with the trust, and sought to have the trust declared void, and the assets distributed under the 1999 trust. Susan also challenged Connie's capacity.

4. The bank petitioned for instructions to confirm it should comply with the direction to defend against the Susan's claims at the expense of the trust. The probate court authorized the bank to defend against Susan's actions at the expense of the trust, and that the separate instructions to successor trustee were part of the trust as a trust amendment. Susan appealed.

5. On appeal, the Court of Appeals affirmed on the grounds that:

   a. the trust provision directing the trustee to defend against the claims at the expense of the trust is not a no-contest clause that cannot be enforced unless and until it is finally determined that the claims lacked merit and were brought without probable cause;

   b. the provision changes the duties of the trustee, and without the provision the trustee would be required to deal impartially with all beneficiaries;

   c. while included in the same part of the trust as the no-contest clause, the direction to defend is separate from the no-contest clause, and this depends on whether the direction to defend penalizes the contestant;

   d. there is nothing in the legislative history that suggests an intention to treat anything that forfeiture of all or portion of a gift as a penalty to which this aspect of the law applies, and there is no authority to support the broader application of the rule;

   e. being forced to bear her own legal costs, whereas the trustee is relieved from this burden, is not enough of penalty to invoke the rule;

   f. the direction to defend is not a no-contest clause, and is not an element of the no-contest clause;

   g. the provision is immediately effective even before a determination of the validity of the amended trust including the provision, since a trustee has a duty to administer the trust on its terms, the contestant has the burden of proof, and the trust should be administered including the direction to defend unless and until the contestant sustains her heavy burden of proof;

   h. Susan is not without a remedy, and could have sought a preliminary injunction on the use of trust funds but failed to do so, and the trustee presented substantial evidence of Connie's capacity and lack of undue influence that may have made it unlikely Susan could obtain a preliminary injunction anyway; and

i. the separate instructions to successor trustee and agent were an effective trust amendment and additional support for the trustee's ability to defend against the claims at the expense of the trust.

B. *Mikel v. Commissioner*, T.C. Memo. 2015-64 (April 6, 2015). Non-binding arbitration provision and in terrorem provision triggered by a beneficiary who contests trust distributions do not disqualify trust transfers for gift tax annual exclusion.

1. The IRS created somewhat of a stir in 2012 among estate planners when it issued CCA 201208026, suggesting that the gift tax annual exclusion would not be available for gifts to Crummey trusts that have arbitration or "in terrorem" (*i.e.*, "no contest") provisions. That CCA apparently was issued in relation to *Mikel v. Commissioner*, decided April 6, 2015, which rejects the IRS's position in that CCA regarding arbitration and in terrorem provisions in Crummey trusts.

2. Spouses in 2007 each gave $1,631,000 to a Crummey trust with 60 beneficiaries having withdrawal rights. If those transfers qualified for the $12,000 gift tax annual exclusion for 60 beneficiaries, the resulting $720,000 of annual exclusion reduced the taxable gift by each spouse to $911,000, which would have been sheltered by each spouse's $1 million gift exemption amount.

3. The trust agreement provided that if any dispute arises regarding the proper interpretation of the agreement, the dispute "shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith." The panel is directed to "give any party the rights he is entitled to under New York law." The trust agreement also had an in terrorem provision stating that a beneficiary would cease to be a beneficiary if the beneficiary institutes or participates in any proceeding to oppose or challenge a trust distribution or "files any action in a court of law."

4. In a summary judgment proceeding before the Tax Court, the IRS took the position that the beneficiaries did not receive a present interest in property because the rights were not legally enforceable, which the IRS maintains requires that a beneficiary can "go before a state court to enforce that right" and that the arbitration provision would not meet that requirement.

5. Furthermore, even though a beneficiary is not bound by the arbitration decision and can bring a state court action to contest the arbitration decision under local (New York) law, the judicial enforcement remedy is "illusory" because of the in terrorem provision.

6. The court rejected the IRS position and granted summary judgment for the donors that the transfers constituted present interests that qualified for the annual exclusion. The court reasoned that "it is not obvious the beneficiary must be able to 'go before a state court to enforce that right.' … A beneficiary would suffer no adverse consequences from submitting his claim to [the arbitration panel], and respondent has not explained why this is not enforcement enough." The in terrorem provision in this case does not apply to a contest regarding a beneficiary's withdrawal right because it only applies to an action to oppose or challenge a trust distribution.
7. Spouses jointly transferred real properties and a condominium with an asserted value of $3,262,000, or $1,631,000 by each, to a Crummey trust with withdrawal powers allegedly for 60 beneficiaries. If those transfers qualified for the $12,000 gift tax annual exclusion for 60 beneficiaries, the resulting $720,000 of annual exclusion reduced the taxable gift by each spouse to $911,000, which would have been sheltered by each spouse's $1 million gift exemption amount.
8. The beneficiaries had withdrawal powers limited to the gift tax exclusion amount under §2503(b). The trustees were required to notify all beneficiaries (and the guardians for minor beneficiaries) of trust contributions within a reasonable time after the contribution of property to the trust. A beneficiary's withdrawal power lapsed if not exercised within 30 days of receiving the notice. A savings clause stated that the withdrawal provision will be construed to effect the grantor's intention that the transfers to the trust qualify for the gift tax annual exclusion. The gift to the trust was made on June 15, 2007, and the trustees gave notice to the beneficiaries of the contribution on October 9, 2007.
9. The trust authorizes the trustees in their discretion to make distributions under a specific standard to any of the trust beneficiaries.
10. If a dispute arises concerning the proper interpretation of the trust, the trust agreement requires that the dispute "shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith." Such a panel in Hebrew is called a "*beth din*." The panel is directed to "enforce the provisions of this Declaration … and give any party the rights he is entitled to under New York law." The trust said that the intention was "to effectuate the intent of the parties … that they have performed all the necessary requirements for this Declaration to be valid under Jewish law." The opinion states in Footnote 4 that any decision by the arbitration panel will not be binding on a beneficiary: "According to respondent, beneficiaries of a trust will not be deemed by a New York court to have consented to an arbitration provision, and a New York court will not enforce an arbitral award against a non-consenting party. Given respondent's

concession on this point, we need not address the correctness of these State law propositions".

11. The trust contains an in terrorem provision designed to discourage beneficiaries from challenging discretionary decisions of the trustees to make distributions. A beneficiary's interest in the trust ends "[i]n the event a beneficiary of the Trust shall directly or indirectly institute, conduct or in any manner whatever take part in or aid in any proceeding to oppose the distribution of the Trust Estate, or files any action in a court of law, or challenges any distribution set forth in this Trust in any court, arbitration panel or any other manner…."

12. The donors did not file timely gift tax returns reporting the 2007 gifts. For some reason [not discussed in the opinion], the IRS became aware of the large 2007 gifts and contacted the donors about the transfers. Subsequently, the donors in late 2011 filed gift tax returns, each reporting gifts of several residences and a condominium to the trust of $1,631,000, but reporting that no gift tax was due (presumably claiming $720,000 of annual exclusion on each return and reducing the taxable gift below the donor's remaining gift exemption).

13. The court grants the donors' motions for summary judgment to treat transfers to the trust as gifts of present interests in property that qualify for the gift tax annual exclusion. (Open questions still remain in the case, including issues regarding the underlying value of the gift properties and the proper number of trust beneficiaries (see footnote 2 of the opinion) and therefore the number of annual exclusions.)

C. ***Kenneth Harrison v. David and Paul Harrison, In re: Estate of Ermogene Harrison*****, 2015 IL App. (3d) 130880-U (IL Ct. App., February 20, 2015).** Suit to determine whether restrictions on land are void as against public policy is not a contest.

1. Ermogene Harrison died survived by three sons Kenneth, David and Paul Harrison. Her will was admitted to probate in July of 2011 and contained specific partition requirement for certain tracts of real property. If any of her sons refuse to follow the partition instructions then his interest in the real estate was forfeited in exchange for $5,000. On April 20, 2012, Kenneth filed a declaratory action in Circuit Court of Hancock County asking the court to (1) declare the restrictions on the division of real property void against public policy and the language regarding the forfeiture of the real property as precatory words that were not enforceable; (2) find a breach of fiduciary duty because Paul had rented the property to himself; and (3) require Paul to provide an accounting for the income derived from the land.

2. From the bench the trial court granted summary judgment dismissing the first two claims and held a hearing to determine the third claim. The first claim was dismissed because the court deemed this request similar to a will challenge and was time barred because it was filed more than six months after opening the estate. The second claim was dismissed because the claim for breach was not adequately plead and Kenneth did not amend his claim in a timely manner. After a hearing, the court dismissed Kenneth's third claim

because the court determined that Kenneth had given up his interest in the property by bringing a will contest and without an interest under the will he was not due an accounting.

3. After the order dismissing the third claim was issued, Kenneth filed an appeal with regards to the declaratory judgment being untimely filed. The Court of Appeals analyzed the issue for three specific items. First, whether the appeal was timely filed because the first court order was issued December 5, 2012 and Kenneth did not file within 30 days after that order. Second, even if the appeal was timely, was the claim barred because it was a will contest filed after the six months deadline for filing a will contest. Third whether Kenneth had accepted a benefit under the will and therefore he was not allowed to challenge the will.

4. The Court of Appeals determined that Kenneth's appeal was timely because the lower court's decision was not finally determined until the third claim was decided. The orders for the first two claims were not within the scope of rule 304(b)(1) interlocutory orders because neither finally determined a right or status of the party instead they merely dismissed what the trial court interpreted as a timely will contest. Kenneth's status and right as a party was not determined under after the final order on the third claim was determined. Next, the court found that the lower court had erred in interpreting Kenneth's action for declaratory judgment as a will contest. The Court of Appeals found that asking the court to determine whether claims are void against public policy is not a will contest because it did not challenge the will or any part of the will as being other than what the decedent intended. Kenneth acknowledged that his mother created the will, acknowledged his mother intended for the will to be written as it was depicted, but that those intentions were void against public policy. Because the trial court erred in treating the action as a will contest it erred in determining that Kenneth's petition was untimely. Kenneth's petition did not have to be filed within the six month time period for a will contest. Because his action was not a will contest, Kenneth was not prohibited from asking the court to determine whether certain language was void for public policy even though he had received assets under the Will. The case was remanded for further proceedings.

XXIII. ISSUE & BENEFICIARIES.

A. *Mary K. Kaull, as Trustee of the Barbara B. Kaull Trust v. Sarah Kaull*, 2014 IL App (2d) 130175; 20144 Ill. App. LEXIS 913 (App. Ct. Ill. Dec. 22, 2014). Court may compel DNA testing to determine trust beneficiaries.

1. Barbara Kaull created a trust that provided, upon her death, the trust was to be divided into equal shares, one for each of her children who survived her and one for each of her children who predeceased her but had descendants who survived her. Barbara had three children, Mary, Sarah and Mark. Mark predeceased Barbara survived by at least one son, Mark James. Shortly before his death, Mark was involved in a petition to determine a parent-child relationship in Texas to establish that Mark has fathered another son, Ryan. Ryan's mother, Elida, stated that although Ryan's birth certificate lists the

name of her ex-husband as Ryan's father, the two had not been living together at the time of conception, and instead, she had had a relationship with Mark. Elida had evidence that Mark and Elida's ex-husband, Ralph, had submitted to a DNA home paternity test that revealed Mark was Ryan's father, and she had a hand written note from Mark acknowledging that he was Ryan's father and he agreed to pay monthly child support.

2. Mark died before the Texas paternity action was finalized, but in light of Elida's claims, Mary Kaull as Trustee of the Barbara B. Kaull Trust filed a petition for instruction with the court requesting for DNA testing of Mark James in order to identify the trust beneficiaries.
3. The court determined that under Illinois Supreme Court Rule 215, in a civil action, the court could order a DNA test for discovery purposes. Mark James refused to comply with the DNA test, and was found in contempt of court. He appealed the contempt charge and challenged the constitutionality of Rule 215 as a violation of his right to privacy under the 4th Amendment of the U.S. Constitution and Illinois Constitution's privacy clause.
4. After a lengthy discussion of discovery procedure and right to privacy claims, the court found that although Rule 215 did not expressly require "good cause" in order for a court to allow DNA testing, it nonetheless requires production of sufficient evidence to meet the "in controversy" and "relevance" requirements and was therefore not unconstitutional and did not violate the state privacy clause or 4th Amendment.
5. The court also held that Rule 215 does apply to a request for DNA testing in order to determine the beneficiaries of a trust and "inherited characteristics" are physical conditions under the Rule. Finally the court held that the lower court did not abuse its discretion in ordering the DNA test for this case.

B. *Johnson v. Rogers,* 2015 Ga. LEXIS 492 (2015). Georgia refuses to apply doctrine of equitable adoption outside of intestacy.

1. Lillian and Jimmie Lee Johnson were married for 37 years, and raised her grandniece Jessica. Lillian died in 2011, and under her will gave Lillian certain tangible property along with a remainder interest in most of her assets after the death of Jimmie Lee. Lillian filed a caveat to the will and claimed an intestate share under the equitable doctrine of virtual adoption. The trial court agreed and awarded her an intestate share. Jimmie Lee appealed. On appeal, the Georgia Supreme Court reversed on the grounds that in Georgia and other states, the remedy of equitable adoption requires, among other factors, a showing of intestacy, and there is no clear legislative direction abrogating that requirement.

C. *Sanders v. Riley,* 296 Ga. 693 (2015). Trial court erred by granting summary judgment against finding of virtual adoption, and some resumed relationship with natural father during teen or adult years does not preclude finding of virtual adoption.

1. Clifford "Colonel" Riley married Corine Mathis in 1964, and they had daughter Ernestine in 1966 (who then predeceased her parents) and son

Curtis in 1969. In 1978, Corine had daughter Shalanda, but at that time the Colonel had not resided in the marital home for 3 years and Corine had begun an affair with Roy Warren. Roy testified that he, the Colonel, and Corine agreed that the Colonel would be her legal father. The Colonel treated her the same as the other children, and she treated him as her father.

2. When Shalanda was 14, Corine told her Roy was her natural father and introduced them for the first time. Roy had only sparse contact with Shalanda after that point (once when she ran away from home, and then much later when Roy was allowed to walk her down the first half of the aisle when she married at age 28).
3. In 2009, the Colonel moved back in with Corine, in 2010 Corine suffered a stroke, and in 2011 Corine shot and killed the Colonel and then herself. Corine left a will that favored Shalanda, but the Colonel died intestate, and each had multiple insurance policies. Curtis disputed whether Shalanda should be allowed to inherit from the Colonel's intestate estate, and the insurance companies filed interpleader actions. In a probate dispute over Shalanda's standing in the estate, Curtis moved for partial summary judgment defeating Shalanda's claim of equitable adoption (Shalanda also claimed an interest as a presumptive, and actual, biological child of the Colonel). The trial court granted summary judgment against the equitable adoption claim finding a lack of clear evidence of an agreement to adopt and severance from the natural father, and Shalanda appealed.
4. On appeal, the Georgia Supreme Court reversed and remanded on the following grounds: (1) the court erred by failing, on summary judgment, to view the evidence in the light most favorable to Shalanda who was not the moving party; (2) viewed in the proper light, there was evidence of an agreement to adopt and severance from the natural father; (3) it is not hard to understand why the Colonel would enter into a private agreement with his wife and her lover, rather than statutorily adopt her, and nothing precludes applying virtual adoption in these circumstances; and (4) the fact that she saw her natural father again after age 14 does not preclude virtual adoption, since the focus is on whether there was a change in the child's status upon the adoption, there was a complete severance until age 14, there was no parental relationship until that point (and not much of one after), and there is no authority suggesting a child can become "unadopted" by developing a relationship later in life with the biological father.

D. ***In re the Charles H. Stix Testamentary Trust and the Clara F. Stix Testamentary Trust,* 2015 Mo. App. LEXIS 444 (April 28, 2015).** Child is trust beneficiary under presumption from being born during marriage and from adjudication during divorce proceedings.

1. Clara Stix and her son, Charles Stix, each executed wills that created trusts for the benefit of their descendants, effective April 20, 1943 and August 7, 1945, respectively. Charles' daughter Ann Stix Grace was the sole lifetime beneficiary of both trusts following the death of Clara and Charles and received all income from each trust. Both of the trusts terminated upon

Ann's death on January 27, 2012 and the assets of the trusts were distributable to Clara's and Charles' descendants. Although the trusts used different language, the class of descendants is identical under both trusts, with each descendant taking an equal share. The trust instruments did not otherwise define descendants.

2. Ann had five children, Charles, Nancy and William (collectively, the "Appellants"), Robert and John. Robert and John predeceased Ann.

3. On March 28, 1985 Robert married Justin Grace's mother, Susan Martin. Justin was born in the State of Washington on October 28, 1985 and his birth certificate listed Robert as his father. Robert and Susan divorced on October 24, 1988 also in the State of Washington. The Washington court issued a dissolution judgment stating that Justin "has been born as a result of this marriage." The judgment granted Susan primary custody of Justin and Robert visitation.

4. Robert died on March 6, 1994, over six years after the divorce and when Justin was eight years old. Robert's will left nothing to Justin. Instead, Justin asserted a claim to an award in lieu of homestead under Washington law, which was opposed by Robert's estate. In settling that claim, Susan and Justin's guardian *ad litem* agreed to acknowledge that Justin was not Robert's biological child despite being born during Robert and Susan's marriage.

5. At Ann's death, Bank of America, N.A., as trustee of the trusts, filed a petition for declaration of rights and instructions for final distribution with the probate court. The Appellants and Justin filed cross-motions for summary judgment. The trial court granted Justin's motion finding that the Washington judgment established Justin was a descendant within the meaning of the trust documents and the Washington judgment collaterally estopped Appellants from relitigating Justin's parentage.

6. On appeal, the Appellants argued that DNA evidence demonstrated that Justin was not Robert's biological son and he was therefore not intended to be considered Ann's descendant under the trust instruments. The Court of Appeals of Missouri disagreed and found that Justin was Robert's legal child both by presumption because he was born during his marriage to Susan and as adjudicated by the Washington court. The court found that because Justin was born during Robert's marriage to Susan, and because Robert acknowledged paternity during his lifetime on Justin's birth certificate and in the divorce proceeding, that acknowledgment was binding on other parties with property interests in his estate. The court found that the acknowledgment by Susan in the later settlement that Justin was not Robert's biological child despite being born during the marriage did not negate the earlier parentage adjudication in the Washington judgment. The court noted the litigation surrounding Robert's estate was not an adjudication of Justin's parentage and no court except the Washington court had ruled on the issue of parentage. Lastly, the court rejected the Appellants' argument that their due process rights were infringed because they did not have the

right to participate in the original litigation of Justin's parentage. The court held that Robert's right to assert paternity over his legal child overcame any right to a slightly larger trust benefit Appellants might have.

E. ***In re the Estate of McGahey,* 2015 Okla. Civ. App. LEXIS 30 (March 20, 2015).** Stepson not an heir through equitable adoption where lack of proof of contract to adopt child.

1. Ernest A. McGahey died intestate and his brother, Ray McGahey, filed a petition requesting letters of administration for his brother's estate and listing the heirs-at-law. James McGahey was not listed as an heir-at-law and filed an objection to the petition stating that he was the son of the decedent and therefore the decedent's only heir-at-law. Ray filed a motion for summary judgment asserting that James was not an heir-at-law because he was not the biological child of the decedent and because he was not adopted by the decedent.
2. The trial court granted summary judgment in favor of Ray finding that there was nothing in the evidence submitted by either party showing an agreement by the decedent to adopt James as his son. James appealed.
3. On appeal, the Court of Civil Appeals of Oklahoma affirmed the lower court's judgment finding that James did not prove that the doctrine of equitable adoption applied which requires evidence of a binding contract for adoption whose existence must be established by clear and convincing proof. In the case of a stepparent/stepchild, particular circumspection and highly rigorous standards are called for before an equitable adoption is appropriate. The court found that although it was undisputed that James was the stepson of the decedent, the record did not support a finding that the decedent believed that James was his adopted son or ever contracted to adopt James as his child.

F. ***Bank of America as Trustee of the Trust Under Agreement of Herbert W. Kochs for the benefit of Phyllis Anderson Picker dated April 23, 1958 v. Donna Marie Judevine, et al.,* 1st District 1st Division, 2015 Ill. App. LEXIS 45(Jan. 26, 2015)**. Trust for then living grandchildren that also named those living at time of execution creates a latent ambiguity.

1. In April of 1958, as part of the divorce agreement between Herbert W. Kochs and his third wife Phyllis Anderson Picker, Mr. Kochs created an irrevocable trust for Phyllis' benefit. After Phyllis' death, the trust was to benefit her mother for life then the remainder of the trust was to be distributed "in equal shares to those who are then living of the settlor's grandchildren, namely:" the trust then named the Mr. Koch's four grandchildren who are living at the time the trust was created.
2. In 2011 Phyllis died, predeceased by her mother, and the corporate trustee of the trust had to determine to whom to distribute the remainder of the trust assets. By this time Mr. Koch was also deceased, but he was survived by eleven additional grandchildren - eight from his first marriage and three from his fourth marriage. Corporate Trustee petitioned the trial court to determine

whether or not there was a latent ambiguity with respect to the after-born grandchildren. Both the named grandchildren and the after-born unnamed grandchildren filed cross-motions for summary judgment as to whether or not the residuary beneficiaries included the unnamed grandchildren.

3. The trial court granted the named grandchildren's motion for summary judgment because in construing Illinois case law when a trust provides for a gift of specifically named individuals and also describes those individuals as a class then the gift is to those individuals only and the class description is merely for identification purposes. Therefore the unnamed after-born grandchildren were not part of the class and there was no latent ambiguity. Further because there was no ambiguity, the unnamed grandchildren's request for attorney's fees was denied.

4. The Court of Appeals reversed the trial court, held that there was a latent ambiguity, and reversed for further proceedings. The Court of Appeals determined that an ambiguity exists when there is "an honest difference of opinion," and a latent ambiguity "does not readily appear in the language in the document, but instead arises from a collateral matter when the documents terms are applied or executed.

5. The Court of Appeals found that the existence of the unnamed after-born grandchildren created a latent ambiguity because prior to their births the terms of the trust were unambiguous, applied to the grantor's grandchildren and all of those grandchildren were named in the trust. After the unnamed grandchildren were born, the term "to my grandchildren" was subject to differing opinions of definitions – only those named in the document or all of those that existed. Because the ambiguity of "to my grandchildren" is not clear without the addition of collateral matter – the existence of unnamed grandchildren – the ambiguity is latent and not patent.

6. The Court of Appeals noted that there was no Illinois case law directly on point to discuss the matter of whether naming specific people within a class should expand a class gift, however, the court did make reference to a Pennsylvania case *In Re: Estate of Clark*, 331 A.2d 408 (Pa. 1975), in which the language "so long as any of my grandchildren, Evan, Margot, Claudine, and Jean, shall be under the age of 25 years" was an indication of a class gift in which the grantor recognized could fluctuate depending on whether all the named children reached a certain age. Therefore the class was expanded to include all beneficiaries whether named or not who met the requirements of the class gift.

7. The Court of Appeals used that same analysis in the case at hand and determined that the term "grandchildren" did not make any specific provision to either include or exclude after-born grandchildren. The court viewed this as a class gift that could include all of the grandchildren and was not limited to those named.

8. Because this was just a review of summary judgment, the court reversed the summary judgment and remanded the case for further fact-finding to

determine whether the settlor's intent was to include only those named beneficiaries or to benefit all of his grandchildren.

9. The Court of Appeals also reversed the trial court's denial of attorney's fees to the unnamed after-born grandchildren because of the trial court erred in not finding an ambiguity, it also erred in not awarding attorneys' fees.

10. The dissenting opinion sided with the trial court in that the trust terms did not create a class gift but merely provided a limitation to those named grandchildren. Further, the dissenting opinion dismissed the fact that the trust was drafted by the divorce attorney instead of the estate planning attorney and pointed out that use of the term "namely" was to identify and highlight exactly who the grantor meant to receive the remainder.

G. *Sanders v. Sanders,* 2015 Cal. App. LEXIS 662 (2015). Adopted adult under Texas law included as beneficiary of California trust, regardless of legal differences in the post-adoption relationship between parent and child under Texas and California law.

1. Under her 1975 will, Marion Sanders created a trust for the benefit of her daughter Mary (who was unmarried at the time), with Mary and bank as co-trustees. The trust beneficiaries also included Mary's "issue" and defined issue to include adopted children. If Mary died without issue, the trust assets would pass to Mary's niece, Jody. In 2013, Mary adopted her friend's adult son, Andrew, in Texas, and then petitioned to confirm that Andrew would be a trust beneficiary. Judy opposed, and the trial court held that Andrew would not be a trust beneficiary of the California trust because under Texas adoption law the adult adoption did not require the parent to support the adopted adult (whereas California law does), and Texas law does not sever the relationship with the biological parents. Mary appealed.

2. On appeal, the court of appeals reversed on the grounds that: (1) the will expressly included adopted children, and did not exclude, adopted adults as beneficiaries; (2) the status of an adopted child is determined by the state of the adoption; (3) under Texas law, an adopted adult is the child of the adoptive parent for all purposes, may inherit from the adoptive parent, and may not inherit from the biological parent; and (4) the mere fact that a sister state does not impose the exact same rights and duties in parent-child relationships as California does is irrelevant, and California cannot devalue a parent-child relationship simply because it was created in a sister state; those policy choices do not alter the status of the relationship.

XXIV. TAXES.

A. *Matter of Thomas L. Clancy, Jr.,* Estate Number 101962 (Baltimore, Maryland Orphan's Court, 2015). Savings clause in codicil intended to qualify family trust for marital deduction takes precedence over tax clause (not amended by codicil) that would otherwise apportion taxes on non-marital trusts to family trust that made valid QTIP election.

1. Author Thomas L. Clancy, Jr. died in 2013, survived by his wife Alexandra, one child from their marriage, and four older children from a prior marriage. Under his will planning, he named his lawyer as personal representative, and

divided the residue of his estate among a marital trust (1/3 of the estate), and divided the balance equally between a family trust for Alexandra and her daughter, and a trust for his children from a prior marriage. The tax clause in the will apportioned taxes to the residuary estate, but excluded the marital trust from taxes. In his second codicil, Clancy amended the family trust to qualify for the QTIP election and the marital deduction, and added a savings clause providing that, anything in the will to the contrary notwithstanding, the fiduciaries would have no power that would prevent the marital trust and the family trust from receiving the benefit of the marital deduction.

2. The personal representative filed a QTIP election for the marital trust and the family trust. Alexandra sued to confirm that estate taxes would not be apportioned to the marital trust and the family trust, and would be solely borne by the trust for the children by prior marriage, and sued to remove the attorney as personal representative so that a successor could sue him for professional negligence. A dispute arose about the apportionment of taxes, and the intersection of the original and not amended tax clause, and the later added savings clause. The apportionment of all taxes to the children's trust would reduce that trust by $6 million (leaving them $5 million in trust, with the trusts for Alexandra totaling $50 million and bearing no taxes), versus the taxes being apportioned equally between the family trust and children's trust.

3. After resolving jurisdictional matters, the court held that the family trust was exempt from estate taxes on the following grounds:

    a. the will expresses the clear intent that the family trust qualify for the marital deduction and not be liable for estate taxes;

    b. the primary purpose of the second codicil, which was successfully achieved, was to qualify the family trust for the QTIP election and the marital deduction, and added the family trust to the marital deduction savings clause;

    c. the tax clause removes the will from the default statutory apportionment, and exempts the marital trust from taxes, but does not specifically direct the apportionment of the taxes between the remaining shares;

    d. without the additional words "paid as an expense of administration" or "without apportionment", or some other clear expression, the tax burden may be on the residue but new questions arise about apportionment among the residuary legatees;

    e. the savings clause in the second codicil is an interpretive aid, designed to stand on its own and clarify the testator's intent if there is a perceived ambiguity or contradiction (and does not cross the line into being an invalid condition subsequent);

    f. the plain language of the savings clause restricts the personal representative from requiring the family trust to contribute to the payment of estate taxes, the clause applies to the entire will and is not dependent on IRS or court determination, and is a clear expression of intent to qualify the family trust for the marital deduction;

g. reading the will to require the family trust to pay estate taxes would violate the settlor's intent, as evidenced by the inclusion of the language "notwithstanding anything in this will to the contrary" in the savings clause;

h. it is not appropriate to separate qualification for the marital deduction and the benefits of the marital deduction that the savings clause was intended to protect;

i. where there are two plausible constructions, the court will favor the one that carries out the settlor's intent;

j. while the structure of the will is some evidence of intent to treat the family trust and children's trust equally, the savings clause is the clearest and most predominant evidence of intent to the contrary, and the codicil was 6 years newer than the will; and

k. the attorney can administer the estate under the court's order, the court's construction renders Alexandra's proposed malpractice action moot, and there is no grounds to remove the attorney as personal representative.

B. ***Papaleo v. Wicks,* 2015 Wash. App. LEXIS 1060.** The language of decedent's will and trust did not express a specific intent that the trust would pay estate taxes attributable to non-trust property; accordingly, those taxes would be statutorily apportioned pursuant to state law.

1. Leon Jensen created the Jensen Family Trust. At his death in 2011, 60.02% of his property was held in the trust and the remaining 39.98% was held in "pay-on-death" ("POD") accounts.

2. Jensen's will provided that all inheritance, estate, or other death taxes attributable to his probate estate or to any other property not part of the probate estate "shall" be paid out of the residue of the probate estate. However, to the extent death taxes were attributable to properties that were part of the trust, the taxes "shall" be paid by the trust. The trust instrument, meanwhile, provided that the trustee may pay "any federal or state taxes including penalties and interest arising by reason of said Trustor's death."

3. The assets in the trust and the POD accounts were non-probate property, but the trustee paid the estate taxes attributable able to both the trust property and the POD accounts from the trust. The issue was whether the estate taxes attributable to the non-trust property (the POD accounts) were properly paid by the trust.

4. In order to avoid statutory apportionment, the dispositive instrument (will or trust) must clearly apportion estate taxes and express the specific intent to require certain assets to carry the tax burden.

5. The court held that the plain language of Jensen's trust did not express a specific intent for the trust to pay the estate taxes attributable to non-trust property. At most it gave the trustee discretion. Therefore, the estate taxes attributable to the POD accounts must be apportioned pro rata pursuant to state law.

C. ***Voboril v. Vanosdall,* 290 Neb. 791; 2015 Neb. LEXIS 83.** Decedent's will expressed a clear intent to treat inheritance taxes as an expense of the estate so each beneficiary's distribution did not bear the inheritance tax allocable to that distribution as the statutory allocation scheme would have required.

1. Decedent's last will and testament left half of his estate to Jane M. Voboril and half to Sharon Vanosdall.
2. Decedent's will directed his personal representative "to pay from my probate estate, without contribution or reimbursement from any person, all inheritance, legacy or estate taxes, including interest and penalties thereon, payable by reason of my death with respect to property passing under my Will, or otherwise, including any property held by me jointly with any person with right of survivorship and any collateral taxes on property passing by this Will."
3. Voboril was the personal representative. She filed inventories listing about $204,000 of probate assets and $1,083,000 of non-probate assets. Based on the assets they received under the will, the trial court determined that Voboril would owe $64,900.84 of inheritance taxes and Vanosdall $7,103.57. But the court ordered the personal representative to treat the inheritance taxes as an expense of the estate, which meant Voboril and Vanosdall would bear them equally.
4. The Nebraska Supreme Court affirmed, holding that the will clearly showed Decedent's intent to treat inheritance taxes as an expense of the estate, instead of a tax proportionally borne by the beneficiaries under the statutory pattern. The will expressly referred to inheritance taxes and directed that they be paid from the probate estate.

XXV. CLAIMS & CREDITORS.

A. ***Pfannenstiehl v. Pfannenstiehl,* 2015 Mass. App. LEXIS 123 (2015).** Interest in spendthrift trust created by father included in marital estate of son incident to divorce.

1. Husband and wife married in 2000 and had two children, one with dyslexia and ADD and the other with Down syndrome. Husband's father created an irrevocable spendthrift trust in 2004 for the benefit of husband and 11 other beneficiaries. The trust was funded (through an apparent sale transaction) with interests in family-controlled corporations that own and operate for-profit colleges, along with life insurance policies on father's life. The trustees of the trust were husband's twin brother and the father's long time attorney (although the attorney was not actively involved in the trust administration). The trust terms provided for discretionary distributions among the class of beneficiaries by an ascertainable standard. Husband and wife were largely supported by the 2004 trust. Husband received an inflated salary as assistant manager of a family run bookstore (and was also allowed 4 years of paid leave to pursue woodworking), and wife worked one day per week in addition to being primary caretaker for the children and their special needs. Wife had left a career as an Army Reserves officer just before obtaining her 20-year

pension, under pressure from the husband's family to care for the children. On the eve of the husband filing for divorce, the trustees ceased trust distributions to him but continued distributions to the other beneficiaries.

2. The probate court included the husband's interest in the 2004 trust in the marital estate, and assigned $1.3 million of the value of that interest (approximately 60%) to the wife and required the husband to pay the wife $49,000 monthly for 24 months to effect the assignment. On appeal, the Massachusetts Court of Appeals affirmed on the following grounds:

    a. the trust regularly distributed to husband until 1 month before his divorce filing, continued distributions to other beneficiaries, and its spendthrift clause was being invoked as subterfuge to mask the husband's income stream and thwart the division of the marital estate;

    b. husband's brother as co-trustee, and brother and father as officers and directors of the family business, controlled trust distributions, and the lawyer co-trustee represented the family and its businesses since 1972, was not involved in the trust administration, and did not demonstrate independence;

    c. the trust spigot was only turned off for husband to manipulate the divorce proceedings, and husband would likely return to receiving distributions immediately after those proceedings;

    d. the spendthrift provision alone does not preclude inclusion in the marital estate where someone neglects to provide for those he is legally required to support;

    e. the ascertainable standard gave the husband a present and enforceable right to trust distributions, it was likely he would receive distributions after the divorce, and as a result of the standard the trust was not wholly discretionary;

    f. the trust distributions were woven into the fabric of the marriage;

    g. the husband also has a vested outright remainder interest in the trust;

    h. once included in the marital estate, the trial court could order the division of the interest among the husband and wife; and

    i. the award of $175,000 in attorneys' fees to the wife was also proper. One dissenting judge found the husband's interest in the trust to be too remote, speculative, dependent on trustee discretion, and elusive of valuation to be included in the marital estate.

B. *TrustCo Bank v. Mathews,* C.A. No. 8374-VCP (Del. Chancery Court, 2015). Claims to reach assets of self-settled Delaware asset protection trusts to satisfy loan guarantee are barred by limitations and laches.

1. TrustCo, a New York bank, lent $9.3 million to StoreSmart (a Florida LLC) in 2006. Susan Mathews guaranteed to loan while a resident of New York, but later moved to Florida. StoreSmart defaulted in 2011, and TrustCo filed a foreclosure action in a Florida court, resulting in an $8.2 million judgment

that TrustCo assigned to ORE Property Two, Inc., a Florida corporation. A stipulated deficiency judgment was entered in the Florida court in 2013 for $2.3 million.

2. In 2007, Susan assigned certain stock to three Delaware trusts. In 2008 (as part of a pre-default loan modification), Susan gave TrustCo a net worth statement showing sharp reduction in her net worth, and noting the establishment of the Delaware trusts. Susan also emailed a TrustCo assistant vice president to confirm TrustCo's demand that she guarantee the loan with the Delaware trusts or put up an additional $1 million in collateral, which was an accurate statement of TrustCo's position at the time. Susan posted the additional $1 million collateral, and the loan closing documents included a copy of one of the Delaware trusts.

3. In their attempt to recover on the debt, in 2013TrustCo challenged the transfers to the Delaware trusts as fraudulent and intended to evade her loan guarantee. The Delaware Chancery Court dismissed the fraudulent transfer claims as untimely on the following grounds:

   a. filing after the applicable limitations period of presumptively an unreasonable delay for laches;

   b. Trust Co admits it discovered the transfers by 2011;

   c. TrustCo filed its complaint more than 6 years after the transfers, but just inside two years of when it admits it discovered the transfer (and claimed that the 2-year New York limitations period should apply);

   d. Delaware has a "borrowing statute" that, for suits arising out of state but brought in Delaware, requires application of the shorter of Delaware's limitations period or the outside state's limitations period, absent very special circumstances such as an absurd result or a result that subverts the purpose of the borrowing statute, and the borrowing statute would presumptively apply here;

   e. the contacts with New York are not so compelling as to justify a different result and application of New York's longer limitations period, since the most significant contacts were in Florida (TrustCo assigned the Florida judgment to ORE, a Florida company, and Susan moved to Florida; and the loan was originally to build a building in Florida), then Delaware (where the trusts are administered and where the suit was brought), and only last New York (where TrustCo is incorporated and where Susan resided at the time of the loan);

   f. both tort and contact factors favor either Florida and Delaware over New York, and both Florida and Delaware have 1 year limitations periods;

   g. the claims are barred as untimely under the 1-year limitations periods under Florida or Delaware law;

   h. it is not necessary to decide whether the same result would be required under the Qualified Dispositions in Trust Act;

i. the claims would be untimely even if New York law applied, since TrustCo had sufficient facts to be on inquiry notice by mid-2010, at which time they knew Susan had created trusts that rendered her insolvent to creditors, and discussed the Delaware trusts with her.

C. *Lewiston v. Kohut,* Case Nos. 15-100804; 14-14452 (U.S. District Court, E.D. Mich., 2015). Joint trust for husband is not a tenancy by the entireties that affords creditor protection in bankruptcy.

1. Lois and Richard Lewiston created a joint trust in 1986, with both of them as trustees and Richard as managing trustee. A 2008 amendment gave either spouse acting alone the ability to manage the trust assets. Richard filed for bankruptcy in 2012 and claimed exemption for the trust and his beneficial interest in the trust as a form of tenancy by the entirety with his spouse. The bankruptcy denied exemption of the trust and the interest in the trust from the bankruptcy estate, and Richard appealed.
2. On appeal, the federal court affirmed the denial of exemption on the grounds that: (1) a tenancy by the entirety is created only when property is transferred directly to a husband and wife, with the consequence of tenancy being that one spouse cannot unilaterally act with respect to the property without the consent of the other spouse; (2) trusts are a distinct legal entity consisting of assets and fiduciary relationships to those assets, whereas a tenancy is merely a form of joint property ownership, and unlike a tenancy by the entirety, any type of property can be conveyed into a trust; (3) the claimed exemption would collapse the legal distinction between living trusts and tenancies by the entirety; (4) the trust interests do not have the same attributes as the tenancy, where under the trust terms a single trustee could act unilaterally with respect to the trust property; and (4) the fact that a husband and wife are the beneficiaries of a trust does not convert a trust into a form of tenancy by the entirety.
3. Resolving a conflict in prior Florida appellate decisions, the Florida Supreme Court held that, if the ex-wife or the guardian were known or reasonably ascertainable creditors of the estate, their claims would not be barred by the three month limitations period that runs on general publication of notice to creditors. To run the three month limitations period on a known or reasonably ascertainably creditor, a copy of the notice would need to be served on such a creditor. In the absence of personal service, the claims would be limited only by the two-year statute of repose.

D. *Beren v. Beren,* 2015 CO 29 (2015). Court may not change date of calculation of elective share as a result of sharp increase in estate assets during protracted litigation over estate, but may apply other equitable principles to increase the elective share.

1. Sheldon Beren, the founder and owner of Berenergy Corporation, died in 1996, survived his wife of 28 years, Miriam, four sons from a prior marriage, two children from Miriam's prior marriage whom he adopted, and one daughter from his marriage to Miriam. In his will, he gave Miriam a lifetime interest in a QTIP trust, but Miriam petitioned for an elective share. The four

sons objected to the augmented estate calculation and contested her elective share claims through 9 years of litigation, during which time the estate assets sharply increased. The probate court, because of excessive costs from the litigation and the passage of so much time, found that it would be equitably unfair to freeze her elective share in time, and awarded her a $24.5 million equitable award in addition to her $26 million elective share. The four sons appealed, and the court of appeals reversed and ordered Miriam to return the equitable award with restitutionary interest. Miriam appealed.

2. On appeal, the Colorado Supreme Court affirmed the court of appeals in part and held that the probate court erred on the following grounds: (1) under the probate code, the elective share is a pecuniary, and not a fractional, amount that is fixed and calculated as of the decedent's death; (2) the court can award payment in cash or in kind; (3) the pecuniary amount does not participate in increases or decreases to the estate during administration; (4) the probate code does not allow the elective share to fluctuate with the estate's value; and (5) the court erred by using asset appreciation and income as a basis for increasing the elective share.
3. However, the court noted that the probate court retained its general equitable jurisdiction in other respects, and remanded to the probate court to consider whether any of the following might justify an increase in Miriam's elective share, in view of the equities of the case including the excessive litigation costs and 10 year delay caused by the sons, forcing Miriam to take cash rather than company interests: (1) not reducing the electing share by the $16.5 million in legal fees incurred by the sons through the protracted elective share litigation; (2) compensating Miriam with a reasonable rate of return for the excessive delay in distribution, and her loss of use or sharing in asset growth, caused by the sons and not found to be caused by Miriam; and (3) equitable considerations that justify not charging Miriam interest, or reducing the interest, on any funds she must ultimately return to the estate (the sons not being entitled to interest, since the return would be to the estate and not to the sons directly).

E. *Reed v. Grandelli,* C.A. No. 8283-VCG (Del. Chancery Court 2015). Gifts to a much younger romantic partner were valid, but loans must be repaid and joint tenancy in land was validly severed by agent under power of attorney following principal's stroke.

1. In 2011, George Reed, a successful businessman who was then elderly but still competent and living independently, lost his wife of 50 years. While having lunch with his son, George met his much younger waitress Lisa, a working single mother. Over the next several months, George frequented the restaurant to see Lisa, and then Lisa began seeing George socially. George made cash gifts to Lisa, loaned her money, and brought her a new truck when her vehicle broke down. George purchased a condo in Rehoboth Beach that, after discussing with his own counsel, he titled as joint property with survivorship with Lisa. During their relationship, Lisa was still romantically involved with her boyfriend Anthony. Lisa asked for money for a trip to Key

West with her brother and son, which George provided, but the money was actually for a trip with her son and Anthony.

2. George had a stroke shortly after Lisa's return from Key West, then a larger stroke a few days later at which point he was cognitively impaired. Thereafter, George's son George, III met with counsel, and then acting as his father's agent under a durable power of attorney created trust for his father, and transferred his father's interest in the condo to the trust, severing the joint tenancy. George died shortly thereafter. George's sons sued to compel return of all of the gifts to Lisa.

3. The court refused to compel the return of most the cash gifts and the truck on the grounds that:

   a. no evidence suggested George lacked capacity, was vulnerable to undue influence, or was impoverished (or even financially inconvenienced) by the gifts, and the elements of fraud were not alleged;

   b. George was old, but physically and financially independent;

   c. while Lisa's testimony that she loved George was not credible, and her goal for the relationship was not romantic fulfillment, George received the physical and emotional attention he wanted from a younger partner in the relationship;

   d. there were no indications of a relationship of trust, George did not rely on Lisa, and the gifts while lavish were not unusual for gifts to a desirable younger partner, and the gifts were clearly made with donative intent inspired by his romantic and physical interest in Lisa;

   e. it would be simple paternalism to hold that mere advanced age prevents an individual from indulging in pleasures at his own expense, even if the expense appears foolish to others;

   f. Lisa must repay all transfers marked by George on the check as loans;

   g. because of her lies to George about the Key West trip, Lisa must repay the costs of that trip paid by George; and

   h. while George intended to make a gift of an undivided interest in the condo, his son validly severed the tenancy as George's agent, and Lisa's interest in the condo is limited to a one-half interest; and partition and sale of the property is ordered, with Lisa's portion of the sales proceeds being applied to repay the loans and the costs of the Key West trip.

F. *In re Estate of McElveny*, No. 33,568 (N.M. Ct. App. May 11, 2015). Personal representative of estate has discretion to proceed under either Unclaimed Property Act or Uniform Probate Code to claim property held by the Department of Taxation and Revenue.

1. Edward McElveny died intestate in 1991. His heirs were his seven adult grandchildren and one adult great-grandchild. In 2013, one of Edward's grandchildren (Michael Phillips) applied to open an informal probate proceeding and to be appointed personal representative of Edward's estate.

Edward’s estate included “a little less than $70,000” in property that was transferred to the Department of Taxation and Revenue as unclaimed property under the Unclaimed Property Act (“UPA”) upon Edward’s death.

2. The probate application stated that Michael claimed the $70,000 in unclaimed property for Edward’s estate. The probate court entered an order appointing Michael personal representative of the estate and ordering the Department to release the unclaimed property to Michael.

3. The Department rejected Michael’s claim to the property on two grounds: first that Michael failed to submit documentation showing that the property would devolve to him alone and second, that the application should have been made directly to the Department, rather than through probate. Michael responded that the demand was made in his capacity as personal representative of the estate, and he disputed that the exclusive method for disbursing property under the UPA was through the Department’s administrative process as opposed to the Uniform Probate Code (“UPC”). The Department failed to respond to Michael’s demand, and he filed a motion in district court to enforce the probate court order and for sanctions.

4. The Department moved to dismiss, arguing that a court order under the UPC was an improper means of disbursing unclaimed property; that the district court lacked jurisdiction because the estate failed to exhaust its administrative remedies; and that the probate court never obtained jurisdiction over the Department because the Department was not served with process. The district court denied the motion to dismiss and enforced the probate court order.

5. The appellate court affirmed. It held that the district court had jurisdiction to enforce the probate order based on the plain language of the UPC. It also reviewed the language of the UPA and determined that a personal representative has discretion to either file a claim with the Department under the UPA or to invoke the court’s jurisdiction under the UPC. For this reason, the court also rejected the Department’s argument regarding exhaustion of administrative remedies; since the estate was not required to proceed under the UPA, there could be no exhaustion requirement.

6. The appellate court also held that the trial court was not required to obtain personal jurisdiction over the Department, and thus the Department’s argument regarding service of process failed. Finally, since there was no factual dispute that the property at issue belonged to the estate, the court rejected the Department’s argument that Michael’s claim was insufficient to overcome the presumption that the property was abandoned.

G. *Jones v. Golden,* 2015 Fla. App. LEXIS 14652 (2015). In Florida, claims of a known or reasonably ascertainable estate creditor are not barred by general publication of notice to creditors unless the notice is actually served on such creditor.

1. Harry Jones died in 2007. Notice to creditors was published in June, but neither Harry’s ex-wife nor her guardian were personally served with a copy of the notice. The guardian filed a claim against the estate within the 2-year

statute of repose, but after the expiration of the three month statute of limitations that runs on publication of notice to creditors.

H. *IMO Daniel Kloiber Dynasty Trust,* C.A. No. 9685-VCL (Del. Chancery Court, August 6, 2014); 2014 Ky. App. Unpub. LEXIS 929 (2014). Delaware chancellor refuses to temporarily enjoin Kentucky divorce court from enforcing orders restricting the assets of a Delaware trust for the primary benefit of one spouse while the divorce proceedings are adjudicated. Kentucky court dismissed separate fraudulent transfer, tort, aiding and abetting, and civil conspiracy claims against husband, his lawyers, and Delaware corporate trustee.

1. Glenn Kloiber established an irrevocable Delaware trust in 2002, and funded the trust with $15,000. The next year, Glenn's son Dan sold 99.45% of his shares in a company to the trust for a $6 million note. In 2007 and 2008, the trust sold its interest in the company for a combined $310 million. Thereafter, the trust held cash, marketable securities, and interests in LLCs with Dan as the sole manager.

2. The trust is for the primary benefit of Dan, with Dan also having a lifetime and testamentary special power to appoint the trust assets among his issue, charity, and the "wife of the Grantor's son" as defined to mean the person to whom Dan is married and cohabitating. The "wife of the Grantor's son" is also a discretionary current trust beneficiary, and subject to Dan's power of appointment, a successor current trust beneficiary with the same rights as Dan's. Dan's issue are also current beneficiaries and, subject to the powers of appointment, the presumptive remainder beneficiaries either outright or in trust.

3. The Delaware corporate trustee has custody of the trust assets and the duties to maintain trust records and file tax returns. In every other aspect of the trust administration, the trustee is directed or controlled by the following:

    a. The Special Trustee (initially Dan), with respect to investments, special holdings, and discretionary distributions, and removal and replacement of the corporate trustee;

    b. The Advisory Committee (Dan's brother and two brothers-in-law) also with respect to removal and replacement of the corporate trustee, if there is no Special Trustee, and after Dan's death to remove and replace Trust Protectors;

    c. Holders (Dan's three siblings and their spouses), any one of whom may act alone, with respect to appoint the trust assets for Dan's benefit, Dan's issue, or the "wife of the Grantor's son"; and

    d. The Trust Protector (one of Dan's brothers-in-law), with respect to the power to grant the trustee additional powers, amend the trust, change the trust situs and governing law, and re-constitute the Advisory Committee if it has no members.

4. Dan separated from his wife Beth in 2010 and filed for divorce in Kentucky that year. Beth claimed the trust assets were marital property subject to equitable division. The Kentucky court entered status quo orders that restricted Dan's actions with respect to the trust without Beth's consent or approval of the

Kentucky court. The trustee and the trust were not parties to the divorce proceedings. Dan did not object at the time to the orders. Beth also sued Dan, the trust, the trustee, and the drafting attorneys seeking to void Dan's sale of assets to the trust as a fraudulent transfer, which was discussed by the Kentucky court with a pending appeal. Dan sought a writ of prohibition from the Kentucky Court of Appeals to block the status quo orders, which was rejected. In March of 2014, the Kentucky court stated it would add the trust as a party to the divorce proceedings, and Beth sought to add the trustee as a party.

5. In May 2014, Dan resigned as Special Trustee and appointed his son Nick as successor, and also resigned as manager of the LLCs held in the trust, without informing the Kentucky court. Nick as Special Trustee directed the trustee to transfer trust assets without Beth's consent or the approval of the Kentucky court. Two days later, the trustee petitioned the Delaware Chancery Court for declarations that the Delaware court has exclusive jurisdiction over trust matters, the trustee may rely on Nick's instructions, Beth's fraudulent conveyance claim is time barred, and the Kentucky court orders are unenforceable against the trustee and the trust. Nick generally admitted the trustee's allegations, other than the trustee's allegation that the sale to the trust was a "qualified disposition" under Delaware law.
6. The Kentucky court then added the trustee, the trust, and Nick as Special Trustee as parties to the divorce proceedings, and Beth filed claims against the trustee. Nick has not yet been served with process. The court also ordered Dan to revoke his resignation as Special Trustee and retake the position within 3 days. Dan sent a letter to Nick doing so, but Nick signed an affidavit refusing to surrender the position of Special Trustee back to Dan asserting it would breach his duties to do so. The Kentucky court held Dan in contempt and issued a rule to show cause against Nick. Minutes before Dan was scheduled to be incarcerated, the Kentucky Court of Appeals stayed the contempt order. The trustee amended its petition in the Delaware proceedings to further seek to eliminate the reach of the Kentucky court concerning the trust and its assets, and Beth sought a status quo order in the Delaware action. Nick then petitioned the Delaware court for a temporary restraining order blocking Beth from seeking to enforce the Kentucky status quo orders.
7. The Delaware chancellor rejected Nick's petition for a TRO on the following grounds:
    a. The Delaware Qualified Dispositions in Trust Act, which grants the Delaware chancery court exclusive jurisdiction over actions concerning qualified dispositions, specifies which among the many Delaware courts will handle those matters, but does not unilaterally preclude sister states from hearing claims under Delaware law, which would not be permissible under Full Faith & Credit principles. Beth is not a party to the trust agreement, and has not agreed to be bound by its forum provisions. Also, Nick and Dan disagree with the trustee's assertion that the sale to the trust was a qualified disposition, and Beth's claims (if the Kentucky

court awards her relief in the form of support or alimony) may be subject to exceptions in the Act.

b. The Kentucky court is not interring with Delaware's "primary jurisdiction" over the trust because: (1) at the time of the orders, no court had primary jurisdiction over the trust; (2) the trustee was not required to file accountings with the court; (3) the trust terms go to great lengths to eliminate the court's role in the regular administration of the trust; (4) the trust terms provide multiple tools (including fiduciary powers and powers of appointment) for removing the trust from Delaware and changing its governing law, and do not mandate that Delaware law continue to apply where the trust situs is changed; and (5) the selection of Delaware law and its courts is merely an option within the discretion of those who control the trust and is not a commitment to oversight of the trust by Delaware or its courts.

c. The Delaware court will not assert primary jurisdiction over the trust because: (1) there is only a colorable claim of Kentucky interference with the Delaware court where the court is not supervising the trust, the trust terms minimize the court's role, and where the trust terms allow departure from Delaware situs and law; (2) Nick will not suffer irreparable harm with the TRO because his concerns can be heard before the Kentucky trial, appellate, and supreme courts, thereby providing him an adequate remedy at law and due process; (3) there does not appear to be a "collision course" to a jurisdictional conflict between Kentucky and Delaware because (a) the Delaware court has also issued a status quo order restricting the trust assets, (b) while Delaware has an interest in having its own laws implemented correctly, it does not have an interest in having its laws deployed to defeat another state's marital property law; (c) the Delaware court will address the validity of Dan's resignation as trustee, but that determination will help and not hinder the Kentucky court's proceedings by clarifying who has control over the trust; (d) if there is a later final and non-appealable Kentucky judgment against the trust, only then will important questions of Delaware law arise; (e) there are intermediate questions unrelated to Delaware law that should be adjudicated first, including whether Dan had the rights under Kentucky property law to transfer the assets to the trust; and (f) the court need not prematurely mark off jurisdictional territory or act as a quasi-appellate court for interlocutory review of Kentucky divorce proceedings.

8. Outside of the marital action, Beth separately sued Dan, his lawyers, and the Delaware corporate trustee in a Kentucky civil action, alleging fraudulent conveyance, tortious interference with marital property rights, breach of marital fiduciary duty, constructive trust, aiding and abetting, civil conspiracy, and seeking punitive damages. The Kentucky trial court dismisses the claims, and the Court of Appeals affirmed the dismissal on the following grounds:

a. A spouse, ten years, before the filing of the divorce action, cannot be an existing creditor under the fraudulent transfer statute;

b. Kentucky does not recognize a cause of action for tortious interference with marital property rights;

c. There is no general marital fiduciary duty, outside of a power of appointment or guardianship, and the proper recourse is through the family court and the equitable distribution of property;

d. Since there was no underlying wrongful act by Dan, there can be no claim for aiding and abetting or civil conspiracy; and

e. Beth failed to carry her burden of proving that the court had jurisdiction over the Delaware corporate trustee.

XXVI. GOVERNMENT BENEFITS.

A. *Lee v. Osorio,* 2015 NY Slip Op 32103(U) (New York County, 2015). Social services refused relief from order barring its claims against special needs trust due to its own lack of diligence.

1. Merrick Lee was born in 2002, and hospitalized at New York Presbyterian Hospital Well Cornell from 2003 until his death in 2010. Medical malpractice claim against the hospital was settled in 2008, with the hospital paying millions of dollars into a special needs trust with the father and a bank as co-trustees, waiving any hospital liens and indemnifying the trust against any Medicaid liens.

2. Upon Merrick's death, the father and bank qualified as administrators, petitioned to close the estate, and served the papers on the city human resources administration (HRA) (which included its social services department), and listing the city and county social services departments as possible estate creditors. After a follow-up email, the HRA sent a letter asserting a lien for $7,333 but did not appear at the hearing. The final accounting showing the lien was served on HRA, which was subsequently paid, and provided for the distribution of the balance of the $2.5 million in the trust to the estate.

3. Three years later, the HRA demanded that the trust reimburse $5.2 million in incorrect Medicaid payments it had made to the hospital (which the hospital had agreed not to receive in the settlement; and HRA was on notice that the hospital had waived its lien and assumed full responsibility), and claimed the trustees were responsible for the payment. The HRA sued the trustees the hospital, the actions were severed, and the trustees moved to dismiss the claims against them based on the prior order. The HRA moved to vacate the order, which the court denied on the grounds that:

   a. The HRA and its social services departments had all the evidence they needed to act in 2010, from the entry of the order, when to stopped receiving account statements, and by cashing the check for $7,333, yet simply failed to proceed in a diligent manner to investigate and preserve any claims because of its own lack of understanding;

   b. its claim it lacked understanding of the court order is shocking, as is its claim for deficiency of notice because notice was sent by overnight courier as directed by the court and not be certified mail;

c. its lack of understanding cannot be attributed to the trustees, and they did not have a duty to do more than they did; and

d. it was the department's responsibility to investigate claims.

B. ***Kimberly DeCambre v. Brookline Housing Authority*, 2015 U.S. Dist. LEXIS 37807 (Dist. Crt. Mass. March 25, 2015).** Trust distributions disqualify recipient from housing assistance benefits.

1. This case arises as an appeal by Kimberly DeCambre from the disqualification of her Section 8 Housing allowance because distributions from her special needs trust were counted as income disqualifying her from low income housing benefits. Ms. Kimberly DeCambre suffers from several disabling aliments including kidney disease, post-traumatic stress disorder, fibromyalgia, arthritis, torn labrum in the hips, shoulders and elbows and a history of depression. As part of a personal injury settlement agreement, Ms. DeCambre received $330,000 in settlement proceeds in a special needs trust created by the court for her benefit. Ms. DeCambre receives Medicaid and Social Security benefits, and until 2013 she received approximately $1,300 in housing assistance.

2. In 2013, Brookline Housing Authority determined Ms. DeCambre no longer qualified for housing assistance because her income exceeded the $22,000 annual limit for a two person household (Ms. DeCambre lives with her son). Ms. DeCambre reported income was only $12,398 and consisted of food stamps, social security, her son's income and fuel assistance program. However, her 2011 federal income tax return listed $100,000 of income, and she received more than $200,000 in distributions from her special needs trust.

3. DeCambre challenged the BHA's decision to count trust distributions as part of her income because personal injury settlement proceeds are specifically exempt from income under the regulatory authority. However, the regulations also require distributions from trust to be included as income. The issue before the court is whether personal injury settlement proceeds lose their exempt character when they are contributed to a trust.

4. The court affirmed the Brookline Housing Authority's calculations of income but urged the agency to issue additional regulations clarifying the treatment of distributions from trusts funded with personal injury settlement proceeds. The court noted that the housing authority does not get a principal payback like Medicaid and Social Security upon the death of the trust beneficiary, and it may be necessary for the housing authority to have more restrictive requirements on income exclusions.

C. ***Ian Ham v. Carolyn W. Colvin, as Acting Commissioner of the Social Security Administration*, 2015 U.S. Dist. LEXIS 50805 (US. Dist Crt. NB, April 17, 2015).** Special needs trust with early termination provision, but lacking payback provision, disqualifies beneficiary from receiving SSI benefits.

1. Ian is a disabled adult who was injured in an accident at Beatrice Community Hospital. As a result of the settlement with the hospital Ian has a special needs trust containing his settlement proceeds. Ian began receiving Social

Security and Medicaid in 1991, but in September 2011 the SSA notified Ian that he no longer qualified for SSI benefits because his trust was a countable resource.

2. Ian's trust contains an early termination provision which allows the grantor or, if deceased, the then acting trustee to appoint the trust proceeds to one or more persons or tax-exempt charitable organizations in the event the trust assets are treated as countable resources or subject to creditor claims. The SSA's Program Operations Manual System ("POMS") provides that "a trust that contains an early termination provision may not be excepted as a resource unless the State would recapture amounts paid for medical assistance upon early termination." Because there was no language in the early termination provision that required payback before distribution to the appointees, the SSA determined that this provision would negate the payback provisions required in special needs trusts and the trust did not qualify as an exempt resource.

D. *Deborah Herting as Trustee v. California Department of Health Care Services*, 2015 Cal. App. LEXIS 268 (Ct. App. Cal. March 27, 2015). Special needs trust payback provisions control over probate code provisions.

1. Nineteen year old Alexandria was injured in a catastrophic auto accident that left her ventilator dependent and with a $3 million dollar settlement agreement of which $1.4 million was placed in a special needs trust for her benefit with the standard Medicaid payback provisions. At Alexandria's death, her mother, Deborah, as trustee and executor of her estate followed standard procedures and notified the state of the death and time period to file claims for reimbursement. After such claims were filed, Deborah submitted a final settlement of the estate denying the claims for reimbursement under a probate code statute that provides that the state cannot seek reimbursement for claims paid to decedents under age 55.

2. At issue before the court is whether the payback requirements under the trust terms control or the probate code statute exempting payback for estate of decedents under age 55. The Court determined that the trust payback language controls (1) because the trust assets are not estate assets and (2) without the payback language in the trust the assets would have been countable resources during Alexandria's life and would have disqualified her from receiving assistance during her life.

E. *Stephany Draper v. Carolyn W. Colvin, as Acting Commissioner of the Social Security Administration*, 2015 U.S. App. LEXIS 3261 (US Ct. App. 8th Cir. March 3, 2015). Improperly drafted special needs trust disqualifies beneficiary from SSI benefits.

1. In June 2006 the then 18 year old Stephany was in a car accident and suffered a traumatic brain injury. She signed a power of attorney naming her parents, John and Krystal as her agents with the power to demand, sue and recover and compromise claims and to fund and transfer assets to a trust of which she is a grantor or beneficiary. In 2007, she began receiving SSI. In February of 2008, John executed a settlement agreement on behalf of Stephany as her

agent. Later that same day and without reference to the power of attorney, John and Krystal created a special needs trust and funded it with Stephany's personal injury settlement proceeds. In September of 2008, the SSA determined that Stephany was ineligible for SSI benefits because her trust was a countable resource as it had not been properly established under the standard set forth the in the POMS.

2. The POMS at issue provides that a parent of a disabled child or the court may create a trust for such child's benefit and that trust must either be a "dry" unfunded trust if allowed by state law or funded with some seed money prior to any settlement funds being contributed to the trust. Here, the SSA determined that although John created the trust in his individual capacity, he funded the trust as Stephany's agent under a power of attorney and with her settlement proceeds. In addition, the terms of the trust expressly stated the trust was being created to hold such proceeds and was being funded with such proceeds.

3. Stephany requested a review of the determination and while awaiting that review, her parents petitioned the court to modify the trust to retroactively list the court as the grantor of the trust instead of John and Krystal.

4. The administrative review was denied, the lower court affirmed the denial and the court of appeals also affirmed the SSA's determination that the trust was not created as a dry trust and later funded with the proceeds. The court rejected a retroactive court order approving the trust because such approval did not equate to creation of the trust.

XXVII. TORTS, SLAYERS, AND BAD ACTORS.

A. ***Estate of Opalinska,* 2015 Ill. App. LEXIS 847 (2015)**. Neither slayer statute nor unclean hands compel disinheritance of daughter who was convicted of perjury and obstructions justice in connection with prosecution of her husband for murder of her mother.

1. Darota married William in Las Vegas on June 9, 2007. On return to Chicago 4 days later, she informed her mother Irene, who was upset but then calmed down. Five days later, Irene was found dead. Darota lied to the police about whether she was with her mother around the time of the murder, and was convicted of perjury and obstruction of justice. William was convicted of first-degree murder and sentenced to 45 years in prison. Darota resigned as administrator of her mother's estate, and the appointed public administrator sought to bar Darota from inheriting. The trial court rejected his arguments and he appealed.

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

   a. the slayer statute precludes someone who intentionally and unjustifiably causes the death of another from receiving property by reason of the death;

   b. if William receives any of Irene's property, it would not be by reason of the death, but rather by a gift from Darota;

c. it is not certain that Darota's inheritance would be controlled by her husband, who is in jail;

d. there is a slippery slope in attempting to prohibit all instances where the murdering party might eventually receive some indirect benefit from an inheritance;

e. slayer statutes do not require a type of reverse constructive trust to ensure the murderer never receives the property;

f. determination of some potential indirect benefit would be inherently speculative;

g. the slayer statute provisions that require cooperation with law enforcement in murder investigations do not bar Darota's inheritance, since they apply only to a beneficiary who causes death (and William was not a beneficiary), and that provision does not provide for disinheritance as a remedy for failure to comply; and

h. the doctrine of unclean hands does not apply to inheritance, and Darota does not seek her inheritance through equitable principles, but rather through the probate code.

B. *Armstrong v. Armstrong,* 2015 Miss. LEXIS 378 (2015). Slayer statute will not apply unless evidence shows slayer had the mental capacity to kill decedent willfully.

1. Joan Armstrong picked up her son, John, after reports of his erratic behavior (he had a long history of delusions and hallucinations and has been diagnosed as a paranoid schizophrenic), and brought him to her condo. John then beat her over the head with a crochet-covered brick, moved her to the bathroom and repeatedly stabbed her, and informed the police that he was preparing her body for burial by bleeding her. John admitted to killing her, was arrested and indicted for murder, was determined not competent to stand trial, and was committed by the court.

2. Joan left her estate equally to her children, her son petitioned to declare the gift to John void under the slayer statute, but John's guardian *ad litem* argued a failure to provide John had the capacity to act willfully under the slayer statute. The court declared the gift to John void, finding John's confession and the indictment sufficient proof of willfulness. John appealed. On appeal, the Mississippi Supreme Court, in a case of first impression, reversed and remanded the case on the following grounds: (1) willfully under the slayer statute means knowingly and intentionally; (2) John has suffered from hallucinations, delusions, and paranoid schizophrenia for more than two decades; (3) the record is silent as to his mental state at the time of the killing; (4) Mississippi will follow the majority of states and hold that the slayer statute requires willful conduct, and an insane person would lack the ability to kill someone willfully; and (5) while this result may be unsettling for some, a change of policy on this issue requires action by the legislature and not the courts.