SOUTHERN FEDERAL
TAX INSTITUTE

REVIEW OF THE PAST YEAR'S SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES

By

Dana G. Fitzsimons Jr.
Bessemer Trust
Atlanta, GA

Friday, October 31, 2025

SESSION CC

Dana G. Fitzsimons Jr.
Managing Director and Senior Fiduciary Counsel
Bessemer Trust
fitzsimons@bessemer.com

Mr. Fitzsimons is Managing Director and Senior Fiduciary Counsel at Bessemer Trust. In this role, he is responsible for working with clients and their advisors to develop practical and efficient wealth transfer plans, and for guiding the firm on fiduciary issues. He serves as Chair of the firm's Fiduciary Counsel Committee and its Diminished Capacity Working Group.

Prior to joining Bessemer, Dana was a partner with McGuireWoods LLP, where he practiced in the areas of fiduciary litigation and estate planning.

He is a Fellow of the American College of Trust & Estate Counsel (ACTEC) and serves on its Board of Regents and on its State Laws Subcommittee. He has been recognized in *Chambers USA: America's Leading Lawyers for Business*, is a 2021 inductee into the NAEPC Association Estate Planning Hall of Fame and a member of The International Academy of Estate and Trust Law, and frequently lectures on fiduciary topics.

Dana earned a J.D. from William & Mary Law School, where he was a member of the law review and graduated *Order of the Coif*, and a B.A. in music from Ithaca College School of Music. He continues to actively perform and record as a jazz and rock drummer.

Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases

(2024 Edition) *

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

Updated as of December 31, 2024

Dana G. Fitzsimons Jr.

Managing Director and Senior
Fiduciary Counsel, Bessemer Trust[1]
3455 Peachtree Road, N.E., Suite 850,
Atlanta, Georgia 30326
Phone: (404) 965-9318
fitzsimons@bessemer.com
www.bessemer.com

[1] The views and comments expressed herein are solely those of the author and do not necessarily reflect the views or practices of Bessemer Trust Company, N.A. and its affiliated entities. These materials are for general educational and discussion purposes only and do not constitute legal advice. These materials are not intended as, and may not be relied upon as, tax or legal advice by any person. No representation or warranty is made as to these materials.

Dana G. Fitzsimons Jr.

Bessemer Trust
Atlanta, Georgia

Mr. Fitzsimons is Managing Director and Senior Fiduciary Counsel at Bessemer Trust. In this role, he is responsible for working with clients and their advisors to develop practical and efficient wealth transfer plans, and for guiding the firm on fiduciary issues. He serves as Chair of the firm's Fiduciary Counsel Committee and the Diminished Capacity Working Group.

Prior to joining Bessemer, Dana was a partner with McGuireWoods LLP, where he practiced in the areas of fiduciary litigation and estate planning.

He is a Fellow of the American College of Trust and Estate Counsel (ACTEC), where he serves on the Board of Regents, is Chair of the Long-Range Planning Committee, and is a member of the State Law Committee. He has been recognized in *Chambers USA: America's Leading Lawyers for Business*, is a 2021 inductee into the NAEPC Association Estate Planning Hall of Fame, and frequently lectures on fiduciary topics.

Dana earned a J.D. from William & Mary Law School, where he was a member of the law review and graduated Order of the Coif, and a B.A. in music from Ithaca College School of Music. He continues to perform and record as a jazz and rock drummer.

Contents

Review of the past year's significant, curious, or Downright Fascinating Fiduciary Cases

(2024 Edition)*

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

Dana G. Fitzsimons Jr.

Bessemer Trust[2]
Atlanta, Georgia

1. Elder Abuse & Guardianship

a. ***Birmingham Nursing & Rehab. Ctr., LLC v. Davis,* 2024 Ala. LEXIS 77 (2024).** Unless limited in the letters of appointment, a co-guardian has the power to unilaterally bind the ward to an arbitration agreement.

(1) In 2015, Alicia Davis and Eugenia Ramey asked the Jefferson Probate Court to appoint them as legal guardians for their elderly mother, Mattie L. Granger, because of cognitive deterioration. The probate court agreed and appointed them both as guardians but referred to them together as a singular "Guardian."

(2) The next year, Granger was admitted to a nursing home run by Birmingham Nursing & Rehabilitation Center, LLC ("Birmingham Nursing"). Davis, the daughter who resided in Alabama, signed the relevant admission paperwork on her mother's behalf, but Ramey, the daughter who lived in Maryland, did not. The admission contract contained an arbitration clause that was signed by Davis alone. Granger remained at the nursing home until June 2022, at which point she was hospitalized with several serious health conditions. She eventually passed away in the hospital three months later.

(3) While their mother was hospitalized, Davis and Ramey sued Birmingham Nursing and two of its employees or agents, alleging that Granger's health conditions had been caused by abuse or neglect at the hands of the nursing home's staff. Once Granger had passed away, Johnnie Woods Davis, as personal representative of Granger's estate, was substituted as the plaintiff, and the complaint was amended to state a wrongful-death claim.

(4) The defendants moved to compel arbitration, which the trial court rejected because the arbitration agreement had been signed by only one of the guardians and was therefore "invalid and unenforceable." The defendants appealed and the Alabama Supreme Court reversed and remanded on the following grounds:

(a) Alabama has a distinct body of caselaw considering specifically the issue how and when arbitration agreements executed by the owners and operators of nursing homes and their residents may be enforced. A mentally competent resident can be bound by a representative acting with apparent authority, but that the representative of a resident who was not competent at the time of admission must have actual authority to act on the resident's behalf. Granger was mentally incompetent at the time she was admitted to the nursing home.

(b) Only a "person" can be appointed as guardian of an incapacitated ward. Davis and Ramey are each persons, but the abstract set consisting of both women together is not. The probate court's order will not be read as appointing a nonperson entity when another

[2] The views and comments expressed herein are solely those of the author and do not necessarily reflect the views or practices of Bessemer Trust Company, N.A. and its affiliated entities. These materials are for general educational and discussion purposes only and do not constitute legal advice. These materials are not intended as, and may not be relied upon as, tax or legal advice by any person. No representation or warranty is made as to these materials.

reading is plausible. While the use of the singular "Guardian" to refer to multiple people is somewhat awkward, the most natural explanation for that phrasing is that the probate court was relying on standard language drafted for the usual circumstance in which only one individual is appointed as a guardian. The best reading of the probate court's order is that it appointed two guardians.

(c) The Guardianship Act gives broad powers to the guardian of an incapacitated ward and any limitation on those powers must be endorsed on the guardian's letters of appointment. The inability to act without the approval of another is an obvious "limitation" on the powers of guardianship, yet no such limitation appears in the probate court's order. The assumption that any time power is jointly granted, it must also be jointly exercised is wrong. There are many instances in which Alabama law authorizes co-agents to exercise their powers independently. The most familiar example comes in the context of parental authority: every child begins life with two parents, and each co-parent usually has the power to sign contracts and consent to treatment on the child's behalf, even without the signature of the other co-parent. A similar principle applies in the power-of-attorney context: the Alabama Uniform Power of Attorney allows a person to designate two or more persons to act as co-agents and specifies that, unless the designation provides otherwise, each co-agent may exercise its authority independently.

(d) The Guardianship Act expressly incorporated the parental-rights analogue into the Guardianship Act by granting each guardian all the powers and responsibilities of a parent regarding the ward's health, support, education, or maintenance. Since a co-parent has the power to act unilaterally, a co-guardian also has the power to act unilaterally. The probate court may limit that power, but only if it spells out the limitation in the guardian's letters of appointment. Here, the probate court's order did not mention any such limitation, so Davis and Ramey each had unilateral authority to act on Granger's behalf.

(e) The most recent version of the Uniform Guardianship and Protective Proceedings Act requires co-guardians to make decisions jointly, and a handful of other states have enacted that model legislation (or something similar to it) by statute. The Alabama Legislature has not adopted the 2017 version of the Uniform Guardianship and Protective Proceedings Act, nor has it enacted any other unanimity requirement for co-guardians.

b. ***In the Matter of the Estate of Olson,* 103 Mass. App. Ct. 842 (2024).** Where a separate statute allows conservators with court authorization to execute wills on behalf of other persons, and the conservator acted on the belief that he had such authorization, extrinsic evidence may be admitted to establish that the unsigned document is a valid will.

(1) In December 2015, the court appointed a conservator for Jean Olson and gave him all the powers and duties authorized to a conservator for a protected person, exclusive of those powers requiring specific court authorization. On September 6, 2017, the court directed that a financial and an estate plan be established for Jean, with the assistance of the conservator and other expert financial and estate planners.

(2) Unable to locate a will or other document expressing Olson's testamentary wishes, the conservator hired an attorney who confirmed that the court had expanded the conservator's authority to create an estate plan and that a guardian ad litem was not required because Olson was represented by independent legal counsel. The conservator then hired a second attorney to draft an estate plan for Olson and met with Olson multiple times throughout 2018 to discuss how she wanted to divide her estate. Olson expressed that she wanted to make major bequests to Boston Children's Hospital and the Masonic Lodge in Brockton because of services that those organizations had provided to her and her family. Once counsel memorialized those wishes in a draft will, the conservator met with Olson for approximately 1.7 hours on October 17, 2018, to discuss the draft, including specifically the provisions that would distribute thirty-three percent shares of Olson's estate to each of Boston Children's

Hospital and the Masonic Lodge in Brockton. After discussion, Olson decided to reduce those amounts to twenty-five percent shares.

(3) On October 23, 2018, the conservator executed the document at issue ("2018 document") titled "Last Will and Testament of Jean Olson." Under the distribution provisions, Olson's estate would be devised as follows: twenty-five percent to Boston Children's Hospital, twenty-five percent to the Paul Revere Lodge A.F. and A.M. (the Masonic Lodge in Brockton), eleven percent to each of her four nephews, and three percent to each of her two nieces-in-law. The conservator signed the 2018 document, which was witnessed and notarized, in his own name as Olson's conservator.

(4) Olson died unexpectedly on May 6, 2019. The conservator petitioned to probate the 2018 document as Olson's will. Olson's nephew, Anthony Lewandowski, and another of Olson's nephews (together, "objectors") objected, arguing that the document was not a valid will because it was not signed by the testator or by someone else in the testator's name. A Probate and Family Court judge agreed with Lewandowski and dismissed the petition.

(5) The Massachusetts Court of Appeals vacated and remanded on the following grounds:

   (a) Where a separate statute allows conservators with court authorization to execute wills on behalf of other persons, and the conservator here acted on the belief that he had such authorization, extrinsic evidence may be admitted to establish that the unsigned document is a valid will. A contrary reading would risk allowing a good faith mistake of the conservator, a person specifically appointed by the court to manage Olson's estate, to override Olson's testamentary intent. As we do not believe this would be consistent with the statutory purposes, we vacate the dismissal of the petition and remand for further proceedings.

   (b) The Massachusetts Uniform Probate Code ("MUPC") is modeled after the Uniform Probate Code ("UPC") but differs in certain respects, including that it omits the UPC provision authorizing holographic wills. Also, the MUPC does not contain a harmless error provision that allows a court to treat a document or writing as a valid will, even if not executed in compliance with statutory formalities, if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will.

   (c) The powers of a conservator do not include the power to make a will. The court has the power to make, amend, or revoke the protected person's will. But the court may confer on a conservator at the time of appointment or later any power that the court itself could exercise.

   (d) The MUPC does not permit, without limitation, the use of extrinsic evidence to prove that an unsigned or unwitnessed document is a will. Under the conservator's reading, any writing imaginable, such as scribbles on a cocktail napkin, could theoretically be probated as a will. This would essentially nullify the requirements that wills "shall be" witnessed and signed.

   (e) Construing the MUPC to supplant entirely the signature and attestation requirements would lead to increased litigation and delays in settling estates and create the risk of fraud and undue influence over the vulnerable and elderly. The Legislature's decision not to adopt either the UPC provision authorizing holographic wills or the UPC harmless error provision supports this conclusion.

   (f) Under the tenet that no word in a statute is to be considered superfluous, the court presumed that the Legislature intended for the "[e]xcept as provided in subsection (b)" clause in the statue to have some meaning. The court noted that the clause may be a product of legislative oversight, as indicated by comparing § 2-502 with the corresponding provision of the UPC. While similar language appears in UPC § 2-502 (a), subsection (b) in the UPC is the provision authorizing holographic wills. The "[e]xcept" clause makes sense in this statutory structure — a will must be signed and witnessed, except that under subsection (b) a will that is not witnessed is still valid as a holographic will if the signature and material portions are in the testator's handwriting. The provision concerning extrinsic evidence, which is subsection (c) of UPC § 2-502, likewise makes sense, as it is not structured as an exception to the execution requirements of subsection (a). Rather, as explained in the comment, it permits the use of extrinsic evidence to prove "testamentary intent." It is possible that the Legislature, after deciding not to adopt the UPC provision authorizing holographic wills, neglected to remove the "[e]xcept as provided in subsection (b)" language from subsection (a). But if that is the case, it is for the Legislature to amend the statute.

(g) In the circumstances of this case and in view of the interplay between § 2-502 and the conservatorship statute, it is appropriate to turn to extrinsic evidence to determine whether Olson intended the 2018 document to be her will. Although the decree here did not authorize the conservator to make a will, were Olson still living, the court could have later conferred that power on the conservator and approved the 2018 document as Olson's will after a substituted judgment hearing. In this situation, where a substituted judgment hearing cannot be held because Olson's death terminated the conservatorship, it aligns with the purposes of the MUPC and common sense and sound reason for the court to consider extrinsic evidence to determine whether the 2018 document comports with Olson's testamentary intent. The conservator has no direct financial interest in the probate of the 2018 document and that he acted on a good faith, albeit erroneous, belief that he had the authority to execute a will for Olson. Allowing a conservator's good faith mistake to potentially defeat a decedent's testamentary wishes would contravene the MUPC's purpose to discover and make effective the intent of a decedent in distribution of the decedent's property without materially serving the other enumerated purposes.

(h) The 2018 document may be submitted to probate if the conservator is able to prove with extrinsic evidence that Olson intended it to be her will.

c. ***Diaz v. Santoyo (In the Int. of Diaz),* 2024 COA 10, 2024 Colo. App. LEXIS 1116 (2024).** As a matter of first impression, Uniform Guardianship and Protective Proceedings Act and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act empower a court to authorize a guardian to move the ward's dwelling place to a foreign jurisdiction where in the ward's best interests.

(1) Humberto Gonzalez Diaz emigrated from Mexico to the United States when he was a teenager. He moved to Colorado and began working maintenance and food preparation jobs in casinos. Diaz married a woman he met while working at the casinos and, as a result of the union, became a lawful permanent resident. He sent money he earned from working at the casinos back to his family in Mexico to maintain the family home. Diaz developed alcoholism while working at the casinos. His alcoholism caused tension in his marriage, and his wife eventually sold the family home and moved out. After his wife left, Diaz became homeless and lived in and out of shelters. During this time, he received senior support services in central Denver. Diaz was incarcerated for threatening a person with a knife at a shelter. A mental health certification was initiated against Diaz and the court appointed Ayo Labode as guardian ad litem for Diaz.

(2) Labode petitioned for appointment of a special conservator for purposes of accessing funds to pay for a professional assessment of Diaz's mental capacity and the necessity of appointment of a guardian. A special conservator was appointed, and the necessary funds were used to pay for a professional assessment of Diaz. A licensed psychologist assessed Diaz and concluded he had a major neurocognitive disorder and was an incapacitated person. Labode petitioned to appoint Diaz's brother-in-law by marriage, Jose Guzman Santoyo, as

Diaz's guardian. In addition to requesting appointment of a guardian, Labode requested authorization for the guardian to transport Diaz from the Denver Detention Center and travel anywhere within the United States and Mexico. The court appointed a court visitor, Brian Wallman, to investigate the allegations in the petition and to prepare a report. Wallman then noted that the proposed guardian, Guzman Santoyo, intended to drive Diaz to Guanajuato, Mexico, to live with his sisters and that Diaz objected to the move.

(3) The court appointed Diaz an attorney. Diaz's counsel contested the request for authority for the guardian to move Diaz to Mexico against his wishes and argued that the request constituted an involuntary repatriation order where no such order had been issued by immigration authorities, and was relief not authorized by the probate code. The court heard testimony from Rita Gonzalez, a relative living in Chicago who was coordinating with Diaz's family in Mexico. Gonzalez testified that Diaz's sisters contacted her to help find Diaz because they didn't want him to be in a bad situation and they wanted him to come to Mexico to be with them and let them care for him. Gonzalez indicated that neither she nor the sisters had firsthand knowledge of or experience dealing with Diaz's specific medical or psychiatric needs; her knowledge of Diaz's condition was through speaking with the attorneys, and the sisters' knowledge was limited to what Gonzalez had told them.

(4) The trial court granted the petition, appointed Guzman Santoyo as Diaz's guardian, and authorized the guardian to transport Diaz to Mexico. Approximately two months after the court issued its order, Guzman Santoyo filed a notice of change of address for Diaz, indicating that he resided with his sisters in Guanajuato, Mexico.

(5) Diaz appealed and the Colorado Court of Appeals reversed and remanded on the following grounds:

(a) The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (the "Jurisdiction Act") authorizes a move "outside this state" without limitation. It does not authorize a move only "to another state" or "within the United States" or "outside this state but not to a foreign country." The plain meaning of "outside this state" includes a foreign country. Guanajuato, Mexico, is "outside this state." Although Diaz made compelling policy arguments against the probate court's "involuntary repatriation" of Diaz over his objection, he cited no legal authority limiting the court's ability to authorize his guardian to move his dwelling place to Mexico.

(b) The Jurisdiction Act also provides that a court may treat a foreign country as if it were a state for the purposes of the Jurisdiction Act. The Jurisdiction Act, which applies to adult guardianship proceedings governed by the Guardianship of Incapacitated Persons Act (the "Guardianship Act"), provides that a guardianship can be transferred to another "state" (which includes a "foreign country") when, among other things, a ward is expected to move there permanently. It would be nonsensical to conclude that a court cannot authorize a guardian to move a ward to a foreign country under the Guardianship Act when such a move is contemplated by the Jurisdiction Act. If the General Assembly had intended to preclude a court from moving a ward abroad, it would have said so.

(c) The court is not required to transfer the guardianship proceeding to the foreign jurisdiction when authorizing a guardian to move a ward's dwelling place. The court may retain jurisdiction over the guardianship proceeding, even if it has authorized the guardian to move the ward's dwelling place to another state or foreign country. Nothing in the statute indicates that a state cannot maintain jurisdiction if the ward's dwelling place is moved out of the state. The Guardianship Act expressly provides that once a guardian is appointed by order of the court, the guardianship continues until terminated, without regard to the location of the guardian or ward. The court retains the discretion to transfer the guardianship proceeding when authorizing a guardian to move the ward's dwelling place if the court determines that it is in the ward's best interests.

(d) The Jurisdiction Act provides the procedures to transfer a guardianship of a ward to another state or foreign country, and it contemplates moving a ward's dwelling place as part of such proceeding. The statutory procedures adequately address the policy concerns implicated by an international transfer of guardianship that Diaz raises on appeal, including assessing the appropriateness of a transfer, determining whether the ward's needs can be met in the foreign jurisdiction, and ensuring that plans for care and services for the ward in the foreign jurisdiction are reasonable and sufficient.

(e) The court must make findings about objections to the transfer and to permanently transfer the guardianship only when the foreign jurisdiction issues a provisional order accepting the proceeding. These requirements ensure that the guardianship proceeding is transferred to a foreign jurisdiction with statutory safeguards in place to guarantee ongoing protection and monitoring of the ward. And because the purpose of both the Guardianship and Jurisdiction Acts is to ensure the ward's ongoing protection, the court should consider whether a transfer of the proceedings is possible and appropriate when deciding whether authorizing a guardian to move the ward's dwelling place outside the state is in the ward's best interest.

(f) There is no authority that prohibits a court from authorizing the guardian, upon initial appointment, to establish or move the ward's dwelling place outside Colorado. The court possessed the legal authority under the Guardianship and Jurisdiction Acts to permit the guardian to move Diaz to Mexico.

(g) The court may authorize a guardian to move a ward's dwelling place at the initial appointment proceeding if it has received a statutorily compliant visitor's report and has determined that such a transfer is in the ward's best interests. In this case, the court did not receive a statutorily compliant visitor's report. The Guardianship Act requires appointment of a visitor and a visitor's report that includes a visit to the respondent's present dwelling and any dwelling in which the respondent will live, if known, if the appointment is made. The court visitor's report must include, among other things, a statement as to whether the proposed dwelling meets the respondent's individual needs. The probate court abused its discretion by not complying with the statutory vetting procedures and not receiving a statutorily compliant visitor's report before appointing the guardian.

(h) The court visitor's report did not say that he visited the sisters' home, and he left blank the entire section pertaining to the suitability of their home. Further, there is no explanation in his report about why he did not visit the sisters' residence or any alternative methods he pursued to determine suitability. Nor does the record contain testimony or argument that would explain the absence of this information. Finally, the court did not inquire about the suitability of the proposed dwelling or even note that this information was missing.

(i) On remand, the visitor must prepare a visitor's report that complies with the statute and for a hearing on the appointment of a guardian. If, after receiving a compliant visitor's report and conducting an investigatory hearing, the court determines that authorizing Diaz's guardian to move his dwelling place out of the country is in his best interests, the court has discretion to condition the move on the transfer of the guardianship proceeding to the foreign jurisdiction.

2. Forfeiture Clauses

a. ***Jacks v. Brossett,* 2024 Ark. App. 6 (2024).** Divided Arkansas Court of Appeals holds that beneficiary violated the in terrorem clauses of a will and trust by: (1) seeking removal of a trustee without adhering to the removal provisions of the trust; (2) attempting to divest person of authority expressly granted by the trust; (3) requesting removal of the trustee in violation of the trust provisions; and (4) demanding that the trustee provide an accounting where the trust terms released the trustee of the duty to account.

(1) Three months prior to his death, Havis Jacks executed a will and a trust. Havis was survived by his daughter, Ashley Jacks, and her two children, Paris and Bayli Ludwig. The will and trust made specific provisions for Ashley, her children, and Sandra Brossett. The nature of Havis and Sandra Brossett's relationship was not known, but she and Havis were close. Ashley and Sandra had a long and very tumultuous relationship.

(2) In his will, Havis appointed Sandra as Executrix of his estate, and Iberia Bank as successor executor. The will also bequeathed all of Havis's interest in his personal automobiles and his household goods and effects to Sandra and provided that if there were items Sandra did not want, then the unwanted items were to be distributed to Ashley or her children. The residue and remainder of his property was directed to be distributed to his revocable trust. The will contained a broad in terrorem clause.

(3) The trust instrument provided that all checking accounts owned by either Havis or the trust were to be distributed to Sandra. The remaining property in the trust, including certain real property, was to be distributed to Ashley. The trust instrument also created a subtrust in the event any distribution was designated for the benefit of his minor grandchildren, Paris and Bayli. The subtrust was funded by two IRA accounts managed by Edward Jones. The trust designated Sandra as trustee for the main trust and designated Iberia Bank as the successor trustee in the event Sandra was unable or unwilling to serve. The trust also designated the bank as trustee of the subtrust. Rather than naming a specific successor trustee for the subtrust, the trust provided that, if for some reason Iberia Bank was unable or unwilling to serve as trustee, Sandra in her individual capacity had the power to appoint, in a signed writing, one or more successor trustees. In no event, however, could Ashley serve as trustee of either the main trust or the subtrust. The trust also set forth a specific procedure for the removal of a trustee. It provides, in pertinent part, that any trustee other than those specifically identified by Havis—Sandra as trustee of the main trust and Iberia Bank as trustee of the subtrust—could be removed by written notice signed by all of the current beneficiaries of the trust. It also provided that if any trustee designation failed, the individuals who at such time could remove such trustee would have the power to appoint and/or nominate the successor or successors by a signed written notice delivered to the current beneficiaries of the trust. The trust also contained a broad in terrorem provision.

(4) Havis died three months after he executed the will and trust. As specified by the terms of the trust, on July 26, 2016, Sandra executed a trustee's deed to Ashley Jacks for the real property owned by Havis. On August 19, 2016, Sandra, in her capacity as executrix of Havis's estate and as trustee of his trust, requested that Ashley immediately return all assets owned by Havis at the time of his death, including but not limited to, all personal automobiles, the motorcycle, tools, household and personal goods, and his personal effects. Iberia Bank declined to serve as trustee of the subtrust. Sandra named herself as successor trustee of the subtrust, and Ashley objected.

(5) Ashley, individually and on behalf of her children, petitioned to remove Sandra as Trustee, and sued Sandra as trustee, as executrix, and as trustee. Ashley alleged that Sandra, as trustee, failed to pay the 2015 real estate taxes, and as executrix failed to timely open a probate of the estate. Ashley did not allege any specific facts indicating that Sandra had actually mismanaged the funds; nor did she ask the court for an order construing the terms of the trust or Sandra's power and authority under it—she asked only for Sandra's removal. Rather than follow the specific procedure outlined in the trust for removal of a trustee, Ashley claimed she was authorized to remove Sandra pursuant to state law, and requested the authority to appoint all future successor trustees.

(6) Sandra filed a counterclaim that Ashley violated the in terrorem clauses of the will and the trust and forfeited her interests.

(7) Ashley amended her petition multiple times. In one of the amendments, she dropped her allegations with respect to the untimely probate of the will and added a claim of damages for breach of fiduciary duty. After Ashley filed her second amended petition to remove Sandra as trustee, Sandra moved for summary judgment. Almost a year later, Ashley filed another amended petition for removal and for damages for breach of fiduciary duty. In her third amended petition for removal, Ashley alleged, as she did in her original petition, that she had the right to remove Sandra and added an allegation for removal of a trustee who has committed a serious breach of trust. The third amended petition also contained an assertion that she had the right to remove Sandra as Trustee pursuant to the trust terms. At this point, Ashley had dropped any allegation as to Sandra's actions as Executrix or as Trustee of the main trust. She asked, however that Sandra be removed as Trustee of the subtrust; that Community First Trust (or other suitable trustee) be appointed in Sandra's place as trustee of the subtrust; and again, that Ashley, rather than Sandra in her individual capacity, be given the power to appoint all future successor trustees. Also included in the third amended petition was a claim for damages for breach of fiduciary duty. She asserted that her breach-of-fiduciary-duty claims did not violate the in terrorem clauses because state law invalidates in terrorem clauses to the extent they relieve a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

(8) The court granted Sandra summary judgment; denied and dismissed Ashley's petition for removal; and denied Ashley's motion to dismiss Sandra's counterclaim. The court found that Ashley triggered the in terrorem provisions resulting in a forfeiture of her interests in the will and trust.

(9) Ashley appealed, and on appeal a divided Arkansas Court of Appeals affirmed on the following grounds:

   (a) The Arkansas Supreme Court has recognized the validity of no-contest clauses since at least 1937. Because such clauses work a forfeiture, they are strictly construed.

   (b) The in terrorem provisions are broad. The will provides, in part, that a person who challenges, directly or indirectly, "any provision" contained in the will or trust; who becomes an "adverse party" in "any suit, action or proceeding (whether legal or administrative) in connection with the administration of" the will or trust; or who otherwise becomes an "adverse party" in "a suit, action or proceeding (whether legal or administrative) involving" the will or trust "shall forfeit" his or her rights and interest under both the will and the trust. Any challenge to the provisions of Havis's will or trust, any challenge to the trustee's discretion under the provisions of the trust, or any action that results in a beneficiary becoming an adverse party in any judicial proceeding involving the will or trust will trigger the implementation of the no-contest clause of Havis's will and trust and "shall" result in a forfeiture of the beneficiary's interest thereunder.

   (c) At a minimum, Ashley violated the in terrorem clauses of the will and trust in four respects: (1) by seeking Sandra's removal as trustee of the subtrust without adhering to the removal provisions of the Trust; (2) by attempting to divest Sandra of authority expressly granted to her by the trust; (3) by requesting Sandra's removal as trustee of the main Trust in violation of the trust provisions; and (4) by demanding that Sandra, as trustee, provide an accounting, despite trust provisions releasing the trustee of such obligations.

   (d) The trust in this case allows for the removal of the trustee of the subtrust by delivery of written notice, signed by all the current beneficiaries. Rather than following the specific removal provisions, Ashley chose to file a judicial action for Sandra's removal instead. The original petition seeking Sandra's removal as trustee of the subtrust was filed on February 21, 2017; yet written notice signed by all the beneficiaries was not provided until March 28, 2017. By failing to abide by the terms of the trust prior to filing judicial action, Ashley became an adverse party in a judicial proceeding involving the trust; thereby triggering the in terrorem clauses.

(e) Second, Ashley triggered the in terrorem clauses by asking the court to divest Sandra of authority expressly granted to her under the trust (the appointment of all future trustees of the subtrust) and to have the court confer such authority on someone else instead. While she dropped her request to personally be granted that authority in her subsequent petitions, Ashley still requested that Sandra be divested of the authority to appoint a successor trustee of the subtrust. By seeking to strip Sandra of this power and confer it on either herself or a third party, Ashley was inviting the court to rewrite the terms of the trust. Such a request constitutes a challenge to a trust provision sufficient to trigger the in terrorem clauses of the will and trust.

(f) Third, Ashley's request to remove Sandra as trustee of the main trust also triggered the in terrorem clauses. Ashley claimed, in her initial petition for removal, that Sandra, as Trustee of the main Trust, failed to pay the 2015 real estate taxes. On July 25, 2016—approximately one month after Havis's death—Sandra, as Trustee of the main Trust, deeded to Ashley the real property left to her by Havis. The 2015 real property taxes on that piece of property were not due until October 15, 2016—several months after the property had been deeded to Ashley—and the property taxes were thereafter not paid on time. Ashley never requested that Sandra pay the taxes prior to suit being filed. There were no allegations of bad faith or any other indication that the failure to pay the taxes was more than a mere oversight. In filing her complaint, Ashley caused herself to be an adverse party in a judicial proceeding involving the trust.

(g) Another violation occurred when Ashley sought court intervention, claiming Sandra had failed to provide the beneficiaries with an annual accounting. However, under the provisions of the Trust, such an accounting is required only of a corporate trustee. The trust document specifically states that a noncorporate trustee is not required to provide an accounting. By filing suit to demand that Sandra perform actions not required of her under the trust, Ashley violated the in terrorem clauses of the will and trust.

(h) Ashley attempted to demand an accounting and remove Sandra as Trustee using the accounting and removal provisions of the Trust Code. However, the Trust Code provides that, except under certain circumstances not at issue here, the terms of the trust prevail over those contained in the Trust Code. Ashley's filing of a lawsuit based on those provisions of the Trust Code also amounted to a challenge to the trust provisions in violation of the in terrorem clauses.

(i) Because the provisions in the will and trust are broad, violations are not limited to attacks on the validity of the will or trust. The fact that Ashley's claims were not an attack on the validity of the will or trust will not preclude a finding that her actions invoked the forfeiture provisions of the in terrorem clauses.

(j) One dissenting justice commented that the Arkansas Supreme Court had previously determined that beneficiaries of a will, who acknowledged the validity of the will but questioned actions of the executor for not complying with the probate code, do not violate a "no contest" clause in the will. Here, Ashley acknowledged the validity of the will and trust, and rather than attacking it, she was questioning the actions of Sandra—whose removal as trustee was provided for and allowed by the trust—for not complying with the probate code and for refusing to follow the grantor's wishes. Ashley was perfectly within her rights to seek to replace a trustee who had breached her fiduciary duty to the subtrust as the self-appointed trustee. The thrust of Ashley's conduct was to protect the assets of the subtrust. Because her children were minors, she was required to prosecute this action as "next friend" of her minor children, the beneficiaries. Therefore, the in terrorem clause could not be invoked to prohibit the beneficiary from adhering to the express terms of the trust allowing removal of a trustee.

(k) A dissenting opinion, joined by two additional justices, noted that the court had previously required a finding that the trustee acted in good faith before a beneficiary forfeited his or her interest due to the in terrorem clause. In this case, no findings were made on whether Sandra acted in good faith, in bad faith, or with reckless indifference in her duties as trustee. Additionally, no finding was made regarding whether Ashley's petition for removal was made in bad faith or with reckless indifference. Sandra cannot be relieved of liability for her acts as trustee merely because there is an in terrorem clause. If she acts in bad faith, reckless indifference, or thwarts the testator's wishes, she is liable. If an in terrorem clause prevents the beneficiaries from bringing suit against a trustee before the evidence is presented, a trustee would have unfettered power to abuse his or her position, thwart the wishes of the grantor, and illegally deplete the entire trust of property, and there would be nothing anyone could do about it. Those with standing to do so would be disinherited before the trial could commence, with no consequence to the trustee for breaching fiduciary duty to the beneficiaries. Fiduciary duty cannot simply be willed away; otherwise, there is no oversight to make sure that the trustee is acting in the best interests of the beneficiaries. An amended complaint, unless it adopts and incorporates the original complaint, supersedes the original complaint. Ashley did not adopt or incorporate her previous complaints in her third amended complaint and therefore it is erroneous for the majority to rely on statements made in the first and second complaints.

(l) Another dissenting justice, joined by three additional justices, expressed concern that Paris and Bayli would not be able to hold the trustee accountable without risking total disinheritance. Sandra appointed herself as the trustee of the grandchildren's inheritance. This self-appointment shattered the well-planned, fortified separating walls of Havis's estate plan. Sandra controlled the inheritance given to Ashley's children, which naturally results in communication and cooperation between Sandra and Ashley—the very tumultuous relationship that Havis fervently attempted to avoid. The worlds were now bound to collide. Not only does Sandra now control the distributions of the grandchildren's subtrust, but if Ashley dares to question, complain, or even request an accounting on behalf of her children, the in terrorem clause in the main trust is triggered, and Sandra can force Ashley to lose her inheritance. The underlying objective in the litigation was that Ashley Jacks, the daughter of Havis Jacks, was attempting to protect her daughters' interests in their subtrust from Sandra.

b. ***Spurlock v. Wyo. Trust Co.,* 2024 WY 19 (Supreme Court of Wyoming 2024).** No-contest clause did not completely prohibit all litigation, trustee removal provisions in trust were not mandatory and exclusive, and lawsuit to remove the trustee for alleged breaches of fiduciary duties was not a challenge to the trust that causes forfeiture.

(1) David Spurlock and his three siblings are the beneficiaries of the C.E. Spurlock Revocable Trust (the "Trust"), which was created by their father, C.E. Spurlock, on March 5, 1997, and subsequently amended on November 2, 2007. The Trust gave David the right to purchase certain real property belonging to the Trust at a discounted price upon C.E.'s death. In July 2016, C.E. was admitted to a care facility in Lander, Wyoming. In September 2016, Wyoming Trust Company (the "Trustee") notified David he had until October 12, 2016, to exercise his option to purchase the property. David and his wife, Andrea, exercised this option and closed on the property in December 2016. When they subsequently entered the property, they discovered cracked and ruptured pipes, which resulted in flooding that caused over $80,000 in damages.

(2) David and Andrea initially filed a lawsuit against David's brother, Charlie, who they believed to be responsible for the damage to the property. They alleged Charlie willfully turned off the heat causing the pipes to freeze. Through discovery in that case, Charlie alleged it was the Trustee who was responsible for maintaining the property at all relevant times. David and Andrea voluntarily dismissed the lawsuit against Charlie. David and Andrea then filed a lawsuit against the Trustee and its officers asserting causes of action for fraud, negligence, and

intentional infliction of emotional distress. They also sought to remove the Trustee in part due to the real estate transaction, but also because the Trustee allegedly had not provided accountings or complied with the Trust's instructions for dividing assets. The complaint specifically stated the lawsuit should not be construed as a challenge to the Trust.

(3) The Trustee filed a motion to dismiss on the grounds of improper venue. The Trustee also asserted David did not plead the fraud claim with the requisite particularity, and the claim of intentional infliction of emotional distress failed to allege the Trustee's conduct was extreme or outrageous. The Trustee also filed an answer, which contained what it claimed was a "compulsory counterclaim." The counterclaim alleged Paragraph 7.2 of the Trust specified the only manner for removal of a trustee — by a majority of all the then living children of the settlor who are under no legal disability. The Trustee asked the district court to declare David's action in filing the lawsuit "necessarily terminated his interest in the Trust" under the Trust's no-contest clause, which stated: "If a beneficiary or representative of a beneficiary or if anyone claiming a beneficial interest in the trust estate or any part thereof should legally challenge or should in any way attempt to impair the function and operation of this trust, its provisions or asset distributions, then all asset distributions to said challenging beneficiary or to the beneficiary upon whose benefit said challenge is raised shall be retained in trust and distributed to the remaining beneficiaries named herein as if said challenging beneficiary or the beneficiary to be benefitted by said challenge and his or her issue had predeceased the distribution of the trust estate."

(4) David did not file an answer to the counterclaim, and the Trustee moved for entry of default. After the Clerk entered default against David, the Trustee moved for default judgment on its counterclaim. David filed a pro se letter explaining his attorney had not informed him about the counterclaim or the default and asked for time to find competent replacement counsel. David's original attorney subsequently filed a motion to dismiss the counterclaim, arguing the district court did not have jurisdiction over the Trust, and the lawsuit was to protect the assets of the Trust, not to impair the function or operation of the Trust. Shortly thereafter, David's new counsel filed a motion to set aside the default, a motion to amend the complaint, and a response to the motion to dismiss.

(5) The district court denied David's motion to amend the complaint, granted the Trustee's motion to dismiss the fraud, negligence, and removal of trustee claims without prejudice on the grounds of improper venue, and dismissed the intentional infliction of emotional distress claim with prejudice for failure to state a claim. The district court also granted David's motion to set aside the entry of default on the counterclaim.

(6) The Trustee moved for summary judgment on its counterclaim. David filed a cross-motion for summary judgment. The district court granted the Trustee's summary judgment motion and denied David's cross-motion for summary judgment. David appealed and the Wyoming Supreme Court reversed and remanded on the following grounds:

(a) No-contest clauses are valid in Wyoming. The intent of the settlor regarding contests to the trust is controlling. While the Trust expresses a desire to avoid litigation, contrary to the Trustee's position, it does not prohibit litigation outright. Giving it such an interpretation would nullify other portions of the Trust. At least two other provisions of the Trust specifically authorize a beneficiary to file litigation. First, Paragraph 7.1 specifically allows any beneficiary to petition a court to appoint a successor trustee if the beneficiaries cannot unanimously agree on who the successor trustee should be if the persons named in the Trust are unwilling or incompetent to serve. Second, Article XII of the Trust gives the Trustee discretion to postpone distributions to the beneficiaries under certain circumstances. "To safeguard the rights of the beneficiary," Paragraph 12.5 allows a beneficiary to apply to a court for a "judicial determination as to whether the TRUSTEE reasonably adhered" to the standard set forth in the Trust for withholding distributions. The Trust must be interpreted as a whole and avoid an interpretation which renders any provision meaningless. Because the Trust specifically allows a beneficiary to bring some forms of litigation, we cannot interpret the no-contest clause as prohibiting all litigation.

(b) By its plain language, the no-contest clause applies only when a beneficiary legally challenges the Trust or attempts to impair the function and operation of the Trust, its provisions or asset distributions. David's lawsuit sought the following relief: damages against the Trustee, not the Trust, related to the real estate transaction; to enjoin the Trustee from committing further breaches of trust; to compel the Trustees to redress their breaches of trust by paying money or restoring property; to order the Trustee to provide an accounting; suspend the Trustee from taking further action on behalf of the Trust; and to deny compensation to the Trustee. The lawsuit did not challenge or seek to modify any of the Trust's provisions or distributions.

(c) Throughout the lawsuit, the Trustee claimed the Trust terms provided the exclusive method for removing the Trustee. However, at oral argument, the Trustee conceded these provisions were not exclusive, and they did not replace the statutory process for removal of a trustee. The plain language shows this provision is permissive and not exclusive. The provision states a trustee "may" be removed by a majority of the beneficiaries. If the beneficiaries choose to use this method to remove the trustee, the removal is effective without any court proceeding. The term 'may' connotes permissive authority and does not structure a mandatory requirement. The Trust did not prohibit David or any of the other beneficiaries from bringing a lawsuit to remove the Trustee for cause under Wyoming statutes. Holding a trustee responsible for losses or for breaches of fiduciary responsibility could require the filing of a lawsuit. The removal method is not exclusive. The district court erred when it found the Trust terms provided the exclusive method for removing the Trustee.

(d) Other jurisdictions have recognized bringing a lawsuit to remove a trustee for cause does not constitute a challenge to a trust. David was not seeking to void, nullify, or set aside any of the Trust's provisions. David's lawsuit was aimed at correcting improprieties allegedly committed by the Trustee. It did not seek to change or modify any portion of the Trust. Thus, David's lawsuit was not a legal challenge to the Trust.

(e) David's lawsuit did not seek any damages from Trust assets. It did not seek to weaken the Trust, diminish its assets, or change or delay the asset distribution. Instead, the lawsuit sought to enforce the Trust's provisions relating to accountings and instructions for dividing assets. Although the Trustee made a discretionary decision to delay final distribution pending the litigation, looking at the intent of David's lawsuit, as determined from the complaint, it was not an attempt to impair the function, operation, or asset distribution of the Trust in violation of Paragraph 10.6.

(f) The Trust terms authorize the Trust to pay for litigation costs incurred in the defense of a challenge to the Trust. Some of the litigation expenses in this case were incurred through the prosecution of the counterclaim seeking to disinherit David. However, David's lawsuit was not a challenge to the Trust, and it did not necessitate the filing of a claim to disinherit him. Filing the lawsuit to remove the Trustee was not an attempt to impair the function or operation of the Trust by forcing it to incur litigation expenses. The district court erred when it found David's lawsuit to remove the Trustee triggered the no-contest clause.

c. ***Key v. Tyler,* 102 Cal. App. 5th 365 (Court of Appeal of California 2024).** Unsuccessful contest to trust amended triggers forfeiture of interests under entire trust agreement and not just those under the amendment.

(1) Thomas E. Plott ("Thomas") and Elizabeth R. Plott ("Elizabeth") (together, the "Trustors") created the Original Trust in 1999. They were designated as both Trustors and trustees and had the power to revoke the Trust as to their share of the marital property during their joint

lifetimes. The Trustors had three children: Sarah Plott Key ("Key"); Elizabeth Plott Tyler ("Tyler"); and a third sister not involved in this litigation, Jennifer Plott Potz ("Potz").

(2) Upon the death of the first trustor, the Trust estate was to be divided into three subtrusts: (1) the survivor's trust ("Survivor's Trust"); (2) the marital trust ("Marital Trust"); and (3) the exemption trust ("Exemption Trust"). The Survivor's Trust consisted of the surviving trustor's separate property and the surviving trustor's community property share of the trust estate, along with household items. The Marital Trust was to include the maximum permissible amount of the deceased trustor's estate that could pass without tax liability under the federal marital tax deduction. The Exemption Trust included the remainder of the Trust estate.

(3) The Original Trust also created a residual trust ("Residual Trust"), which was created to receive assets flowing from the other three subtrusts for distribution to the beneficiaries upon the death of the surviving trustor.

(4) After the first trustor's death, the Survivor's Trust remained revocable, but the Marital Trust and the Exemption Trust became irrevocable. The surviving trustor also retained the power by will or codicil to direct the distribution of the Survivor's Trust upon the surviving trustor's death. Absent such direction, the Original Trust provided that, upon the death of the surviving trustor, the personal effects in the Survivor's Trust (with the exception of a grand piano which was to be given to Key) would be distributed in equal portions to the three children. The remainder of the assets in the Survivor's Trust would flow into the Residual Trust.

(5) The surviving trustor had the right to receive the net income from the Marital Trust and the Exemption Trust during the surviving trustor's life. The surviving trustor also had the right to change the manner in which the Trustors' issue would receive their shares from those sub trusts. However, the surviving trustor could not change the amount of those shares. Unless the surviving trustor made such a change, upon the surviving trustor's death the assets remaining in the Marital Trust and the Exemption Trust were to flow into the Residual Trust.

(6) In article seven of the Original Trust, the trustors specified the shares of the Residual Trust that the beneficiaries were to receive from the assets flowing into that trust after the death of the surviving trustor. Those assets were to be divided and distributed in shares consisting of 50 percent to Tyler, 35 percent to Potz, and 15 percent to Key.

(7) The Original Trust contains a No Contest Clause. The clause provides in part that "if any devisee, legatee or beneficiary under this Trust, or any legal heir of the Trustors or person claiming under any of them directly or indirectly (a) contests either Trustor's Will, this Trust, any other trust created by a Trustor, or in any manner attacks or seeks to impair or invalidate any of their provisions, … then in that event Trustors specifically disinherit each such person, and all such legacies, bequests, devises, and interest given under this Trust to that person shall be forfeited as though he or she had predeceased the Trustors without issue, and shall augment proportionately the shares of the Trust Estate passing under this Trust to, or in trust for, such of Trustors' devisees, legatees and beneficiaries who have not participated in such acts or proceedings."

(8) The 2003 Amendment, executed separately by Thomas and Elizabeth in that year, is a one-page document that amended article seven of the Original Trust governing the Residual Trust. The 2003 Amendment changed the shares to be distributed to the three children from the Residual Trust so that Tyler, Key, and Potz would each receive a one-third share. The 2003 Amendment does not contain a no contest provision.

(9) Thomas died in 2003. Following his death, Tyler used her influence over Elizabeth to obtain the 2007 Amendment. The 2007 Amendment revised article four of the Original Trust governing the Survivor's Trust. It changed the requirements for the distribution of property from the Survivor's Trust following Elizabeth's death. Under the revised distribution scheme, Key was to receive only "[a]n amount equal to the lesser of $1,000,000, or 5% of the then Survivor's Trust Estate less any amount owed on any outstanding promissory note in favor

of the Surviving Trustor." Tyler was to receive 65 percent of Elizabeth's interest in the family's nursing home business entities and 50 percent of Elizabeth's remaining assets. Potz was to receive 35 percent of Elizabeth's interest in the business entities and the other 50 percent share of Elizabeth's remaining assets. These shares were to be distributed to Tyler and Potz through the Residual Trust. The 2007 Amendment also gave Tyler the Beverly Hills home that Elizabeth owned, along with its contents.

(10) Key petitioned to invalidate the 2007 Amendment on the ground of undue influence. Following trial, the probate court granted that petition and the court of appeals affirmed. Following remand from that decision, Key filed a petition to enforce the No Contest Clause (the "No Contest Petition"). Tyler responded with a motion to strike that petition under the anti-SLAPP statute. The probate court granted Tyler's anti-SLAPP motion. As is relevant to this appeal, the court concluded that Tyler had not directly contested the Trust because she did not initiate any legal proceedings challenging the Trust, but instead simply defended the 2007 Amendment against the challenge that Key brought. Furthermore, the court concluded that Key had failed to show that Tyler lacked probable cause to defend the 2007 Amendment.

(11) The court of appeals reversed this order and held that Tyler's pleadings defending the 2007 Amendment alleged the invalidity of a protected instrument, and therefore met the statutory definition of a direct contest. The court of appeals also held that Key had made a sufficient showing that Tyler lacked probable cause for her defense of the 2007 Amendment to warrant denial of Tyler's anti-SLAPP motion, and remanded for further proceedings on Key's No Contest Petition. Following remand, Tyler moved to bifurcate the trial on Key's No Contest Petition. Tyler argued that there was a preliminary, and potentially dispositive, issue arising from the absence of a no contest provision in the 2003 Amendment. Tyler claimed that the absence of such a provision means that the 2003 Amendment is not a protected instrument, and that Tyler's share of the assets from the Residual Trust specified by the 2003 Amendment is therefore not subject to forfeiture.

(12) The probate court agreed and, on its own motion, denied Key's No Contest Petition with prejudice. Key appealed and on appeal the court of appeals reversed and remanded on the following grounds:

(a) There is no dispute that Tyler's defense of the 2007 Amendment in court constituted a direct contest of the Original Trust. The scope of the potential forfeiture resulting from Tyler's direct contest of the Original Trust under the language of the No Contest Clause is an issue of law involving the interpretation of a written instrument to which the law of the case doctrine could apply. The court's prior decision, however, did not decide that issue. The court previously decided only that Key had provided sufficient evidence of a probability of success on her No Contest Petition to defeat Tyler's anti-SLAPP motion, and the legal issue that Tyler's defense of the 2007 Amendment in court was a direct contest of the Original Trust. The court did not decide whether the absence of such a no-contest clause in the 2003 Amendment affected the scope of a possible forfeiture of Tyler's interests under the No Contest Clause.

(b) Unless limited by statute, the scope of the forfeiture required under a trust's no contest clause depends upon the intent of the trustors as expressed in the language of the instrument. Even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court must not rewrite the testator's will in such a way as to immunize legal proceedings plainly intended to frustrate.

(c) The forfeiture language in the No Contest Clause is comprehensive. It requires that, in the event any beneficiary contests "this Trust, any other Trust created by a Trustor, or in any manner attacks or seeks to impair any of their provisions," the "Trustors specifically disinherit each such person," and all interests given "under this Trust" to that person shall be forfeited. The term "disinherit" is broad. Its plain meaning is that the Trustors intended to deny any inheritance to a beneficiary who contests the Trust. That general term is followed by the further specific consequence that a beneficiary who contests the Trust forfeits any interest that is "given under this Trust."

(d) Tyler's interest in the assets flowing through the Residual Trust falls within the scope of this broad forfeiture language. The instruction that the Trustors intended to "disinherit" any beneficiary who contests the Trust is not limited to any specific inheritance. Tyler's interest in assets distributed through the Residual Trust is certainly among those that she would inherit. Tyler's interest in assets distributed through the Residual Trust also comes within the more specific scope of assets that are subject to forfeiture if they are "given under" the Original Trust.

(e) The 2003 Amendment changed the percentage of assets that each beneficiary would inherit from the Residual Trust, but that is all that it did. It did not displace the structure of the subsidiary trusts, nor did it change how assets would flow into the Residual Trust. The provisions of the Original Trust that created and governed the Survivor's Trust, the Marital Trust, and the Exemption Trust remained unaffected by the 2003 Amendment. Under the terms of the Original Trust, each of those subtrusts would contribute assets to the Residual Trust. Each of the beneficiaries was to receive her specific individual share of the assets flowing into the Residual Trust under the terms specified in the 2003 Amendment. But those assets were also "given under" the overall structure of the Original Trust.

(f) Critically, there is also nothing in the language of the No Contest Clause suggesting that the Trustors intended to limit the forfeiture that would result from particular kinds of contests. To the contrary: The language of the No Contest Clause shows that the Trustors intended for it to reach as broadly as possible in imposing consequences for the decision to contest the Trust in any manner. The Trustors specified that all manner of conduct challenging the Trust would trigger the No Contest Clause, including a contest of "either Trustors' Will, this Trust, any other trust created by a Trustor," or conduct that "in any manner attacks or seeks to impair or invalidate any of their provisions." Under the No Contest Clause, the consequences of each of these challenges is the same: The challenger is to be disinherited and must forfeit all interests she otherwise would receive "under this Trust." This broad language contradicts any argument that the Trustors intended to limit the scope of a forfeiture only to the specific assets controlled by the particular trust provision that a beneficiary chooses to challenge.

(g) The absence of specific reference to a contest of a trust amendment does not support the conclusion that the Trustors intended to limit the forfeiture that would apply to Tyler's challenge here. It would make no sense for the Trustors to state that a beneficiary's contest of "any other trust created by a Trustor" would result in forfeiture, but not a contest of an amendment to the same trust. Tyler's contest was not limited to the 2003 Amendment. Tyler also directly contested the Original Trust itself. The relevant question is therefore whether the Trustors intended to limit the forfeiture that would result from such a contest only to the share of assets directly specified in the Original Trust instrument. Nothing in the language of the No Contest Clause supports that conclusion.

(h) Moreover, Tyler's contest of the Original Trust directly affected the assets that she now argues should be exempt from forfeiture. In short, the 2007 Amendment cut off the flow of business assets that Key would otherwise have inherited through the Residual Trust before they ever reached the Residual Trust, making the one-third share of the Residual Trust that the 2003 Amendment allocated to Key irrelevant with respect to those assets. This was hardly a minor change. Nor was it limited to personal property. Rather, it affected the entirety of assets distributed through the Survivor's Trust, amounting to an attack on both the Original Trust and the beneficiaries' shares specified in the 2003 Amendment.

(i) This significant change amounted to the type of contest that the Trustors clearly intended to trigger the full scope of the forfeitures identified in the No Contest Clause.

(j) The Probate Code carefully circumscribes the types of contests that can support the enforcement of a no contest clause. A no contest clause may be enforced only against three types of contests, including, as relevant here, a "direct contest that is brought without probable cause." The current legislative scheme represents a balance between competing policy interests. On the one hand, no contest clauses help in respecting a transferor's wishes and reducing conflict among beneficiaries. On the other hand, they can restrict access to the courts to protect important rights and, if wrongly applied, can result in a forfeiture that the transferor did not intend.

(k) In the event of a direct contest brought without probable cause, the Legislature has already balanced the various policy interests to permit a forfeiture. The governing statutes do not place any further limit on the scope of the forfeiture that the transferors are permitted to impose. The statute identifies the types of contests that a no contest clause may be enforced against, not the types of instruments to which a forfeiture may be applied. This is consistent with the Legislature's purpose to clearly designate the categories of contests that may support the application of a no contest clause. The statute does not address the scope of forfeiture that is permissible once a contest that falls within one of these categories has occurred. Thus, Tyler does not identify any legislative limitation on the scope of forfeiture that trustors may impose as a penalty for a direct contest brought without probable cause.

d. ***Succession of Maloney,* 2024 La. LEXIS 1220 (Supreme Court of Louisiana 2024).** No-contest clause in a will was enforceable for an action taken outside the will's succession proceeding.

(1) Bonny Babin Maloney ("Mrs. Maloney") was married to Robert Maloney, Sr. until his death in June 2019. Mrs. Maloney died in May 2020. The couple had five children including Robert, Jr., Kurt, Craig, and Julie. Robert, Sr. executed a notarial will in December 2012. Three codicils were executed the year prior to his death. The first increased the property bequeathed to Mrs. Maloney including Robert, Sr.'s one-half community interest in the family home and added a no-contest clause. The second included additional bequests to Mrs. Maloney that slightly reduced the inheritances of Robert, Jr. and Kurt. The third made changes to the executors in the event Mrs. Maloney was unable to serve.

(2) Upon Robert, Sr.'s death, Mrs. Maloney opened his succession and was confirmed as independent executrix. A judgment of partial possession was rendered in August 2019 that placed Mrs. Maloney in possession of various assets including the community property bequeathed to her in the first two codicils of Robert, Sr.'s will. The family home and other assets then belonged solely to Mrs. Maloney, in full ownership.

(3) Mrs. Maloney subsequently executed a new Last Will and Testament ("Testament") in September 2019 to include the assets she inherited from Robert, Sr. The Testament named Craig as independent executor. The Testament also listed the family home as the separate property of Mrs. Maloney and bequeathed it in full ownership to Julie. One quarter of Mrs. Maloney's residual estate was bequeathed to each of the surviving children. The Testament included a no-contest clause, Article 13.1, which disinherits and revokes any legacy to any legatee or heir who contests or challenges it, who seeks to impair or invalidate any provision of it, or "is otherwise engaged in a controversy with or against the Executor of [Mrs. Maloney's] estate and which concerns her estate."

(4) Upon Mrs. Maloney's death, Craig succeeded her as independent executor of Robert, Sr.'s succession and was confirmed as independent executor of Mrs. Maloney's succession. Both successions remained open, and Craig remained the executor in each.

(5) In August 2020, Robert, Jr. and Kurt (collectively "Applicants") filed a petition in Robert, Sr.'s succession to annul the codicils, to vacate the judgment of partial possession, and for

injunctive relief averring various infirmities in execution including lack of testamentary capacity. The petition named Craig as defendant in his capacity as both the executor of Robert, Sr.'s estate and as the "succession representative of Bonny Babin Maloney." The petition sought to annul the bequest made to Mrs. Maloney of Robert, Sr.'s community interest in the family home. A temporary restraining order ("TRO") was sought to prevent Craig, "from alienating, [or otherwise] encumbering ... any moveable or immovable property comprising the estate of [Robert, Sr.] including but not limited to all property set forth in the [judgment of partial possession]" — this included the family home bequeathed to Julie in Mrs. Maloney's Testament. The TRO was granted thus prohibiting Craig, as executor of Mrs. Maloney's estate, from placing Julie in possession of her inheritance. The trial court ultimately ruled that Robert, Sr. had testamentary capacity to execute the codicils. On subsequent motion by Craig as executor of Robert, Sr.'s estate, the trial court disinherited Robert, Jr. and Kurt pursuant to the no-contest clause in the first codicil of Robert, Sr.'s will.

(6) Craig, as executor of Mrs. Maloney's estate, filed a petition for declaratory judgment in Mrs. Maloney's succession seeking to enforce the no-contest clause in Article 13.1 of Mrs. Maloney's Testament. Craig later moved for partial summary judgment against Robert, Jr. and Kurt arguing that by filing suit and obtaining a TRO against him in Robert, Sr.'s succession in his capacity as executor of Mrs. Maloney's estate, effectively enjoined him from administering the assets of Mrs. Maloney's estate. The trial court granted judgment in favor of Craig finding that Robert, Jr. and Kurt violated the no-contest clause in Article 13.1 by engaging in a controversy against the executor of Mrs. Maloney's estate that concerned her estate. Robert, Jr. and Kurt were thus disinherited from Mrs. Maloney's estate. The court of appeal affirmed based on the clear and unambiguous language of the no-contest clause.

(7) Robert, Jr. and Kurt appealed, and the Louisiana Supreme Court affirmed on the following grounds:

(a) A cardinal rule of the interpretation of wills is that the intention of the testator as expressed in the will must govern. If the language of a will is clear and unambiguous, it must be carried out as written — its letter is not to be disregarded under the pretext of pursuing its spirit. Absent the existence of a forced heir, a testator is free to dispense of her estate in any manner and impose any conditions not contrary to law or good morals.

(b) No-contest clauses, also known as in terrorem clauses, are testamentary provisions that trigger the revocation of a bequest if a legatee contests a will. Such clauses are not expressly prohibited under Louisiana law. The no-contest clause in this case is triggered, in part, in the event a legatee is "engaged in a controversy ... against the Executor of [Mrs. Maloney's] estate and which concerns [her] estate."

(c) As a threshold matter, a court must determine whether a no-contest clause is triggered by the actions of a legatee, i.e., is the no-contest clause applicable. The clear and unambiguous language of Article 13.1(c) of Mrs. Maloney's Testament dictates that Robert, Jr. and Kurt — by obtaining a TRO against Craig in Robert, Sr.'s succession in his capacity as executor of Mrs. Maloney's estate — are disqualified as legatees. As astutely observed by the court of appeal, Mrs. Maloney's inclusion of Article 13.1(c) clearly and unambiguously expressed her intent to broaden the reach of the no-contest clause beyond actions or controversies brought in the instant succession proceeding. Disputes or controversies brought in Mrs. Maloney's succession are covered by Article 13.1(a) and (b) whereas the language of Article 13.1(c) reflects an intention for broader application to include any disputes or controversies against her executor concerning her estate — to conclude otherwise would render Article 13.1(c) superfluous. The TRO effectively sought to remove property from Mrs. Maloney's estate and prevent Craig from administering her estate and the specific bequests contained in her Testament. The practical result of which would allow Applicants to do indirectly what they could not do directly.

(d) Having affirmed on the narrower grounds of Applicants obtaining a TRO against Craig in his capacity as Mrs. Maloney's executor, the court's pretermit determination of whether an unsuccessful action against the validity of a will based on a lack of testamentary capacity or deficiency of requisite statutory formalities results in enforcement of a no-contest clause. One commentator has advocated for Louisiana courts to adopt a modified common law approach allowing for good faith, probable cause exceptions wherein courts consider an action contesting a will on a spectrum. The court leaves this question for another day noting that — in the interim — the legislature may wish to evaluate whether public policy dictates that specific statutory exceptions precluding the operation of no-contest clauses should exist based on the nature of a legatee's action in contesting a will.

(1) One dissenting justice would hold there is no authority in Louisiana law to support a no-contest clause in a will, and that these clauses are immoral and contrary to civilian principles. Civilian law, unlike common law, is expressly provided for, in a code. And immoral, because they preemptively deny access to the courts, which is not only immoral but violative of the constitutional guarantees of due process.

e. ***Crane v. Crane,* 2024 Va. Cir. LEXIS 170 (Circuit Court of Fairfax County 2024).** No-contest clause does not bar challenge to second trust amendment and tangible personal property memorandum.

(1) Plaintiff Marietta Crane is the daughter of Sigrid Crane ("Sigrid"). Defendant John Crane is one of two sons of Sigrid. On May 3, 2016, Sigrid executed a will. On that same date, Sigrid created the Sigrid R. Crane Trust ("2016 Trust"), a revocable trust, in which the Trustee was to "divide the remaining trust property in equal shares among my children, Marietta R. Crane, John R. Crane, and Mark R. Crane." On December 23, 2021, Sigrid amended the 2016 Trust ("First Amendment"); on that same date, she also executed a new will ("2021 Will"). On March 17, 2022, Sigrid purported to amend the 2016 Trust a second time in what is titled "2nd Amendment To 3 May 2016 Trust Instructions For Article 1 & 7 Distribution Of Trust Property" ("2nd Amendment"); she also executed a Personal Property Memorandum ("Personal Property Memorandum") which purported to distribute all her tangible personal property to Defendant.

(2) Marietta sued seeking a declaration that the "no contest" clauses in Section 13.03 of the 2016 Trust, in the First Amendment, and in the 2021 Will, would not be triggered by Marietta's challenge to the validity of the purported 2nd Amendment and the Personal Property Memorandum, because John allegedly exercised undue influence on Sigrid.

(3) The "no contest" clause in Section 13.03 of the 2016 Trust stated: "If any person attempts to contest or oppose the validity of this trust or any amendment to this trust, or commences, continues, or prosecutes any legal proceedings to set this trust aside, then that person will forfeit his or her share, cease to have any right or interest in the trust property, and will be considered to have predeceased me for purposes of this instrument."

(4) The court granted summary judgment in Marietta's favor on the following grounds:

(a) No-contest provisions are simultaneously strictly enforced and strictly construed. Strictly enforced means the court will enforce the provision without any wincing concerning its alleged harshness or unfairness — so long as the testator or settlor clearly intended the forfeiture. Strictly construed means that the intent to forfeit must be very clear. The language used must precisely express the specific intent to cause a forfeiture. Strict enforcement cannot be justified by mere inferences of intent. As in other areas of law, a provision seeking to sustain forfeiture is construed strictly against forfeiture, and thus, the instrument must give the right of forfeiture in terms so clear and explicit as to leave no room for any other construction. A Virginia chancellor will not lift his hand to aid a litigant in enforcing a forfeiture. The heavy lifting must be done entirely by the unmistakable language of the drafter of the putative forfeiture provision.

(b) When interpreting a "no contest" provision in a trust, the court must find that the settlor not just clearly, but very clearly, intended the forfeiture resulting from the contest to the trust, and the court must also very strictly construe the language of the "no contest" clause against the forfeiture resulting from the contest to the trust.

(c) Starting with the title of the purported 2nd Amendment, "2nd Amendment To 3 May 2016 Trust Instructions For Article 1 & 7 Distribution Of Trust Property," the 2016 Trust did not include "Instructions" for Article 1 or Article 7. And, while Article 1 of the 2016 Trust includes Section 1.05 (the authorization for the settlor to amend the Trust), Article 1 says not a word concerning distribution, the apparent focus of the 2nd Amendment. Thus, the title of the purported 2nd Amendment lacks clarity, let alone the high level of clarity called for by Hunter.

(d) Turning to the first sentence in the 2nd Amendment; it refers to "making the following amendment to Section 7 for the distribution of remaining trust property." There is, however, no Section 7 in the 2016 Trust; there is an Article 7, which has two sections, 7.01 and 7.02. Thus, even if "Section 7" could be construed as "Article 7," it is not clear, let alone "very clear," whether the purported amendments are additions to, or substitutions for, either Section 7.01 or Section 7.02, or both, or additions to, or substitutions for, parts of either Section 7.01 or Section 7.02, or both.

(e) The operative language of the purported 2nd Amendment uses the term "inherit," a term which is used to describe the result of property being transferred by and from a deceased person (through either a will or by intestacy) to a living person. It is not a term used in trusts because, in a trust, there is divided ownership of property, the trustee usually having legal title and the beneficiary having equitable title, such that legal title to property in which the living person has an equitable title is distributed to the living person by the trustee, not the settlor, after the death of the settlor. Moreover, unlike Article 7 (which directs the Trustee to "distribute" or "divide" trust property, the purported 2nd Amendment does not instruct the Trustee to "distribute" or "divide" property, which is a significant omission because, in a trust, there is divided ownership of property, the trustee usually having legal title and the beneficiary having equitable title.

(f) Finally, at the bottom of the purported 2nd Amendment, it states: "Instructions for the Distribution of Personal Property of Sigrid R. Crane." Plainly, nothing in the purported 2nd Amendment "to Section 7" concerns Sigrid's personal property; the "Disposition of Tangible Personal Property" is governed by Section 1.01.

(g) When the provisions of the 2nd Amendment are taken all together, the purported 2nd Amendment does not come close to being "very clear" that it is an "amendment" to "Article 1 & 7" of the 2016 Trust within the meaning of Section 13.03 of the 2016 Trust. That being the case, Plaintiff's challenge to the validity of the purported 2nd Amendment does not fall within the "no contest" clause in Section 13.03 of the 2016 Trust.

(h) Section 1.01 of the 2016 Trust states in pertinent part "I direct that my Personal Representative distribute my tangible personal possessions according to a separate Personal Property Memorandum. . . ." As the Personal Property Memorandum at issue here purports to distribute all Sigrid's personal property, it is certainly the Personal Property Memorandum referred to in Section 1.01 of the 2016 Trust. It is not, however, an "amendment" to the 2016 Trust as it does not purport to change in any way the substance of the 2016 Trust. That being the case, Plaintiff's challenge to the validity of the Personal Property Memorandum does not fall within the "no contest" clause in Section 13.03 of the 2016 Trust.

3. Investments

a. ***Redlin v. First Interstate Bank,* 2024 SD 5 (2024).** Waiver of prudent investor rule permitted trustees to invest trust assets in money market account and mere loss of potential investment returns does not constitute gross negligence or bad faith.

(1) On December 14, 2004, Helene M. Redlin established a trust ("2004 Trust") to provide for her children if their other financial resources failed. In addition to a small amount of cash and an interest in the Helene Redlin Limited Partnership, the 2004 Trust assets included a $3 million life insurance policy on Helene. Upon Helene's death, any assets over $3 million were to be distributed to the Terry A. Redlin and Helene M. Redlin Dynasty Trust. Her daughters, Kim and Kelly, could then, at the discretion of the trustee, receive income and principal distributions from the remaining assets "for their health, support and education, taking into consideration their other financial resources of any kind." In the event of Kim and Kelly's deaths, Helene's son Charles could also receive income and principal distributions from the 2004 Trust under identical conditions. Any assets remaining after the death of Helene's children would be gifted to the Redlin Art Center.

(2) Charles, Kelly, and Kim were also the beneficiaries of two other family trusts. The Helene M. Redlin Grantor Trust, established in 2017, was split into three subtrusts of $11.6 million for each of Helene's children. Charles, Kelly, and Kim received $1 million each through another trust established in 2000. These funds were distributed to Charles, Kelly, and Kim without consideration for their interest in the 2004 Trust.

(3) The 2004 Trust allowed Helene to appoint and remove trustees, establish plans for the succession of trustees, and appoint a Trust Protector as well as an Investment Advisor. Helene could also appoint "a successor trustee for limited or general purposes and accord specific responsibilities and powers."

(4) The 2004 Trust granted specific powers to trustees, including the ability to open and maintain one or more savings accounts or checking accounts and deposit to the credit of such account or accounts all or any part of the trust property, irrespective of whether such property may earn interest. In the event of multiple co-trustees, decisions were to be made by majority vote, with unanimity required where only two co-trustees are qualified to vote. The 2004 Trust also waived the Prudent Investor Rule.

(5) Robert M. Ronayne was designated as the initial trustee and no appointments were made to fill the positions of Trust Protector or Investment Advisor. In October 2016, Helene appointed her sister, Jill Fahnhorst, as Trust Protector. Pursuant to her new authority under Article V, Jill immediately removed Ronayne as trustee and Helene designated a plan of successor trustees, appointing Great Western Bank, the predecessor to First Interstate Bank, as the successor and sole Trustee of the Trust. Later, in December 2016, Helene signed a document ("Appointment Instrument") appointing her son Charles as trustee and Great Western "as an administrative trustee to exercise such powers and authorities as the co-trustees may, from time to time, direct."

(6) Helene died in January 2020 and life insurance proceeds of $3 million were distributed to the 2004 Trust. The assets were then placed in a money market account at a Florida financial firm. As required by the terms of the 2004 Trust, assets in excess of $3 million were distributed to the Terry A. Redlin and Helene M. Redlin Dynasty Trust in October 2020. From March 2020 to April 2021, the money market account yielded $843.23 in interest. Learning of this rate of return, Kelly retained a financial expert to assess the economic damage to the 2004 Trust while it was held in the low interest money market account. The expert opined that if the $3 million in trust assets were aggressively invested from March 31, 2020 through December 31, 2021, the 2004 Trust would have reaped a total investment return of $2,388,768.

(7) Kelly sued Charles and First Interstate alleging breach of fiduciary duty and seeking their removal as trustees. Kelly argued that Charles and First Interstate were both co-trustees and that they had breached their fiduciary duties by failing to invest the trust assets more aggressively. Despite Helene's waiver of the Prudent Investor Rule, Kelly claimed that Charles and First Interstate remained liable for investment decisions made unreasonably or in bad faith.

(8) First Interstate and Charles moved for summary judgment. First Interstate argued that its appointment as administrative trustee in 2016 had removed it from general trustee status, leaving Charles as the sole general trustee. First Interstate reasoned that, due to its ostensibly inferior position to Charles, it had no fiduciary duty to invest the 2004 Trust assets. However, even if the bank was a general trustee, both First Interstate and Charles maintained that waiver of the Prudent Investor Rule shielded them from liability for placing the 2004 Trust assets in the money market account.

(9) The circuit court held that the 2016 Appointment Instrument amended First Interstate's status from general trustee to administrative trustee, thereby limiting its duties and liability, and granted First Interstate's motion for summary judgment and denied Kelly's motion to remove the bank as trustee. Regarding Charles, the circuit court held that, even though he did have a fiduciary duty to invest the trust assets, this duty was limited by the 2004 Trust, which waived the Prudent Investor Rule, granted his motion for summary judgment, and denied Kelly's motion for his removal as trustee.

(10) Kelly appealed and the South Dakota Supreme Court affirmed on the following grounds:

(a) The court declined to determine whether First Interstate Bank was a general or administrative trustee because, where investing the 2004 Trust assets in a money market account was not a breach of fiduciary duty, summary judgment is appropriate as to both Charles and First Interstate.

(b) Since no Investment Advisor had been appointed, investment powers and responsibilities were entrusted to the trustees. The trust terms waived the Prudent Investor Rule and granted the trustee the broadest possible direction in determining what constitutes an appropriate investment.

(c) The South Dakota Investment and Management Powers of Fiduciaries Act provides that "[t]he provisions of this chapter may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument. The trustee is not liable to a beneficiary for the trustee's reasonable and good faith reliance on those express provisions." The statute focuses on whether a trustee's actions were based on a good faith, reasonable interpretation of the trust documents.

(d) The 2004 Trust specifically waives the Prudent Investor Rule, authorizing trustees to make investment decisions "irrespective of any risk, nonproductiveness, or lack of diversification." The trust also gives trustees the power to "open and maintain one or more savings accounts or checking accounts and . . . deposit to the credit of such account or accounts all or any part of the trust property, irrespective of whether such property may earn interest."

(e) There is no evidence that Charles' and First Interstate's reliance on these provisions was unreasonable or in bad faith. Charles and First Interstate were specifically authorized to make investment decisions regardless of risk or nonproductivity of the investment. By placing the 2004 Trust assets in a money market account, yielding conservative interest income, the co-trustees were operating as authorized. The after-the-fact conclusion that this decision was egregiously unreasonable does not generate a question of fact regarding whether the co-trustees were reasonably relying on the 2004 Trust provisions. There is also no indication that Charles or First Interstate operated in bad faith or had ulterior motives that would call their actions into question.

(f) The South Dakota Uniform Trusts Act provides that "[a] provision of a trust instrument relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or as a result of gross negligence." Therefore, the 2004 Trust cannot waive liability for gross negligence and bad faith and Charles and First Interstate remain liable for any such potential misconduct.

(g) Kelly makes the general assertion that Charles and First Interstate were grossly negligent and acted in bad faith by not aggressively investing the 2004 Trust assets. However, co-trustees of the Trust were authorized to invest the assets "irrespective of . . . nonproductiveness," including in a checking or savings account "irrespective of whether such property may earn interest." Kelly also admitted in a footnote that her expert's analysis was likely based on an incorrect time frame because Charles and First Interstate did begin to slowly invest the Trust assets into the market in 2021. The mere loss of potential investment returns does not constitute gross negligence or bad faith on this record. Gross negligence consists of willful or wanton misconduct. That standard is simply not met in this case.

(h) Charles and First Interstate were not required to invest the money in any particular way under the 2004 Trust documents. They were authorized to do exactly what they did—keeping the entirety of the trust assets in a checking or savings account, irrespective of the rate of interest. The 2004 Trust was designed as a last recourse for Helene's children should all other financial resources fail. Charles and First Interstate did not commit willful or wanton misconduct by keeping the assets in a conservative money market account, earning modest but consistent interest income without any risk from the inherent volatility of the stock market.

b. ***In the Matter of the Trusts under the Will of Kline,* 495 Mass. 1 (Supreme Judicial Court of Massachusetts 2024).** Massachusetts Principal and Income Act permitted a trustee of trusts to adjust between principal and income after pursuing a total growth strategy that disproportionately increased trust principal relative to trust income.

(1) In 1988, Helyn W. Kline died testate. Under the terms of Kline's will, separate trusts were created, including trusts to benefit one of her daughters, Denise Jo Levy.

(2) Levy was entitled to distributions of the trusts' net income. In addition, the will permits the trustees to distribute to Levy principal for any emergency affecting Levy, and only under the most extraordinary circumstances. The will stated that Kline did not anticipate the probability that any principal distributions to Levy would be required. Levy's three sons, Stephen Judson, William Judson, and the petitioner, Peter Judson, were the current remainder beneficiaries. Robert Friedman ("trustee") and Levy were the current trustees of the trusts.

(3) Since being established, the trusts had experienced significant growth of principal, but income was only approximately two percent of the principal's value. Accordingly, the trustee determined to exercise the power to adjust set forth in the Massachusetts Principal and Income Act ("MPIA") and transferred some of the trusts' assets from principal to income. Following this adjustment, he distributed $90,000 in trust income to Levy, which comprised approximately 3.2 percent of the three-year average value of the trusts. After the shift of principal to income, the distributions to Levy increased by approximately 1.1 percent of the total value of the trusts' principal (averaged over the prior three years).

(4) Peter sued the trustees alleging that, since 2020, improper distributions had been made to Levy in excess of the trusts' net income. The trustee and Levy moved for summary judgment, which the trial court granted. Peter appealed. The Massachusetts Supreme Court transferred the case to itself on its motion and affirmed on the following grounds:

(a) The MPIA comprehensively governs the treatment of principal and income for trusts. One of the act's central purposes is to address the "vexing problem" faced by trustees saddled with the sometimes-conflicting aims of the duty to invest trust assets under the prudent investor rule, on the one hand, and the duty to administer the trust impartially so as to treat fairly both current beneficiaries entitled to distributions from net income and beneficiaries entitled to future distributions of principal, on the other. A prudent investment strategy may counsel investing to maximize the trust's total return but may result in growth in principal without a comparable growth in income. Such a strategy may comply with the prudent investor rule, but it may improperly favor remainder beneficiaries over income beneficiaries. Similarly, an investment strategy that maximizes traditional trust accounting income such as interest, dividends, and rents may result in a lopsided win for the income beneficiary at the expense of the remainder beneficiary. The rigid characterization of investment returns as "income" or "principal" limited a trustee's ability to take advantage of an over-all investment strategy that maximized the expected total return of the trust's assets.

(b) The MPIA solves this conundrum by permitting a trustee who pursues a prudent investment strategy to maximize the trust's total return without regard to the characterization of that return as "principal" or "income" to adjust trust assets between principal and income to administer the trust impartially based on what is fair and reasonable to all of the beneficiaries. In other words, the MPIA allows a trustee to shift what traditionally might be characterized as an increase in the value of principal to income, and vice versa, in order to maintain equitable treatment among beneficiaries while at the same time pursuing a prudent investment strategy. The act permits a trustee to adjust between principal and income to administer the trust impartially so as to achieve fair and reasonable treatment between beneficiaries if the trustee considers it necessary and the statutory prerequisites are met.

(c) The MPIA authorizes a trustee to adjust trust assets between principal and income in order to administer the trust impartially, unless the trust instrument contains a "different provision" that clearly denies the trustee that power.

(d) If the trust instrument does not contain the requisite "different provision," then a trustee has the power to adjust and must determine whether and how to exercise that power. In doing so, the act requires a trustee to consider all factors relevant to the trust and its beneficiaries, including nine enumerated nonexclusive factors that may be relevant to a trustee's determination. A trustee's decision to adjust between income and principal, as well as the trustee's determination as to which factors are relevant to that decision and the weight to give those factors, is owed substantial deference; it may be disturbed only if the court finds the trustee abused his or her discretion. The power to adjust is subject to control by the court to prevent an abuse of discretion.

(e) A trustee may not, however, adjust between principal and income where the trustee is a beneficiary of the trust. Where this prohibition applies, and there is more than one trustee, a co-trustee to whom the prohibition does not apply may make the adjustment between principal and income unless the exercise of the power to adjust by the remaining trustee is not permitted by the terms of the trust.

(f) There is no dispute that the trustee is subject to the prudent investor rule and that the trust instrument describes Levy's benefits in terms of income.

(g) The will provision that limits the trustee's power to distribute the trusts' principal only where "necessary for any emergency affecting" Levy does not discuss, much less clearly preclude, the power to adjust. Instead, the provision addresses only distributions of principal; it is silent as to whether the trustee may adjust between principal and income. Thus, the will does not contain a "different provision" that clearly denies the trustee the power to adjust.

(h) Although the will bars a trustee who is also a beneficiary from participating in any decision relating to any discretionary distributions of income or principal, it neither restricts the other trustee from acting nor prohibits Levy from asking the trustee for distributions.

4. Cy Pres & Termination Of Charitable Trusts

a. ***In re Trust B Under Agreement of Richard H. Wells,* 2022 Pa. Super. LEXIS 377 (2022); 293 A.3d 569 (PA Supreme Court 2023); 311 A.3d 1057 (2024).** Reduction in administrative fees is not a basis for summary judgment terminating a perpetual charitable trust. Pennsylvania Supreme Court grants review and affirms trial court because trust termination is not warranted simply because it is to the advantage of beneficiaries, and trustee fees and compliance with private foundation rules are not a basis for trust termination.

(1) Richard H. Wells ("Wells") for much of his life was a resident of Oil City, Venango County, Pennsylvania. Wells was a 1924 graduate of Virginia Military Institute ("VMI"). In 1952, Wells became president of and was appointed to the Board of Directors of the Oil City Trust Company. Wells aggressively led his bank to expand and acquired additional banks. In 1954, the Oil City Trust Company changed its name to First Seneca Bank and Trust Company following the purchase of two other local banks. Mr. Wells continued the expansion of the bank by merger with two other banks and was continually reelected as president of the bank until his retirement on December 31, 1963.

(2) In 1956, Wells created a revocable trust with First Seneca Bank and Trust Company as the trustee. During his lifetime, Wells amended the trust agreement four times, in 1960, in 1961, in 1963, and in 1965. Originally, the trust agreement provided that Wells' wife or his children would receive the net income of the trust for life, with the power to invade principal in the trustee's discretion for the benefit of his wife or children. Upon the death of his wife, the trust would be divided into new trusts for each of his children and then upon their death it would be distributed under the terms of their wills or to their issue free of the trust. If there was no issue, then the assets of the trust would be distributed to various individuals with the residue, if any, to VMI to be added to its general endowment fund and identified as a memorial to Richard H. Wells and the class of 1924. The amendment in 1960 changed the terms of the agreement so that VMI was to receive "favorable consideration" in the allocation of trust income, instead of a gift of the residue to VMI to be added to its general endowment fund. In 1961 and in 1963, the gift to VMI continued to be "favorable consideration" for the distribution of the trust income of a contingent charitable remainder. Then in 1965, Wells amended the trust for the final time. In this amendment, he removed all references to his son and provided that, upon his wife's death, two other individuals would receive lump-sum payments instead of money in trust, and then the remaining principal would form a perpetual charitable trust that would distribute its income annually to VMI, which would be credited to the class of 1924, and which would be unrestricted to be applied for such purposes as the VMI Foundation governing board determined.

(3) VMI asserted that the trust had assets of $2 million, annual income was $67,000 per year (a 3.35% return), and with fees of approximately $18,500 per year, the trustee's fees represent approximately twenty-eight percent (28%) of the income of the trust in 2017, which it alleged was out of proportion to the intended benefits of the trust to its beneficiary. VMI petitioned to terminate the trust or remove and replace the corporate trustee. VMI claimed that the trust should be terminated: (1) to save administrative expenses and trustee fees; (2) because VMI incurred management and audit expenses in accounting for the trust in the preparation of its audited financial statements, which reduced its net benefit; (3) to eliminate the costs of filing the trust tax returns; and (4) to allow the trust to be better invested with other VMI assets.

(4) The trustee opposed the suit. The Pennsylvania state attorney general intervened. VMI moved for summary judgment and the trustee filed a counter motion for summary judgment. The

attorney general also sought dismissal of VMI's suit. The orphans' court denied VMI's motion and granted the trustee's motion and dismissed the suit. VMI appealed.

(5) On appeal, the Superior Court affirmed the lower court on the following grounds:

(a) The state statute provides as follows: "If the separate existence of a trust, whenever created, solely for charitable purposes results or will result in administrative expense or other burdens unreasonably out of proportion to the charitable benefits, the court may, upon application of the trustee or any interested person and after notice to the Attorney General, terminate the trust, either at its inception or at any time thereafter, and award the assets outright, free of the trust, to the charitable organizations, if any, designated in the trust instrument or, if none, to charitable organizations selected by the court, in either case for the purposes and on the terms that the court may direct to fulfill as nearly as possible the settlor's intentions other than any intent to continue the trust, if the court is satisfied that the charitable organizations will properly use or administer the assets."

(b) The orphans' court did not commit error when it held that the trust instrument was clear and Wells wanted a charitable trust to go on in perpetuity rather than an outright gift to VMI. He clearly knew what he was doing. He was the president of a bank and trust company. Wells wanted to make a gift in trust to his alma mater and he did.

(c) The settlor's intent is paramount, and if that intent is not contrary to law, it must prevail. VMI has not proven the existence of administrative expense or other burdens unreasonably out of proportion to the charitable benefits. VMI conceded that the trustee's fees were consistent with market rates. The trustee is entitled to its attorneys' fees payable out of the trust assets.

(d) On March 7, 2023, the Pennsylvania Supreme Court granted allowance for appeal in the case to determine this issue: "Whether, in a matter of first impression, the Pennsylvania Superior Court erred in its analysis and application of 20 Pa.C.S. § 7740.3(e) ("The Charitable Trust Termination Statute") in holding that the VMI Foundation, Inc. (hereinafter, "VMI Foundation") is not entitled to the remedies sought by its Motion for Summary Judgment, specifically to include the termination of the Wells Trust with an award of the trust's assets to the VMI Foundation to be held on the conditions nearly identical to the terms and conditions set forth in the Wells Trust?"

(6) On appeal, the Pennsylvania Supreme Court affirmed on the following grounds:

(a) There is no factual dispute that Wells intended to create a perpetual charitable trust. Wells was well-versed in the language and structure of trusts. Not only was Wells the long-term and successful president of a bank and trust company, but he demonstrated his aptitude in this regard with multiple revisions, refining over time his intentions as settlor. Wells designated his company to serve as trustee, and he directed that the trustee would receive reasonable compensation.

(b) Wells chose not to make any gifts to VMI directly but, instead, to create a generalized charitable trust with favorable consideration to the needs of VMI. In the final amendment, Wells again opted not to make an outright gift to VMI but to benefit the Foundation as the sole beneficiary of the perpetual charitable trust. Wells further amended the Trust to expand upon the reasonable compensation owed to the trustee so as to include a commission computed on the income and corpus under a schedule of compensation in effect when the services were performed.

(c) When Mrs. Wells died in 2004, the Foundation became the sole beneficiary of the Trust, receiving an equitable right to derive benefits from the property held in trust. This is exactly how Wells intended it to be when he unambiguously created the perpetual charitable trust and provided for the periodic distribution of trust income to the Foundation in perpetuity. It is not disputed that Wells intended to create a perpetual charitable trust with a single beneficiary and that terminating the Trust would be contrary to this intent.

(d) Notwithstanding Wells' indisputable intent, a court has authority to terminate his trust. The UTA is premised upon the Uniform Trust Code ("UTC"), a "comprehensive" national model proposed for codification of the common law of trusts, which model "applies generally to all trusts. The UTA and the UTC both provide that the common law of trusts and principles of equity supplement the legislation, except to the extent modified" by statute.

(e) Because of the well-established rights of settlors to dispose of their property through trust, the common law is particularly solicitous of the settlor's "intent that the trust shall not be terminated," an intent evidenced by the creation of the trust in the first instance. For more than a century, the common law has recognized that a beneficiary of a charitable trust has no right to demand the termination of the trust and the award of assets. Under the common law, a "trust cannot be terminated if it would frustrate the testator's purpose in creating the trust."

(f) Although beneficiaries had no common law right to terminate a trust and to obtain the assets outright, the common law doctrines of equitable deviation and cy pres empowered courts to modify the terms of a trust in particular circumstances. Equitable deviation permitted a court to alter the provisions of a charitable trust to account for unanticipated circumstances in order to give effect to what the settlor probably would have intended had the settlor anticipated the circumstances. Cy pres empowered the court to reform a trust when changed circumstances made implementation of the settlor's express directions impossible, illegal, or impracticable to implement. Although the doctrine of cy pres is imprecise, it endeavors to approximate the intention of the settlor.

(g) Under the UTA, a trust may be modified or terminated only in defined circumstances and under precise standards. In certain circumstances, the General Assembly has required that modification or termination be premised upon effectuating the settlor's intent. The UTA codifies equitable deviation for noncharitable trusts due to unanticipated circumstances in order to "approximate the settlor's probable intention." The General Assembly chose to limit the remedy of equitable deviation to noncharitable trusts.

(h) The UTA codifies the common law doctrine of cy pres as well as administrative deviation, the termination of small trusts, and judicial termination. The UTA recognizes that strict adherence to a settlor's intended charitable purpose may not always be possible because of changing circumstances that arise after the settlor's intent is memorialized in the trust. Where the particular charitable purpose has become "unlawful, impracticable or wasteful," courts have the cy pres power to modify or terminate (in whole or in part) a charitable trust in order to effectuate the settlor's charitable intentions. Under such circumstances, and in the absence of contrary language, the UTA presumes that the settlor would prefer that the gift be used for other charitable purposes rather than to see the trust fail, and accordingly empower the court to alter the purpose to which a charitable trust's assets are to be applied. Equitable deviation for noncharitable trusts and cy pres for charitable trusts both permit a court to alter the trust's provisions due to unforeseen circumstances, in order to further the intended purpose of the trust.

(i) The General Assembly has authorized the administrative deviation of charitable trusts, permitting the modification of administrative provisions in order to preserve the trust. The General Assembly accounted for the administrative deviation of noncharitable trusts in a separate section. This is a departure from the UTC, which provides for the administrative deviation of charitable and noncharitable trusts alike in UTC Section 412(b).

(j) The UTA also authorizes the administrative termination of small charitable trusts. Even in this categorical termination provision, the beneficiary cannot unilaterally decide that it would prefer that the trust be terminated. The burden is on the trustee to establish that the assets of the trust are less than $100,000 and to obtain the consent of the Attorney General and the beneficiaries. The General Assembly has made the legislative determination that all charitable trusts having assets less than $100,000 are likely to be inefficient to administer and may be terminated.

(k) Judicial termination of charitable trusts under proceeds in two parts: termination and distribution. The termination provision requires an examination of whether the trust's "separate existence" results in "administrative expense or other burdens" that are "unreasonably out of proportion" to the trust's "charitable benefits." If so, then the court "may" terminate the trust and proceed to the distribution provision, awarding the assets outright to the beneficiary to fulfill "as nearly as possible the settlor's intentions other than any intent to continue the trust." The statute operates to permit the court to set aside the settlor's intent "to continue the trust" only after the court, in its discretion, determines that the balancing referenced in the termination provision weighs in favor of termination.

(l) Judicial termination of charitable trusts under the UTA has no direct counterpart in the UTC. The "unreasonably out of proportion standard" is an invention of our General Assembly. Here, we construe the plain language of that statute. It is not merely when the burdens are out of proportion to the charitable benefit that termination is warranted. Rather, the General Assembly has required that disproportion to be "unreasonable" before the court has any discretion to terminate. "Unreasonable" generally is understood to be a heightened standard, one that intentionally is difficult to meet. "Unreasonable" suggests the absence of reason.

(m) The factors that the court expressly is required to consider before terminating a trust—the trust's separate existence, expense and burdens, unreasonable disproportionality, and charitable benefits—do not include the settlor's intent to continue the trust. This represents a departure from judicial termination of charitable trusts under the common law, a statutory "modification" of "the common law of trusts and principles of equity."

(n) The General Assembly has required the consideration of settlor intent in other scenarios, indicating its willingness to do so when intent matters. The "unreasonably out of proportion" standard protects the settlor's intent to continue the trust by requiring a showing that a charitable trust's "administrative expense or other burdens" are so excessive as compared to the charitable benefits that it becomes unreasonable to persist. Any rational or non-excessive discrepancy between the burdens and benefits would not suffice. A "burden" is not "unreasonably out of proportion," and does not permit termination, unless the trust's "separate existence" essentially defeats the "charitable benefits" established by the trust. If the court weighs the burdens and the benefits and finds the burdens to be unreasonably out of proportion to the benefits, the court "may" in its discretion proceed to the distribution prong and "award the assets outright" to the beneficiary.

(o) The lower courts in this case rejected termination in part because termination would be inconsistent with the settlor's intent to continue the trust. It is not disputed that termination would violate Wells' intent. Termination will always be contrary to the settlor's intent. If the settlor's intent to continue a trust, standing alone, could defeat judicial termination, termination would never be warranted, and the judicial termination provision would be meaningless. Instead of enacting an inconsequential statute, the General Assembly deemed judicial termination in derogation of settlor intent to be warranted when the high standard of that section is satisfied.

(p) The settlor's intent to continue the trust does not independently defeat termination. But that does not end the matter. It is the Foundation's burden, as the moving party and the appellant, to establish that the trial court abused its discretion in weighing the burdens and the benefits or in denying termination. The Foundation asserts that it established unreasonable disproportion because terminating the Trust and handing the assets to the Foundation would avoid the 1.39 percent federal excise tax as well as the mandatory five percent annual distribution and the concomitant lack of investment flexibility that results from the private foundation rules ("PFR").

(q) The Wells Trust and the Foundation are both tax-exempt charitable organizations. With the Tax Reform Act of 1969, Congress created a rigid regime of regulation for private foundations such as the Wells Trust, a regime borne of "deep distrust of private foundations." Although the Wells Trust is subject to the PFR, the Foundation is not. The PFR create a tax regime governing private foundations and impose substantial penalties for those that fail to comply. In particular, the PFR impose an excise tax; prohibitions upon self-dealing between the private foundation and certain "disqualified persons"; annual minimum distribution requirements; penalties upon on the failure to make annual distributions; penalties for excess business holdings; penalties for investments that jeopardize the charitable purpose; and taxes upon taxable expenditures. Violations result in graduated penalties.

(r) The PFR impose an annual excise tax of 1.39 percent upon the net investment income of the Wells Trust, which is defined as the amount by which gross income and capital gain net income exceed certain allowable deductions. The Foundation's Chief Financial Officer estimated that the excise tax burdens the Wells Trust in the amount of approximately $4,325 annually. Neither PNC nor the Commonwealth dispute this figure.

(s) The Foundation asserts that, because the Wells Trust is a private foundation subject to the PFR and the mandatory five percent distribution, the Trust cannot avail itself of the total returns investment policy permitted under the state principal and income act.

(t) If the five percent minimum distribution required by the PFR exceeds the distribution that otherwise would be made because of a unitrust election, the trustee must comply with the federally mandated distribution. It is not clear that the Wells Trust is barred from making a unitrust conversion election. For private foundations such as the Wells Trust, therefore, the trust document is deemed to include the distributions required to satisfy the PFR, and the PFR will supersede the effects of an election to the extent necessary to comply with the PFR's mandatory five percent distribution. The Foundation also argues that the PFR deny the flexibility afforded to vary the annual distributions between two and seven percent and to average the value of the Trust over the prior three years. Again, this is true only if the total returns are less than those mandated by the PFR. If the total returns exceed those mandated by the PFR, then the increased distributions would not burden the Trust, but would benefit it.

(u) The Foundation believes that the PFR pose a risk to the Wells Trust's ability to maintain the "real value" of the principal because they deprive the Trust of the definition of "income" provided in the unitrust statute. Because the PFR and the unitrust statute both require income to be determined in terms of the total value of the trust, the unitrust statute offers no relative protection of the "real value" of the principal. The flexibility afforded by the unitrust statute to derive a return from the appreciation of capital or earnings already has been accomplished by the PFR.

(v) Even if the Foundation was correct that the application of the PFR limits investment flexibility, this would hardly be an irrational or excessive burden. The total returns distribution rate under the Foundation's endowment is less than the mandatory five percent required by the PFR, highlighting why Congress sought to impose the mandatory distribution as part of the Tax Reform Act of 1969. The mandatory five percent distribution has become the standard spending rate for private foundations. By contrast, public charities sometimes "hoard money at the expense of the beneficiaries of their charitable mission." The Foundation's sizeable endowment and distribution rate is in line with "immense billion-dollar endowments at some colleges and universities that have average spend rates of 4.6 percent, a figure below the private foundation mandate." The PFR requires a higher distribution to the Foundation than the Foundation requires of itself.

(w) Because the PFR ensure a steady distribution rate of five percent, we agree with PNC and the Commonwealth that they provide a benefit, not a burden, to the Foundation. The distributions required by application of the PFR are not unreasonable burdens. If the Foundation believes that the mandatory distributions will degrade the long-term value of the Trust, then the Foundation is free to remedy this degradation through its own savings and investment strategy. In particular, to the extent that application of the PFR results in greater distributions to the Foundation, the Foundation is free to save and invest the difference as it chooses. The Wells Trust provided unrestricted distributions, leaving the Foundation free to spend its annual distribution or to add the surplus to its endowment and to invest the money accordingly. Because the PFR's mandatory distribution benefits the Foundation, it is not something to be considered on the "administrative expense or other burden" side of the scale.

(x) The Foundation has conceded the reasonableness of PNC's fees and does not challenge these fees as a basis for termination on appeal. Notwithstanding this concession, the Foundation includes in its calculation of burdens that would be avoided with termination the $13,450 that the Wells Trust annually spends in management and custodial fees. Trusts carry with them inherent costs and administrative burdens, most notably fees that are paid from the trust to the trustee. Wells accounted for the costs of trust administration by providing "reasonable" compensation to the corporate trustee. Compensation at levels that arise in a competitive market [is] presumed to be reasonable in the absence of compelling evidence to the contrary. The Foundation has conceded that PNC's fees are reasonable and represent market rates, indicating that the fees are not out of proportion to the benefits the Trust provides. The Foundation has not argued that PNC is violating any fiduciary duty relating to the Trust. The trustee's fees are inherent to Wells' chosen method of distribution through a perpetual charitable trust. The trustee's fees are not disproportionate to any charitable benefit when those fees are an inherent part of the operation of the trust as explicitly directed by Wells. PNC's reasonable fees are not part of the weighing required because reasonable fees cannot be unreasonably disproportionate.

(y) By the Foundation's own calculations, the administrative expenses and burdens imposed upon the Wells Trust through the PFR are about $4,325 annually, which is the approximate amount of the annual excise tax. Although the Foundation speaks broadly of the "totality of the combined, deleterious impact on maximizing the Wells Trust's charitable purposes" that the PFR impose, the Foundation has not quantified any other expense or burden in which the separate existence of the Trust results.

(z) The benefit side of the analysis considers the charitable benefits that result from the separate existence of the trust. A charitable purpose "may be applied to almost anything that tends to promote the well-doing and well-being of social men where neither law nor public policy forbids." The Wells Trust was created for the purpose of supporting higher education at Wells' alma mater through its endowment via the Foundation. Trusts may achieve charitable benefits in terms of the distributions that are paid to beneficiaries. A charitable trust that extends in perpetuity provides a long-term, ongoing benefit to the beneficiary—a benefit that results from the separate existence of the trust and that would be unavailable with an outright gift. If VMI were to close its doors, then the trustee could save the trust, seeking to invoke cy pres to fulfill as nearly as possible Wells' charitable intention. A transfer of assets to the beneficiary would provide no such protection.

(aa) From 2010 through 2020, the Foundation received $639,314 in distributions. During this time, the value of the trust principal increased by forty percent, from $1.5 million to more than $2.1 million. Between 2017 and 2019, the Foundation received an average annual distribution of $71,500, nearly six times the amount paid by the Trust in fees and taxes. The size of the trust indicates that it ought to be self-sustaining and productive for many years to come. The charitable benefits to the Foundation are substantial.

(bb) Whether the burdens are unreasonably out of proportion to the charitable benefits or whether to terminate the trust in the face of such disproportion are both questions vested in the sound discretion of the orphans' court. The high standard imposed for judicial termination is fact-intensive. It requires a robust assessment of benefits and burdens and the exercise of considered judgment to ascertain whether the burdens are unreasonably excessive in light of the charitable benefits the trust provides.

(cc) Even if the Foundation demonstrated as a factual matter that there were burdens created by the separate existence of the Wells Trust that are unreasonably out of proportion to the charitable benefit, the General Assembly vested the orphans' court with the discretion not to terminate the Trust. A remand is not necessary, because the orphans' court already exercised this discretion. That court determined that neither the charitable benefits nor the burdens warranted judicial termination. The orphans' court found nothing about PNC's fees to be unreasonable and found that the Trust was not burdened by confusion, complexity, or contradiction. Weighing the burdens and benefits, the orphans' court held that the Trust's fees and expenses were not unreasonably out of proportion to the charitable benefit. The record demonstrates compellingly that the Trust's expenses and burdens are not unreasonably out of proportion to the charitable benefits by any measure, and that the orphans' court did not abuse its discretion.

(dd) The approximately $4,325 that the Wells Trust will pay out annually in excise taxes is weighed against the charitable benefit of approximately $71,500 in annual distributions to the Foundation, as well as the likelihood that the value of the Trust will continue to increase under PNC's management and to provide long-term distributions. Consideration of PNC's reasonable compensation does not change this analysis, because reasonable fees are not irrationally excessive when compared to the charitable benefits. Individually or in the aggregate, none of the modest burdens imposed because of the Trust's status as a private foundation are unreasonably out of proportion to the charitable benefit. Because the Foundation did not meet its burden, there was no basis for the orphans' court to set aside Wells' intent to continue the Trust or for this court to intrude upon the orphans' court's exercise of discretion in this regard.

(ee) The General Assembly has considered the circumstances warranting judicial termination of a charitable trust and has not determined that termination is warranted simply because it is to the advantage of beneficiaries. There is no indication that the General Assembly was concerned with whether the beneficiary could achieve more investment flexibility by virtue of its distinct tax treatment or whether the beneficiary enjoyed a financial relationship with another corporation that could result in less compensation to the trustee. Termination was intended to free the trustee of the obligation of meeting complex administrative expenses and burdens.

(ff) Termination merely because it would be more advantageous to the beneficiaries is inappropriate. The Foundation has not provided precedential support from this Commonwealth or elsewhere showing that beneficiaries may obtain termination simply because they believe that they can manage the assets more efficiently. The absence of precedent supporting the ability of beneficiaries to terminate the trust and to obtain the assets outright over objection by other interested parties or the Attorney General indicates that these circumstances are unusual and not those at which the UTA is directed. The Foundation's request is, quite literally, unprecedented.

(gg) The PFR's "burdens" have applied to all private foundations since 1969. The General Assembly is well aware of the PFR and has legislated on this subject matter in the Charitable Instruments Act. If the General Assembly believed these burdens to be unreasonably out of proportion to charitable benefits and categorically to warrant termination, it could have authorized the judicial termination of any charitable trust classified as a private foundation. Other legislatures have done as much. Rather than permit the termination of all private foundation trusts, the General Assembly chose to enact a fact-specific and high standard.

(hh) The courts presume that a settlor understands the costs inherent in creating a trust, such as the costs of an independent trustee and any tax consequences. Mr. Wells certainly was aware of these expenses, as he directed the payment of reasonable trustee fees from the Trust. Trusts typically have expenses. It will almost always be the case that it costs less to give an outright gift than it does to administer a trust. A gift is made and is done, whereas a trust such as the Wells Trust extends into perpetuity and requires administration for the duration of its existence. Simply comparing the expenses involved in a gift versus the expenses involved in administering a trust is not sufficient to establish the unreasonably disproportionate standard. Otherwise, all trusts would be subject to termination. Whatever savings may result from terminating a trust and awarding the assets to the beneficiary outright are not relevant. Although the Foundation believes that it could manage the trust assets better than PNC has done, it is the trustee, not the beneficiary, who administers the trust. It is the trust document, not the Foundation's preference, that controls the terms of the trust.

(ii) The General Assembly has accounted for the interest of the settlor in continuing the trust by enacting a heightened standard for the termination of that trust. The plain language of the statute protects this intent by ensuring that termination may be permitted only when the administrative expenses and burdens are unreasonably out of proportion to the trust's charitable benefit. To the extent that the Foundation believes termination to be warranted because Wells never anticipated that the Trust would be subject to the PFR, an examination of what the settlor may have anticipated is another way of addressing what the settlor may have intended. And, like the consideration of the settlor's intent to create a trust, what the settlor anticipated with respect to the trust is not relevant as an independent consideration. The General Assembly knows how to account for unanticipated circumstances and how they relate to trust termination, as it has authorized the termination of a noncharitable trust due to unanticipated circumstances. The General Assembly decided to exclude unanticipated circumstances as a basis to terminate charitable trusts.

(7) One concurring and dissenting justice would vacate the judgments below and remand for further proceedings.

b. ***In re Est. of Heinecke,* 2024 N.J. Super. Unpub. LEXIS 426 (2024).** Court applied cy pres but rejects reallocation of devises to failed charities to other charitable takers under will.

(1) Barbara Heinecke died testate. Under her will (the "Will"), she gave 25% of her estate to various charities, including the New Jersey Society for the Prevention of Cruelty to Animals ("NJSPCA") and the International Relief Fund ("IRF"). The co-executors sued for instructions as to the disposition of funds bequeathed to the NJSPCA and the IRF, and alleged both organizations were defunct. The co-executors suggested the court distribute the shares equally among the remaining charitable beneficiaries listed in the Will. The estate also sought counsel fees and costs from the beneficiaries who would receive an increased share.

(2) The estate explained that legislation in 2018 repealed the statutes governing the administration, authority, and duties of the NJSPCA, directed the Attorney General to "take any action necessary to facilitate the reincorporation of the NJSPCA as a non-profit corporation independent of the State, and transferred responsibility for enforcement of

animal cruelty laws from the NJSPCA to county prosecutors and municipal law enforcement agencies. Further, the estate noted mailings to both the NJSPCA and IRF were returned as "not deliverable" and "unable to forward." IRF did not participate in the litigation.

(3) NJSPCA, Inc. filed a certification of its counsel in lieu of an answer. In it, counsel stated he had represented both the NJSPCA and NJSPCA, Inc., for over thirty years and was personally familiar with the underlying facts. He attested NJSPCA, Inc., was reincorporated March 7, 2019, all the assets of the original entity were transferred to it, and NJSPCA, Inc., had a mission precisely consistent with that of the original entity except for law enforcement. Counsel therefore concluded the newly incorporated NJSPCA, Inc., as authorized by the express language of the statute, is the successor in interest of what was the primary animal cruelty/welfare law enforcement body in this state and the court should apply the doctrine of cy pres to redirect Barbara Heinecke's devise to appellant.

(4) The Attorney General objected, and alleged that the primary function of NJSPCA, Inc. was fundamentally different from the law enforcement role of the NJSPCA. Because the NJSPCA no longer existed in the form it did at the time Barbara Heinecke created her will, and NJSPCA, Inc.'s, mission substantially differed, the Attorney General argued redistribution of the devise among the other designated charities was more consistent with the decedent's intent.

(5) NJSPCA, Inc.'s counsel confirmed the entity's official address was his law office and it had no employees beyond a web designer. He was unable to provide the names and addresses of current officers and members of the board of trustees, their positions, the new entity's employer identification number, or to confirm whether there were any holdovers on the board from the former NJSPCA, or whether NJSPCA, Inc., was listed on websites like GuideStar or Charity Navigator.

(6) NJSPCA, Inc. later submitted: (1) a certificate of good standing with the New Jersey Department of the Treasury; (2) a New Jersey certificate of incorporation as a non-profit; (3) a letter from the IRS confirming its 501(c)(3) status; (4) a screenshot of its website; (5) a letter from the IRS confirming its employer identification number; and (6) a draft tax return for 2021 listing its primary purpose as "education to the public on animal welfare issues." Counsel also certified his involvement with NJSPCA, Inc.'s, reincorporation and the organization's plans for the future, including publication of a handbook educating children about animal cruelty, advertising in local newspapers, and participating in the New Jersey Animal Show.

(7) Some of the problems raised by the Attorney General included the late filing of NJSPCA, Inc.'s, 2019 and 2020 tax returns in February 2022 and the inconsistencies and contradictions in the submitted documents. For example, it noted the 2019 tax return stated activity was limited during that year "in part due to the pandemic," which did not begin until 2020. Additionally, it pointed out while the tax returns indicated funds were kept in an attorney trust account, counsel's first and third certifications stated the funds were held in segregated bank accounts.

(8) The trial court interrupted NJSPCA, Inc.'s counsel, asking counsel to "curtail [him]self and get right to the legal argument," as counsel had provided extensive background on NJSPCA dating back to its formation in 1863. Counsel's argument extended for five and one-half pages of the transcript and continued for an additional four pages thereafter.

(9) The trial court granted the relief requested by the estate, applied the cy pres doctrine, ordered the devises designated for IRF and the NJSPCA be distributed in equal shares among the other charitable beneficiaries named in the Will, and granted the estate's request for counsel fees and costs.

(10) NJSPCA, Inc. appealed and the New Jersey Superior Court affirmed in part, reversed in part, and remanded, on the following grounds:

(a) The cy pres doctrine is a judicial mechanism for the preservation of a charitable [disposition] when accomplishment of the particular purpose of the gift becomes impossible, impracticable or illegal. Where the donor manifests a general charitable intent, rather than allow an impossible gift to fail, the court may redirect the funds to a charitable purpose as nearly as possible to the original particular purpose. The absence of any provision directing the devise revert to the estate or other heirs in the event of its failure may signify a general charitable intent. Id. at 504.

(b) The devise to the NJSPCA became impossible. The organization has been dissolved by statute and no longer exists. NJSPCA, Inc., may share a name with the original NJSPCA, but at its core is a fundamentally different organization which no longer investigates animal welfare or enforces animal cruelty law.

(c) The redistribution of the devise to NJSPCA, Inc. would be inconsistent with Barbara Heinecke's expressed intent. A devise made to a charitable corporation is taken by implication, as intended to promote the purposes for which the corporation is created. NJSPCA's primary purpose was the advancement of animal welfare through investigation and enforcement of the animal cruelty laws of the state of New Jersey. In contrast, NJSPCA, Inc. has no law enforcement authority nor does it conduct investigations related to animal cruelty.

(d) The trial court erred, however, by redistributing the devise to the American Humane Association, the Christian Relief Services, the National Wildlife Federation, and the World Wildlife Federation/World Wildlife Fund. The investigation and enforcement of animal cruelty law was important to Barbara Heinecke and consistent with her intent as reflected in her devise to the NJSPCA. Thus, redirection of the funds allocated to the NJSPCA to entities without a similar purpose does not effectuate her intent. Barbara Heinecke's choice of other beneficiaries in paragraph six does not mandate the court to redirect the gift intended for the NJSPCA to those specified organizations. Rather, the court must consider what would be "as similar as possible" to Barbara Heinecke's purpose in making her gift to the NJSPCA. Nothing in the record indicates she would not have wanted her gift redirected to another corporation or association having similar purposes.

(e) IRF is now defunct and the devise to it became impossible. Barbara Heinecke's gift for IRF was intended to promote international cooperation and understanding through interaction and dialogue" and "to empower women and children and promote ethics throughout Africa and in Iraq." Redistribution to the designated animal, wildlife, and Christian relief charities does not effectuate that purpose.

(f) On remand, the court should conduct further proceedings and make factual findings sufficient to effectuate the distribution of the devises to organizations with missions as similar as possible to Barbara Heinecke's particular purposes. The court should exhaustively explore charities and organizations to determine options that most closely resemble the NJSPCA's and IRF's original purposes, and redirect the devises accordingly.

c. ***Johnstown v. Smith,* 2024 Ohio App. LEXIS 3851 (Court of Appeals of Ohio 2024).** The Attorney General's efforts to prevent others from usurping his statutory role over charitable trusts does not demonstrate he will not fairly and adequately represent the interests of possible trust beneficiaries.

(1) Brigadier General Perry L. Miles died in 1961, and his last will and testament was admitted to the Licking County Probate Court. Item 14 of the will created a charitable trust (hereinafter "Trust"), which owned 168.06 acres of undeveloped land in Licking County. The Trust owned approximately $1,290,000.00 in other assets.

(2) The Trust provided that the farm, residences, buildings, furnishings, and personal effects, books and antiques be kept and maintained as the Longwell and Miles Memorial Estate for

the purpose of Religious, Educational and Recreational good and benefit to the residents of Johnstown Village, Liberty Township and surrounding community. The Trust also provided for the safekeeping of items of historical value to the community, provided a gathering place for groups interested in the betterment of mankind through religion and education study, and provided a suitable environment for picnics, camping and recreation areas, for the youth of the community.

(3) The Trust vested management power in the trustee, along with the individual person that holds the position of President of The Johnstown Bank, the President of The Johnstown Federal Savings and Loan Association, the Mayor of the Village of Johnstown, Licking County, Ohio, and the President of the Township Trustees of Liberty Township, Licking County, Ohio (collectively to be known as the Longwell and Miles Memorial Estate Body, acting by majority).

(4) Since 2010, the Trustee was required to file status reports with the trial court every six months to allow the court to monitor the Trust's activities. The Trustee filed an application with the trial court seeking permission to terminate the Trust and distribute the Trust's assets to the Licking Park District to fund the development of a memorial park, and to the Licking County Foundation to fund scholarships for local schools. The application included a resolution approving the proposal signed by three members of the Management Body, including the trustee. The president of the Liberty Township Trustees did not sign the resolution, but filed a memorandum stating he did not object to the proposal, provided any funds given to the park district were specifically earmarked for the General Miles Memorial Park.

(5) City of Johnstown and Johnstown-Monroe School District, along with the Greater Johnstown Parks District (hereinafter "Johnstown Contingent") filed a motion to intervene. The Johnstown Contingent also filed a complaint for declaratory judgment.

(6) The Ohio Attorney General ("OAG") filed a motion to intervene, a response in opposition to the Johnstown Contingent's motion to intervene, and a motion to dismiss the Johnstown Contingent's complaint for declaratory judgment.

(7) The Johnstown Contingent appealed and the court of appeals affirmed on the following grounds:

    (a) The Ohio Attorney General has exclusive authority to enforce charitable trusts. Permitting possible beneficiaries to have separate counsel besides the Attorney General and to institute their own actions to enforce charitable trusts might unduly burden trustees and compromise the best interest of the beneficiaries. Because the enforcement of a charitable trust is done in the interest of the general public, the attorney general is the proper party to prosecute the claim.

    (b) The OAG's efforts to prevent the Johnstown Contingent from usurping his statutory role does not demonstrate he will not fairly and adequately represent the interests of Appellants as possible beneficiaries of the case.

    (c) A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

    (d) Assuming arguendo the Mayor's status as a member of the Management Body gives him the same rights as a co-trustee of the trust, the Mayor is not a party to the declaratory judgment action. The Mayor's membership in the Management Body of the trust does not impute to the City of Johnstown, which is a separate entity from the Mayor.

(e) Appellants similarly do not represent the entire community. Appellants represent only one municipality and one school district, while the Trust benefits the entire surrounding community. The OAG is the public officer who lawfully represents the entire community.

(f) Appellants herein are not referred to in the Trust as actual beneficiaries, but rather have the same level of interest as the entire community for whom the trust was established and are at best characterized as possible beneficiaries of the trust. Appellants have not pointed to any special interest they have in the trust which distinguishes them from the entire community for whom the trust was established.

(g) The Third Restatement of Trusts, which indicates special interest standing might be justified where the beneficiary group is "reasonably limited" and the issue is a matter of common concern to all members of the potential recipient group, has not been adopted by Ohio courts, and is inapplicable to the instant case. The group of potential beneficiaries of the Trust is not reasonably limited, as it extends not only to the City of Johnstown, but also to the township and the "surrounding community." The concerns of Appellants are linked to its own interests and not to the entire surrounding community for whom the trust was established. Furthermore, the Restatement does not diminish or otherwise supersede the OAG's exclusive authority.

d. ***Ex parte Marshall,* 2024 Ala. LEXIS 123 (Supreme Court of Alabama 2024).** Trial court erred by referring claims against trustee and board members of charitable trust to special master.

(1) The will of Mabel S. Amos ("Amos") devised her residuary estate to two separate trusts, the Amos Family Trust and the Mabel Amos Memorial Fund ("the trust"), which is a charitable trust, and named a bank as trustee. The Amos Family Trust consisted of one-third of Amos's residuary estate and provided for various family members of Amos during their lifetimes. Upon the death of the last surviving beneficiary of the Amos Family Trust, any remaining assets of the Amos Family Trust are to be distributed to the trust. The will provided that trust net income after payment of costs was to be expended to fund or to provide scholarships for deserving young men and women in Alabama to assist them in attending any educational institution.

(2) Amos died in 1999, and her will was admitted to probate. The bank served as the trustee of the trust and administered it in conjunction with the trust's board members. At the time Marshall filed his mandamus petitions, Albritton, Clifton, and McNees served as board members; Bell is no longer a board member.

(3) Megan Carmack and Leigh Gulley Manning ("Leigh") sued the trustee and board members asserting numerous causes of action and seeking equitable relief, compensatory damages, and punitive damages. Leigh, who is the daughter of James Gulley, Amos's nephew, claims to be Amos's sole surviving heir. Carmack is Leigh's daughter, and Michaelyn and Michael are Carmack's children and Leigh's grandchildren.

(4) One of the assets of the trust was a piece of land that Amos had owned at the time of her death. At the time of Amos's death, the land had gas wells on it that provided some income to the trust. In 2011, however, oil was discovered on the property. Carmack and Leigh alleged that the land was then leased by the trust to Fletcher Petroleum Company, which installed an oil well, named "Amos 36-3," on the land. That complaint alleged that Amos 36-3 produced $70 million to $80 million worth of oil and gas and has the potential for another $20 million. Carmack and Leigh challenged the fees charged by the trustee, and the providing of scholarships to the children of board members. They alleged self-dealing, excessive fees, improper scholarships, improper distributions to other charities, improper delegation of the scholarship decisions away from the board, failure to keep records, diversion of funds, and filing of false federal tax forms.

(5) The trustee moved to dismiss the complaint for lack of standing. Carmack and Leigh amended their complaint to add the attorney general as a defendant and asked the court to realign the AG as a plaintiff. Tyra Lindsey ("Lindsey"), a minor, by and through her mother and guardian, Denese Rankin, moved to intervene on behalf of herself and all young men and women of the State of Alabama who are permissible distributees of the scholarships that are to be awarded by the trust. Lindsey alleged that she met all the necessary requirements to receive a scholarship from the trust and has an interest in the proper management of the trust and the preservation of its assets, and generally sought the same relief as Carmack and Leigh. The trustee opposed intervention for lack of standing but did not oppose the AG realigning as a plaintiff.

(6) Lindsey then brought a new suit to remove the trustee, compel an accounting, and award damages against the trustee.

(7) The AG moved to intervene, which was granted by the trial court. The AG then sued the trustee and board members, alleging self-dealing, breach of fiduciary duties, unjust enrichment, negligence, wantonness, and violation of the Alabama Uniform Trust Code. The AG sought compensatory and punitive damages, an accounting of the assets and investments of the trust, as well as an accounting of the fees paid by the trust, and an injunction against the trustee.

(8) The trial court consolidated the two actions and appointed a special master. The AG moved to vacate the special master because the trustee and board members had settled the claims in the trust litigation, made the trust whole, and addressed administrative matters. The AG petitioned the Alabama Supreme Court for a writ of mandamus directing the circuit court to vacate its order appointing a special master, which the Alabama Supreme Court granted on the following grounds:

   (a) The trust is a charitable trust created for the public purpose of providing financial assistance to undefined beneficiaries. There is no question that the circuit court has jurisdiction to enforce the terms of the trust.

   (b) The AG has the rights of a qualified beneficiary of the trust because no charitable organization has been expressly designated to receive distribution under the terms of the charitable trust. As a qualified beneficiary, the AG has standing to invoke the jurisdiction of the circuit court to assume control of the trust and to administer it in accordance with its terms. The AG properly invoked the jurisdiction of the circuit court by filing a complaint in the consolidated cases below, and the circuit court has properly assumed control of the trust.

   (c) To properly determine if the circuit court's referral of all the matters in these cases to a special master was appropriate, the court must first determine whether the cases were to be tried by a jury or not, and also determine whether an accounting has been requested. It appears that the actions below are to be tried without a jury. The claims asserted by the AG alleged breach of fiduciary duties, unjust enrichment, negligence, wantonness, and violation of Alabama's Uniform Trust Code. Therefore, insofar as the circuit court referred to the special master those matters to be tried without a jury, those matters are to be referred to a special master only upon finding of some exceptional condition requiring such referral.

   (d) In the present cases, the circuit court did not indicate that "some exceptional condition" required the referral of the entire cases to a special master. In fact, the circuit court's order makes no mention of the necessity of such a finding to justify the referral of the entire cases to a special master. The allegations in the AG's complaint are straight forward and easily understandable. An "exceptional condition" does not exist in these cases to support the circuit court's referral of the entire cases to a special master. There appears to be no basis to support the circuit court's referral of the cases, including, among other things, motions to dismiss and determinations of liability, to a special master. The circuit court exceeded its authority in referring the entire cases to a special master.

(e) The AG requested an accounting. The circuit court is not required to demonstrate the existence of an "exceptional condition" to refer matters of account and of difficult computation of damages. However, the fact that an accounting may be required does not in itself offer a basis for reference to a special master. The circuit court offered no explanation as to why it believed that a referral of the accounting of the trust was required or what about conducting such an accounting would be complicated. The circuit court did not specify the parameters of the referred accounting. Based on the parties' allegations, it appears that the accounting would consist of determining the assets of the trust and its expenditures, including scholarships awarded and administrative fees paid. There is nothing indicating that the circuit court would not be able to ascertain the assets and expenditures of the trust through the typical discovery process, which, of course, the circuit court is perfectly capable of overseeing.

(f) Even if a circuit court properly refers an accounting to a special master, that does not mean that every other matter in the case unrelated to the accounting may also be referred to a special master without consideration of the other requirements. Each matter referred to a special master must satisfy the applicable standard. The circuit court's referral of the matters to be tried without a jury do not meet the applicable standard because there is nothing indicating that those matters involve an "exceptional condition." Therefore, even if the circuit court's referral of the accounting in these cases was appropriate and within its discretion, such a referral does not justify the referral of the other matters to be tried without a jury.

(g) A circuit court is perfectly capable of conducting an accounting without appointing a special master, and Marshall's request for an accounting is not inconsistent with his objection to the referral of the entire cases to a special master.

5. Discovery, Disclosure, & Information Access

a. ***In re Est. of Braunstein,* 2024 NYLJ LEXIS 3349 (New York County Surrogate's Court 2024).** Court recognizes trust choice of law provision and refuses to compel trustees to account.

(1) Michael Bennett Braunstein ("Grantor") established on irrevocable trust (the "Trust") for the lifetime benefit of his wife, Barbara, with the remainder to be held in further trust for the benefit of his two daughters, Lisa and Julie. The Grantor died on May 2, 2013, and the Trust was funded with an $8 million life insurance policy on Grantor's life. The Trust provides as follows: "The Trustees shall not be required at any time to file any account in any court, nor shall the Trustees be required to have any account judicially settled." The Trust also provided that its "validity and construction" would be governed by Connecticut law.

(2) Lisa and her mother, Barbara, were involved in a dispute about Barbara's handling of the Grantor's estate. Before the parties settled that dispute, Lisa requested and received information about the administration of the Trust. Thereafter, the co-trustees, Barbara and William Zousmer, provided Lisa an informal account for the period covering June 26, 2013, to December 31, 2021, in the form required by Connecticut courts. After Lisa raised concerns, the co-trustees addressed those concerns and rectified some entries, resulting in an amended informal account for the same period, which also met the requirements for accountings in Connecticut courts (the "Revised Account"). Lisa's sister, the other presumptive remainder beneficiary of the Trust, consented to the Revised Account and signed a Receipt, Release and Refunding Agreement. The co-trustees subsequently provided some additional information requested by Lisa, but she refused to consent to the Revised Account and petitioned the New York court, alleging that the co-trustees had not provided some of the information requested.

(3) The co-trustees objected to the court's jurisdiction and asserted that Connecticut law applied and the Trust terms precluded the New York court from directing the accounting. The New York Surrogate's Court denied the petition to compel an accounting on the following grounds:

(a) Barbara has resided in New York County at all relevant times, and the assets of the Trust are held in accounts at a financial institution located in New York County. Therefore, the court has jurisdiction over the Trust and venue is proper in New York County.

(b) The Trust expressly states that its validity and construction is to be governed by the laws of the State of Connecticut. In addition, there are at least two more references in the Trust to the application of Connecticut law. When the intent of a grantor is expressly stated in the body of the trust instrument with respect to the issue of what law is to control the trust, the instrument should be construed and a determination of its validity made according to the law chosen by the settlor. As a result, New York courts will apply the laws of other jurisdictions when a grantor has clearly expressed an intent to do so. Here, the Grantor's choice of law is clear, and, for this reason, Connecticut law applies. If New York has jurisdiction over a trust, nothing prohibits its courts from deciding questions of construction or enforceability of such trust's provisions through the application of the law of another jurisdiction.

(c) The Connecticut law upon which Respondents rely for the proposition that trustees may be relieved from a duty to file a judicial account by the instrument creating the trust does not apply here. At all relevant times, Section 45a-177 of the Connecticut General Statutes has applied in that regard only to testamentary trusts. Likewise, Conn Gen Stat Ann 45a-499kkk(d) and (g) do not permit a grantor to waive a trustees' duty to account. The law in Connecticut, in fact, specifically allows a beneficiary of an inter vivos trust to obtain an accounting so long as the court concludes that cause has been shown that an accounting is necessary.

(d) Even under Connecticut common law a provision in an inter vivos trust relieving a trustee from her duty to account would not deprive the court of the power to order an account when faced with credible allegations of breach of fiduciary duty. This makes sense because relieving a trustee of a duty to account would be antithetical to the very foundation of fiduciary relationships.

(e) On this record, however, Petitioner has not provided sufficient cause to justify putting the Trust through the expense of a judicial accounting. Despite having received an informal account and then the Revised Account, Petitioner does not allege that Respondents breached their fiduciary duty in any way. In fact, she does not identify a single issue related to the Trust's administration. Nor does Petitioner dispute Respondent's contention that she has received substantial documentation and information, including tax returns, financials statements and documents supporting administration expenses. Petitioner simply states as a basis for seeking the accounting that Respondents provided some of the documents and information requested and refused to provide others. Petitioner does not specify the nature of the information she seeks, much less describe its importance to the transactions reflected in the Revised Account.

(f) Under these circumstances, Petitioner has failed to establish the necessity of a judicial accounting. The result would be the same under New York law, which gives the court discretion to direct an accounting if it is in the best interests of the estate.

6. Revocable Trusts

a. ***Stewart v. Martin,* 2024 U.S. Dist. LEXIS 111605 (Southern District of Ohio, Western Division 2024).** UTC Section 1001 does not eliminate constitutional standing requirements, and contingent beneficiaries of revocable trust lack standing to sue for actions taken by trustee during the lifetime of the settlor.

(1) This matter stems from disputes involving a Second Restatement of Declaration of Trust ("Trust") executed by Lester Martin ("Lester") on May 15, 1990, which was subsequently restated in 1995 and 2002. The Trust provided that, upon Lester's death, the Trust's assets would be divided evenly among his living children and the offspring of his deceased children. Lester and his wife, who predeceased him, had five children: David W. Martin ("David"), Betsy Martin Smith, Janet Bertolino, Susan Weinert, and Sarah Stewart. Sarah Stewart died on April 3, 2011, and was survived by her two children, Plaintiffs Daniel Stewart and Rachel Kosoff ("Plaintiffs"). Lester also had eleven other grandchildren ("Grandchildren Beneficiaries").

(2) On February 20, 2018, Lester executed a First Amendment of the Trust, appointing David as successor trustee. On the same day, Lester resigned as trustee and David accepted his appointment as trustee. Also on February 20, 2018, Lester executed a Durable Power of Attorney ("POA") in which he granted power of attorney to David.

(3) Over the course of 2019 and 2020, David made several distributions from the Trust to Plaintiffs and Sibling Beneficiaries and Grandchildren Beneficiaries (collectively, "Beneficiary Defendants"). In 2019, he gave $15,000 to each of the Grandchildren Beneficiaries, $2 million each to himself and his siblings, $100,000 to each of the Plaintiffs, and another $100,000 to each of the Grandchildren Beneficiaries. In 2020, he gave $3.3 million each to himself and his siblings, $165,000 to each of the Grandchildren Beneficiaries, $200,000 each to 2012 trusts for the benefit of the Plaintiffs, and $50,000 outright to each of the Plaintiffs.

(4) Lester died on March 13, 2020.

(5) Plaintiffs sued David for breach of trust; breach of fiduciary duty; conversion; intentional interference with an expectancy of inheritance; constructive trust; recission of the authorization or direction of distributions from trust for lack of capacity; recission of authorization or direction of distributions from the trust for undue influence; recission of the power of attorney for lack of capacity; and, recission of the power of attorney for undue influence.

(6) On cross-motions for summary judgment, the trial court entered judgment in favor of Plaintiffs for breach of trust and breach of fiduciary duty, but deferred ruling on damages. The trial court found that questions of fact remained regarding the amount of damages. Specifically, the trial court found that a failure to account for interest earned by Plaintiffs on the money improperly placed in their trust accounts may result in a windfall. The trial court further held that a failure to account for the amount of money Plaintiffs had removed from the trusts over the preceding three years may similarly result in a windfall. The court struck the claims for conversion and intentional interference with expectancy of inheritance with prejudice, striking the prayer for punitive damages, and striking the prayer for constructive trust.

(7) At the close of a jury trial on the issue of damages, David moved for a directed verdict. The Court denied the motion for directed verdict. The jury returned a verdict in favor of Plaintiffs in the amount of $2,086,000. David moved for relief from the judgment, which the federal district court granted on the following grounds:

    (a) A judgment is void if the court that rendered it lacked jurisdiction of the subject matter.

    (b) Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies. The doctrine of standing is an essential component of the case or controversy requirement of Article III. To establish standing, plaintiffs bear the burden of showing a concrete and particularized injury-in-fact, which is traceable to the defendant's conduct, and can be redressed by a favorable judicial decision.

(c) A concrete harm is one that is real and not abstract. A mere procedural violation of a statutory right does not amount to a concrete injury. Article III standing requires a concrete injury even in the context of a statutory violation. Standing is to be determined as of the time the complaint is filed.

(d) Ohio law has long held that a beneficiary of a trust only possesses an equitable interest in the trust until their interest is vested. The settlor of a revocable trust retains the right to change the beneficiaries, use all of the assets in the trust, or revoke the trust during their lifetime. Consequently, where a contingent beneficiary's claimed injuries occurred during the lifetime of the settlor, Ohio courts have held that the contingent beneficiary's injuries could not have existed prior to the death of the settlor. As such, the contingent beneficiary is not entitled to the corpus of the trust while the settlor is still alive. This is because it was not until her death that any of her descendants would become entitled to any distributions from either of the trusts, and any distributions would be from whatever assets settlor left in the trusts.

(e) In this instance, the Trust is a revocable trust where Lester was both settlor and the sole beneficiary, after the death of his wife. The corpus of the Trust was Lester's to do with what he may. Plaintiffs' interest in the Trust corpus did not vest until the moment Lester passed and, as such, they had no entitlement to monies that passed in or out of the Trust prior to that point in time. One cannot be injured by the deprivation of something that was not theirs to begin with.

(f) Plaintiffs argue that even where a beneficiary's interest is contingent they may still be able to bring a claim if there are allegations of fraud, bad faith, or other malicious conduct. Prior to trial, Plaintiffs moved to amend the First Amended Complaint and strike Counts III and IV, which plead claims of conversion and intentional interference. The Court granted that motion. The Court looks to the amended complaint to determine jurisdiction. Plaintiffs elected to amend their complaint and drop their claims alleging bad faith, thus removing the bad faith allegations from consideration by the Court in determining whether Plaintiffs have suffered an injury capable of satisfying the Constitutional standing requirement.

(g) Plaintiffs also argue that they have "statutory standing" under the Ohio version of UTC Section 1001 (Remedies for Breach of Trust). "Statutory standing" is a misnomer, as it is not actually a question of standing, rather it is simply a question of whether the particular plaintiff has a cause of action under the statute. Where a plaintiff alleges a statutory violation, that plaintiff must also fulfill Article III standing irrespective of the statutory violation. Statutory standing alone does not create Article III standing. Thus, a plaintiff may fall within the category of persons who has a cause of action under the statute, but if they have not suffered a concrete harm, the plaintiff will not have standing.

(h) UTC Section 1001 does not create a statutorily defined harm, but defines the remedies a party may pursue to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. Thus, the only plaintiffs who would fall within the statute are those who are owed a duty which has been or may be breached. Therefore, even if David owed Plaintiffs a duty during Lester's lifetime, that alone would not create a concrete and particularized harm as required for Plaintiffs to have standing.

(i) For instance, if prior to Lester's death it had been discovered that David, in his role as POA, was not properly creating a writing ordering himself, as Trustee, to make distributions then the Court could have ordered David to repay the Trust or it could have enjoined him from making any further distributions without a writing. If Plaintiffs had brought that suit with Lester living and the Court had determined they were owed a duty, the same remedies would have been available to the Court. That money would still have belonged to Lester, however, and would have returned to the Trust for Lester to spend as he wished. Plaintiffs' interest in that money would vest only if the money was in the Trust corpus when Lester died.

(j) Plaintiffs were entitled only to an interest in the corpus of the Trust upon Lester's death. The harm Plaintiffs complain of bares no close relationship to the purpose the Ohio legislature sought to codify nor is the harm of the type traditionally regarded as providing a basis for a lawsuit in these circumstances. Plaintiffs were not entitled to the money distributed from the Trust at the time David acted. Therefore, Plaintiffs have no injury that may satisfy the Constitutional standing requirement.

(k) It is not clear why this issue was raised so late in the litigation or, at least, why it was not raised prior to a trial that consumed the resources of both the court and the parties. Regardless of this concern, if Plaintiffs do not have standing to pursue a claim, then this Court does not have jurisdiction to hear the claim.

b. ***Yonke v. D'Angelo,* 2024 N.Y. Misc. LEXIS 4773 (New York Supreme Court 2024).** Under New York law, a remainder beneficiary of a revocable lifetime trust has standing to compel an accounting of a trustee's administration of the revocable trust only for the period commencing after the grantor's death.

(1) In 2010, Ingrid Yonke ("Decedent") created a revocable trust (the "Trust"). Decedent was the sole beneficiary during her lifetime. The Trust would continue to exist after her death for the benefit of her daughter, Kristina. Decedent reserved the right to revoke the trust. During the Decedent's lifetime, the trustee was required to pay all net income to Decedent, along with discretionary principal for Decedent's medical care, maintenance, support and general welfare. Upon the Decedent's death, net income was distributable to Kristina, along with principal for her health, support, maintenance, and education. Kristina also had the right to withdraw all the trust assets by age 40. The Decedent appointed George to serve as trustee of the Trust, and named George's sons, David and Christopher, to serve as successor trustees in the event that George was not able to serve.

(2) During the Decedent's lifetime, George made more than $5,000,000 in Trust distributions to, or for the benefit of, the Decedent. George also provided the Decedent with annual financial reports for the Trust and statements for its investment accounts. The Decedent approved of George's administration of the Trust for the period October 1, 2010 to January 1, 2012, expressly releasing — and indemnifying — him from liability for his stewardship of the Trust during that period.

(3) The Decedent died on August 7, 2012, survived by Kristina.

(4) Kristina petitioned to compel George to account as trustee of the Trust, and also alleged that George was ineligible to serve as trustee of the Trust, claiming that George received several hundreds of thousands of dollars in legal fees from the Decedent and her Trust during the period 2011 to 2012. George opposed the petition and asserted Kristina lacked standing to sue, and that he had been released by the Decedent.

(5) After the Decedent's death, George administered the Trust for Kristina's benefit. George monitored the Trust's accounts, consulted with investment advisors, and retained accountants to facilitate his administration of the Trust. George also rendered an accounting (the "Accounting") for the period of August 7, 2012, to January 31, 2015 (the period after the Decedent's death, during which Kristina had a vested interest in the Trust) and petitioned to have it judicially settled. Kristina filed objections to the Accounting.

(6) George died on April 16, 2018. David D'Angelo and Christopher D'Angelo ("Respondents") moved to substitute into this proceeding on behalf of George's estate, which the court granted. Respondents moved for summary judgment, which the court granted on the following grounds:

(a) Until the grantor's death, a revocable trust is an "ambulatory instrument," and the grantor retains the right to revoke, or amend, the instrument and/or the rights of the beneficiaries who take under it. The trustee of a revocable trust simply acts at the behest of the grantor. The remainder beneficiaries of a revocable trust have no right to take action relative to the trust before the grantor dies. It is clear that a remainder beneficiary of a revocable trust lacks standing to compel the trustee of the revocable trust to account for the period before the grantor's death. During the grantor's lifetime, the grantor retains the right to revoke or amend the governing trust instrument, and the remainder beneficiaries' interests in the trust, thus, vest only upon the grantor's death.

(b) The remainder beneficiary of a revocable trust lacks the authority to sue the trustee of the revocable trust for an accounting of the trustee's administration thereof during the lifetime of the trust's grantor. Kristina lacks standing, as a remainder beneficiary of the Trust who did not have a beneficial interest therein before the Decedent's passing, to compel an accounting of George's administration of the Trust for the period occurring during the Decedent's lifetime.

(c) This conclusion is buttressed by the fact that Decedent (the only person who had standing to object to George's conduct as Trustee of the Trust during her lifetime) expressly approved of George's administration of the Trust during the period October 1, 2010 to January 1, 2012, and granted him a release for that period of the Trust's administration.

(d) Respondents' motion for summary judgment dismissing Kristina's Petition to compel George (and/or respondents, as fiduciaries of his estate) to account for his administration of the Trust from the Trust's October 1, 2010, creation to the Decedent's August 7, 2012, death was granted. Summary judgment was also granted dismissing that branch of the petition requesting that George account for the Trust's administration during the period after the Decedent's death, as George already has rendered his Accounting for that period.

(e) Under New York law, a remainder beneficiary of a revocable lifetime trust has standing to compel an accounting of a trustee's administration of the revocable trust only for the period commencing after the grantor's death, when the governing trust instrument becomes irrevocable, and the remainder beneficiary's interest therein vests.

(f) Although Kristina also references the difficulties that the Decedent had with alcohol, the evidentiary record before the court establishes that the Decedent was a well-educated, highly sophisticated person, who managed her own daily affairs, administered her father's estate, actively participated in litigation, and gave regular instructions to George as to how to handle her Trust's affairs. The mere fact that the Decedent may have been an alcoholic is insufficient to raise an issue of fact calling into question the validity of the Approval, or any other legal transaction into which the Decedent entered. For the Decedent's alcohol addiction to be relevant to any of the transactions that are before the court on respondents' motion, the evidentiary record must show that the Decedent's judgment was impaired at the time that the transactions occurred. The record is devoid of any such evidence.

(g) In light of George's passing, Kristina's motion to remove George as Trustee of the Trust raises only an academic issue, as George is no longer serving as trustee of the Trust. As such, Kristina's request to remove George as Trustee of the Trust is moot.

(h) Kristina also cross-moved for David's removal as successor trustee of the Trust, which was denied due to pleading deficiencies, and because the settlor enjoys the right to determine who is most suitable among those legally qualified to settle his affairs and execute his trust, and his solemn selection is not lightly to be disregarded. Kristina failed to plead that David has violated or threatens to violate the trust placed in him or is currently insolvent or likely to be insolvent imminently. Kristina merely alleged, in conclusory terms and without any evidentiary support, that David should be removed as successor trustee of the Trust because of actions that George undertook. However, Kristina lacks standing to complain about any transactions that occurred prior to the Decedent's death. Petitioner failed to submit any evidence to support unsubstantiated and conclusory assertions about David.

c. ***In re Estate of Wright,*** **2024 Tex. App. LEXIS 8078 (Court of Appeals of Texas 2024).** Handwritten words "not right" and "will write new one" on will do not revoke will.

(1) Doris Faye Wright passed away on September 21, 2021, and was survived by her four sons, Demry Martin Wright, Matthew Wright, Patrick Wright, and Thomas Wright. Demry filed an application for probate of will and issuance of letters testamentary. Demry alleged that Doris executed a holographic will ("2007 will") which had not been revoked. Thomas filed an amended counter-application, alleging that Doris executed a will ("1993 will") which had not been revoked. In the alternative, Thomas requested the trial court to enter an order declaring heirship and appointing an administrator of Doris's estate in the event the trial court found that Doris died intestate.

(2) Demry testified that Doris's husband passed away on May 6, 2006, almost a year before Doris created the 2007 will. Demry explained that after Doris died, he found the 2007 will inside a lockbox in her bedroom. According to Demry, the lockbox contained various legal documents.

(3) Under the 1993 will, Doris's estate was to be distributed equally among her four sons. In contrast, the 2007 will significantly departed from the terms of the 1993 will. For example, under the 2007 will, Doris's "home in Kingsville, and other property" was to be distributed equally among Demry, Matthew, and Patrick. Acreage in Goliad was to be held in trust by Demry, Matthew, and Patrick, with Demry as trustee. Demry was also to receive the "ranch" and the Goliad land "in return for his care of land and my cows." The 2007 will also contained a provision gifting Thomas acreage in Fannin and $10,000. However, a line was struck through the words within this provision.

(4) On the second to last page of the 2007 will, Doris expressed her desire for her family to continue to enjoy the "land at the ranch." On the last page of the 2007 will, Doris wrote "I do realize that at some time in future the land will have to be sold or divided," and provided her signature under that statement. Underneath this signature, Doris wrote "Not right," and provided another signature underneath those words. Underneath this second signature, Doris wrote "Jan. 16, 2014." Underneath this date followed a scribbly line which led to the words, "Will write new one."

(5) Demry testified that he did not know when Doris marked out the provision for Thomas in the 2007 will but stated he believed that in 2007, Doris wanted Thomas to get the Fannin property and had not written him off the will. Demry explained that Doris had filed a partition suit to sell the Fannin property in December 18, 2013, which was a short period before the January 6, 2014 date written in the 2007 will. Demry also testified that Doris had successfully sold the Fannin property for $286,000. In reference to the "Not right" and "Will write new one" language in the 2007 will, Demry stated that he was not aware that Doris had ever written a new will.

(6) Thomas testified that as far as he knew, all the Fannin property had been sold or transferred. Thomas explained that he believed Doris treated him differently in the 2007 will because of tension between him and his brothers. Thomas acknowledged the partition suit and stated that the language "Not right" and "Will write new one" reflected Doris's intent to revoke the 2007 will. Thomas also testified that Doris had started a new will, that Demry and Patrick were part of it, but he did not think he was. Thomas also stated that Doris did not actually complete a new will and indicated that she had written some notes in the final pages of the notebook containing the 2007 will but did not sign it.

(7) The trial court orally pronounced its ruling that Doris died intestate. Demry appealed and the court of appeals reversed and remanded on the following grounds:

(a) § 253.002 expressly provides the requirements for revoking a written will or a clause or a devise in a written will: "A written will, or a clause or devise in a written will, may not be revoked, except by a subsequent will, codicil, or declaration in writing that is executed with like formalities, or by the testator destroying or canceling the same, or causing it to be destroyed or canceled in the testator's presence." This statute is the exclusive method for revoking a will and a testator's intent to destroy or revoke a will, standing alone, cannot abrogate the clear wording of the statute.

(b) Generally, a construction which would render the decedent intestate as to any part of their estate is not favored. In this case, the central dispute between the parties is whether Doris revoked the 2007 will with the language "Not right" and "Will write new one." Here, the language "Will write new one" cannot be reasonably interpreted to constitute a present intent to revoke the 2007 will. See id. A liberal reading of the language, at most, suggests an intent to create a new will in the future, not an intent to revoke the current will wherein this language appears; therefore, we conclude that the "Will write new one" language did not accomplish the 2007 will's revocation nor is it evidence of its revocation.

(c) In order for consideration of extrinsic evidence to be proper, the trial court must have first found that the disputed language was ambiguous. Nothing in the trial court's order indicates that it found the disputed language to be ambiguous, and no findings of facts or conclusions of law were requested by the parties or issued by the trial court. Even if the trial court impliedly found the disputed language to be ambiguous, whether a will is ambiguous is a question of law.

(d) The disputed language does not constitute clear "words of cancellation" or contain a present intent to revoke the will; thus, there is no patent ambiguity. Similarly, there is no latent ambiguity because the words do not sensibly convey a present intent to revoke the will. Therefore, the trial court erred to the extent it found the disputed language ambiguous as a matter of law and when it considered extrinsic evidence to determine the meaning of the disputed language.

7. Privileges & Exceptions

a. ***Byers v. Bull,* 2024 U.S. Dist. LEXIS 204364 (United States District Court for the District of Idaho 2024).** Federal court refuses to recognize fiduciary exception to attorney client privilege in Idaho.

(1) Four brothers brought various claims against defendants related to the alleged mismanagement of their grandfather's trust. Their grandfather, Delbert Parker, worked with Defendant Thomas Holmes to prepare a will and revocable trust in 2004 and to later amend the trust in November 2006. As part of that trust, upon Parker's death, Plaintiffs' father ("Harvey") and Parker's stepdaughter were to receive yearly payments from the trust. The trust also dictated that, should a beneficiary die, the beneficiary's share would go to the beneficiary's issue by representation.

(2) Parker died on March 31, 2007. Before his death, he had a strained relationship with both beneficiaries of the trust. Parker allegedly believed Harvey maintained a relationship with him for his money, and he also did not trust that Harvey was responsible in financial matters. Even still, Parker left Harvey 75% of the trust, and Harvey was to receive $15,000 a year from the trust. Upon the death of Parker, Larry Bull became the trustee. At times, Bull would allegedly consult with Holmes as to the proper administration of the trust.

(3) In 2009, Holmes assisted in the drafting and filing of a "TEDRA" agreement, which amended the trust and, in pertinent part, gave Harvey an up-front lump sum distribution from the trust

of $100,000 and then 75% of the trust thereafter to be distributed annually in $50,000 increments. Additionally, in the event of Harvey's passing, his shares would pass to his spouse, then his issue, rather than directly to his issue. Bull signed this agreement before it was filed, along with Harvey and Parker's stepdaughter.

(4) Harvey started experiencing health issues as he got older, which included dementia. Plaintiffs became concerned about Harvey's ability to care for himself, especially as he spent significant amounts of money and acted in ways that put his safety at risk. Harvey's wife mentioned the trust to Plaintiffs, and Plaintiffs contacted Defendant Bull to discuss the trust. Plaintiffs claim they asked about the assets in the trust to make sure they would be sufficient for Harvey's needs, and they also asked whether they were beneficiaries of the trust, to which Bull replied they were not. Harvey later died on October 21, 2022. When he died, the assets in the trust allocated to Harvey were entirely depleted.

(5) Plaintiffs accused Bull of fraudulently misrepresenting that they were not beneficiaries of the trust, and also that they were deprived of their pecuniary interests and rights to information due to this misrepresentation. Plaintiffs also alleged that Bull and Holmes conspired together to change the terms of the trust against the intent of Parker and to the detriment of Plaintiffs as beneficiaries.

(6) In response to interrogatories, Bull invoked the attorney-client privilege and indicated that he acted in a manner consistent with legal counsel provided by attorney Thomas J. Holmes when asked whether there was any person whose acts or omissions may bar or reduce Plaintiffs recovery against him or whether there were any superseding or intervening causes for Plaintiffs' damages.

(7) Plaintiffs sought communications which Bull and Holmes ("Defendants") claimed were protected by the attorney-client privilege. Plaintiffs moved to compel production, which the federal district court granted in part and denied in part on the following grounds:

   (a) The court, sitting in diversity jurisdiction, must apply state substantive law in the way it believes the Idaho Supreme Court would apply it, and that includes in finding whether there is an exception to, or waiver of, the attorney-client privilege.

   (b) Under the federal common law, when a trustee obtains legal advice related to the exercise of fiduciary duties—including in the administration of a trust—the trustee cannot withhold attorney-client communications from the beneficiaries of the trust. A key difference between the states who have chosen to adopt the fiduciary exception and those who have not is the authority the states' highest courts felt they possessed (or did not possess) to create new exceptions to the attorney-client privilege. To date, the Idaho Supreme Court has not addressed whether the fiduciary exception applies to trustees who invoke the attorney-client privilege for communications with their attorneys regarding the administration of a private trust.

   (c) In Idaho, a privilege is waived when the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. Idaho courts have not specifically addressed whether putting an attorney's legal advice "at issue" constitutes waiver, but the Idaho Supreme Court has held in another case that the plaintiff had waived the attorney-client privilege by giving testimony about privileged communications and using those communications as a defense.

   (d) Under the Idaho Rules of Evidence, the attorney-client privilege does not apply where the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a fraud.

   (e) The existence of an attorney-client relationship between Defendant Bull and Defendant Holmes is undisputed. Defendant Bull retained Defendant Holmes for legal counsel related to the administration of the Parker Trust, and there is every indication that the communications between the two parties were confidential.

(f) The trial court did not analyze the relationship between Holmes and Plaintiffs in deciding whether the fiduciary exception applies. The fiduciary exception is more concerned with the relationship between the trustee and beneficiaries (Bull and Plaintiffs) rather than the beneficiaries and the trustee's attorney (Plaintiffs and Holmes). If the fiduciary exception were to apply in this case, it would be because Bull was only seeking legal advice in his capacity as trustee, and in doing so, he could not later assert the attorney-client privilege to the detriment of those to whom he held a fiduciary obligation; it would not be because there is an attorney-client relationship between Holmes and Plaintiffs.

(g) Idaho precedent is not overly persuasive in deciding whether the Idaho Supreme Court would recognize a wholly new exception to the attorney-client privilege. Even if a trustee is seeking legal advice solely as to the proper administration of a trust, it is often to protect the trustee from personal liability should they improperly administer the trust. A trustee acting in this official capacity is still the client of an attorney, which means that the incredibly important reasons for why the attorney-client privilege exists are implicated. This is so because heirs are not necessarily intended beneficiaries of the attorney's services and, in fact, are frequently in a position of conflict with the attorney's client, the personal representative. The complexity in balancing the competing interests between trustees and beneficiaries in recognizing the fiduciary exception is evidenced by the plethora of courts who have chosen not to adopt the exception for a variety of reasons.

(h) It is not the case that if an attorney's duties extend to the beneficiaries of instruments the attorney drafts, the advice the attorney renders as to the administration of those instruments is likewise for the benefit of those beneficiaries, and there should be no privilege that can block disclosure of the related communications. That position does not account for the importance of the attorney-client privilege and the potentially competing interests of a trustee and a beneficiary.

(i) An Idaho appellate court has recognized that an attorney-client relationship, even if formed solely to ensure proper administration of an estate, is not one between the attorney and the beneficiaries but between the trustee and the attorney. Multiple state courts have chosen not to adopt the fiduciary exception because doing so could risk the very real protections the attorney-client privilege provides in the pursuit of justice.

(j) The Idaho Rules of Evidence recognize six enumerated exceptions to the attorney-client privilege. The exceptions are specific, particularized, and enacted by the Idaho Supreme Court itself. While the Idaho Supreme Court has stated it construes the Idaho Rules of Evidence to promote the development of evidence law, there really is no way to construe any of the existing exceptions to include the fiduciary exception.

(k) There is a fiduciary exception in the Idaho Rules of Evidence in a corporation context, which is the exception most comparable to the fiduciary exception in a trust administration context. There are however vast differences between small, private estate administration and large, public fiduciary roles that can present very different challenges and circumstances for trustees and the attorney's that advise them. One of the most obvious differences between the two is the potential lack of expertise in the trustee of a private trust relative to a corporate fiduciary. The value in legal guidance to a private trustee, who potentially has much less ability to protect themselves in the event of a lawsuit over mismanagement allegations, is high; such a trustee is protected by the attorney-client privilege.

(l) Were the Idaho Supreme Court to adopt the fiduciary exception, it would only do so by very deliberately balancing the interests of beneficiaries and trustees while preserving the importance of the attorney-client privilege. With such important issues at stake, the Idaho Supreme Court would utilize its established procedures for adopting amendments to the Idaho Rules of Evidence. This includes receiving a recommendation to amend, providing notice and accepting comments, and adopting the rule only after consideration and recommendation by the Administrative Conference.

(m) It is next to impossible to predict what the Idaho Supreme Court would do in such a situation. Upon consideration of the issue, however, it is wholly possible the Idaho Supreme Court would not recognize the exception, particularly because such important interests are at stake. There is simply too little direction from the Idaho Supreme Court based on their existing decisions to recognize the fiduciary exception in this case. Existing procedures utilized by the Idaho Supreme Court to amend the Idaho Rules of Evidence should not be bypassed. The request to recognize the fiduciary exception to compel production here is therefore denied.

(n) Bull has been extremely vague in shifting the blame to Holmes. However, even in that vagueness, he is directly using Holmes' counsel as a defense. In responding to the interrogatories, Bull implies that he, at the very least, cannot be fully liable for the alleged harms Plaintiffs have suffered because he was acting in line with the "legal counsel" provided by Holmes, and in the same written breath, invokes the attorney-client privilege. This is the epitome of using the attorney-client privilege as "sword and shield." Unfortunately, because Bull has not been very forthcoming with additional information as to how Holmes is responsible for Bull's involvement in this case, it can only be assumed that Bull is alleging Holmes gave him wayward legal advice in confidential communications. Effectively, Bull is putting Holmes' advice "at issue."

(o) In most cases finding an implied waiver of the attorney-client privilege by putting legal advice "at issue," the client is extensively testifying to their attorney's bad advice or behavior. Here, Bull did not offer detailed testimony, and it is not appropriate to completely forego the protections the attorney-client privilege provides. But Plaintiffs must be given some latitude to ask probing questions to prevent Bull from asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials. To balance the important protection of the attorney-client privilege while simultaneously fleshing out Bull's defense, Plaintiffs may ask a limited set of questions to Holmes during his deposition.

(p) Plaintiffs may ask whether Holmes ever counseled Bull to deviate from the express terms of the trust. If he answers in the affirmative, counsel may follow up by inquiring in what way he counseled Bull to deviate. And if Holmes counseled such a deviation, what was his basis for doing so? Plaintiffs may also ask whether Bull and Holmes ever communicated about administering or amending the trust in a way that was contrary to the terms of the trust, and if they did, what the reasons were for doing so. While limited in scope, this will allow Plaintiffs to ascertain whether any alleged mismanagement of the trust by Bull was at the behest of Holmes.

(q) If such a question is asked, and Holmes' responses impermissibly implicate the attorney-client privilege, those answers will not be admissible in the future. However, these few specific questions are necessary to understand the scope of advice given and whether there is any foundation to Bull's blanket statements that he might be less culpable because he was acting at the direction of Holmes. Only by asking such questions will Plaintiffs be able to adequately dispute Bull's contention that he cannot be liable for their alleged harms due to Holmes' counsel.

(r) As addressed above, the crime-fraud exception prevents the use of the attorney-client privilege where a client retains counsel for assistance in committing a fraud. There is no blanket rule that allows in-camera review to determine the applicability of the crime-fraud exception. However, a judge may engage in an in-camera review of any evidence or documents where there is a showing of a factual basis adequate to support a good faith belief by a reasonable person that in-camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

(s) Plaintiffs allege Bull told them they were not beneficiaries of their grandfather's trust, preventing them from accessing information about the trust prior to all its assets being distributed. If such were true, Bull would have committed fraud if he knowingly misrepresented the material fact of Plaintiffs' beneficiary status, preventing them from stopping mismanagement of the trust against their interest. What's more, if Bull received counsel from Holmes to carry out such an act, the crime-fraud exception would apply to that communication between the two of them. Because there is a reasonable belief that evidence, if any, as to whether Bull consulted with his attorney to fraudulently tell Plaintiffs they were not beneficiaries of their grandfather's trust will be found in the 2018 document being withheld under the attorney-client privilege, the court will conduct an in-camera review of the document.

b. ***In re Est. of Aoki,* 2024 NYLJ LEXIS 1179 (Surrogate's Court of New York, New York County 2024).** Advice of counsel to trustee related to trust administration subject to privilege waiver by successor trustee, and waiver by assertion of the advice of counsel defense.

(1) Rocky Aoki, the founder of the Benihana Restaurant chain, died in July 2008, and, more than 15 years later, there were still a number of contested and unresolved litigation matters related to his estate. In one of those matters, two of decedent's children, Devon Aoki and Steven Aoki ("Devon and Steven") sought the removal of decedent's surviving spouse, Keiko Ono Aoki ("Keiko"), as trustee of a trust created under decedent's will (the "Trust"); in the other two proceedings, Keiko sought the settlement of her accounts as testamentary trustee. The court appointed a guardian ad litem ("GAL") in Keiko's initial accounting and the removal proceeding to protect the interests of the Trust's contingent remainder beneficiaries, Devon's infant children and Steven's unborn issue.

(2) Keiko served not only as Trustee but also as chief executive officer ("CEO") of Benihana of Tokyo, LLC ("BOT"), an entity wholly owned by the Trust. Devon and Steven and the GAL offered as grounds for Keiko's removal, her litigation and business decisions while managing BOT and, specifically, its legal disputes with Benihana, Inc. ("BI") (collectively, the "BOT-BI Cases"). In addition to serving as grounds for removal, Keiko's actions and decisions in the BOT-BI Cases serve as the basis for objections by Devon and Steven, and the GAL, who seek to surcharge Keiko in her accounting as Trustee. In particular, Devon and Steven and the GAL have alleged that these legal battles between BOT and BI were pursued in bad faith and led, among other things, to Keiko's incurring unreasonable and unnecessary attorney's fees, which were borne by the Trust.

(3) The parties filed cross-motions that raised the issue of the scope of the attorney-client privilege under circumstances where the party claiming privilege served as a fiduciary and asserted advice of counsel as a defense. In matter, suspended trustee Keiko moved for a protective order and to quash a subpoena served on her former counsel. Devon and Steven, who are beneficiaries of the Trust, cross-moved to compel Keiko to comply with certain discovery demands seeking communications between her and her counsel and also between her and another firm that had represented her as Trustee, and to compel counsel to comply with their subpoena which requests production of certain documents and an examination under oath of a person to be designated by counsel (the "Counsel Subpoena"). Regarding the documents sought, current counsel to Keiko confirms that prior counsel has delivered to them all documents responsive to the Counsel Subpoena. Consequently, the portions of the cross-motions relating to documents sought in the Counsel Subpoena have been resolved as against counsel. Current counsel to Keiko, however, has not produced the responsive documents received from prior counsel, claiming that they are protected from disclosure by the attorney-client communication privilege.

(4) In the second set of cross-motions, Devon and Steven sought an order compelling the production of documents also withheld by Keiko from another firm that previously represented her. They sought to compel production of certain communications of Keiko with that firm, as well as communications among her and the other firms, that Keiko claimed were privileged in her privilege log. These communications were in the possession of Keiko's current counsel, but Keiko objected to their disclosure on privilege grounds.

(5) The GAL took positions in line with those of Devon and Steven, joining their removal proceeding as a petitioner and also objecting to Keiko's account as Trustee. With respect to the second set of cross-motions, the GAL supported Devon and Steven's motions to compel, and also moved separately to compel Keiko to comply with the GAL's own discovery demands. That motion was granted in part by the court.

(6) Devon and Steven's discovery demands sought communications with counsel related to, among other things: (1) the BOT-BI Cases; (2) the 2018 sale of a 75 percent equity interest in a BOT affiliate (the "Minor Transaction"); (3) investments that Keiko caused the Trust and BOT to make; (4) Keiko's compensation from BOT; (5) BOT's alleged use of Keiko's private residences as office space; and (6) transfers of funds or assets between and among the Trust and Keiko. Devon and Steven described these six subjects about which Keiko received advice as generally relating to the ongoing, real-time and prospective administration of the Trust and argue that these communications must be produced because they are relevant to their claims in the removal and accounting proceedings, and the Interim Successor Trustee, whom the court appointed upon suspending Keiko, waived the attorney-client privilege, or because Keiko waived the privilege of those communications by affirmatively relying on advice of counsel as a defense.

(7) Keiko argued that summary removal should not be granted because she had relied in good faith on the advice of her counsel. In support of her good faith argument, Keiko offered excerpts of certain communications between her and counsel to BOT. After the motion for summary judgment was denied, as agreed to by the parties, Keiko filed an Amended Verified Answer in the removal proceeding which included the advice of counsel defense.

(8) Keiko averred that she retained counsel to advise her in her capacity as Trustee of the Rocky H. Aoki Testamentary Trust in connection with the administration of the Trust and related litigation, including litigation against Devon and Steven, and sought and obtained advice concerning how actions taken related to BOT's disputes with BI and the Minor Transaction could affect actual and potential claims by Devon and Steven.

(9) Devon and Steven argued that the privilege belongs not to Keiko individually but to the office of the trustee. There is no dispute that the Interim Successor Trustee declined to assert any privilege with respect to communications with Keiko's prior lawyers regarding advice she received as Trustee and as CEO of BOT while serving as Trustee.

(10) The court granted the motions of each of the parties in part, directed Keiko to amend her privilege log to list all communications with counsel over which she is asserting privilege, specify the capacity she received the advice reflected in the communication and whether the advice she received did or did not relate to the ongoing administration of the Trust or its assets, and turn over to Devon and Steven's counsel and the GAL all communications with counsel as to which privilege may not be asserted, and deliver to the court-appointed referee the communications with those firms as to which she continues to claim privilege regardless of the guidance provided by the court, on the following grounds:

(a) In New York, the right of parties to maintain the confidentiality of their communications with their lawyers and to insulate those communications from disclosure to their adversaries is protected by statute and by long-standing principles that courts have upheld for centuries. This well-established rule, however, is in obvious tension with the policy of New York to encourage liberal discovery in civil disputes and, as a result, courts narrowly construe the privilege.

(b) Keiko, as the party asserting the privilege, bears the burden of establishing her entitlement to protection by showing that the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship, that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

(c) Any information or document that would tend to support the removal and surcharge claims of Devon and Steven and the GAL, including that Keiko wasted the assets of the Trust by engaging in the BOT-BI Cases against the advice of counsel or Keiko's defenses against those claims is material and should be disclosed, unless privileged. Because communications between Keiko and her lawyers, whether privileged or not, would tend to support the respective claims of the parties, they may not be withheld on relevance grounds.

(d) Unless separately waived, a trustee does not lose the right to have independent counsel and risk having such communications with counsel disclosed and the privilege invaded in adversarial proceedings by beneficiaries and others against that individual as trustee. Under the "fiduciary exception" to the attorney-client privilege, when a trustee obtains legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the trust beneficiaries are entitled to the production of documents related to that advice. The New York Court of Appeals embraced to a certain extent this exception to the attorney-client privilege in *Hoopes v. Carota* (1989). In *Hoopes*, the court held that the privilege afforded to communications between fiduciaries and their lawyers could be invaded through a "good cause" showing, which included a demonstration of an identity of interests between the beneficiaries of a trust and the trustee concerning the advice that the fiduciary obtained from counsel. In 2002, however, the legislature effectively eliminated the fiduciary exception with respect to communications between personal representatives of estates, including trustees, and their counsel. The 2002 statute provides that: "For purposes of the attorney-client privilege, if the client is a personal representative (which includes testamentary trustees) and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary: (i) no beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and (ii) the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client."

(e) This amendment made clear that confidential communications between estate fiduciaries and their counsel are generally protected by the privilege, and that good cause to invade the privilege of those communications could not be established by the mere fact that the fiduciary owed a duty to the beneficiaries. The amendment also clarified that, for purposes of the attorney-client privilege, the beneficiary should not be treated as a client of the estate fiduciary's attorney.

(f) When it comes to legal advice relating to the discharge of a trustee's duties, including the management of trust assets or the administration of those assets, the privilege belongs to the office of the trustee. First, there should be consistency in the application of privilege waiver rules relating to who, between a predecessor in office or its successor, holds the attorney-client privilege. The law in New York for decades has provided that the privilege attached to attorney-client communications regarding a corporation's day-to-day management or its ongoing operations passes to the directors and officers of its successor corporation. The conclusion reached here applies solely to communications between the former Trustee and her counsel as they relate to the ongoing administration of the Trust.

(g) Successor trustees play a special role in the protection of trust assets. By statute, successor trustees are granted all powers, duties and discretion of the original trustee, including the power and duty to administer the trust. As part of these duties, the successor trustee must receive the assets from his or her predecessor and ensure that the latter acted properly in administering the trust. In fact, the failure of a successor fiduciary to address any breach of duty by his or her predecessor in the administration of the trust exposes the former to liability. In order to discharge this critical responsibility, the successor trustee must be privy to all aspects of the predecessor's actions, including those involving litigation decisions, and must be able to waive the privilege afforded to the communications between the predecessor and the lawyers who represented him or her whenever the successor deems it necessary.

(h) The practical realities of trust administration support this conclusion. The business of any trust may include litigation. In fact, a successor trustee has the authority to substitute for his or her predecessor in any action or proceeding pending in favor of the latter at the time he or she ceased to act as trustee. A change in trustee, whether that change is the result of resignation, removal or some other reason, while litigation is ongoing should not cause the successor trustee to lose the right to assert the attorney-client privilege. The opposite result would unnecessarily disrupt the interests of the trust and its beneficiaries.

(i) At present, only the Interim Successor Trustee has a fiduciary duty to protect the Trust and its beneficiaries. This duty requires the Interim Successor Trustee to hold and assert the attorney-client privilege pertaining to ongoing Trust management advice in the manner most beneficial to the Trust, including waiving it, if necessary to protect its assets. On the other hand, Keiko, as suspended Trustee, is only bound by self-interest.

(j) The Interim Successor Trustee holds the privilege as to communications pertaining to the former trustee's ongoing administration of the Trust and its assets and as to advice sought to guide her in the discharge of her duties, including her decisions related to BOT, its management, its decision to engage in the Minor Transaction, and the BOT-BI Cases. The Interim Successor Trustee having declined to assert any privilege with respect to communications between Keiko and the lawyers who represented her as Trustee in these matters, those communications must be disclosed to Devon and Steven and the GAL.

(k) The parties disagreed whether some of the advice that Keiko claimed was privileged was provided to defend her in connection with adversarial proceedings with Devon and Steven, and thus concededly not discoverable, or whether it was provided in connection with the administration of BOT, an asset of the Trust, and therefore must be disclosed. Disputes concerning privilege are better determined by examining the communications were referred to the Referee for determination after an in-camera review.

(l) Even if the attorney-client privilege here had not been waived by the Interim Successor Trustee, Keiko's privilege arguments concerning some of her communications with counsel were waived by asserting advice of counsel as a defense. When a party affirmatively puts the advice of her counsel at issue, such as Keiko has here as a defense to acts offered as the basis for her removal and surcharge as Trustee, the privilege is waived as to the subject matter involved. In that circumstance, invasion of the privilege is permitted or even required in order to ascertain the validity of the claim of the party asserting the privilege. A party relying on such a defense may not "cherry pick" those attorney communications that support its position and withhold those that do not if they are within the subject matter for which the privilege was waived.

(m) The 2019 statutory amendments were added to make clear that a fiduciary does not waive the attorney-client privilege by "merely" asserting that he or she relied on attorney advice. The legislative history does not support that the amendments were intended to preclude future affirmatively asserted "at issue" waivers or in any way displace the usual rules of waiver. The statute leaves it to the courts to determine whether there has been a waiver and, if so, the extent to which the privilege has been waived. Keiko has not met her burden of establishing that counsel communications were not within the subject matter of her advice-of-counsel waiver. The conclusion that Keiko waived the attorney-client privilege attached to the counsel communications is grounded on the well-established principle that a trustee who controls a business wholly owned by her trust, such as BOT here, cannot use the business form to shield her actions from scrutiny and is accountable for the administration of the affairs of the company as Trustee. In other words, Keiko and her decisions as CEO of BOT are subject to inquiry and discovery in the context of the removal and accounting proceedings. She placed advice of counsel at issue in defending against the claims of Devon and Steven and the GAL in those proceedings and, as a result, is not entitled to withhold disclosure of the advice she received from her counsel as Trustee concerning those matters.

(n) Because Keiko specifically interposed as a defense in opposition to summary judgment that her good faith in managing BOT, and in particular her litigation decisions concerning the BOT-BI Cases, could be established by attorney communications, she should not be allowed to "cherry pick" which of those communications she put at issue. Additionally, Keiko cannot assert advice of counsel as a defense to efforts to remove as Trustee and surcharge her while also claiming that the scope of the waiver premised on such defense is limited only to advice received by her as CEO of BOT. As a result, advice Keiko received from her counsel concerning the BOT-BI Cases or concerning any other action vis-a-vis BOT is discoverable.

(o) Keiko may still assert privilege with respect to advice she received to defend herself in the proceedings against the claims of Devon and Steven and the GAL to the extent that such advice was not provided to guide her in the ongoing administration of the Trust's assets. All the communications that Keiko seeks to withhold on this ground shall be included in a privilege log and the basis for any privilege assertion indicated. Disputes concerning whether communications fall into this category are referred to the Referee for determination after an in-camera review, if necessary.

(p) It is unclear whether other communications concern administration of the Trust or BOT or adversarial proceedings with Devon and Steven, or both. As to some communications, Keiko invokes the common interest exception to waiver of attorney-client privilege. Keiko's claims of individual representation are difficult to assess without reference to particular documents or communications and should be reviewed in camera by the Referee. Keiko must also provide to the Referee communications that she describes as related to "Surrogate Court Proceedings," even if she claims they are protected attorney work-product. To the extent the Referee determines that a communication in any of these three categories is solely referrable to advice to Keiko individually, it should be withheld. However, to the extent the Referee determines that advice Keiko received overlaps partially or wholly with the advice provided to BOT by Schulman, and is within the subject matter waiver of Keiko's advice of counsel defense, communications reflecting such advice should be disclosed. Finally, to the extent that any of the Schulman communications relate to advice provided to BOT and Keiko in connection with a demand for arbitration that Keiko and BOT contemplated filing against Manson, those communications should be disclosed because Keiko placed the advice of Manson "at issue" in these proceedings.

c. ***In re Est. of Ashworth,* 2024 CO 39 (2024).** Physician-patient privilege survives the privilege holder's death, but testamentary exception provides for disclosure of the decedent's privileged medical records if they are required to administer the estate.

(1) Robert Harrison Ashworth died on December 22, 2022. In 2017, when he was in the early stages of Alzheimer's disease, Ashworth executed a will that named his son, Brian, as his estate's personal representative. The will divided Ashworth's estate evenly among his four children: Christine, Gwendolyn, Brian, and Kimberly. Then, in early 2022, Ashworth executed a new will that named Christine as the personal representative and included only Christine and Gwendolyn as beneficiaries. The 2022 will excluded Brian and Kimberly from any inheritance.

(2) In the years between the execution of the two wills, Ashworth's memory and ability to live independently declined as conflict among his children intensified. Brian and Kimberly ultimately lost contact with Ashworth. Christine and Gwendolyn maintained control over Ashworth's care and were allegedly present during the signing of the 2022 will.

(3) After Ashworth's death, Christine submitted the 2022 will for probate. Brian contested its validity and sought access to medical records from the last eight years of Ashworth's life, starting from the first time he was diagnosed with declining mental faculties. Brian claimed that the records would shed light on Ashworth's decision-making capacity (or lack thereof) at the time he executed his final will. Christine, however, refused to provide any medical records, citing the physician-patient privilege. The trial court considered written motions from both parties before ordering Christine to provide the medical records for an in-camera review, stating that the court would not release any records which are not related to the mental capacity of the decedent.

(4) Christine appealed and the Colorado Supreme Court held that the physician-patient privilege survives the privilege holder's death, but the testamentary exception provides for disclosure of the decedent's privileged medical records if they are required to administer the estate, on the following grounds:

(a) Colorado's physician-patient privilege is statutory. The privilege applies with equal force whether the privileged information is sought via in-court testimony or through pretrial discovery. The purpose of this privilege is to enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the physician's disclosure of information imparted to him by the patient during the course of a consultation for purposes of medical treatment. This purpose mirrors that of the attorney-client privilege, which aims to promote candor in legal consultations by protecting against later disclosure of confidential material, even after the client has died.

(b) The patient is the protected party in the physician-patient relationship. The patient, like the client, is the only person who can expressly or impliedly waive the privilege. The Colorado Supreme Court had never expressly held that the physician-patient privilege extends beyond the death of the patient, but made clear that the attorney-client privilege does. As a matter of the first impression, the protections of the physician-patient privilege continue after the privilege-holder has died.

(c) While both the physician-patient privilege and the attorney-client privilege extend past death, neither is absolute. When a will is contested, withholding information in deference to an absolute privilege of either variety would frustrate the purposes of the Colorado Probate Code: settlement and administration of the estate in accordance with the decedent's testamentary intent. The Court recognized a testamentary exception to the attorney-client and physician-patient privileges as early as 1905. Several contested will cases have mentioned, without fanfare, that the decedent's physician testified about their patient's mental or physical condition. The Colorado Estate Planning

Handbook also states it is well established that evidence as to the decedent's condition of health is discoverable in will contest litigation where lack of testamentary capacity or susceptibility of undue influence has been alleged. The Court is not breaking new ground here and is simply explicitly recognizing what has been longstanding practice.

(d) The attorney-client and physician-patient privileges are motivated by the same purpose: promoting full disclosure within the relationship. They operate similarly regarding waiver, and they both survive the death of the privilege-holder. Both privileges would serve to frustrate the purposes of probate proceedings if they were not subject to a testamentary exception. As a matter of first impression, the Court recognized the exception to the physician-patient.

(e) The testamentary exception to the physician-patient privilege is particularly important in contested will cases when a party places the decedent's physical or mental health at issue by raising "sound mind" or "undue influence" claims. Both claims often cannot be proved or disproved through direct evidence; the factfinder must draw inferences from evidence about what the decedent knew, understood, and believed when the contested will was executed. These circumstantial assessments would be severely curbed if the decedent's relevant medical records were off the table. The "sound mind" factors and the "undue influence" susceptibility assessment both typically require medical or mental condition evidence.

(f) If the medical records at issue here illuminate Ashworth's testamentary capacity and aid the court in determining whether the 2022 will was valid, the testamentary exception applies. Of course, this exception applies only to pertinent records. In-camera review protects against disclosure of irrelevant medical information to which the exception does not extend.

8. Limitations & Other Defenses

a. ***Singleton v. Singleton,* 2024 U.S. Dist. LEXIS 204854 (United States District Court for the Northern District of Georgia, Atlanta Division 2024).** Email is not a report that runs shorter statute of limitations on claims.

(1) Defendant Mark Singleton was the sole trustee of the Hubbard Albert Singleton, Sr. Revocable Living Trust (the "Trust"). The Trust established a revocable living trust for Hubbard Albert Singleton, Sr. during his lifetime, as the primary beneficiary, and became irrevocable upon his death with his children becoming the beneficiaries. In his role as trustee, Defendant executed a convertible bond in favor of Coin Closing, LLC. Defendant is an owner of Coin Closing, LLC and signed the convertible bond as its Managing Director. On November 3, 2020, Defendant sent the Plaintiff Steven Singleton an email informing him of the convertible bond and attaching a copy of the bond document. In the email, the Defendant explained that he had parked the remaining Trust funds into a convertible bond with an 8 percent interest rate and that he would sell the Plaintiff's portion as soon as he could finalize a sale.

(2) On or about November 23, 2020, and again on September 12, 2023, the Plaintiff requested a formal accounting and distribution of the Trust funds as required under Article One, Section L of the Trust. The Plaintiff has also demanded that the Defendant distribute his Trust interest pursuant to the terms of the Trust. The Plaintiff sued the Defendant, asserting claims for: breach of fiduciary duties; removal of the Defendant as trustee; conversion; fraudulent misrepresentation; accounting; constructive trust; attorney's fees; and punitive damages. The Defendant asserted a counterclaim for declaratory judgment under the terms of the Trust.

(3) Defendant argued that the Plaintiff's breach of fiduciary duty and conversion claims were barred by the statutes of limitation. He contended that his November 3, 2020 email to the

Plaintiff triggered the shorter two-year statute of limitations because the email put the Plaintiff on notice of any potential breach of duty claim against him at that time. The Defendant also argued that the Plaintiff's conversion claim was barred by the four-year statute of limitations because the convertible bond was executed on July 1, 2019, more than four years prior to the filing of this action. Finally, the Defendant asserted that he was entitled to summary judgment on the Plaintiff's defenses to his Counterclaim, including the defenses of failure to state a claim, unclean hands, and estoppel, because the Plaintiff has failed to provide any factual basis for those defenses.

(4) The Defendant moved for summary judgment, which the court denied in part and granted in part on the following grounds:

(a) The Defendant seems to have moved for summary judgment only as to the breach of fiduciary duty and conversion claims as those are the only two expressly mentioned, and therefore only those were addressed by the court.

(b) O.C.G.A. § 53-12-307(a) provides that for claims against a trustee for breach of trust, the statute of limitations is two years "if a beneficiary has received a written report that adequately discloses the existence of a claim against the trustee for breach of trust." Otherwise, the statute of limitations is six years. The statute further provides that "[a] report adequately discloses [the] existence of a claim if it provides sufficient information so that the beneficiary knows of such claim or reasonably should have inquired into the existence of such claim." The Georgia Supreme Court has elaborated that such a report must include the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest.

(c) The Defendant's November 3, 2020 email to the Plaintiff does not constitute a "report" within the meaning of O.C.G.A. § 53-12-307(a) under this definition. The email says only that the Trust funds were put into a convertible bond with 8 percent interest and that the Defendant had planned to sell it as soon as he could "finalize [a] sale." This is a far cry from the level of detail that the Georgia Supreme Court contemplated for a trust report. Accordingly, the Plaintiff's breach of fiduciary duty claim is subject to the standard six-year statute of limitations and, because the claim is thus timely, the Defendant's Motion for Summary Judgment fails as to this claim.

(d) As to the Plaintiff's conversion claim, the Defendant's contention that the claim accrued and the statute of limitations began running on July 1, 2019—when the convertible bond was executed—is without merit. The convertible bond had a maturity date of January 3, 2022. But under Georgia law, the statute of limitations for a tort action begins to run when the damage from a tortious act is actually sustained. Put another way, the statute of limitations begins to run when the injured party first knew or should have known of his alleged injuries. Since the convertible bond did not mature with payment becoming due until January 3, 2022, the Plaintiff could not have maintained an action for conversion of the Trust funds prior to that date, since theoretically the Defendant could have disbursed the Plaintiff's share from the convertible bond's matured proceeds. As the Plaintiff alleges the Defendant failed to do so, thus forming the basis of his conversion claim, the statute of limitations began running on January 3, 2022. Conversion claims carry a four-year statute of limitations, and the claim is therefore timely. Accordingly, the Defendant's Motion for Summary Judgment is denied as to the conversion claim.

(e) The Defendant's Motion for Summary Judgment is granted as to three of the Plaintiff's affirmative defenses to the Defendant's Counterclaim: failure to state a claim, unclean hands, and estoppel. The Defendant has shown that the Plaintiff has not presented any evidence or responded to interrogatories supporting these defenses, shifting the burden to the Plaintiff to rebut the Defendant's evidence. The Plaintiff's only response to the

Motion as to this issue was that the Defendant is not entitled to summary judgment on his Counterclaim, but the Defendant did not move for summary judgment on the Counterclaim itself. Granting summary judgment on these defenses to the Counterclaim does not doom the Plaintiff's chances to defend the Counterclaim altogether, however; at trial, the Plaintiff can still put on evidence showing that the Defendant's Counterclaim lacks merit.

b. ***Kleefeld v. Wells Fargo Bank, N.A.,* 2024 U.S. Dist. LEXIS 39713 (United States District Court for the Central District of California 2024).** Assurances by financial advisor that there were no tax concerns with trust consolidation tolled running of limitations on claims arising from judicial consolidation of trusts.

(1) Between 1965 and 1967, Mark Taper, as settlor and initial trustee, created four inter vivos trusts for the benefit of his granddaughter, Claudia Kleefeld, as beneficiary during her lifetime. Each of the Trusts provides for discretionary income to be distributed to Kleefeld for her lifetime and allows for discretionary principal distributions in fractions at specified ages.

(2) In 2012, Wells Fargo began providing Kleefeld with professional services in her financial planning and wealth management affairs. Wells Fargo provided these services primarily through Thomas Moran, who at the time served as Senior Vice President of Wells Fargo's Wealth Management Group. Through this relationship, Wells Fargo advised Kleefeld that it was in her and the Trusts' best interests to consolidate the Trusts. Moran specifically advised Kleefeld that the Trusts were required to be consolidated into a single trust for ease of administration and lower fees. As part of the consolidation process, Wells Fargo would be appointed as successor Trustee to facilitate the administration of the Trusts and their assets. Wells Fargo further advised Kleefeld that there would be no adverse tax consequences from the consolidation.

(3) Kleefeld agreed to appoint Wells Fargo as trustee of the Trusts effective January 1, 2013, subject to the court's approval of the consolidation of the four trusts. Wells Fargo contacted an attorney to represent the interests of Wells Fargo in connection with the preparation of a petition to consolidate. Moran was responsible for overseeing the consolidation process and approving the completion of the petitions. At Wells Fargo's direction, counsel filed the trustee confirmation and consolidation petitions in Los Angeles Superior Court. The court granted the petitions and consolidated the Trusts into Trust 1.

(4) In September 2015, after learning that Wells Fargo advised one of her relatives that trust consolidation could trigger adverse tax consequences, Kleefeld sought counsel from Moran as to whether there was any cause for concern about adverse tax consequences resulting from the consolidation of her Trusts. Moran, in his position as Kleefeld's advisor, assured Kleefeld that there was no reason for concern. However, on February 2, 2017, Moran forwarded to Kleefeld a "preliminary analysis" performed by another law firm that raised numerous issues whether Kleefeld would suffer adverse tax consequences at the time of the consolidation or modification of the Trust, at the time of the distribution to Kleefeld, and at the time of her death.

(5) Kleefeld alleged that, shortly thereafter, Wells Fargo refused to resolve or remediate those adverse tax consequences and instead undertook a campaign to coerce Kleefeld to agree to Wells Fargo's demands that she consent to its resignation as Trustee with a waiver of all claims relating to the consolidation of the Trusts. Wells Fargo also demanded all of Kleefeld's accounts be closed within 30 days, and instructed counsel to file a Petition to remove Wells Fargo as Trustee for the Trust despite knowledge that Kleefeld would be unable to secure a successor Trustee unless and until the potential adverse tax consequences caused by Wells Fargo were resolved. Kleefeld further alleged that, despite possessing knowledge to the contrary, Wells Fargo concealed the potential adverse consequences of its actions. By combining the Trusts, Wells Fargo may have lost then existing tax attributes and thereby exposed Kleefeld to potentially significant adverse tax consequences.

(6) Kleefeld brought suit and alleged (1) breach of fiduciary duty, (2) negligence, and (3) declaratory relief. Kleefeld alleged that she incurred expenses exceeding $500,000 resulting from the tax uncertainties created by Wells Fargo's consolidation of the Trusts. Wells Fargo moved the Court to strike all of Kleefeld's causes of action under California's anti-SLAPP statute, dismiss the action, and award Wells Fargo its costs and attorneys' fees. Wells Fargo also moved the Court to dismiss Kleefeld's Complaint. The federal district court denied the motion to strike and denied the motion to dismiss, on the following grounds:

(a) California's anti-SLAPP statute is the frontline defense against lawsuits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. SLAPPs—strategic lawsuits against public participation—are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. SLAPP plaintiffs do not intend to win their suits; rather, they are filed solely for delay and distraction, and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances.

(b) California's anti-SLAPP statute states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." A defendant may use the anti-SLAPP statute against state law claims when a federal court is exercising diversity jurisdiction.

(c) Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. First, the defendant must make a prima facie showing that the conduct underlying the plaintiff's cause of action, or portions of the cause of action that are asserted as grounds for relief, arises from the defendant's constitutional rights of free speech or petition. Second, if the first prong is satisfied, the burden shifts to the plaintiff to prove that he or she has a legally sufficient claim and to show a probability that the plaintiff will prevail on the claim.

(d) Here, Wells Fargo clearly satisfies its burden to establish that its activity is protected, particularly to the extent it involved making representations to the state court in connection with the judicial consolidation of the Trusts and preparing documents for filing in court. Communications that are intimately intertwined with, and preparatory to, the filing of judicial proceedings qualify as petitioning activity for the purpose of the anti-SLAPP statute. Wells Fargo's activity is also protected activity to the extent it involves statements made to Kleefeld, who had far more than "some interest" in the consolidation proceedings. Where a cause of action is based on both protected activity and unprotected activity, it is subject to the statute unless the protected conduct is "merely incidental" to the unprotected conduct. The judicial consolidation of the Trusts is not "merely incidental" to the unprotected activity. Rather, the consolidation is crucial to each of Kleefeld's causes of action, for she would be unable to succeed on any claim had the consolidation not occurred. Furthermore, Kleefeld could conceivably make out a legally sufficient breach of fiduciary duty and negligence claim based solely on her allegations related to the judicial consolidation alone. Kleefeld's causes of action do not arise out of a general breach of duty, but out of Wells Fargo's act of consolidating the Trusts. The judicial consolidation was therefore not "incidental" to the causes of action, but it was their "gravamen." But for Wells Fargo's act of consolidating the Trusts, Kleefeld would have no basis on which to bring this lawsuit. Accordingly, Wells Fargo has satisfied its burden of showing that Kleefeld's causes of action arise from protected activity.

(e) The burden now shifts to Kleefeld, who must demonstrate that there is a probability that she will prevail on the claims. If the plaintiff fails to meet this burden, the anti-SLAPP motion must be granted and the claims dismissed.

(f) Regarding the timeliness of Kleefeld's claims, the parties dispute the proper limitations period that applies to Kleefeld's claims and the date the limitations period began accruing. The parties first agree that the two-year statute of limitations period applies to Kleefeld's claim for negligence. The parties dispute the proper statute of limitations to apply to Kleefeld's claim for breach of fiduciary duty. Although the statute of limitations for a breach of fiduciary duty claim is four years, the time period to file such a claim shrinks to three years if the claim for breach of fiduciary duty actually alleges constructive fraud. The statute of limitations is driven not by the cause of action, but rather by the gravamen of the complaint.

(g) Kleefeld's allegations do not amount to a fraudulent conspiracy, but rather assert that Wells Fargo improperly advised Kleefeld that consolidation would be in her best interests. Kleefeld alleges that Wells Fargo failed to exercise utmost care when it wrongly advised her about the tax implications of consolidating the Trusts. Kleefeld further alleges that Wells Fargo failed to properly remedy the consequences of its mistaken counsel. The allegations do not amount to an intentional fraudulent conspiracy. Therefore, despite Wells Fargo's efforts to curtail the statute of limitations period, the gravamen of Kleefeld's Complaint lies in a claim for breach of fiduciary duty. Accordingly, a four-year limitations period applies to Kleefeld's claim for breach of fiduciary duty.

(h) Wells Fargo argues that the statute of limitations should have begun accruing on August 12, 2013, the date that the court consolidated the Trusts. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements. An exception to this general provision is the discovery rule, which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. In cases involving a trust relationship and fiduciary obligation, courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity.

(i) Kleefeld's suspicions were initially raised in September 2015, when she became aware that Wells Fargo gave conflicting advice to one of her relatives that trust consolidation could trigger adverse consequences. Kleefeld, however, carried out an investigation and sought counsel from Moran as to whether there was any cause for concern about adverse tax consequences with respect to her or the Trust because of the consolidation. In response, using his position of trust, Moran assured Kleefeld there was no reason for concern. This continued reassurance postponed the accrual of Kleefeld's cause of action. Although it is true that Kleefeld had a duty to investigate once she had notice of facts sufficient to arouse the suspicions of a reasonable man, Kleefeld carried out the duty of inquiry when she confronted Moran.

(j) It was not until February 2, 2017, when Moran informed Kleefeld that there were tax consequences associated with Wells Fargo's prior misguided advice. Moran did so by forwarding to Kleefeld a "preliminary analysis" performed by counsel, which raised numerous issues whether Claudia would suffer adverse tax consequences at the time of the consolidation or modification of the Trust, at the time of the distribution to Claudia, at her death, or at each of these times. Accordingly, the Court finds that February 2, 2017, the date that Kleefeld learned of the facts giving rise to her causes of action, is when the statute of limitations period began accruing.

(k) Kleefeld filed her Complaint on May 24, 2023. Considering the above, Kleefeld had until February 2, 2019, to file her negligence claim and February 2, 2021, to file her claim for breach of fiduciary duty. However, Kleefeld alleges, and Wells Fargo does not refute, that the parties entered into a tolling agreement that suspended the running of any statute of limitations from February 1, 2019, to and including June 30, 2023. Accordingly, Kleefeld's claims for negligence and breach of fiduciary duty are timely. Here, because the underlying obligations to be adjudicated by Kleefeld's claim for declaratory relief involves Wells Fargo's alleged negligence and breach of fiduciary duty, Kleefeld's claim for declaratory relief is also timely.

(l) Wells Fargo argued that Kleefeld's Complaint is barred by the litigation privilege. California's litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. The privilege immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution. The litigation privilege protects Wells Fargo from liability based on any communications made to both Kleefeld and the state court related to the judicial consolidation of the Trusts. However, it does not fully immunize Wells Fargo's alleged conduct of advising Kleefeld that consolidating the Trusts would be in her best interest, nor does it protect Wells Fargo's subsequent failure to adequately remedy the harm that the consolidation caused to Kleefeld. Wells Fargo's advice to Kleefeld was not given in the course of a judicial proceeding, but rather in Wells Fargo's capacity as Kleefeld's financial advisor. In other words, Wells Fargo's tax advice and subsequent post-consolidation failure to remediate was not functionally connected to the consolidation process. Therefore, the litigation privilege does not preclude Kleefeld's ability to establish the minimal merits of her claims.

(m) Wells Fargo argued that Kleefeld will be unable to prove that the Trust consolidation was done at Wells Fargo's direction. However, throughout her Complaint, Kleefeld factually alleges that Wells Fargo provided her with careless advice, counseled her to consolidate the Trusts, took control of the Trust-consolidation process, and directed the consolidation to occur.

(n) Kleefeld alleges that by acting on Wells Fargo's advice, she suffered concrete and particular damages in the form of professional expenses and unexpected tax liabilities. Additionally, Wells Fargo's argument that Kleefeld cannot recover attorneys' fees under the "American rule" may potentially apply to fees incurred through this litigation, but does not necessarily apply to those incurred in an attempt to remediate Wells Fargo's alleged wrong. Wells Fargo also conflates attorneys' fees with the other categories of Kleefeld's alleged expenses, including accounting fees, financial service fees, and other professional fees.

(o) The Federal Declaratory Judgment Act, not California procedural law, determines the authority to issue declaratory relief. A court may declare the rights and other legal relations of any interested party seeking such declaration in a case of actual controversy within its jurisdiction.

(p) Kleefeld satisfied her burden to demonstrate that there is a probability that she will prevail on the claims under the second prong of the anti-SLAPP analysis.

c. ***Marshall v. Munder,* 2024 U.S. Dist. LEXIS 100378 (United States District Court for the Northern District of Illinois 2024).** Each disbursement from trust related to individual, discretionary decisions made by trustee made instead of a series of discrete but repeated violations, and every wrong disbursement is on its own terms an actionable breach of trust not subject to the continuing violation doctrine for limitations purposes.

(1) Roberta Marshall established the 4-M River Farm Trust ("the Trust") on September 1, 1992, for the benefit of her great-grandchildren. Although Roberta had four children, she named only two—James Marshall, now a resident of Florida, and Beth Munder, presently a resident of Illinois—as co-trustees. When she formed the Trust, Roberta acknowledged prior gifts of

$10,000 to each of her living grandchildren and directed the trustees to make additional $10,000 gifts to individual trusts in the name of any future born grandchildren. Roberta also directed the trustees to make $10,000 gifts to individual trusts in the name of any future born great-grandchildren. Aside from these gifts, the terms of the Trust direct the trustees to make payments from the Trust's income and principal that they deem necessary for the health, maintenance, education, and support of Roberta's grandchildren and great-grandchildren. Despite the birth of a great-grandchild in January 2022, the trustees did not make the requisite $10,000 gift within the first year of that great-grandchild's birth.

(2) The Trust holds a one-half interest in the Marshall Family Farm, which consists of about 800 acres of land in LaSalle County, Illinois. Aside from the income that the farm generates, the Trust accumulates wealth from Department of Agriculture ("DOA") subsidies that the DOA pays to the Marshall Family Farm. Since December 31, 2014, these income streams have generated over $335,000 in Trust revenue. Although Marshall and Munder are co-trustees, Munder had exercised exclusive control over the Trust's bank account since December 31, 2014, through Marshall's filing of this case. In 2016, Munder began distributing Trust funds to Roberta's children without consulting Marshall or obtaining his consent as co-trustee. Munder split $20,000 equally among Roberta's four children, including herself and Marshall, in April 2016. She then distributed another $60,000 in the same manner in April 2017. In March 2018, Munder unevenly distributed a total of $12,160 between the four children. Finally, in March 2019, Munder paid a total of roughly $1,900 to herself and two siblings, excluding Marshall from this distribution.

(3) Munder made further distributions of Trust funds to Roberta's ten grandchildren without Marshall's consent. In December 2020, two events occurred. First, Munder distributed $50,000 between the grandchildren despite Marshall proposing distributing only $12,000. Munder argued that $50,000 was justified because her generation never received a dime in personal distributions from 4-M and she felt the grandchildren should have the opportunity to invest their portions of the Trust as they desired. Second, after Marshall learned about the $50,000 distribution, he demanded control of the Trust's bank account. Munder refused and added that she received legal and financial advice that the $50,000 distribution was proper. Then, in December 2021, after Marshall asked Munder to stop making further distributions while he obtained legal advice concerning the Trust's administration, Munder distributed a total of $10,000 to each of the ten grandchildren and $2,585.58 to a separate family-owned business that Munder operates. Munder continued to make disbursements in April and May of 2022 in the amount of $16,533, which took the form of tax payments to the Illinois Department of Revenue and the United States Treasury on Roberta's grandchildren's behalf. Marshall did not consent to these disbursements and did not know of the 2022 payments until after he filed suit.

(4) Aside from her distributions of Trust funds, Marshall complains about several of Munder's other actions. In 2018, Munder worked with an attorney to revise the terms of the Trust to remedy several problems the attorney claimed would occur after Roberta's grandchildren each turned thirty. After Marshall rejected the revised language, Munder paid the attorney nearly $30,000 from the Trust for his services without providing Marshall with any invoices. In 2021, after Marshall obtained an opinion letter from a different attorney concerning Munder's operation of the Trust, Munder refused to pay this attorney's fees on the grounds that Marshall did not consult her about obtaining the letter. Munder also transferred the Trust's bookkeeping duties to her sister-in-law without Marshall's consent; denied Marshall access to the Trust's check register; failed to send Marshall original versions of Trust documents; operated a farm in competition with the Trust's business; and declined to sign an agreement with a local government entity because of her disputes with Marshall and other relatives concerning the operation of the other farm.

(5) Marshall alleges that Munder's actions amount to a breach of trust. He sued on March 28, 2023, seeking actual and punitive damages of over $185,000 for the Trust, as well as

Munder's removal as co-trustee. Munder moved to dismiss the suit, which the federal district court denied on the following grounds:

(a) Illinois law provides a five-year statute of limitations for a breach of a fiduciary duty claim (such as a breach of trust). Illinois does not apply the continuing violation doctrine to such claims. A continuing violation exists when the defendant commits discrete but repeated violations. The continuing violation doctrine holds that where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease. The continuing violation doctrine does not apply to breach of fiduciary duty claims under Illinois law, meaning the Court must dismiss Marshall's amended complaint if he failed to bring his claim in a timely manner—even if he alleges facts that would otherwise demonstrate a continuing violation.

(b) Each disbursement related to individual, discretionary decisions Munder made instead of a series of "discrete but repeated violations." Here, Marshall alleges that Munder made no fewer than six disbursements resulting from independent acts within the five years preceding his complaint. Every allegedly wrong disbursement is on its own terms an actionable breach of trust not subject to the continuing violation doctrine. This means that although the Trust disbursements Munder made before March 28, 2018 (five years before Marshall filed suit) are beyond the reach of Marshall's breach of trust claim, Marshall can nevertheless proceed against those Munder made after that date.

(c) Marshall clarifies in his response to Munder's motion to dismiss that his true complaint is that she continued to unilaterally exercise control over the bank account without his consent after Marshall requested Munder to allow him to maintain the bank account in December 2020. Including the fact that Marshall sought to take control over the bank account in December 2020, Munder did not withhold access to Trust account documents until Marshall requested access to and control over the account on December 12, 2020. Thus, because Marshall filed his complaint on March 28, 2023, the court cannot find that any breach of trust claim arising from his inability to access the Trust account had lapsed.

(d) Munder identifies six statements that contain language arguably accusing her of fraudulent conduct. A claim "sounds in fraud" if it is premised upon a course of fraudulent conduct. However, even if a complaint contains allegations of fraud, the claims those allegations support are not subject to dismissal if they are also based on separate allegations of non-fraudulent conduct. Here, Munder identifies a smattering of allegations that plead vaguely fraudulent conduct; however, this handful of allegations fails to elevate Marshall's breach of trust claim to one that sounds in fraud and is therefore subject to Rule 9's stricter standard. Marshall's factual claim that Munder acted "in concert with others" does not amount to pleading breach of trust based on conspiracy to commit fraud. The Court has failed to find a case that holds that an allegation sounds in fraud when it merely accuses the defendant of acting with an "improper purpose" or with "a personal agenda." The Court is unconvinced that a mere two paragraphs that arguably plead fraudulent conduct transform Marshall's breach of trust claim into one that is premised upon a course of fraudulent conduct. But the Court need not go that far, because there is ample, non-fraudulent conduct that Marshall pled that supports his breach of trust claim. The crux of Marshall's complaint, and the subject of most of his factual allegations, is the allegedly improper disbursements of Trust funds. There are other non-fraudulent allegations of misconduct involving Trust funds, including Munder's alleged improper payment of $30,000 to Hasenbalg, and her refusal to reimburse attorney's fees that Munder incurred related to the Trust. And Marshall alleges non-financial misconduct as well. Given the inclusion of ample allegations of non-fraudulent conduct against Munder, Rule 9 does not apply to Marshall's breach of trust claim and denies Munder's motion to dismiss on this ground.

d. ***Blake v. Stephenson (In re Estate of Pinckney),* 2024 Cal. App. Unpub. LEXIS 2741 (Court of Appeal of California 2024).** Actual awareness of probate proceedings renders the extrinsic fraud doctrine inapplicable to avoid claims being barred by statute of limitations, because any lack of participation would be due to heir's inaction rather than any extrinsic fraud.

(1) Cathey Lee Pinckney (Cathey Lee) died at the age of 67 on May 15, 2018. At the time of her death, Cathey Lee's only living relative was a paternal uncle named Neal Pinckney ("Uncle Neal"). Uncle Neal was around 82 years old at the time of Cathey Lee's death. Cathey Lee had not seen or spoken with Uncle Neal since she was a toddler, back in 1952.

(2) On October 20, 2017, a will for Cathey Lee was executed. The will named Patricia Stephenson ("Stephenson") as the executor, and left Stephenson everything. Stephenson was not related to Cathey Lee by blood, and the will characterized her as Cathey Lee's "very dear and loyal friend." The will bore the signatures of two witnesses—namely, (1) Eric Moss, and (2) Robin W. Behrens.

(3) There is reason to suspect the will is a fraud. Both Moss and Behrens—who were employees of Stephenson's limousine business—later disclaimed that they witnessed the will's execution. What is more, handwriting experts disagreed over whether the signature on the will was Cathey Lee's. At the time of Cathey Lee's death, her estate was worth a little more than $3 million, comprised mostly of a home in Beverly Hills with an estimated value of $2.5 million.

(4) On June 7, 2018, Stephenson petitioned the probate court to admit the will into probate and authorize her to administer the will. Stephenson subsequently filed two supplements to her petition explaining her efforts to locate any heirs of Cathey Lee. Stephenson knew that Cathey Lee had an uncle, but did not know if he was still alive, did not know his name, and did not know his current address. Stephenson searched Cathey Lee's home and found no evidence of any living relatives. Stephenson's attorney considered hiring an "official heirship firm" to look for possible relatives, but ultimately decided to run a search on PeopleFinders; the PeopleFinders search did not reveal Uncle Neal.

(5) As a result, Stephenson's petition alleged that Cathey Lee "was survived by no known next of kin," and she did not provide notice of her petition to any specific individual. However, Stephenson published notice of the petition in two Los Angeles County-based publications—namely, the Metropolitan News and the Beverly Hills Weekly. Uncle Neal resided in Hawaii, where he had lived since 1987. On July 10, 2018, the probate court admitted the will into probate. On July 23, 2018, the court issued letters testamentary appointing Stephenson as Cathey Lee's personal representative.

(6) In August 2018, Charles Jerome Broquard ("Broquard") learned of Cathey Lee's will and Stephenson's role in admitting it to probate and administering it. Broquard had been Stephenson's roommate, but they had a falling out after Stephenson told Broquard's former wife that Broquard had been molesting their teenage son. Broquard was also convicted of felony fraud, had a civil judgment for extortion entered against him, and owed $1 million in back taxes. Grinding his proverbial axe, Broquard immediately started to investigate the legitimacy of the will Stephenson had admitted to probate. He contacted Moss and Behrens, the purported witnesses to the will's execution, and drafted their declarations disclaiming they had ever witnessed the will's execution. Behrens received phone calls from an "heir hunter"—likely Broquard—explaining the hunter was acting on behalf of the heirs to Cathey Lee's estate, and in one call around Labor Day 2018, the caller specifically identified Uncle Neal.

(7) Uncle Neal filed a petition challenging the will based on 14 different claims. Attached to the petition was a genealogical chart Broquard had prepared. Uncle Neal also petitioned for successor letters of administration to name his attorney as Cathey Lee's personal representative. That attorney had been referred to Uncle Neal by Broquard.

(8) Stephenson responded with a demurrer and a motion to strike, partially on the ground that Uncle Neal had not filed his petition within the 120-day window for post-probate challenges to wills set forth in Probate Code section 8270. The probate court sustained the demurrer due to Uncle Neal's seeming concession that he knew about the will's defects within the 120-day window. Except for striking or otherwise dismissing the claims for malicious prosecution and for double and treble damages, the court granted Uncle Neal leave to amend.

(9) Uncle Neal filed an amended petition. This petition alleged claims (1) to contest the will, (2) for fraud, (3) for undue influence, and (4) for elder abuse. Uncle Neal and his attorney attached declarations indicating that the representation in the prior oppositions about "unearthing" the will's possible invalidity in September 2018 were incorrect. Stephenson once again responded with a demurrer. The probate court overruled the demurrer after concluding that the timeliness of Uncle Neal's claims could not be decided on the face of the pleadings.

(10) The probate court conducted the evidentiary hearing and found that Uncle Neal was aware of the proceedings to administer Cathey Lee's estate prior to November 7, 2018 and thus within the 120-day period set forth in Section 8270. Uncle Neal filed this timely appeal, and the court of appeals affirmed on the following grounds:

   (a) When an interested person seeks to challenge a will after it has been admitted to probate, section 8270 erects two potential procedural hurdles to the challenge. The first hurdle erects a total bar to any challenge brought by someone who was a party to a will contest that occurred before the will was probated or who knew about that pre-probate contest and had a reasonable time to prepare to join in but opted not to do so. This hurdle is designed both to prevent persons who were parties from relitigating a challenge and to prevent persons who were not parties but who knew about the pre-probate contest from "waiting and seeing" how the pre-probate contest plays out and then taking a second bite at the apple afterwards.

   (b) The second hurdle erects a 120-day statute of limitations that starts to tick once the will is admitted to probate. The imposition and then shortening of the limitations period both reflects and effectuates the pervasive and dominant judicial and legislative theme that probate matters must be expeditiously handled to effect a prompt distribution of property to the decedent's designated beneficiaries and to avoid unnecessary delay and expense. Because the 120-day limitations period is "jurisdictional," an order admitting a will to probate becomes "final" and "conclusive" and cannot be "collaterally attacked" by a post-probate challenge once the 120-day period expires. Second, and as relevant here, a court must entertain an untimely post-probate challenge—a court must entertain a collateral attack—if the order admitting the will to probate was procured by extrinsic fraud.

   (c) To obtain relief from section 8270's time bar, it is not enough to show "extrinsic circumstances"—that the challenger was kept in ignorance or away from court. The challenger must also show that they (1) have a meritorious case, and (2) exercised diligence in seeking to set aside the order to be challenged. The second additional requirement means that the challenger must show that the extrinsic fraud—rather than their own lack of diligence—is what prevented them from participating in the proceeding. Thus, where a party has actual knowledge or actual notice of the proceeding prior to the expiration of a limitations period (and, hence, when they still have a right and ability to participate), that party cannot sidestep the limitations period on the basis of extrinsic fraud because, in that instance, their lack of participation was not due to the extrinsic fraud but rather their own inaction.

   (d) The trial court's ruling finding Uncle Neal's post-probate challenge to the will untimely is correct. Because this case did not involve any pre-probate challenges to the will, the only hurdle posed by section 8270 is the 120-day limitations period. It is undisputed that Uncle Neal's February 2019 petition was untimely because the 120-day period expired on

November 7, 2018—which is 120 days after the July 10, 2018 order admitting the will to probate. Because it is also undisputed that Cathey Lee is deceased, the only available exception to the 120-day period is extrinsic fraud. Whether or not there was extrinsic fraud, the probate court found that Uncle Neal actually knew of the probate proceeding prior to November 15, 2018—and hence prior to the expiration of the 120-day limit. Uncle Neal does not challenge that finding on appeal. As a result, he cannot rely on the extrinsic fraud doctrine and his post-probate petition was properly denied as untimely.

(e) The probate court asked the right factual question—namely, what did Uncle Neal know prior to the expiration of the 120-day limitations period? Where that question fits into the legal analysis goes solely to the probate court's rationale. Because our job is to review the court's ruling and not to grade its reasoning, Uncle Neal's criticisms of the probate court's rationale provide no basis for overturning its ruling.

(f) There is no distinction between being aware of a probate proceeding and being aware of the probate petition where, as here, the petition is how a proceeding is instituted. Uncle Neal provides no explanation for this distinction, and the court will not engage in such hair splitting. What is at issue here is whether Uncle Neal's awareness of the proceeding severs the causal connection between any extrinsic fraud by Stephenson and Uncle Neal's inability to file a timely challenge; that issue turns on his awareness of facts that would cause a "reasonably prudent person to suspect wrongdoing," where the wrongdoing is existence of the proceeding of which the person was not notified or is being prevented from joining. There is no reason to alter the longstanding elements defining the extrinsic fraud doctrine on the basis of a statute dealing with a wholly different issue.

(g) Because the extrinsic fraud doctrine is inapplicable if the person invoking it is aware of the facts that give rise to a suspicion of wrongdoing, the challenger need not know all the details of the proceeding and have lined up all the evidence necessary not only to show extrinsic fraud but also to prevail on the merits. Because Uncle Neal does not dispute that the evidence in this case supports the reasonable inference that he knew as early as Labor Day 2018 that there was a probate proceeding of which he was not personally notified, that is sufficient; even if the court were to ignore this law and indulge Uncle Neal's argument that the challenger must also be aware of the substantive merit of his challenge to the will, Uncle Neal does not dispute the trial court's finding that he knew, by November 2018, that Broquard was building a case for Uncle Neal to "challenge the will."

(h) Uncle Neal points to his testimony and Broquard's testimony from the evidentiary hearing, where they testified that Uncle Neal first learned of the will contest in mid-January 2019. However, the probate court found Uncle Neal's testimony on this point not to be credible based on its contradiction with the testimony of the second "heir hunter" and on Uncle Neal's admittedly poor memory, and found Broquard's self-serving testimony on this point not to be credible based on his personal animosity toward Stephenson, his lack of credibility as a prior felon, and other reasons. There is substantial evidence to the contrary—namely, Behrens's testimony that the "heir hunter" who called him and knew about the forged signatures and mentioned Uncle Neal as far back as Labor Day 2018 created a reasonable inference of Uncle Neal's knowledge at that point in time.

(i) The probate court focused the evidentiary hearing on the question of whether Uncle Neal was aware of the probate proceeding involving Cathey Lee's will during the 120-day window when Uncle Neal could still file a post-probate challenge to that will. Because his actual awareness of a proceeding would render the extrinsic fraud doctrine inapplicable (because any lack of participation would be due to his inaction rather than any extrinsic fraud), the probate court's (mostly) unchallenged finding that Uncle Neal had that awareness renders the question of whether there was extrinsic fraud irrelevant: If there was not extrinsic fraud, then Uncle Neal would not be entitled to relief; and if there was extrinsic fraud, Uncle Neal's actual awareness of the proceeding would preclude the application of the extrinsic fraud doctrine. Indeed, the whole point of narrowing the evidentiary hearing to the very specific issue of Uncle Neal's awareness was—as the parties' joint statement itself explained—aimed at the question of awareness first because the answer to that question might obviate the need to reach the more complicated question of whether extrinsic fraud existed. Uncle Neal's attempt to unravel the litigation plan he agreed to below is as duplicitous as it is meritless.

e. ***Hamilton v. Green,*** **98 Cal. App. 5th 417 (Court of Appeal of California 2023).** 120-day limitations on trust contests after notice bars related claims for interference with inheritance rights, interference with prospective economic advantage, interference with contract, conversion, quiet title, breach of fiduciary duty, and an accounting.

(1) Lena Grace Hamilton ("Lena") was the settlor of the Lena Grace Hamilton Trust, dated March 11, 1991 ("trust"). Lena had two children, defendant LaDonna Green ("LaDonna") and Eric Duane Hamilton ("Eric Sr."). Eric Sr. also had two children, plaintiffs Dominic Hamilton ("Dominic") and Eric Hamilton ("Eric Jr.").

(2) The trust named LaDonna as the initial trustee. The trust provided that upon Lena's death, the trust estate would be distributed to LaDonna and Eric Sr. The trust also stated that at the time of Lena's death if either LaDonna or Eric Sr. was not living, or was later deceased, distribution shall be made to that person's descendants, if then living. A handwritten amendment ("trust amendment") changed that term to read, "if one beneficiary is alive all Lena's properties shall go to the survivor." The trust amendment was dated September 26, 2002 and bore Lena's purported signature.

(3) Eric Sr. died in 2004, predeceasing Lena. Lena died in 2019. After Lena's death, LaDonna informed Dominic and Eric Jr. that she was the sole beneficiary of the trust as Eric Sr. had predeceased Lena. LaDonna provided Dominic and Eric Jr. with excerpts of the trust to substantiate her argument that she was the sole beneficiary. Dominic and Eric Jr. asked LaDonna for a copy of the trust instrument. LaDonna refused the request.

(4) On January 13, 2020, Dominic and Eric Jr. petitioned seeking LaDonna's removal as trustee, based in part on her failure to provide Dominic and Eric Jr. with a complete copy of the trust instrument. Dominic and Eric Jr. requested a court order requiring LaDonna to submit the original trust instrument along with any amendments. On April 17, 2020, LaDonna served Dominic and Eric Jr. with a "notification by trustee" ("notification"). As required by statute, the notification informed Dominic and Eric Jr. in bold, capitalized letters, "you may not bring an action to contest the trust more than 120 days from the date the notification by trustee was served upon you." LaDonna also attached a copy of the trust and the trust amendment.

(5) On March 10, 2021, Dominic and Eric Jr. sought leave to file a first amended probate petition. Dominic and Eric Jr. moved to amend their petition to challenge the validity of the trust amendment, asserting it was a forgery. Dominic and Eric Jr. also sought to allege the invalid trust amendment could not eliminate their interests in the trust. The court denied the motion. On July 29, 2021, Dominic and Eric Jr. filed a civil complaint against LaDonna. The complaint alleged causes of action for: (1) interference with inheritance rights; (2) interference with prospective economic advantage; (3) interference with contract; (4) conversion; (5) quiet title; (6) breach of fiduciary duty; and (7) an accounting. Each cause of action specifically alleged the invalidity of the trust amendment as the basis for relief.

(6) LaDonna filed a demurrer to Dominic and Eric Jr.'s complaint on the ground that each cause of action was time-barred. LaDonna contended the complaint was "an action to contest the trust" and the 120-day statute of limitations therefore applied.

(7) The court sustained the demurrer without leave to amend. Dominic and Eric Jr. appealed, and the court of appeals affirmed on the following grounds:

(a) When a trust becomes irrevocable, a trustee must serve a written notification on all beneficiaries and heirs of the settlor. The notification must contain the following language: "[y]ou may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you."

(b) Actions that challenge the validity of a trust are actions that "contest the trust". The court is not "bound by its label" in deciding whether an action is a trust contest. Rather, the court looks to the substance of that action and its practical effect.

(c) The practical effect of Dominic and Eric Jr.'s complaint was to challenge the validity of the trust amendment to establish the pre-amendment trust should govern. Each cause of action in the complaint would require the trial court to determine the validity of the trust amendment. Although the prayer for relief does not expressly ask the court to invalidate the trust amendment, without a finding that the trust amendment was invalid, Dominic and Eric Jr. had no interest in the trust and were not entitled to the relief they sought. Dominic and Eric Jr.'s complaint was an "action to contest the trust." Because the lawsuit was filed more than a year after LaDonna served Dominic and Eric Jr. with the notification, the complaint is time-barred.

f. ***White v. White,*** **316 Neb. 616 (Supreme Court of Nebraska 2024).** Suit for breach of contract to make a will arising from premarital agreement is not a claim that is subject to the nonclaim statute's requirements for the timely filing of a claim.

(1) Yvonne M. White, formerly known as Yvonne M. Gubser, and Leonard P. White ("Lenny") executed a premarital agreement in September 2016 and married approximately 2 weeks later.

(2) The premarital agreement provided that in the event of Lenny's death, and if Yvonne survives him, Yvonne shall receive $100,000 from Lenny's estate (and this provision shall be treated as a contract to make a Will). Attached to the agreement were two exhibits, one from Yvonne and the other from Lenny, which listed the separate property of each party existing at the time of the premarital agreement's execution. No motor vehicles were listed as the separate property of either party.

(3) Lenny died in October 2018. In March 2019, Lenny's two sons, Jamison Patrick White and Ryan Howard White, applied for the informal probate of Lenny's will and to be appointed as co-personal representatives of his estate. Attached to their application was a copy of Yvonne and Lenny's premarital agreement, along with a copy of Lenny's will that was executed in 2006. Their application also stated that Lenny was married to Yvonne at the time of his death, that the premarital agreement included provisions Lenny made for Yvonne's benefit if he predeceased her, and that the agreement was unrevoked and remained in full force and effect at the time of Lenny's death.

(4) Jamison and Ryan's application was granted, and a notice to creditors was published in March 2019, directing claims against Lenny's estate to be filed by a specified date two months later or be forever barred. The co-personal representatives subsequently filed an inventory with the court that showed no jointly owned property between Yvonne and Lenny and listed a "2015 Cyclone 4000 Fifth Wheel Camper" as an asset of Lenny's estate.

(5) Thereafter, in September 2019, Yvonne filed a complaint against Jamison and Ryan in their capacity as co-personal representatives of Lenny's estate, alleging that the estate was subject to probate; that it had failed, refused, or neglected to pay her the $100,000 that was owed under the terms of the premarital agreement; and that it had wrongfully claimed ownership of the camper. According to Yvonne, this constituted a material breach of the premarital agreement. Jamison and Ryan moved to dismiss Yvonne's complaint in the district

court for lack of jurisdiction. Jamison and Ryan subsequently filed an answer, alleging, in relevant part, that Yvonne failed to make a timely, valid claim against the estate to enforce the premarital agreement and that the camper did not belong to Yvonne under the terms of the premarital agreement. Both parties moved for summary judgment.

(6) The district court granted summary judgment in favor of Yvonne in the amount of $100,000, but denied summary judgment as to ownership of the camper. Following the trial, the district court entered an order finding that "from the four corners" of the premarital agreement, Yvonne was the owner of the camper. Specifically, under article 2 of the premarital agreement, the court considered the camper to be a "personal article" that Yvonne jointly owned with Lenny with full rights of survivorship. The district court reiterated in its written order that Yvonne's claim against the estate was timely, because Jamison and Ryan waived the necessity of Yvonne's filing a claim in the probate estate by virtue of the terms of their application for informal probate.

(7) Jamison and Ryan appealed, and the Court of Appeals affirmed the judgment of the district court. Jamison and Ryan further appealed, and the Nebraska Supreme Court affirmed on the following grounds:

(a) Jamison and Ryan assumed that the "nonclaim statute" applied to Yvonne's suit. Because the parties proceeded in the district court under the assumption that it was a claim, and the statute's applicability was never directly addressed by the district court, the Court of Appeals did not find it necessary to independently decide whether the nonclaim statute applied to Yvonne's suit. The issue of whether Yvonne's suit was bound by the nonclaim statute presents a question of law that needs to be addressed.

(b) Under the state probate code, creditors' claims in probate proceedings must be brought within the time limitations set forth in the nonclaim statute. The code defines a "claim," in relevant part, as "liabilities of the decedent or protected person whether arising in contract, in tort or otherwise." A claim does not include, among other things, "demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

(c) The nonclaim statute provides that a qualifying claim against a decedent's estate which arises at or after the death of the decedent must be presented within 4 months after it arises. The requirements of the nonclaim statute are mandatory, and where a claim is not filed within the applicable time provided in the statute, absent an excuse for the delay or relief granted, it is forever barred. Mere notice of a claim against a decedent's estate fails to satisfy the requirement of sufficiently filing or presenting a claim. An administrator cannot waive the defense of nonclaim to the prejudice of the estate either by agreement with the claimant or by neglecting to plead such a defense.

(d) Yvonne's suit in the district court did not qualify as a "claim," in part because there were no liabilities of the decedent or the decedent's estate at issue for either the $100,000 or the camper. Instead, according to Yvonne and Lenny's premarital agreement, the suit for the $100,000 was a cause of action against the estate for breach of contract, and the suit for the camper was a cause of action involving disputed title of property allegedly belonging to the decedent. Yvonne's complaint alleged that under the premarital agreement, she was entitled to receive that sum from the estate. The provision then explicitly stated that "this provision shall be treated as a contract to make a will." A contract to make a will can be established only by: (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. Satisfying one of these three subsections is the only way to prove the existence of a contract to make a will.

(e) No one appears to dispute that the premarital agreement was a writing signed by Lenny evidencing a contract with Yvonne or that the agreement called for Yvonne to receive $100,000 if she survived Lenny. The premarital agreement thus satisfies the requirements for the establishment of a valid contract to make a will, and Yvonne was thus entitled to the $100,000 from Lenny's estate.

(f) The effect of a valid contract for wills is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract. As a result, Yvonne was a beneficiary of the estate, not a creditor or a claimant against it. Her breach of contract suit for the payment of the $100,000 was not the assertion of a "claim" and was not subject to the nonclaim statute's requirements for the timely filing of a claim.

(g) Jamison and Ryan do not dispute that they never paid Yvonne the $100,000 from the estate, despite acknowledging that the premarital agreement was unrevoked and remained in full force and effect at the time of Lenny's death. It is therefore apparent that Jamison and Ryan, in their capacity as co-personal representatives of Lenny's estate, are liable for breach of contract. And because Yvonne's suit was for breach of contract, it was not barred for being untimely filed. By statute, an action for breach of written contract must be brought within 5 years of the cause of action. Lenny died in 2018, the co-personal representatives of his estate were appointed in March 2019, and Yvonne brought her suit against the co-personal representatives in September 2019.

(h) Yvonne's suit for the camper was likewise not a claim subject to the nonclaim statute and was not barred from being asserted for being untimely filed; it was instead a dispute regarding the title of a specific asset allegedly belonging to Lenny's estate. Disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate are excluded from the definition of a "claim" for purposes of the probate code. An action involving disputed title of property allegedly belonging to a decedent and included in the decedent's estate is not a "claim." Yvonne's suit asserted that the camper's title belonged to her under the terms of the premarital agreement, whereas Jamison and Ryan asserted that the camper was an asset of Lenny's estate. The suit for the camper thus involved a dispute not subject to the nonclaim statute.

(i) The premarital agreement stated in relevant part that, as used in the agreement, the term "personal and household articles" included "all articles of personal and household use . . . of every kind and description and wherever located, such as, by way of illustration, . . . motor vehicles, boats, and sports equipment." The provision further stated that "[u]nless otherwise specifically agreed to by the parties at the time of purchase, all personal and household articles later acquired by Yvonne and Lenny shall be deemed to be jointly owned, with full rights of survivorship." The camper falls within the language of provision 2.2 of the premarital agreement. In particular, the provision prescribed that personal and household items acquired by Yvonne and Lenny after marriage were deemed to be jointly owned with full rights of survivorship unless otherwise agreed to by the parties. Personal and household articles was defined to include, among other things, motor vehicles and boats. A camper is arguably a motor vehicle under the plain meaning of that term. But, even if not seen as such, a camper is, at a minimum, similar to motor vehicles and boats. Further, it is uncontroverted that the camper here was acquired after Yvonne and Lenny were married. Jamison and Ryan also argue that "personal and household articles" in provision 2.2 of the premarital agreement was intended to apply only to items such as an air fryer and a bedspread that Yvonne testified about, rather than the camper. This argument fails to acknowledge that "motor vehicles" were expressly included in the premarital agreement's definition of personal and household articles.

g. ***Davenport v. Kindred Hosps. Ltd. P'ship,* 2024 Ky. LEXIS 329 (Supreme Court of Kentucky 2024).** Probate proceedings, including the appointment of a personal representative during probate, are special statutory proceedings, making the order of appointment effective at its signing by the judge.

(1) On July 19, 2018, Penny Ann Simmons died. On September 11, 2018, the Spencer District Court signed an order appointing Davenport to be the personal representative of the Simmons Estate. On September 21, 2018, the Spencer County Clerk entered this order. On September 20, 2019, Davenport filed a medical malpractice/wrongful death suit against Kindred in Jefferson Circuit Court on behalf of the Estate.

(2) Kindred filed a motion for summary judgment alleging the lawsuit was filed outside of the statute of limitations, having been filed more than one year after Davenport was appointed personal representative. Kindred argued that the date of Davenport's appointment was when the order of appointment was signed by the district judge, and state law provides a 1-year window for the personal representative to bring claims on behalf of the estate. Davenport opposed the motion, arguing the state statute conflicts with the civil rules and violates the separation of powers.

(3) The circuit court granted the motion for summary judgment and dismissed the case. The Court of Appeals hesitantly affirmed. The Kentucky Supreme Court granted discretionary review, and affirmed, over one dissent, on the following grounds:

(a) At issue is the interplay between two statutes and two rules of civil procedure.

(b) KRS 395.105 provides: Every fiduciary, before entering upon the execution of the trust, shall receive letters of appointment from the District Court having jurisdiction as now fixed by law. The duties of a fiduciary shall be such as are required by law, and such additional duties not inconsistent therewith as the court may order. The appointment shall be effective with the signing of an order by the judge.

(c) KRS 413.180(1) provides: If a person entitled to bring any action mentioned in KRS 413.090 to 413.160 dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after the qualification of the representative.

(d) CR 1(2) provides: These Rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules, and appeals from civil actions, which are governed by the Rules of Appellate Procedure. Regulations and manuals published by the Administrative Office of the Courts upon authorization of the Supreme Court relating to internal policy and administration within the Court of Justice shall have the same effect as if incorporated in the Rules.

(e) CR 58(1) provides: Before a judgment or order may be entered in a trial court it shall be signed by the judge. The clerk, forthwith upon receipt of the signed judgment or order, shall note it in the civil docket as provided by CR 79.01. The notation shall constitute the entry of the judgment or order, which shall become effective at the time of such notation; however, an authorized order for pretrial adult or juvenile release or detention, or a signed emergency protective order, shall be effective when issued and does not require prior entry in the clerk's office to become effective. The additional notation required by CR 77.04(2) or by RCr 12.06(2) shall govern the running of time for appeal under CR 73.02.

(f) Davenport contended that the final sentence of KRS 395.105 ("[t]he appointment shall be effective with the signing of an order by the judge[]") violated the separation of powers enshrined in the Kentucky Constitution, and that the legislature intended for the statute of limitations to begin at a time other than when the order of appointment is signed by a judge.

(g) The law is well settled that in the state of Kentucky one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch. The Kentucky Constitution grants to the Supreme Court the exclusive power to prescribe rules of practice and procedure for the Court of Justice. Davenport argued that the legislature encroached upon this power by setting forth a rule of procedure in probate cases that conflicts with duly promulgated Rules of Civil Procedure.

(h) To the extent KRS 395.105 provides for a different effective date for an order, in this case the time the order is signed by the judge, the statute conflicts with the constitutional prerogative of the Supreme Court to set our rules of procedure. However, the Civil Rules also recognize that in special statutory proceedings the Kentucky Supreme Court cedes to the legislature the ability to set procedural requirements that conflict with the general Rules of Civil Procedure. To survive a separation of powers challenge, probate and the appointment of a personal representative must qualify as a "special statutory proceeding."

(i) A "special statutory proceeding" is one that is complete within itself having each procedural detail prescribed. The existence of a special statutory proceeding is determined by evaluating whether the statute in question provides for a comprehensive, wholly self-contained process that prescribes each procedural detail of the cause of action.

(j) Probate, including the process of appointing a personal representative, qualifies as a special statutory proceeding. Probate generally is subject to a robust statutory framework. Therein, the legislature has prescribed specific rules for personal representatives, including who may be appointed, how a person may apply to be appointed, when an estate may be distributed, when actions against an administrator may be brought or revived, who may be substituted upon the death of a representative, when an order dispensing with administration may be set aside, and the formalities or informalities of settlements. The comprehensiveness with which the statutes address these matters is akin to other proceedings we have determined to be of the special statutory variety. Because the statutes dealing with probate are sufficiently comprehensive to be considered complete within itself, probate is a special statutory proceeding.

(k) Because probate is a special statutory proceeding, the procedural requirements of a statute will prevail over any inconsistent procedures set forth in the Rules with regard to special statutory proceedings. Instead of the order of appointment becoming effective upon its entry by the clerk, as part of a special statutory proceeding, pursuant to KRS 395.105 an order appointing a personal representative becomes effective upon its signing by the judge.

(l) KRS 413.180 provides a 1-year window during which a personal representative may bring any surviving claims. The language does not perfectly track that found in the appointment statute. Specifically, KRS 413.180(1) begins the 1-year period upon qualification of the representative, rather than upon appointment. The period set forth in KRS 413.180 begins when a personal representative becomes legally empowered to manage the estate pursuant to KRS 395.105—in other words, when a judge signs the order appointing the representative.

(m) Because the statutes provide no guidance as to when an individual has qualified to be eligible for appointment, the more rational rule is to date qualification from the moment a judge determines an individual is qualified, which is by necessity at appointment. Otherwise, the date of qualification becomes hopelessly inscrutable. Because no requirement exists for an official determination of qualification, litigants could argue qualification occurred once a prospective representative had satisfied all the prerequisites which may or may not coincide with a clearly dated order from the district court. The court will not endorse such an unclear approach. Because qualification becomes officially recognized upon appointment, the date of qualification and the date of appointment are, for practical purposes, coterminous. Appointment, therefore, is a reasonable, easily pinpointed date that can signify successful qualification. Accordingly, that date will be operative for the purpose of calculating the limitation period.

(n) This decision makes explicit what Kentucky's case law has long recognized: the running of the limitation period begins at the date of appointment.

9. Distributions & Disbursements

a. ***In re Trust Under Article Third of Will of Wen,* 2024 N.J. Super. Unpub. LEXIS 1480 (Superior Court of New Jersey, Appellate Division 2024).** When the trust's terms refer to the beneficiary's accustomed manner of living, it would not be reasonable or even a result contemplated by the settlor for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle.

(1) Wu Huai Wen ("decedent") died testate on November 14, 2009. Pursuant to Article Third of decedent's Last Will and Testament ("LWT") dated November 6, 2009, a Family Trust was established providing for income payments and discretionary principal payments to decedent's spouse, Ping Wen, during her lifetime. Following Ping's death, the remaining balance was to be distributed to decedent's living descendants, including his daughter Catherine Wen, his son Andrew Wen, his son Peter Wen Ping, and the children were named as Trustees of the Trust; however, following litigation, Shirley Whitenack, Esq. was appointed by the court as Temporary Substitute Trustee by order dated June 30, 2014. Whitenack sought to have her interim accounting approved.

(2) The LWT provided that the Family Trust would pay net income to Ping and discretionary principal to Ping (even to the point of completely exhausting the same) as the trustees, in their discretion, deem advisable for the health, support, and maintenance of Ping in her accustomed manner of living.

(3) Pursuant to the accounting, the Trust's principal assets amounted to $1,480,090.33, of which principal disbursements of $188,199.68 and principal distributions of $298,104.57 were made, leaving a principal balance of $993,786.08. The Estate received income in the amount of $254,651.04, of which $188,004.08 was distributed. A total of $1,060,433.04 remained in the Estate.

(4) Peter filed exceptions to the accounting. He submitted a certification in which he detailed his version of the background and grievances against his sister Catherine's handling of the Estate and Trust assets. However, he stated that the purpose of the certification was not to present any specific objections to the accounting submitted by Whitenack but to set forth the basis for his concerns about his sister's control and manipulation of his mother for consideration by Whitenack as it relates to the ongoing administration of the Trust.

(5) Whitenack supplied Peter with supplemental documentation. Peter reiterated his exceptions and requested more detailed information regarding "the monthly distributions of principal to Ping in the amount of $11,000. Peter believed the monthly distribution requests came from Catherine, rather than Ping, and accused Catherine of deceptively acquiring ownership interests in three of Ping's properties, one of which was Ping's current residence for which Catherine charged Ping rent. Peter further posited that Catherine has inappropriately used her fiduciary role to both siphon off Ping's assets while simultaneously having the Trust fund her lifestyle.

(6) Peter highlighted rent payments, which were based on a suggested rental amount provided by a realtor but resulted in Catherine receiving a double benefit in the form of rent, a home health aide who was neither necessary nor licensed and acted more as a domestic assistant, gifts which directly benefit Catherine and her family, and other miscellaneous living expenses. Although Peter acknowledged that Whitenack had denied certain requests, including funds to pay for Catherine's son's school, Peter requested Whitenack to conduct a further investigation into the propriety of the expenses as well as other sources of income and support available to Ping.

(7) Whitenack maintains that the bulk of the $11,000 comprised $3,250 in rent and $6,050 in home health aide costs, and the remainder covered utilities and costs of living.

(8) The judge agreed that the terms of the Trust conferred on Whitenack complete discretion in making principal distributions for Ping's health, support and maintenance without taking into consideration her other assets and forms of income and approved the accounting. Peter appealed and the court of appeals affirmed on the following grounds:

(a) Exceptions to an executor's account are a vehicle for determining the propriety of the executor's statement of assets and claims for allowance. Consequently, it is only the conduct of the executor, not the conduct of others, that is properly before the court. Although a trustee has a duty to deal impartially with all beneficiaries and to protect all of their interests, first and foremost a trustee has a duty to ensure that the estate is distributed in accordance with the testator's wishes. Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) When the trust's terms refer to the beneficiary's accustomed manner of living, as here, it would not be reasonable or even a result contemplated by the settlor for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle. The standard ordinarily entitles a beneficiary to distributions sufficient for accustomed living expenses, extending to such items as regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance, and continuation of accustomed patterns of vacation and of charitable and family giving.

(c) Here, there is no abuse of discretion and no basis to intervene. Whitenack exercised her discretion in making principal distributions to Ping in accordance with the terms of the Trust. Peter's exceptions, which were predominantly levelled against Catherine's rather than Whitenack's conduct, were insufficient as a matter of law and properly rejected by the judge in summary fashion.

b. ***Garaventa v. Mangini,* 2024 Cal. App. Unpub. LEXIS 5279 (Court of Appeal of California 2024).** Given the significance of the family company to the family's wealth and the family's substantial involvement in its operation, settlor intended the trust "hostile acts" provision and office of "special trustee for hostile acts"—her attempt to deter her children from fighting after her death—to encompass acts taken in an official company capacity.

(1) Mary C. Garaventa included in the family trust a provision creating a Special Trustee for Hostile Acts. This provision empowers the special trustee to designate a sibling's act as "hostile" and to limit trust distributions to that sibling for an unspecified length of time as a consequence. The settlor's laudable effort to achieve familial peace has proven fruitless. This case was the fifth appellate probate battle waged by the siblings, including four in the last year. Its focus: the scope of the special trustee's authority. The designated peace process has become the newest battleground.

(2) Mary's children are Silvio Garaventa, Jr., Marie Louise Adler, Louisa Binswanger, Joseph Garaventa, and Linda Garaventa Colvis. The family trust ("Trust") provides that after Mary's death, the Trust estate is to be distributed evenly among five sub-trusts for the benefit of the five siblings and their children. In 2013, Mary restated the Trust. The restated Trust provides the initial trustee is Mary and the successor trustee is Louisa or, if Louisa is unwilling or unable to serve, Joseph.

(3) In the 2013 restatement of the Trust, Mary added a provision targeting "Hostile Acts" by the siblings and their descendants. The provision creates the position of "Special Trustee for Hostile Acts" and provides, "Notwithstanding anything herein to the contrary, if any issue of the Trustor engages in a Hostile Act toward another issue or the spouse of an issue of the Trustor, the Special Trustee for Hostile Acts shall have the power to suspend any distributions otherwise payable to an issue of the Trustor for such period as the Special Trustee for Hostile Acts shall determine."

(4) Mary died in 2015, and Louisa became trustee of the Trust. The special trustee for hostile acts is Father Richard Mangini ("Special Trustee"), the family's longtime priest. Instead of defusing the internecine battling, as Mary had hoped, the hostile acts provision has been weaponized by the siblings, who have lodged numerous allegations of hostile acts with the Special Trustee.

(5) The hostile acts allegation underlying the instant appeal involves the family business (the "Company"). The five siblings each own 6 percent of the Company's shares; the remaining 70 percent is held by the Trust. The five siblings also sit on the Company's board of directors. The Company's value is substantial: the Trust's estate is worth more than $100 million and the Trust's 70 percent interest in the Company is its primary asset.

(6) For years, Joseph and Clark Colvis, Linda's husband, worked as senior managers for the Company: Joseph as chief executive officer and Clark as chief operating officer. At a 2018 Company board meeting, when the board consisted only of the five siblings, Silvio, Marie, and Louisa voted to terminate the Company's employment of Joseph and Clark and replace them with nonfamily members. Linda subsequently asked the Special Trustee to find these votes hostile acts. Joseph and Clark also filed lawsuits challenging their terminations. The Special Trustee found that Silvio, Marie, and Louisa had committed hostile acts under the terms of the Trust by voting to terminate Joseph and Clark, but reserved ruling until the completion of litigation on what consequence, if any, to impose.

(7) Silvio filed a petition in the ongoing trust proceeding seeking (among other relief) a ruling that the term "Hostile Acts" in the Trust does not extend to acts taken when acting as a Company board member. Louisa joined in this aspect of Silvio's petition ("Petitioners"). The Special Trustee opposed the petition. Linda also filed an opposition and Joseph joined in Linda's filing. The probate court found that, under the plain language of the Trust, hostile acts include acts taken in the capacity of a Company board member.

(8) Petitioners appealed and the Special Trustee filed a cross-appeal. The court of appeals affirmed on the following grounds:

(a) The Trust provides: "A Hostile Act is any intentional act by an issue of the Trustor that materially and adversely affects the peace and harmony of other lineal descendants of the Trustor. Examples of this conduct include, but are not limited to, initiating a physical altercation against another issue or the spouse of an issue, intentional disclosure of confidential information detrimental to family peace and harmony, and initiating legal action against a lineal descendant or the spouse of a lineal descendant without obtaining the prior written consent of the Special Trustee for Hostile Acts. The written consent to initiate legal action shall include a determination that there is no reasonable alternative to resolve a conflict other than initiating legal action; such action is necessary to achieve family peace and harmony; and will benefit all concerned."

(b) To say this provision reflects a concern about conflict among the siblings and their families is an understatement. Mary determined that the likelihood of serious infighting—including physical fights, publicly revealing secrets detrimental to the family, and suing each other—was so significant as to warrant authorizing limitations on the siblings' inheritances as a deterrent.

(c) Mary's intent behind the hostile acts provision must be evaluated in the context of the significance of the Company to family members. At the time Mary added this provision, Joseph and Clark held senior management positions at the Company; each of the siblings sat on the Company's board of directors and held a 6 percent ownership in the Company; and either Louisa or Joseph would, after Mary's death, become trustee of the Trust and thus control the 70 percent ownership of the Company held by the Trust. Absent a clear indication to the contrary, it beggars belief to conclude that Mary would exclude conduct while acting in an official Company capacity from the hoped for deterrence of the hostile acts provision. The settlor knew that her children would deal with each other in the business context, and given that she obviously wanted peace in the family, it would have been strange for her to exclude from the definition of "Hostile Acts" the very circumstances in which her children were most likely to be hostile to one another.

(d) The siblings are Mary's "issue" whether they are acting as individuals or as Company board members. Authority governing the legal liability of corporate board members is inapposite. The sole question here is whether Mary intended the word "issue" to exclude her children when acting in an official Company capacity. She did not.

(e) In the context of this family's dynamics, it makes little sense to believe Mary took the extraordinary step of adding the hostile acts provision but intended to immunize the siblings from the consequences of using their official positions with the Company to harm each other. Given the Company's financial value to family members and their management and oversight roles, the family's interactions and its peace and harmony were and are substantially intertwined with the Company. There is no basis to conclude that Mary intended the term "peace and harmony" to exclude conduct while acting in an official Company capacity.

(f) It is indisputable that the Trust and the shareholders agreement grant the trustee substantial authority over Company business. In light of Mary's concern over the siblings' contentious relationships and her wish to deter infighting, it is most consistent with Mary's intent to apply the hostile acts provision to acts taken in an official Company capacity and thus ensure that Louisa or Joseph do not use this broad power to commit hostile acts against other family members. This conclusion is buttressed by the fact that the hostile acts provision is prefaced by the phrase, "Notwithstanding anything herein to the contrary . . . ," indicating that the Trust's grant of broad authority over Company business to the trustee should not be construed to limit the hostile acts provision.

(g) The Special Trustee does not review official acts for their business purposes, but instead determines whether any act by an issue is hostile under the terms of the Trust and, if so, what consequences should follow. Petitioners' complaints about the wisdom of the Special Trustee's decisions are not relevant to the determination of the sole issue presented in Petitioners' appeal: whether the hostile acts provision applies to acts taken in an official Company capacity.

(h) The possibility that an act taken in an official Company capacity will be deemed a hostile act is not the only potential adverse consequence; most significantly, given the siblings' litigiousness, such an act could well be the target of one or more lawsuits. Petitioners fail to explain why their conduct as board members would be impacted more by the court's construction of the hostile acts provision than by the possibility of other adverse consequences.

(i) The siblings show no signs of reducing their infighting over the enviable estate left them by their parents. They have been chastised by Mary and by the Special Trustee, to no apparent avail. Mary was well aware of their intractability, which led her to include this highly unusual provision in the Trust. Given the significance of the Company to the family's wealth and the family's substantial involvement in its operation, she intended the hostile acts provision—her attempt to deter her children from fighting after her death—to encompass acts taken in an official Company capacity.

(j) The Special Trustee argued the court erroneously found the Special Trustee's authority over distributions is limited to instructing the general trustee, and instead, the Special Trustee has the authority under the Trust to suspend distributions directly. The Special Trustee has made no final determinations that distributions should be suspended. Indeed, with respect to many or most of the hostile act complaints, siblings have filed lawsuits over the same conduct, and the Special Trustee has repeatedly stated his intention to refrain from deciding the consequences of any hostile act until litigation over the same conduct has completed. Because the Special Trustee has not sought to suspend distributions to any hostile actor, the issue of how he may implement any such suspension is not ripe.

c. ***Johnson v. Butler,* 2024 N.C. App. LEXIS 8 (Court of Appeals of North Carolina 2024).** Trustee breached duties by paying excessive compensation to caretaker and himself, and personal use of trust assets.

(1) This case is centered around a series of trusts benefitting Luther D. Warner ("Mr. Warner") and Shirley T. Warner ("Mrs. Warner"). The Shirley T. Warner Revocable Trust ("STW Trust") was originally executed on 30 August 2001 naming Mrs. Warner as grantor and trustee and Mr. Warner as successor trustee. On 19 November 2015, Mr. Warner, acting as Mrs. Warner's Attorney in Fact, executed an amendment to the STW Trust in which Mrs. Warner resigned as trustee, Mr. Warner was appointed as successor trustee, and defendant Jeffrey was appointed as second successor trustee. Mr. Warner died on 28 November 2015, making defendant Jeffrey the trustee of the STW Trust.

(2) By the time of Mr. Warner's death, Mrs. Warner was suffering from advanced Alzheimer's disease or dementia. The STW Trust directed the trustee to pay or apply such part or all of the income and principal of this trust as it deems necessary for the proper health, support and maintenance of the grantor, and her spouse and minor children, if any. Following Mr. Warner's death and the death of her only child, Paula Gay Warner, Mrs. Warner became the primary beneficiary of the STW Trust, with the Macedonia United Methodist Church of Cary, North Carolina ("the Church") as the sole residuary beneficiary.

(3) In addition to defendant Jeffrey Butler ("defendant Jeffrey") serving as Mrs. Warner's agent and attorney in fact, Blaire Butler ("defendant Blaire") entered into an independent contractor agreement with the STW Trust. The agreement directed defendant Blaire to provide all human resource services for the purpose of providing Shirley Warner with caregivers as needed and to remain on call at all times to assist Mrs. Warner. The initial agreement was for the term of 1 January to 31 December 2017 and directed the STW Trust to pay defendant Blaire $12.00 per hour. The agreement was unmodifiable except by amendment reduced to writing and signed by both the Trust and defendant Blaire.

(4) Mrs. Warner died on 17 January 2020, and defendant Jeffrey qualified as the executor of her estate on 13 March 2020. Upon Mrs. Warner's death, the Church became the sole beneficiary of the STW Trust. The Church filed petitions to remove defendant Jeffrey as trustee. On the eve of a hearing on those petitions, the trial court entered a consent order accepting defendant Jeffrey's resignation as trustee and appointing Linda F. Johnson as successor trustee of the STW Trust ("plaintiff"). Following her appointment as successor trustee, plaintiff requested, received, and reviewed detailed financial records for the STW Trust and created detailed accountings. Defendant Jeffrey did not provide any formal accountings from his trusteeship.

(5) Plaintiff sued defendants, alleging the following claims: breach of fiduciary duty and breach of trust; constructive fraud; conversion and trover; civil conspiracy; restitution and unjust enrichment; and punitive damages. Plaintiff alleged that between 15 January 2016 and 13 January 2020, defendant Jeffrey made payments or distributions to defendant Blaire through the STW Trust in excess of $633,088.00, generally in monthly installments of $10,000.00 or $15,000.00 per month. The complaint noted that defendant Blaire would have needed to work 833.33 hours per month to justify a $10,000.00 monthly payment pursuant to the independent contractor agreement, but a thirty-day month consists of only 720 hours.

(6) Plaintiff further alleged that between 9 March 2016 and 13 January 2020, defendant Jeffrey made payments or distributions from the STW Trust to himself in excess of $655,564.00, including more than $500,000.00 in the month before Mrs. Warner's death. The complaint also included allegations regarding other payments from the STW Trust as follows: (1) Amazon purchases of approximately $189,888.00, with reimbursements of $62,576.99; (2) Paypal purchases or payments of approximately $2,528.00; (3) catering and meal delivery services totaling approximately $46,621.00; (4) grocery bills totaling approximately $38,925.00; (5) fast food orders totaling approximately $15,500.00; (6) laundry services totaling approximately $33,687.00 during a period of less than six months; (7) consulting services totaling approximately $41,000.00; and (8) "unexplained checks payable to 'cash' and ATM and other cash withdrawals" totaling approximately $35,188.00. The complaint included several attached exhibits, including a copy of the independent contractor agreement, defendant Jeffrey's trustee resignation documents, and extensive summaries of transaction details and balance sheets from the STW Trust.

(7) Defendant Jeffrey stated he was back paying himself for times that he had nursed Mrs. Warner, which was not part of his trustee duties and that he charged $30 an hour plus overtime. Defendant Jeffrey also testified that he was providing himself a one-percent commission for his services as trustee. Plaintiff moved for summary judgment. The trial court entered an order granting partial summary judgment in favor of plaintiff on claims for breach of fiduciary duty and breach of trust, constructive fraud, and civil conspiracy, in the amount of $1,658,608.60. Plaintiff entered a voluntary dismissal of the remaining claims against defendants.

(8) Defendants appealed and the court of appeals affirmed on the following grounds:

   (a) Jeffrey established a fiduciary relationship between himself and the STW Trust and owed several fiduciary duties, including those of good faith, loyalty, and prudent administration. In less than five years, however, defendant Jeffrey paid approximately $633,088.37 to defendant Blaire and approximately $655,564.56 to himself. These transactions are rebuttably presumed to be affected by a conflict of interest.

   (b) Defendants' argument that defendant Jeffrey owed no duty to the remainder beneficiaries while Mrs. Warner was alive is misplaced; the underlying cause of action concerns breaches of fiduciary duty to the STW Trust, not to the Church. Further, Defendants failed to present an accounting prior to or at the hearing to rebut the presumption of a conflict of interest. Although Mrs. Warner had entered into a durable power of attorney with defendant Jeffrey prior to her death, the record reflects that Mrs. Warner was suffering from advanced Alzheimer's disease around the time the power of attorney was entered.

   (c) In addition to breaching the duty of loyalty, defendant Jeffrey breached the duty of prudent administration with the nature and amounts of payments to himself and defendant Blaire. The independent contractor agreement set defendant Blaire's payment at $12.00 per hour, yet defendant Jeffrey paid her $10,000.00 and $15,000.00 per month. Defendant Jeffrey's "back paying" himself for care giving duties was not substantiated by any record of an agreement between himself and the STW Trust to provide those services, nor a comprehensive record of hours worked. Finally, defendant Jeffrey testified that he gave himself a one-percent commission for his service as trustee but failed to give notice to qualified beneficiaries of any proposed payment of compensation.

(d) Defendants repeatedly breached their fiduciary duties to the STW Trust, and these breaches substantially and unjustifiably diminished the STW Trust.

(e) Constructive fraud requires proof of circumstances (1) which created the relation of trust and confidence (the fiduciary relationship), and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

(f) An inherently fiduciary relationship may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.

(g) Plaintiff established that both defendants had a confidential and fiduciary relationship with the STW Trust and Mrs. Warner. As previously discussed, defendant Jeffrey had a fiduciary relationship with the STW Trust as its trustee and with Mrs. Warner as her agent under power of attorney. Defendant Blaire was also in a fiduciary relationship with the STW Trust and Mrs. Warner by virtue of the independent contractor agreement and her purported role as caregiving coordinator. Due to Mrs. Warner's health condition, a confidential and fiduciary relationship existed because of the special confidence reposed on defendant Blaire, who in equity and good conscience was bound to act in good faith and with due regard to the interests of the STW Trust and Mrs. Warner.

(h) Furthermore, defendants clearly benefitted from their transactions with the STW Trust. Although a number of expenses went to goods or services involved in Mrs. Warner's care, many of the transactions were unexplained, unrelated to Mrs. Warner's care, breached existing agreements, or occurred after Mrs. Warner's death. This includes more than $189,000.00 in Amazon purchases, of which $62,576.99 was reimbursed, which defendant Jeffrey stated was due to his belief that the card had been "accidentally used." It also includes the direct payments totaling over $600,000 to each defendant. Defendants have failed to present sufficient evidence or argument to rebut the presumption that constructive fraud occurred.

(i) In order for a plaintiff to recover damages upon a claim of civil conspiracy, the following elements must be established: (1) an agreement between two or more individuals; (2) sufficiently alleged wrongful overt acts; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme. Where civil conspiracy is established, all of the conspirators are liable, joint and severally, for the act of any one of them done in furtherance of the agreement.

(j) In this case, an agreement existed between the defendants, namely the independent contractor agreement. Plaintiff's evidence established that the agreement and the payments pursuant to the agreement were sufficiently alleged wrongful acts. Defendant Jeffrey paid defendant Blaire significantly more than the agreed $12.00 per hour rate. Although defendants argue that defendant Blaire's excessive payment was for working "overtime," as an independent contractor, defendant Blaire was not entitled to overtime, nor did the agreement provide for any adjusted pay rate based on hours worked. The payments and distributions amounted to an injury to the STW Trust and plaintiff, as well as establishing that the conspiracy was pursuant to a common scheme. Accordingly, the trial court properly granted plaintiff's motion for summary judgment with respect to civil conspiracy.

d. ***Karris v. KeyBank N.A.,* 2024 IL App (1st) 231471-U (2024).** The res judicata prohibition against claim-splitting does not apply where the court in the first action has expressly reserved the plaintiff's right to maintain the second action.

(1) Nicholas A. Karris, Sr. ("Karris Sr.") died on December 1, 2012, and was survived by his wife, Mary Ann Karris ("Mary Ann"), and two adult children, Nicholas Karris, Jr. ("Nick") and Holly Karris ("Holly"). Karris Sr.'s last will appointed Mary Ann as the sole executor of his estate and left his estate to the Nicholas A. Karris Trust dated August 7, 1997 ("1997 Trust"). Mary Ann and KeyBank are co-trustees of the 1997 Trust, which is administered from offices located in Chicago. The 1997 Trust created sub-trusts: Marital Trust A, Marital Trust B, and two residuary trusts. Mary Ann is the beneficiary of the marital trusts; Holly and Nick are the remainder beneficiaries. Mary Ann, Holly, and Nick are the beneficiaries of the residuary trusts.

(2) The marital trusts provide for mandatory net income distributions to Mary Ann, while the residuary trusts provide for income and principal distributions pursuant to a "best interests" standard. The size of the estate is vast. At the beginning of 2016, the estate consisted of over 30 commercial and residential properties, over 30 different limited liability corporations and was valued in excess of $300 million.

(3) During Karris Sr.'s life, the 1997 Trust owned membership interests in Water Tower Capital Partners LLC ("WTCP"), which, in turn, owned a 99-year ground lease under a commercial property located at 679 North Michigan Avenue in Chicago. We refer to this commercial property as the Apple property because 679 North Michigan Avenue was under lease to Apple, Inc. for its flagship retail store. The Apple property made up over 99% of Marital Trust A and was appraised at $42 million in 2014.

(4) On December 26, 2014, KeyBank transferred the Apple property from Marital Trust A to Mary Ann. On December 29, 2014, Mary Ann sold the Apple property in equal halves to two new trusts, the Holly S. Karris Gift Trust and the Nicholas P. Karris Gift Trust, for $2,145,000 in cash and a $19,300,00 promissory note from each trust. Mary Ann subsequently assigned her interest in the promissory notes to two additional trusts created in August 2015: the Holly S. Karris Promissory Note Trust and the Nicholas P. Karris Promissory Note Trust. According to Holly, the transfer of the Apple property to Mary Ann and the subsequent creation of the four new trusts were not contemplated by Karris Sr. in either his will or the 1997 Trust.

(5) On April 13, 2016, Holly filed an amended petition in the circuit court of DuPage County to remove KeyBank as co-trustee of the 1997 Trust for violating its fiduciary duties and acting in opposition to Karris Sr.'s intent. Specifically, Holly complained that KeyBank breached its fiduciary duties as co-trustee by: failing to timely transfer assets from Karris Sr.'s estate to the 1997 Trust; treating Holly differently from Mary Ann with respect to discretionary distributions from the residuary trusts; proposing a "sham" sale of certain properties; transferring the Apple property to Mary Ann and creating the four new trusts; and relinquishing control of major decisions related to estate properties to Nick and failing to provide information about the estate to Holly.

(6) The circuit court found that KeyBank did not breach any fiduciary duties by taking 18 months to transfer assets from Karris Sr.'s estate to the 1997 Trust, Holly was not treated unfairly with respect to discretionary distributions, KeyBank did not engage in a sham sale of properties, KeyBank did not fail to provide information about the estate to Holly, and Nick's management of the estate properties was proper. With respect to the transfer of the Apple property to Mary Ann (the "Apple transaction") and the subsequent creation of four new trusts (the "Apple trusts"), the court found breach of fiduciary duty with respect to the Apple transaction and removed KeyBank as co-trustee of the 1997 Trust. KeyBank and Mary Ann brought motions to reconsider, arguing that the court made a mistake of fact because Mary Ann would not receive outright ownership of the Apple property in the event of a default on the promissory notes. Rather, the promissory notes were assigned to the promissory note

trusts, and in the event of a default, ownership would go to those trusts. The court granted the motions to reconsider and concluded that it had erred in its discretionary decision to remove KeyBank as co-trustee because Holly had failed to show any fraud, self-dealing, dishonesty or bad faith on the part of KeyBank.

(7) Holly appealed and then voluntarily dismissed the appeal, which was approved by the appellate court. Holly then filed a petition for a citation to discover and recover assets against Mary Ann, KeyBank, and Nick ("defendants"). Holly asked the court to require defendants to produce a representative to be examined regarding documents and information in defendants' possession and control that are necessary to determine the full extent of the defendants' liability for engaging in and actively participating in the illegal and void Apple transaction, and to determine all other improper distributions from the trust estate of Karris Sr. in violation of the express terms of his will and the 1997 Trust. Holly sought to restore Karris Sr.'s estate and 1997 Trust with the Apple interest, as well as any other assets, funds, and property determined to be improperly concealed, converted, or embezzled, which are currently in the possession, ownership or control of the defendants or other third parties.

(8) The court denied Holly's petition for a citation as premature. Mary Ann also filed an amended petition to reform the promissory note trusts and gift trusts to allow for the Apple transaction. The court denied Mary Ann's amended petition to reform the trusts and granted Holly's motion to strike and dismiss the amended petition. The court stated that the primary reason the Apple transaction was done was for tax and saving purposes, but the transaction did not comply with the 1997 Trust, and the distribution of the Apple property to Mary Ann was improper.

(9) Holly filed a second petition in the DuPage County circuit court seeking the removal of Mary Ann and KeyBank from their roles as co-trustees. Holly further provided a list of 21 supplemental allegations of breaches of fiduciary duties committed by Mary Ann and KeyBank. Several of these "supplemental" allegations merely repeated the claims that Mary Ann and KeyBank breached their fiduciary duties by approving the transfer of the Apple property to Mary Ann.

(10) The court denied Holly's second removal petition. Holly moved to vacate and reconsider, which the court denied without prejudice to Holly's right to pursue damages as a result of the Apple transaction or the unwinding thereof. Holly appealed the orders denying her second removal petition and denying her motion to vacate and reconsider. Mary Ann and KeyBank moved to dismiss the appeal on the basis that the September 5 order was not a final judgment. The court of appeals denied the motion without prejudice to appellant's right to raise an independent claim for damages. The appellate court affirmed the denial of the second removal petition and the denial of the motion to vacate and reconsider, finding that the law-of-the-case doctrine precluded Holly from relitigating Mary Ann and KeyBank's removal based on the Apple transaction.

(11) Holly then filed a 15-count, first amended complaint against defendants related to their alleged mismanagement of the 1997 Trust including, but not limited to, the Apple transaction. The counts alleged breach of the trust agreement, fraudulent transfers, dissipation and defunding the trust, breach of fiduciary duty, conversion, fraud, civil conspiracy, tortious interference with an inheritance expectancy, intentional infliction of emotional distress, and loss of consortium. Defendants sought dismissal. The circuit court denied dismissal, finding that the DuPage County circuit court had not ruled on the damages claims raised in the first amended complaint and, in fact, had specifically stated that its denial of the removal petitions did not preclude Holly's right to pursue damages as a result of the Apple transaction.

(12) Holly filed her 11-count third amended complaint against defendants again related to their alleged mismanagement of the 1997 Trust including, but not limited to, the Apple transaction. The counts alleged breach of trust, breach of fiduciary duty, fraud, conversion, and tortious interference with an inheritance expectancy. Holly also sought an accounting and inventory

of the financial condition of the 1997 Trust. Defendants moved to dismiss, and the court granted the motion to dismiss the third amended complaint based on res judicata. The court found that the claims in Holly's third amended complaint involved the same causes of action as had been asserted in the removal petitions and litigated to a final judgment Holly appealed, and the court of appeals reversed and remanded on the following grounds:

(a) For res judicata to apply, three elements must be met: (1) an identity of parties or their privies; (2) a final judgment on the merits rendered by a court of competent jurisdiction; and (3) an identity of cause of action. Res judicata precludes a plaintiff from splitting her claims arising from the same transaction into multiple actions. Under the rule against claim-splitting, where a cause of action is entire and indivisible, plaintiff cannot divide it so as to maintain separate lawsuits. Thus, plaintiff may not sue for part of a claim in one action and then sue for the remainder in another action.

(b) An exception to the general rule against claim-splitting applies here. The state supreme court has adopted the exceptions to the rule against claim-splitting set forth in the Restatement (Second) of Judgments. The relevant exception provides that the res judicata prohibition against claim-splitting does not apply where the court in the first action has expressly reserved the plaintiff's right to maintain the second action.

(c) The circuit court expressly stated that its rulings denying the removal petitions were "without prejudice" to Holly's right to pursue her cause of action for damages against defendants related to their conduct in the Apple transaction ("Apple-related damages"). The appellate court acknowledged that the circuit court's rulings on the removal petitions were made "without prejudice to [Holly's] right to raise an independent claim for damages." The circuit court's express reservation of Holly's right to pursue her damages action placed it squarely within the exception to the application of res judicata. Therefore, the rule against claim-splitting does not apply in the instant case to preclude the Apple-related damages claims raised in the third amended complaint. The circuit court did not simply deny the removal claims "without prejudice," but specifically stated that Holly retained the right to "pursue damages as a result of the Apple transaction or the unwinding thereof," thereby expressly reserving her right to maintain the second action.

(d) The court actually found that the Apple transaction was "flawed from the get-go" and that it violated the terms of the 1997 Trust and Karris Sr.'s donative intent. The court further stated that its denial of the removal petitions "was not a blessing of the Apple transaction." Therefore, the court expressly noted that its rulings were "without prejudice" to Holly's right to pursue damages as a result of the Apple transaction or the unwinding thereof. There is nothing inequitable in requiring defendants to litigate, for the first and only time, the issue of whether they are liable for damages resulting from their participation in the Apple transaction.

(e) Many of the claims in the third amended complaint filed in the Cook County circuit court seek damages for conduct occurring after the litigation of the removal petitions, i.e., they involve allegedly improper, continuous breaches of fiduciary duties committed after the Apple transaction that have decreased the value of the 1997 Trust from over $300,000,000 in 2016 to less than $150,000,000 to date. Counts IX and XI further seek the appointment of a special fiduciary to take possession and control of the 1997 Trust estate pending resolution of the claims of continuing breaches of fiduciary duties. Res judicata extends only to the facts and conditions as they were at the time a judgment was rendered. When new facts or conditions intervene before a second action, establishing a new basis for the claims and defenses of the parties respectfully, the issues are no longer the same, and the former judgment cannot be pleaded as a bar in a subsequent action.

(f) A defendant's continuing course of conduct, even if related to conduct complained of in an earlier action, creates a separate cause of action. An earlier judgment relating to a course of conduct does not bar claims for continuing conduct complained of in the second lawsuit that occur[s] after judgment has been entered in the first lawsuit. The claims in the third amended complaint seeking damages and the appointment of a special fiduciary due to defendants' continuing course of misconduct vis-à-vis the maintenance of the 1997 Trust are not barred by the earlier judgments rendered by the DuPage County circuit court on the removal petitions.

10. Situs, Forum Selection, Jurisdiction, & Venue

a. ***In re Dille Fam. Trust,* 2024 Pa. Super. Unpub. LEXIS 1232 (2024).** Court may refuse to recognize change of trust situs pursuant to trust terms where the change of situs will defeat the purposes of the Pennsylvania Uniform Trust Act and makes court supervision impossible.

(1) This matter is but one in a lengthy dispute over the rights to the fictional world of Buck Rogers. It started with a feud between the Dille and Nowlan families around the time of the creation of the character Buck Rogers in the late 1920s.

(2) The Dille Family Trust ("DFT") was created on August 16, 1979, in the state of California, by Robert C. Dille ("Mr. Dille") and Virginia N. Dille ("Mrs. Dille") (collectively "Settlors"). They amended the trust on January 5, 1982. Settlors were the original trustees of the DFT. Their children, Lorraine Dille Williams and Robert Nichols Flint Dille ("Appellants" or "Beneficiaries"), are the DFT's sole beneficiaries. When Mr. Dille died in 1983, Arthur Martin became co-trustee with Mrs. Dille. On February 1, 1989, the co-trustees and Appellants executed a document transferring the situs of the DFT to Illinois. When Mrs. Dille died in 2009, Mr. Martin became sole trustee. He resigned from that position on March 8, 2011. The DFT named Dennis Fox as successor trustee, however, he never acted as trustee and resigned on May 4, 2011. The last-named successor trustee in the DFT was American Guarantee and Trust Company but they too declined to accept the position. As the DFT did not have a trustee, Appellants asked Attorney Louise A. Geer to become trustee. She accepted on June 6, 2011. She began administering the DFT from her office in Lawrence County, Pennsylvania. On August 26, 2018, Appellants notified Attorney Geer that she was no longer the trustee of the DFT. Appellants did not seek a court order to remove Attorney Geer as trustee of the DFT.

(3) On February 20, 2019, Appellants signed an "Instrument Transferring Situs of Trust" which indicated that they intended to transfer the situs of the DFT to California. That same date, Appellants signed an "Instrument Confirming Request for Mandatory Distribution and Removal of Entirety of Shares of Principal in Trust Estate of the Dille Family Trust" which they claim removed all assets from the DFT, effectively terminating the trust. On April 5, 2019, Appellants petitioned the Superior Court of Los Angeles County, California to order that Attorney Geer was not trustee of the DFT, that all assets of the DFT were removed on February 20, 2019, to appoint Appellants as co-trustees of the DFT, and to order Attorney Geer to turn over all DFT property to Appellants. The petition was dismissed due to lack of jurisdiction and improper venue, finding that the principal place of the DFT's administration was Pennsylvania.

(4) Attorney Geer, as trustee of the DFT, executed a purchase agreement with the Buck Rogers Company and Nowlan Family Trust selling any and all assets the DFT owned of the trademark and intellectual property rights to Buck Rogers for $300,000.00. Attorney Geer then petitioned to show cause why she is not the trustee of the DFT, why Pennsylvania is not the situs of the DFT, and why the proceeds from the purchase agreement should not be distributed to the DFT. Appellants again signed an "Instrument Transferring Situs of Trust: Dille Family Trust" purporting to transfer the situs of the DFT to California. This "Instrument" was filed with the Superior Court of Los Angeles County, California. This filing did not request a court order to change the situs to California and Appellants did not seek a court order from Pennsylvania to change the situs to California.

(5) Dennis Fox, the named successor trustee who resigned and never acted as trustee for the DFT, filed, through his attorney, Jennifer Mihok, a Praecipe to Discontinue Attorney Geer's action with the orphans' court, purporting to be the trustee of the DFT. The orphans' court ordered the prothonotary not to take action on the praecipe. Appellants filed with the orphans' court a "Notice of No Subject Matter Jurisdiction" and attached their filing with the Superior Court of Los Angeles County, California. The orphans' court entered an order declaring Appellants' notice a nullity.

(6) Attorney Geer filed a motion requesting the court strike or nullify Appellants' situs filing in California and enjoin Mr. Fox from holding himself out as trustee of the DFT. The court deferred its ruling on this motion until its final decision on whether Attorney Geer was lawfully appointed trustee and remained trustee after the August 26, 2018, notification from Appellants that they removed Attorney Geer as trustee.

(7) Mr. Fox, still purporting to be trustee of the DFT, along with Appellants, filed a petition in the Superior Court of San Mateo County, California, asking the court to approve a retroactive distribution of all DFT assets and terminate the DFT. This was filed without any notice to Attorney Geer, the Nowlan Family Trust (which had been permitted to intervene below), and the orphans' court in Lawrence County, Pennsylvania. Appellants and Mr. Fox did not inform the San Mateo County court of the Los Angeles County order that found California did not have jurisdiction of the DFT and all recent administration of the DFT was conducted in Pennsylvania. Although the San Mateo County court initially granted the petition, the court subsequently withdrew the order and dismissed the petition with prejudice when it learned of the Los Angeles County order and pending Lawrence County case.

(8) The orphans' court found Attorney Geer was lawfully appointed trustee and the attempt to remove her was ineffective under Pennsylvania law. The Superior Court affirmed the orphans' court's decision. The orphans' court ordered that, from June 6, 2011, until the date of the order, the situs of the DFT was and remained in Lawrence County, Pennsylvania. Appellants timely appealed and the Superior Court affirmed on the following grounds:

  (a) The DFT provides, in part, that "a majority of the Beneficiaries may transfer the Trust situs to a more convenient jurisdiction."

  (b) The Pennsylvania Uniform Trust Act provides that the provisions of a trust instrument prevail over any contrary provisions of the Act. There are a number of mandatory rules, however, that the trust instrument must bend to, including the power of the court to take action and exercise jurisdiction as may be necessary in the interests of justice. The orphans' court found that the provision in the DFT must bend to the purposes of the Pennsylvania Uniform Trust Act because if it did not, it would make court supervision impossible.

  (c) The Superior Court of California, County of Los Angeles, held, in part that the principal place of administration of the trust has not been in California since long before Attorney Geer accepted the trusteeship. The principal place of administration is the usual place where the day-to-day activity of the trust is carried on by the trustee. The evidence demonstrated all these activities took place in Pennsylvania. Not all agreements which apply California law are subject to the jurisdiction of the California courts. Where the trust has no substantive connection with the state, there is no jurisdiction, even if it applies California law.

  (d) As the California court already held that it did not have jurisdiction over either the DFT or Attorney Geer as trustee, changing the situs to California would leave the DFT without any court supervision. Allowing the change in situs, as was attempted prior to the above-quoted Los Angeles County order, still would not give the California courts jurisdiction over Attorney Geer. It is vitally important for there to be court supervision over a trust and that if it permitted this transfer of situs, no court would have jurisdiction over the

DFT and the transfer would make court supervision impossible. While it is true that the provisions of a trust instrument prevail over any contrary provisions of the Pennsylvania Uniform Trust Act, those provisions must bend to the court as may be necessary in the interests of justice. The DFT terms with regard to situs must be followed, except where the exercise of the specific provision will defeat the purposes of the Pennsylvania Uniform Trust Act and makes court supervision impossible. If the situs was transferred to California, without a Pennsylvania Court's approval and without the consent of the Trustee, California would have no personal jurisdiction over the Trustee located in Pennsylvania and therefore would not have the ability to supervise the administration of the Trust as contemplated by the Uniform Trust Act, which is primarily mirrored in Pennsylvania's Uniform Trust Act.

(e) While the Beneficiaries have a right given to them by the Amended Trust document to transfer the situs to a more convenient jurisdiction, that right must be exercised only in conjunction with either the current Trustee submitting to the jurisdiction of California or pursuant to an Order of Court from the Court of Common Pleas of Lawrence County authorizing a change of situs. If the current Trustee is removed, the provision in the Amended Trust that allows the Beneficiaries to change the situs for their convenience will be given deference and they will not be required to show cause to justify a change in situs.

(f) The orphans' court was justifiably concerned that allowing the change of situs pursuant to the DFT's provision would leave the DFT, and, in turn, Appellants, to do as they please and without court supervision. The orphans' court's decision, therefore, was valid as it was in the interests of justice, not, as Appellants allege, pursuant to a new exception to the Pennsylvania Uniform Trust Act.

(g) The orphans' court is a court of equity and may decline to enforce express provisions of a trust when the party seeking enforcement has unclean hands. The unclean hands doctrine derives from the unwillingness of a court to give relief to a suitor who has so conducted himself as to shock the moral sensibilities of the judge, and it has nothing to do with the rights or liabilities of the parties. This doctrine applies where the wrongdoing directly affects the relationship subsisting between the parties and is directly connected with the matter in controversy.

(h) The doctrine of unclean hands also provides a basis for the orphans' court here to decline to enforce the situs change provision of the DFT. Appellants thrice attempted to thwart the power of the orphans' court below.

(i) Appellants petition in San Mateo County, California, without notice to Attorney Geer, the Nowlan Family Trust, or the orphans' court, was met with sanctions in Pennsylvania. The orphans' court had entered an order, requested by Appellants, enjoining any distribution of DFT assets prior to the filing in San Mateo County, California. After the filing in San Mateo County, California, Appellants were sanctioned, which was affirmed on appeal. As Appellants have unclean hands, the orphans' court had the authority to decline to enforce section the DFT situs provision, in addition to enforcing the interests of justice exception of the Pennsylvania Uniform Trust Act.

(j) Even if the orphans' court failed to consider, as Appellants' claim, the February 20, 2019, change of situs instrument, it was harmless because the orphans' court considered the Los Angeles County, California order of July 11, 2019, and the September 3, 2020, change of situs instrument which was filed with the Los Angeles County, California court on September 18, 2020. The September 3, 2020, change of situs instrument has substantially the same language as the February 20, 2019, change of situs instrument. As such, the orphans' court did not err by not expressly considering the February 20, 2019, change of situs instrument, as alleged by Appellants.

(k) In this protracted case, Appellants appealed from a January 11, 2022, order which held that Attorney Louise Geer was lawfully appointed Trustee of the DFT on June 6, 2011, and that their attempted removal of her as Trustee on August 26, 2018, was ineffective. That appeal was filed on January 21, 2022. It is undisputed that this was not an appeal from a final order. The January 11, 2022, order did not address Appellants' September 3, 2020, instrument purporting to change the situs to California nor did it address the September 18, 2020, filing in California. The orphans' court correctly held that it could continue to address this matter, along with other issues, that were not being raised on appeal with this Court at that time. The proceeding could, and did, continue without any prejudice to Appellants' rights.

b. ***Lofino v. Gigante,* 2024 U.S. Dist. LEXIS 16091 (S.D. Ohio 2024).** Mere request for removal of a co-trustee does not place the entire trust corpus into controversy for diversity jurisdiction purposes.

(1) Michael Lofino and Barbara Gigante were the co-trustees and the sole remaining beneficiaries of the Charles J. Lofino Trust ("Trust"). Gigante asserted that the Trust was valued at over 2.5 million dollars. Lofino claimed that Gigante's declining physical and mental health made her incapable of performing her duties as trustee. Lofino sued Gigante to remove her as co-trustee and to appoint a successor trustee in her place.

(2) Lofino was a citizen of the State of Ohio, where he was domiciled. Gigante was a citizen of the State of New York, where she was domiciled. Gigante removed the case to the Ohio federal court based on diversity jurisdiction. Gigante alleged that the parties are diverse and that the amount in controversy exceeded $75,000. Lofino timely moved to remand and argued that Gigante has not met the amount in controversy requirement because he stipulated that he is only seeking attorney's fees in an amount not to exceed $74,000 and is not seeking any compensatory damages. Gigante opposed, claiming that the amount in controversy requirement was satisfied because Lofino's stipulation is insufficient to guarantee the amount in controversy does not exceed $75,000 and the value of the economic right Lofino seeks to protect exceeds $75,000. Gigante argued that five values—in addition to Lofino's attorney's fees—should be included to determine the amount in controversy: (1) Gigante's trustee fees; (2) the successor co-trustee's potential trustee fees; (3) Gigante's attorney's fees; (4) Lofino's requested distribution of $800,000; and (5) the trust corpus of over $2.5 million.

(3) The federal district court remanded the case to the state probate court on the following grounds:

(a) Diversity jurisdiction exists where all plaintiffs are citizens of different states than all defendants, and the amount in controversy exceeds $75,000. Where, as here, a case is removed based upon diversity jurisdiction, the defendant bears the burden of pleading and proving—by a preponderance of the evidence—that the amount in controversy requirement is met. If the Court's subject-matter jurisdiction is uncertain, the Court must resolve all doubts in favor of remand.

(b) When a plaintiff is seeking non-monetary relief, the amount in controversy is measured by the value of the object of the litigation. The court must determine the amount in controversy from the perspective of the plaintiff, with a focus on the economic value of the rights he seeks to protect. The Sixth Circuit has never held that the costs imposed on a defendant can satisfy the amount in controversy requirement. Instead, the economic value of injunctive relief is an objective valuation of the plaintiff's future losses if he does not prevail. Additionally, statutorily authorized attorney's fees are included in establishing the amount in controversy. Because Florida law directs courts to award attorney's fees in actions regarding the exercise of trustee powers, attorney's fees are included in the amount in controversy calculation in this case.

(c) Lofino is seeking primarily non-monetary relief: the removal of Gigante as trustee and the appointment of a successor. He stipulated that he is not seeking any compensatory damages and does not seek to deny Gigante any trustee fees. Finally, he stipulated that he is seeking no more than $74,000 in attorney's fees. Therefore, the Court must determine the value of the litigation based upon Lofino's future losses if Gigante is not removed and any attorney's fees he would receive if he prevails.

(d) First, the value of the attorney's fees Lofino seeks is less than $75,000. Even assuming Lofino's stipulation by itself is insufficient to limit his monetary recovery, Gigante bears the burden of proof to establish by a preponderance of the evidence that the amount in controversy exceeds $75,000. Gigante has not shown that Lofino's attorney's fees are more likely than not to exceed $75,000, or even the maximum amount listed in Lofino's stipulation.

(e) Second, the value of Gigante's attorney's fees is not included in the amount in controversy. A defendant's costs are not used to satisfy the amount in controversy requirement. The value of the trustee fees that Gigante or the potential successor co-trustee could collect is not part of the amount in controversy. Lofino only seeks injunctive relief and attorney's fees. While removing Gigante and appointing a successor co-trustee could potentially affect the trustee fees that are ultimately paid out of the trust, this is merely speculative. Moreover, Gigante has not demonstrated the amount of trustee fees that could be paid out to Gigante or the successor.

(f) Neither the Court nor the parties could locate a case directly on point concerning whether the value of any potential future distributions of a trust contributes to the amount in controversy in an action to remove a trustee. However, speculative or collateral effects of injunctive relief are generally not included in calculating the amount in controversy. Although Gigante denied Lofino's request for a distribution of $800,000 from the Trust, it is merely speculative that a successor co-trustee would approve such a request. Lofino is not seeking to force Gigante to distribute any amount of money from the Trust; he is seeking to have her removed as co-trustee due to the alleged breach of her duties as trustee. Thus—resolving any doubt in favor of remand—future distributions of the Trust are not the economic value of the right Lofino seeks to protect and do not contribute to the amount in controversy.

(g) Finally, the circuits are split about whether a trust corpus contributes to the amount in controversy where removal of a trustee is sought, and the Sixth Circuit has not taken a position on the issue. While the District Court for the Western District of Kentucky takes the position that the trust corpus is the value of the object of the litigation in a case involving the removal and replacement of a trustee, this court is not bound by that interpretation. Lofino acts as a co-trustee of the Trust, and replacing the other co-trustee does not necessarily result in such drastic changes of power or put the entire trust corpus in dispute.

(h) The Third Circuit takes the position that the mere request for removal of a trustee does not place the entire trust corpus into controversy. That approach is appropriate in this case. Here, neither the corpus of the trust nor its beneficial ownership is in controversy in this litigation. Therefore, the trust corpus is not included in the amount in controversy calculation.

11. Fiduciary Appointment, Removal, & Succession

a. ***In re Otto Bremer Trust,* 2023 Minn. App. LEXIS 4 (2023); 2 N.W.3d 308 (Supreme Court of Minnesota 2024).** Trustee of large charitable trust removed for breaches of the duty of loyalty, taxable self-dealing, causing the trust to incur unnecessary expenses, injuring the trust's charitable reputation, refusing to disclose information to the attorney general, and eliminating a relationship with at least one distributee.

(1) Otto Bremer founded the Otto Bremer Trust (the "Trust") in 1944. The Trust is an express trust governed by a trust instrument (the "Trust Instrument"). The Trust functions as a charitable trust with no named beneficiaries. The Trust Instrument directs that "no part of the trust estate or income therefrom shall be used for any purpose except such as is charitable."

(2) Shortly before establishing the Trust, Bremer created a holding company for his investments in community banks called the Otto Bremer Company, now called the Bremer Financial Corporation ("BFC"). Bremer originally funded the Trust with shares from BFC. Paragraph 16 of the Trust Instrument instructs the trustees to retain the Trust's BFC shares and that these shares "may only be sold if, in the opinion of the [t]rustee, it is necessary or proper to do so owing to unfor[e]seen circumstances." At the time of the bench trial, the vast majority of the Trust's assets consisted of its BFC stock ownership and the Trust's total value was over $2 billion.

(3) When he founded the Trust, Bremer appointed three individual trustees. The Trust Instrument states that "[t]here shall not be more than 3 acting [t]rustees at any one time." The Trust Instrument grants the trustees the power to appoint their successors. Brian Lipschultz, Daniel Reardon, and Charlotte Johnson Reardon were the trustees.

(4) The Trust Instrument granted the trustees authority and discretion to determine the methods and processes for carrying out the Trust's charitable purposes. This includes discretion "to choose the purposes, objects, or institutions which further the Trust's purposes that shall receive aid from the Trust or be its beneficiaries." Since its founding, the Trust has granted more than $700 million to organizations to further the Trust's mission and its charitable purposes.

(5) Lipschultz used the Trust's assets for personal purposes. Lipschultz misused staff time, postage, and computer resources for non-Trust purposes. A Trust employee reported Lipschultz's personal use of the Trust's assets to the Trust's controller around September 2019. After confirming that Lipschultz misused the Trust's assets, the Trust hired an accounting firm to calculate the value of the misuse. The accounting firm determined that between 2017 and 2019 Lipschultz's misuse totaled $1,875. The calculation did not include the time the Trust paid Lipschultz while he worked on non-Trust matters. The accounting firm charged the Trust $4,762.80 for the review. The Trust incurred a tax on self-dealing under the IRS code. Lipschultz admitted that he used the Trust's resources for non-Trust purposes and that this constituted self-dealing under the IRS code. Lipschultz reimbursed the Trust $1,875. Lipschultz did not reimburse the $4,762.80 the Trust paid the accounting firm or the legal fees the Trust incurred in remediating the self-dealing.

(6) In February 2019, executives from BFC met with an investment banker to discuss a potential "merger-of-equals" opportunity for BFC with another company. BFC retained an investment bank to evaluate its strategic opportunities. In April 2019, the investment bank presented its analysis to the BFC board, which included the trustees. The investment bank identified four potential "strategic alternatives" for BFC: (1) continue with the status quo; (2) go public through an initial public offering; (3) pursue a merger; or (4) explore a BFC sale. After this meeting, the trustees, especially Lipschultz, expressed interest in selling. The rest of the BFC board did not want to pursue this option.

(7) The trustees and other BFC board members explored their favored routes for the next few months. Then, in July 2019, the trustees formally concluded it was necessary and proper to sell the Trust's shares in BFC as soon as reasonably practical due to unforeseen circumstances.

(8) In August 2019, tensions between the trustees and the other BFC board members increased. BFC's board convened a special board meeting to address BFC's strategic alternatives. After further deliberation, and over the trustees' objections, the BFC board voted to terminate

discussions about a sale and prohibited management from engaging in further sale discussions without explicit BFC board approval. The August 2019 meeting placed the trustees "in the awkward position of owning an asset that had become hostile to the idea of a sale at that time." Lipschultz worked closely with an investment-bank consultant (the consultant) to develop a plan to get around the "hostility" problem. Lipschultz and the consultant planned to replace the BFC board through a calculated sale of the Trust's nonvoting shares in BFC.

(9) The plan called for the Trust to sell enough nonvoting shares so that when investors who purchased the nonvoting shares converted them to voting shares, the Trust and the investors would collectively hold just over 50% of BFC's total voting shares. With the majority of the voting power, the Trust and the investors could vote to replace the BFC board.

(10) Lipschultz and the consultant expected a new board would be willing to reconsider BFC's "strategic alternatives," including the sale of BFC. Lipschultz purposefully sought out investors who were willing to incur the risks associated with a hostile deal. Lipschultz told the consultant he wanted smaller activist investor funds who "live for this kind of thing," because selling to them "would signal to the entrenched [BFC] management and [BFC's counsel] that we aren't f-cking around." In another text, Lipschultz stated they needed activist investors willing to replace the BFC board "ASAP." The consultant later commented to Lipschultz, "[y]ou told me don't bring me friendlies[,] . . . bring me real investors . . . that only care about making money and are willing to do whatever is necessary."

(11) Lipschultz became frustrated with Johnson, who did not share Lipschultz's enthusiasm for this plan. Lipschultz admitted it took Johnson some time to sign off on the plan due to the many known and substantial risks. Lipschultz sent several texts disparaging Johnson to the consultant. The consultant joked with Lipschultz about Johnson: "She should just give me her trustee's seat." Lipschultz responded: "That would be great. She could give it to the panhandler on the street in front of the office and even that would be better."

(12) In October 2019, the trustees sold 725,000 nonvoting shares of BFC stock, or 7% of the Trust's BFC holdings, to 11 separate investors at $120 per share. After the sale, BFC refused to register the conveyed shares to the investors that purchased them. When the trustees learned BFC refused to register the shares, Lipschultz anticipated the investors would join forces to sue BFC. Lipschultz texted the consultant on November 4, 2019: "I am frightened for BFC if they try to withhold shares from the new investors. I picture an aerial bombardment, the likes of which sleepy St. Paul has never seen." On November 7, 2019, Lipschultz texted the consultant: "I am looking forward to observing the carnage."

(13) Significant litigation ensued. BFC filed suit against the trustees on November 19, 2019. Several investors subsequently filed suit against BFC for its failure to register their purchased shares. Additionally, BFC shareholders sued the trustees. In a December 2019 text to the consultant, Lipschultz discussed investor F.J.'s intent to sue BFC. The next day, F.J. sued BFC.

(14) In a series of texts to the consultant, Lipschultz expressed frustration that some investors did not sue BFC. Regarding suggestions about the duration of the litigation, Lipschultz remarked: "The truth is [the Trust] can weather this storm for a long time. I've got years of reserves if absolutely necessary." Lipschultz admitted that by "years of reserves," he meant the Trust's assets available to fund legal fees.

(15) The Attorney General ("AGO") sued to remove the three trustees. The district court granted in part and denied in part the AGO's petition for interim equitable relief. The court of appeals affirmed the district court's decision regarding interim equitable relief.

(16) After the stock sale but before trial, Lipschultz made two phone calls to the CEO of Junior Achievement, a worldwide nonprofit that seeks to prepare young people for success in a global economy. The Trust provided grants to Junior Achievement in prior years, including $1

million in 2017 and a five-year $500,000 program-investment loan. The Trust was Junior Achievement's largest donor. In a November 2020 call, Lipschultz complained to Junior Achievement's CEO that Junior Achievement had not defended the trustees during their legal challenges with BFC and the AGO. Lipschultz told Junior Achievement's CEO that the Trust "expected that Junior Achievement would have gone to the governor or to the attorney general" to tell them that the AGO's investigation of the Trust was "government overreach." Lipschultz told Junior Achievement's CEO that she needed to go to her board and figure out how Junior Achievement would prove that it was the trustees' partner if Junior Achievement wanted to obtain future funding. Thereafter, Junior Achievement submitted a three-year renewal request for a $1.2 million grant. In July 2021, the Trust approved the request. But the new grant was significantly delayed compared to previous years, and Junior Achievement missed nearly a full fiscal year of funding. This delay occurred concurrently with the COVID-19 pandemic impacting other revenue streams, which forced Junior Achievement to reduce its workforce by 40% to save costs.

(17) In August 2021, approximately one month before the trial began, Lipschultz and Junior Achievement's CEO had another phone call, during which Lipschultz expressed anger and frustration that Junior Achievement intended to honor the BFC board chair at an upcoming event. Lipschultz claimed that the board chair had sued the trustees personally and was trying to "dismantle" the Trust. Lipschultz told Junior Achievement's CEO that the decision to honor the BFC board chair "would damage [their] relationship moving forward." Junior Achievement's CEO testified that Lipschultz made her feel "disrespected and bullied." She also testified that Lipschultz treated her "more poorly than [she had] been treated by a donor in [her] professional career."

(18) After the August call, Junior Achievement's CEO emailed several Junior Achievement board members. The Junior Achievement board instructed the CEO to cease one-on-one discussions with Lipschultz to protect her from "very difficult, very hostile conversations." Later, the Junior Achievement board voted to "return the $1.2 million recently funded grant from [the Trust]." The $1.2 million represented 10% of Junior Achievement's annual revenue. That decision was documented in a letter from Junior Achievement's board chair to the Trust stating: "Moving forward, we do not believe a continued relationship aligns with either organization's expectations. Therefore, we are returning your recent grant award of $1.2 [million] with this letter."

(19) On multiple occasions during the AGO's investigation and litigation, the AGO asked the trustees to identify all named potential successor trustees. Lipschultz initially claimed he had not named one. A few weeks before trial and in support of a motion, the trustees' counsel attached a copy of Lipschultz's successor appointment, with the successor's name redacted. Lipschultz refused to provide an unredacted copy because he worried about potential publicity affecting his nominated successor. Lipschultz identified the successor for the first time at trial while on the witness stand.

(20) The district court granted the AGO petition to remove Lipschultz and denied the AGO petition to remove Reardon and Johnson.

(21) Lipschultz appealed, and the Court of Appeals affirmed on the following grounds:

(a) Even when a trustee is given complete discretion, the trustee cannot exercise that discretion in a manner that violates a fiduciary duty owed to the trust's beneficiaries. The trustees of a charitable trust are expressly prohibited by the Minnesota Charitable Trust Act from engaging in an act of "self-dealing," as defined by the IRS code, that could give rise to liability for the tax imposed by the IRS code. Here, Lipschultz admitted he used the Trust's assets for non-Trust purposes probably from the day he arrived at the Otto Bremer Trust. Lipschultz admitted that his use of the Trust's resources for non-Trust purposes constituted self-dealing under the IRS code. This self-dealing caused the Trust to incur a tax on self-dealing under the IRS code. Lipschultz's admitted misuse of assets is prohibited under the general duty of loyalty and under the Charitable Trust Act.

(b) Although the district court noted that Lipschultz's misuse did not cost the Trust a great deal when compared to the Trust's $2 billion in value, it did determine Lipschultz's actions violated the strict prohibitions against self-dealing. And, even assuming that Lipschultz's personal use of the Trust's assets was "de minimis," there is no "de minimis defense" to whether self-dealing violates the duty of loyalty.

(c) During his conversations with the consultant, Lipschultz displayed a crude, vulgar, and otherwise offensive brashness that has no place in the charitable world. These conversations included Lipschultz's desire to find aggressive investors, rude comments about BFC's CEO, and disparaging statements about Johnson. The communications, coupled with Lipschultz's aggressive pursuit of the sale, were emblematic of Lipschultz's animosity and vindictiveness towards BFC and his co-trustees. Lipschultz's hostility went beyond mere attitudes and instead resulted in actual vindictive acts of administration. Lipschultz allowed his own personal interests, animosity, enmity, or vindictiveness to impact his decisions and behavior as a trustee of one of the region's most important charitable institutions. Lipschultz sought out aggressive investors who "live for" hostile takeovers because he wanted to show BFC management the Trust was not "f-cking around." Once the many lawsuits were filed, Lipschultz expressed a willingness to use extensive Trust resources to fund continued litigation. Simply put, Lipschultz put his own interests before that of the Trust.

(d) Lipschultz's abusive treatment of Junior Achievement's CEO caused a rift between the Trust and a longtime beneficiary. And that Lipschultz's actions caused a significant delay in Junior Achievement's receipt of its grant funds. Lipschultz's behavior led to Junior Achievement returning its grant funds and severing its relationship with the Trust. Lipschultz's actions caused a serious breakdown in communications between the Trust and a beneficiary. This breakdown interfered with the proper administration of the Trust by severing a multi-year relationship with a beneficiary.

(e) Trustees must disclose fully, frankly, and without reservation all facts pertaining to the trust. A serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust is a particularly appropriate circumstance justifying removal of the trustee. The AGO has the rights of a qualified beneficiary with respect to charitable trusts. Lipschultz acted in a deceitful and secretive manner when the AGO asked him to disclose his successor's identity. Lipschultz sought to hide [his successor] nomination from the AGO and would not reveal the nomination until he was forced to do so on the stand at trial.

(f) A district court may remove a trustee if the court determines that removal of the trustee best serves the interests of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively. Lipschultz's persistent improprieties supported his removal as serving the best interests of the beneficiaries and the Trust. Lipschultz continually breached his duties to the Trust's beneficiaries. Lipschultz caused the Trust to incur unnecessary expenses, injured the Trust's charitable reputation, refused to disclose information to the AGO, and eliminated a relationship with at least one beneficiary.

(22) On appeal, the Minnesota Supreme Court affirmed on the following grounds:

(a) Lipschultz was removed as a trustee under the Minnesota Uniform Trust Code, which allows the court to remove a trustee if the trustee has committed a serious breach of trust. The term "serious breach of trust" is not defined within the statute or generally in the Minnesota Trust Code, so the court looks for guidance to the official comments to the Uniform Trust Code. The comments to Uniform Trust Code section 706 provide that "a serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct" or "a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together." The district court removed Lipschultz under the comment's second definition of "serious breach," finding that Lipschultz should be removed because he committed "a concerning series of breaches . . . that collectively constitute a serious breach of trust." The court of appeals affirmed on the same basis.

(b) The court will less readily remove a trustee named by the settlor than one appointed by a court. But Lipschultz was appointed by his own father—not by settlor Otto Bremer. Lipschultz is the third generation of his family to serve as a trustee for the Trust, but furthering Trustees' family legacies is not a Trust purpose.

(c) Although courts give deference to a settlor's intent, this dispute is about a trustee's alleged breach of trust—which cannot have been the settlor's intent. The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries cannot be superseded by a trust instrument. Consequently, the intent of the settlor does not prevent a court from removing a trustee for breaching fiduciary duties. Accordingly, the district court did not err by not considering the settlor's intent that Lipschultz be a trustee.

(d) Lipschultz contended that the court might "divine a general rule" from this court's previous trust cases defining a "serious" breach of trust as one that works "material and substantive harm" on the trust. There is, however, no compelling reason why the court should "divine a general rule" when it can simply apply the persuasive comments of the Uniform Trust Code to determine whether a series of smaller breaches, when considered together, amount to a serious breach. There is no need to deviate from the instructive comments of the Code and ignore its second definition of a serious breach.

(e) Lipschultz also suggested that the district court created, and the court of appeals affirmed, a new "no place in the charitable world" standard for removing a trustee. But nothing in the district court's order suggests that the "no place in the charitable world" language was a standard that the court was applying, rather than merely a description of Lipschultz's behavior. The district court and the court of appeals correctly stated and applied the standard for removal of a trustee.

(f) Nothing about the district court's order suggests that it assumed that removal would be proper in the absence of a serious violation. In its order, the district court references the Restatement (Third) of Trusts, recognizing that "not every breach of trust warrants removal of the trustee, but serious or repeated misconduct . . . may justify removal." The district court also acknowledges that removal of a trustee is a "drastic action" that is not always appropriate. The court's order shows that it fully appreciated the severity of removing a trustee and properly applied the statutory requirements to determine whether removal was appropriate.

(g) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. The district court removed Lipschultz because his repeated improprieties constituted a serious breach of trust. Lipschultz engaged in a series of breaches that collectively constitute a serious breach of trust. Lipschultz's breaches were a series that cumulatively justify removal.

(h) The first in the series of breaches is Lipschultz's admitted self-dealing, his personal use of Trust resources. The duty of loyalty prohibits a trustee from putting their own interests above those of the beneficiaries, and no rule is more fully settled than that which forbids a trustee's dealing with himself in respect to trust property. Minnesota law specifically prohibits trustees of a charitable trust from engaging in acts of self-dealing that could give rise to liability for the tax imposed by the IRS Code. Lipschultz's self-dealing not only could, but did, give rise to federal tax liability. There is no "de minimis defense" to whether self-dealing violates the duty of loyalty. To establish a breach for self-dealing, no fraud, in fact, need be shown by the beneficiaries, and no excuse can be offered by the trustee to justify such transactions. Even if the cost of Lipschultz's misuse was minor in comparison to the $2 billion value of the Trust, he still committed self-dealing, by his own words, "probably from the day [he] arrived at the Otto Bremer Trust" and engaged in behavior that exposed the Trust to IRS tax liability. From using his assistant—who was employed by the Trust—to accomplish personal, familial, and business-related tasks, to using the Trust's address for his own business, Lipschultz repeatedly placed his own priorities before those of the Trust. Even if the district court would not have removed Lipschultz for this behavior alone, it is a part of a concerning series of breaches that may justify removal.

(i) The most concerning of Lipschultz's breaches of trust was his breach of the duty of loyalty when interacting with Junior Achievement, a Trust grantee. The duty of loyalty prohibits a trustee from placing "the trustee's own interests above those of the beneficiaries." Lipschultz breached the duty of loyalty when he "misused grantmaking power to further his own personal objectives and resentment." At worst, his actions could be reasonably interpreted as threats against future grants because Junior Achievement was honoring the Bank's board chair. At best it was abusive treatment of a grantee for operational decisions unrelated to any legitimate charitable purpose of the Trust. Lipschultz's conduct did harm Junior Achievement: it caused the organization to receive delayed funding during a critical time, return a $1.2 million grant, and sever its relationship with the Trust, which had previously been the organization's largest donor.

(j) It was the responsibility of Lipschultz, and no one else, to conduct himself in accordance with the duties of a trustee of a well-respected charitable trust. Lipschultz failed to meet this standard when interacting with Junior Achievement.

(k) His conduct reflects a breach of the loyalty more broadly owed "to the accomplishment of purposes beneficial to the community," and for which the Attorney General is empowered to petition as the representative of the community. The district court did not abuse its discretion when it based its removal of a trustee of a charitable trust on a breach of the duty of loyalty when the trustee used his position of power to intimidate a grantee on matters unrelated to any charitable purpose.

(l) The Attorney General, who has the rights of a qualified beneficiary as to a charitable trust, requested information regarding Lipschultz's successor's identity. Lipschultz noted that trustees may choose not to comply with the duty of information when it is unreasonable under the circumstances and contends that delaying revealing the identity of his successor was reasonable—he feared that publicity would negatively impact the successor. Lipschultz's reasons for not revealing his successor's identity are not valid reasons to be evasive about a topic that the Attorney General's Office has every right and reason to explore. Because Lipschultz was one of three trustees of a massive charitable trust, it was imperative for the Attorney General's Office to ascertain the identity of his named successor. Further, Lipschultz did not merely delay revealing his successor's identity but affirmatively lied about having a named successor. Accordingly, the court of appeals correctly concluded that the district court did not abuse its discretion when it found that Lipschultz breached the duty of information and considered this breach as part of a series of breaches justifying removal.

b. ***Pollock v. Mullins,* 2024 Ohio 3423 (Court of Appeals of Ohio 2024).** Breach of the duty to inform under the UTC is a serious breach of trust justifying removal of trustee.

(1) Larry R. Mullins was married to Roger Glass, who died in August 2022. Prior to his death, Glass executed various estate planning documents including a will and two trusts. Glass first

executed a February 2022 will which appointed Mullins as executor. The will devised Glass's residuary estate to Mullins.

(2) Glass also executed a "Fourth Amended and Restated Revocable Living Trust Agreement" ("Living Trust") on March 22, 2022. According to Schedule A attached to the trust, the trust estate consisted of a mix of voting and non-voting stock in Marene, Inc., as well as an Ameriprise Brokerage Account. The beneficiaries of the trust were Roger Glass's nieces, Kristen Pollock, Elizabeth Pollock, and Meredith Pollock. Upon the death of Roger Glass, Mullins became the trustee of the Living Trust. Relevant hereto, the trust stated: "Since the stock being distributed to the beneficiaries of the Roger S. Glass Stock Trust is closely-held corporate stock which is not readily liquidated or marketable or convertible to cash, it is the obligation of the Trustee of this Trust to pay all applicable federal estate taxes which are attributed to the value of the stock included as part of the Grantor's taxable estate. The Trustee shall use the funds in the Trust Estate to pay all applicable estate taxes, costs of administration, debts and claims prior to distribution pursuant to paragraph B. (B) Upon the Grantor's death, and after payment of all applicable taxes, claims of administration, debts and expenses, the Trustee shall distribute the Trust Estate to the Grantor's nieces, to-wit, Kristen Pollock, Elizabeth Pollock, and Meredith Pollock, in equal shares, or to the survivors of them."

(3) Glass also executed the Roger S. Glass Stock Trust ("Stock Trust") on March 22, 2022. Under that trust, upon his death, Glass's sister Carol Pollock became the trustee. The trust provided that the Marene Inc. stock would be held as a separate Trust solely for the benefit of Glass during his lifetime. The trust further provided that upon his death, the voting stock would be distributed in equal shares to Kristin and Elizabeth Pollock, and the non-voting stock would be equally distributed to Kristin, Elizabeth, and Meredith Pollock. At some point following the death of Roger Glass, Mullins made a determination that the Marene stock had not been transferred into either trust and that it had become a part of Glass's estate, which thus passed exclusively to Mullins.

(4) Carol Pollock and her three daughters ("the Pollocks") filed suit against Mullins for specific performance, injunctive relief, damages, and removal of Mullins as trustee of the Living Trust. Mullins filed a counterclaim seeking a declaratory judgment that he was the sole beneficiary of Glass's 2022 will, that the shares of Marene stock passed through the estate, and that, as such, he was the legal owner of those shares. On September 23, 2023, the Pollocks filed a motion to remove Mullins as trustee of the Living Trust. Following the hearing, the probate court issued a judgment removing Mullins as trustee.

(5) Mullins appealed and the court of appeals affirmed on the following grounds:

   (a) Mullins claimed the probate court violated his right to due process by permitting the Pollocks to raise issues during the hearing that were not contained in the motion to remove him as trustee. Specifically, Mullins contends the removal motion, including briefing, was based on the alleged failure of Mr. Mullins to transfer the Marene Shares despite the ownership issues. However, at the later Removal Hearing, the Pollocks introduced the New Arguments surrounding Mr. Mullins's alleged failure to provide the beneficiaries a copy of the 2022 Revocable Trust and information on the Ameriprise account. In conjunction with this argument, Mullins contends that the court erred by failing to consider the evidence set forth in his post-hearing brief, which he claims rebutted the allegations surrounding whether he had provided the beneficiaries with information about the trust and the Ameriprise account.

   (b) The complaint, which expressly sought to have Mullins removed as trustee, stated that Mullins had failed to keep the beneficiaries properly informed about the administration of the trust and the material facts necessary for them to protect their interests. It further alleged that Mullins had violated his duty to notify the beneficiaries of his acceptance of the trusteeship and his duty to provide them with his contact information. Finally, the complaint alleged that Mullins had failed to notify the beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report.

(c) Although the motion to remove did not cite the above-referenced statutory duties, it did state that Mullins had violated his duties to the trust beneficiaries. It further stated that he had "persistently failed" to administer the trust and that he had shown that he did not intend to perform the duties imposed by law upon trustees. The motion also stated that Mullins had committed a breach of trust.

(d) The Pollocks' argument regarding failure to keep beneficiaries informed was not new or surprising. The motion to remove contained language sufficient to inform Mullins of the claim that he had failed to meet his duties as trustee. Further, the complaint set forth with specificity the duties Mullins allegedly failed to fulfill. Thus, Mullins's claim that he was ambushed by "new" arguments lacks merit. Moreover, Mullins, as trustee, should have been aware at the time of the hearing, and been able to confirm, whether he had complied with his statutory duties as trustee. The law imposes statutory duties upon trustees, and any trustee that argues otherwise probably should not be serving as a trustee.

(e) Mullins's claim that the court should have considered the rebuttal evidence raised in his post-hearing brief is without merit. Further, even had the court considered his "rebuttal" evidence, there was nothing in the post-trial brief or the affidavit attached thereto to support the claim that Mullins had complied with his statutory duties to the beneficiaries.

(f) A breach of trust occurs when a trustee violates a duty owed to a beneficiary. In determining what constitutes a "serious" breach of trust, this court has noted that the term "serious" is not defined and there is scant case law discussing the term. The Ohio "serious breach of trust" reason for removal of a trustee is the same as the uniform code. The official comment to the 2006 version of the Uniform Code states: "Not every breach of trust justifies removal of the trustee. The breach must be 'serious.' A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee."

(g) Evidence was presented that Mullins, as trustee, had failed to advise the beneficiaries about the existence of the trust or their right to request a copy of the trust document and the trustee's reports. He failed to provide them with notification of his acceptance of the trusteeship or his contact information. He further failed to keep them "reasonably informed about the administration of the trust" or of any material facts necessary for them to protect their interests. Although Mullins argues that both Carol Pollock and the attorney for Marene were aware of all the above, there is no indication that the actual beneficiaries were provided such information.

(h) It is not even clear whether Mullins has taken any steps in the administration of the trust. At the very least, Mullins does not contest that the Ameriprise account is an asset of the trust. Thus, regardless of the dispute regarding the Marene stock, he should have taken steps to administer this asset. Yet Mullins was unable to provide information regarding that account other than to testify that it was being held by his financial advisor. He presented no competent evidence that he had taken any steps to provide the beneficiaries any information about that account.

(i) Mullins failed to meet his statutory duties as trustee. The probate court abused its discretion in removing him as Trustee of the Living Trust.

c. ***In re Judith C. Rolenc Revocable Trust,* 2024 Iowa App. LEXIS 444 (Court of Appeals of Iowa 2024).** Court rejects attempt to remove trustee and appoint bank as successor.

(1) Scott Rolenc appeals the district court's order recognizing his brother, Steve Rolenc, as successor trustee of their mother's trust. Upon review, we affirm the court's order.

(2) This family and its various entities and conflicts mired the district and appellate courts for years. This particular case involved the district court's order recognizing a successor trustee of Judith ("Judy") Rolenc's trust. In reaching its decision, the district court took judicial notice of two other case files.

(3) In 1996, Judy entered into a Revocable Trust Agreement, which declared Judy as the settlor and trustee of her private trust. The trust identified Ronald Rolenc as Judy's husband and named their three children as equal beneficiaries upon the death of Judy and Ronald: Scott Rolenc, Steven ("Steve") Rolenc, and Stanford ("Stan") Rolenc. The trust designated Ronald successor trustee. Stan was designated as Ronald's successor trustee; Steve was designated as Stan's successor trustee; and "a national or state bank selected by a majority of the income beneficiaries" of the trust was designated as Steve's successor trustee. Judy executed an amendment to the trust in 2008, which did not amend the successor-trustee provisions.

(4) Ronald died in 2016. Upon his death, Judy was appointed trustee of Ronald's trust. In June 2017, Judy filed a First Amended and Restated Revocable Trust Agreement, which designated Stan and Steve as successor co-trustees. If either Stan or Steve was unable to serve as trustee, then the remaining designated successor co-trustee was designated to serve as sole successor trustee. If neither Stan nor Steve was able to serve as trustee, then a bank or trust company authorized under state or federal law to conduct trust business, selected by a majority of the income beneficiaries was designated successor trustee. In December 2017, Judy filed a Second Amended and Restated Revocable Trust Agreement that did not amend those successor-trustee provisions.

(5) In January 2020, upon the parties' agreement that Judy was not able to act as successor trustee of Ronald's trust, the court entered an order appointing Steve successor trustee of Ronald's trust, despite the terms of Ronald's trust designating Scott as successor trustee. Specifically, the court found that, given the various lawsuits filed by Scott involving the trust, his mother, and/or his brother Stan, a conflict of interest exists and allowing Scott to serve as successor trustee is not in the best interest of the trust or the beneficiaries. Instead, the court appointed Steve, who had not been involved in any litigation to date and was named as a successor trustee in the trust document. Scott appealed the court's order but later dismissed his appeal.

(6) In October 2020, the district court determined Judy was not competent. Stan and Steve began acting as successor co-trustees under the terms of Judy's trust. When the trust became too "cash poor" to pay for litigation expenses it was incurring, Steve and Stan determined the best thing for Judy would be to liquidate some of the trust's farmland because the farm ground was worth more than anything. To ensure the property was sold at fair market value, they decided to take it to auction. Scott was the highest bidder. The brothers signed a contract for Scott to purchase the farmland, but Scott refused to close on the transaction, essentially making his own injunction on the property because the court would not grant him an injunction to stop Steve and Stan's sale.

(7) Steve and Stan petitioned for limited trust supervision requesting the district court recognize them as the present co-trustees. Scott objected, claimed the trust was a result of undue influence, fraud, duress, or mistake, and asked that a bank be appointed as trustee. The court entered an order recognizing Steve as successor trustee of Judy's revocable trust. The court found it would be inappropriate for Stan to serve in this role due to his involvement in litigation

involving other family members or business entities. Scott appealed and the court of appeals affirmed on the following grounds:

(a) This action is a little more complicated than a simple appointment of a successor trustee to Judy's trust. Although the district court's order was framed as an order appointing successor trustee, upon the court's previous determinations in January 2020 that Judy was not able to act as successor trustee of Ronald's trust and even more definitively in October 2020 that Judy's "present physical and emotional health preclude her from making any decisions concerning her finances," Steve and Stan were appointed as successor co-trustees of Judy's trust. Under the trust terms, at the time it was determined Judy was not competent, and therefore unable to properly administer the trust, Steve and Stan became successor co-trustees.

(b) Iowa courts have the authority to remove and replace trustees when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries. While courts have a wide latitude of discretion in such matters, they consistently decline to order removal of a trustee unless such action is clearly in the best interests of the trust and its beneficiaries. The power to remove a trustee should be used only when the objects of the trust are endangered. A court is less likely to remove a trustee named by a settlor, as opposed to one appointed by the court.

(c) Scott claimed Steve should not be successor trustee for the same reasons Stan was not appointed successor co-trustee. To fully understand why Stan was not appointed co-trustee the court looked back to its decision of the same question relating to Ronald's trust (in which the court denied Scott's request for appointment as successor trustee and instead appointed Steve). There, the court stated: "Iowa courts have the authority to remove and replace a trustee when there is sufficient reason to do so to protect the best interest of the trust and its beneficiaries. Given the various lawsuits filed by Scott involving the trust, his mother, and/or his brother, this Court finds a conflict of interest exists. Allowing Scott to serve as successor trustee is not in the best interest of the trust or the beneficiaries. Perhaps once the litigation has ended, it would be appropriate to revisit the same. In the meantime, Steven will serve as successor trustee. He has not been involved in any litigation to date and as noted, was named as a successor trustee in the trust document."

(d) The court denied Stan's request for appointment as successor co-trustee of Judy's trust, stating: "Although not identical, the arguments presented for each party are similar to the same considered in the appointment of a successor trustee for Ronald's trust. Steve and Stan are now asserting the argument made by Scott as to honoring the desires of their mother to appoint them as co-trustees and Scott is arguing his brothers should not serve due to conflicts of interest and/or failure to properly administer Ronald's trust. In considering the appointment of successor trustees, Judy's intent as to who the successor trustee(s) should be is clearly indicated throughout Exhibits 1A through 4A. Typically, this court would follow the terms of a trust document concerning the appointment of a trustee and/or successor trustee. This court will look at Stan and Steve independently of one another in determining if either or both should continue serving in this role. Concerning Stan, this court agrees with Scott that it would be inappropriate for Stan to serve in this role. Scott is accurate in his argument that this court has previously commented in other cases as to Stan's suspect actions and questionable dealings related to Red Oak Diesel Clinic. Further, many of the lawsuits filed by Scott are related to the conduct of Stan. Stan certainly did not initiate that litigation, but he is intimately involved in it. His situation now is no different than Scott's when this court determined it was not appropriate for Scott to serve as successor trustee of Ronald's trust. As such, Stan will not serve as a successor trustee."

(e) Scott claimed that Steve and Stan acted together as successor co-trustees in attempting to enforce the auction of the farmland, and Steve has the same conflict as Stan. The reason Steve and Stan determined the trust needed to sell farmland was to produce cash to pay for litigation fees, which were spurred in large part by Scott. Steve and Stan had nothing to gain by depleting trust assets, as they are the only named beneficiaries of Judy's trust.

(f) Scott offered no evidence, other than his own testimony, to support a finding Steve comingled or depleted trust assets. Steve believed it would be punishment to Judy's trust if a bank was ordered to serve as successor trustee due to the costs of getting a new trustee and its counsel up to speed on all the litigation, and testified as follows: "The cost we would have there and any efficiency of getting anything done, getting the lawyers up to speed in this and all future proceedings, which in my estimate will be twenty of them, you know. I found myself a long time ago when I told my dad back in the—been in the '80's that all this would end up in a lawsuit someday. I was wrong because it's going to end up in twenty of them. And having a bank's attorney going through all this punitive to my mom's estate."

(g) Steve is acting in his capacity as successor trustee and conservator to enforce the sale of the farm ground as a result of the auction. Ironically, Scott is critical of Steve's failure to act in his fiduciary capacity as noted above and offers the same as a reason to remove him as successor trustee. In this instance, Scott is now arguing that because of Steve's actions as trustee to enforce the sale of the farm ground, he should be removed. Scott's situation was completely different in that Scott filed lawsuits against the trust. Steve is acting on behalf of the trust. There is no conflict precluding him from continuing to serve as successor trustee.

d. ***In re Est. of Gusoff,*** **2024 Del. Ch. LEXIS 178 (Court of Chancery of Delaware 2024).** Executrix removed for co-mingling assets and failing to respond to court requests for information about estate and decedent's law practice.

(1) Gary M. Gusoff (the "Decedent") died on September 19, 2018, survived by his wife, Linda Rich Gusoff, his two daughters Gloria L. Gusoff and Valerie J. Gusoff, and others identified in his last will and testament. His will was admitted to probate and his wife (the "Executrix") was issued letters testamentary.

(2) The Executrix filed an inventory and her first accounting. The Decedent's daughters filed exceptions to the accounting asserting that: (1) the Executrix's valuation of the Decedent's law practice was incorrect; (2) the Executrix was commingling or misappropriating estate assets; and (3) the Executrix should be removed (the "Exceptions"). The Register of Wills mailed the Exceptions to the Executrix, advising the Executrix of the deadline to respond, but she did not timely respond.

(3) The Executrix submitted paperwork to the Register of Wills (the "Submission"), the Register of Wills invoiced the Executrix for her filing, and, for a time, the filing fees went unpaid.

(4) The Submission was 387 pages long and difficult to comprehend, but provided that: (1) the Decedent's law practice had a checking accounting of $500,000.00 and other assets of $92,000.00, purportedly supporting the valuation of $750,000.00 reflected in the Executrix's inventory and first accounting; (2) commingling was explained as "checks belong to wife & the Decedent"; (3) outstanding claims and funeral expenses will be paid after "trial in Pennsylvania"; (4) the estate has been reported to police agencies in Delaware and Pennsylvania; and (5) an attorney is assisting with the estate and trial.

(5) The rest of the voluminous Submission includes; (1) the Executrix's complaints to the Consumer Financial Protection Bureau; (2) bank statements from Bank of America, PNC, Firstrust, Wells Fargo, and BB&T; (3) a notice of deficiency regarding income taxes; (4) a notice from the Social Security Administration regarding overpayment of benefits to the Decedent

for the benefit of the Executrix; (5) copies of checks; (6) communication regarding reconciling the Decedent's business accounts and clearing out his office; (7) an email chain between the Executrix and Encompass; (8) a Philadelphia police report, (9) letters between the Executrix and Joseph Cardona and from the Executrix to others about Joseph Cardona; (10) lists of the Decedent's cases dated July 7, 2015 and February 8, 2018; (11) an escrow report from the Decedent's law firm; (12) various dockets relating to the Decedent's cases and clients; (13) letters and emails from or with the Decedent relating to his law practice before his death; (14) a response to the Exceptions dated May 8, 2023 (the "Response"); (15) a letter addressed to Register of Wills staff; (16) emails from the Register of Wills to the Executrix explaining deficiencies in the accounting; and (17) the Decedent's 2015 W-9.

(6) Executrix blamed others for her delay and the sloppiness of the accounting. She conceded that she used estate money for personal expenses, although averred that the money was "married property."

(7) The court warned her about her failure, despite numerous reminders, to pay the filing fee for the Submission. The Executrix paid the outstanding fees and filed another set of exhibits, totaling 190 pages, with a cover page and attachments, many of which appear largely duplicative of the Submission (the "Second Submission," with the Submission, the "Submissions").

(8) The court removed the Executrix as personal representative, did not release her from her bond so she remained answerable for her service, on the following grounds:

(a) Where an executor or administrator neglects official duties, the Court of Chancery may remove the executor or administrator from office.

(b) The Submissions do not answer or resolve the concerns the court raised with the Executrix and ordered her to address. The Submissions do not provide any explanation, let alone persuasive explanation, why the Executrix commingled funds in the estate checking account, why she used the estate funds for her own personal expenses, what steps she has taken to pay the outstanding claims and unpaid funeral expenses, and what steps she has taken to protect the monetary and personal property bequeathed to all the heirs. The Executrix has also failed to provide a copy of the court docket from Pennsylvania, despite an explicit direction to do so. It appears, instead, that there is no ongoing case in Philadelphia, despite the Executrix's representations.

(c) The Executrix is not an appropriate person to continue administering the Decedent's estate. There is also a concern with the Executrix's failure to timely pay the Register of Wills' invoice for docketing her filings.

(d) The administration of this estate has been protracted, delayed, and frustrated by the Executrix. The Executrix has tried to bury the Court and the Register of Wills in paperwork. But the Executrix's voluminous filings fail to convince the court that the Executrix is ready, willing, and able to probate this estate properly and promptly for the benefit of all heirs.

e. ***Maloney v. Bryant (In re Est. of Eberhard),* 332 Ore. App. 745 (Court of Appeals of Oregon 2024).** Drafting lawyer removed as personal representative due to conflict of interest arising out of scrivener's error in drafting decedent's will, which gave rise to a potential malpractice claim against lawyer.

(1) Ronald Bryant and decedent, Robert Eberhard, were close friends, and Bryant served as decedent's lawyer and business partner. Through the years, Bryant drafted various iterations of decedent's will and those of his wife, Kaye Eberhard. Decedent and Eberhard had one surviving child, Holly Maloney ("petitioner"), and one grandchild, J.D. ("Maloney's son"). The operative wills for both decedent and Eberhard nominated Bryant to act as the personal representative of their respective estates and appointed him as the trustee of all the trusts created by the wills.

(2) Prior to Eberhard's death, the wills and codicils for decedent and Eberhard each contained provisions that allowed the surviving spouse to disclaim any portion of the predeceased spouse's assets. Those disclaimed assets would pass to a credit shelter trust. Upon the death of the surviving spouse, the credit shelter trust would terminate and distribute $100,000 to J.D.'s trust and the remainder to Maloney's trust. Alternatively, if the disclaimer provisions were inapplicable (either because both spouses died contemporaneously or because the other spouse had already died), the codicils provided a bequest of $100,000 to the J.D. Trust and of all remaining property to the Maloney trust. In short, the wills and codicils contemplated that the J.D. Trust would receive a total of $200,000 and the Maloney trust would receive the remainder.

(3) Eberhard died before decedent in 2016, and decedent disclaimed some of her assets for tax purposes. Those disclaimed assets passed to a credit shelter trust, which Bryant served as the named trustee.

(4) In the wake of Eberhard's death, decedent asked Bryant to draft a new will. That will omits, among other provisions, the disclaimer provision (which was no longer applicable since Eberhard had predeceased decedent) and the bequest of $100,000 to the J.D. Trust.

(5) Decedent died testate in 2017, which triggered the termination of the credit shelter trust. Bryant incorrectly distributed the credit shelter trust's assets. Specifically, he distributed all the assets to the Maloney trust and did not distribute anything to the J.D. Trust. Not only did Bryant fail to distribute the credit shelter trust's assets correctly, but he also filed with the court a petition for partial distribution from decedent's estate to the J.D. Trust, declaring that the J.D. Trust was a beneficiary of decedent's will and that a $100,000 distribution from decedent's estate to the J.D. Trust can be made at this time. However, decedent's operative will no longer contained any such bequest to the J.D. Trust. When Maloney asked Bryant about the mistaken distribution to the J.D. Trust, Bryant's attorney sent a letter explaining that Bryant had mistakenly omitted the $100,000 bequest to the J.D. Trust from decedent's will.

(6) Petitioner Maloney sought to remove Bryant as personal representative. On March 25, 2021, the parties appeared for a hearing on the petition to remove Bryant as personal representative. Despite the court's initial refusal to allow the hearing to continue to the next day, the court eventually told Maloney to conclude her case by the end of the day so that Bryant would have the following morning to put on his case. The following morning, Bryant called two witnesses before he testified himself. In the middle of his own direct examination, the parties had run out of time and the court cut the examination short, allowing only a brief cross-examination and redirect. Bryant argued that he should have more time to complete his case, and the court instructed the parties to schedule a new date. Almost two months later, the hearing continued before the same judge on May 18, 2021. Bryant sought to resume his testimony on direct examination. Maloney objected, asserting that she had already completed her cross-examination. Bryant reminded the court that his direct examination had been cut short due to scheduling issues and argued that fairness required that he be allowed to continue his direct examination. The court denied the request, explaining that its notes reflected that Bryant had already completed his direct examination. Importantly, the court did allow Bryant to continue his redirect examination.

(7) The trial court ultimately granted the petition to remove Bryant as personal representative of decedent's estate and appointed a successor. Bryant moved to set aside the order removing him as personal representative and the limited judgment appointing a successor. The trial court denied the motion. Bryant appealed and the court of appeals affirmed on the following grounds:

(a) Even assuming that the trial court abused its discretion in refusing to allow him to resume his own direct examination at the May 18 hearing, Bryant failed to demonstrate that the error was not harmless. The exclusion of evidence is not presumed to be prejudicial. Bryant assigns error to the exclusion of a portion of his own direct examination. Yet, at the time of the trial court's ruling, he did not make an offer of proof as to the nature of the evidence excluded. Even accepting the representations that Bryant makes on appeal as to the nature of the excluded evidence (specifically, that Bryant was prevented from testifying that decedent never intended the J.D. Trust to get more than a total of $100,000 from his and Eberhard's estates), any error was still harmless. Evidence of decedent's intentional removal of the bequest to the J.D. Trust would have been admissible on redirect had Bryant offered it.

(b) Redirect may extend to the facts elicited on cross-examination; matters that tend to limit, explain, or qualify them; or matters that tend to rebut or modify any inference resulting from the cross-examination—provided that the inquiries are directly connected with the matter stated in cross-examination. Here, Maloney's cross-examination of Bryant delved into Bryant's decision to distribute $100,000 to the J.D. Trust from decedent's estate, even though decedent's will did not authorize that distribution. In response to that questioning, Bryant explained that he was surprised to find that decedent's will did not authorize that distribution because he didn't realize that that portion had been taken out of the will. At least one inference from that line of questing is that Bryant erroneously removed the provision related to the $100,000 distribution from decedent's will. Therefore, testimony that decedent asked Bryant to remove the bequest to the J.D. Trust from the will would have been admissible on redirect examination to rebut that inference. And there is no suggestion in the record that the trial court would have excluded such testimony on redirect.

(c) Bryant failed to establish on appeal that it was the court's truncation of his direct examination that resulted in the absence of that evidence and not simply his failure to offer that evidence on redirect. Indeed, an offer of proof would have removed any ambiguity on this point. Accordingly, because we are unable to identify any harm that resulted from the trial court's ruling, we reject Bryant's first assignment of error.

(d) The trial court concluded that Bryant had a conflict of interest because the estate could potentially bring a malpractice claim against him as the drafter of decedent's will based on evidence that he had mistakenly omitted the bequest to the J.D. Trust when he revised the will. Bryant was the drafter of the decedent's will. It appears he eliminated a provision from the will that the decedent may have intended to keep in the will. Bryant assumed the provision was still in the will during its administration and made a distribution from the estate to a non-beneficiary. Although Bryant's actions here may not have been done in bad faith or with a selfish motive, the Court recognizes that this issue creates a conflict. The administration of the estate appears close to being finalized; however, having knowledge of the conflict issue, the Court cannot simply look away or turn a blind eye.

(e) The court explained that the "good cause" for removing Bryant as personal representative was the existence of a conflict of interest. And, understood in the context of the evidence presented at the hearing, the court identified that conflict of interest as one arising from allegations that Bryant mistakenly removed the $100,000 bequest to the J.D. Trust from decedent's will, which gave rise to a potential malpractice claim against Bryant.

(f) Bryant's argument rests on the credibility of his own testimony about decedent's wishes to establish that he did not make a mistake drafting decedent's will. However, whether his testimony could establish a valid and effective defense against a claim of malpractice is immaterial in this context. There is sufficient evidence to sustain the trial court's finding of a conflict of interest because there was some evidence in the record that Bryant had made a mistake drafting decedent's will. As a result, Bryant was not in a position to objectively assess the strength of the estate's potential malpractice claim against him. Regardless of the relative merits of such a claim, a conflict of interest arose from the mere fact that Bryant could not be disinterested in evaluating the strength of the claim.

Therefore, we conclude that the trial court did not abuse its discretion in removing Bryant as personal representative for "good cause shown."

f. ***Matter of Wagt (Lehman),* 2024 N.Y. Misc. LEXIS 2559 (Surrogate's Court of New York, Queens County 2024).** The process of duly qualifying as a corporate fiduciary is not a restriction against a national bank or a foreign bank from doing business in New York State.

(1) By decision and order of this court dated March 8, 2024, the court granted the unopposed petition by Despina Argyros and Carol Ruth Wagt, a non-resident alien, to revoke letters of co-administration c.t.a. and successor letters of co-trusteeship issued in 2002 to Bernice Henig and Carol Ruth Wagt, and to grant successor letters of co-administration c.t.a. to the petitioners. The court also granted successor letters of trusteeship to the Raymond James Trust N.A., upon its duly qualifying.

(2) Counsel for petitioners requested the court reconsider that part of its order which requires Raymond James Trust N.A. to "duly qualify" according to law prior to the issuance of letters of trusteeship. Rather than file a motion to vacate or modify the court order, counsel for petitioner filed an affirmation and a memo of law, supported by a copy of an e-mail from an attorney who ostensibly represents Raymond James Trust N.A., positing that, because Raymond James Trust N.A. is a national bank, it is not subject to the mandate that a corporate trustee file certain documentation with the clerk to duly qualify as a fiduciary prior to the issuance of letters of trusteeship. In sum, it is asserted that the requirement that Raymond James Trust N.A. file documentation to duly qualify as a fiduciary is a violation of the Supremacy Clause of the United States Constitution. Specifically, petitioner contends that the New York State law (Banking Law §131 [3]) is in clear conflict with the federal law (12 U.S.C. § 92a [a] and [b]) which grants powers to national banks to do business within the states.

(3) The federal law cited by counsel provides that a national bank is authorized to act as a fiduciary in the same capacity as a state bank "when not in contravention of State or local law," and that national banks have the same power to offer fiduciary services as the state banks. Contrary to counsel's allegation, there is no clear conflict between the federal statute and the New York State statute in this instance. The process of duly qualifying as a corporate fiduciary is not a restriction against a national bank or a foreign bank from doing business in New York State. Rather, it is merely a procedural step to be taken with the court clerk, so as to authenticate the identity of the professed corporate entity seeking to be appointed as the fiduciary, and to provide a method for service of process in any action or proceeding commenced against such fiduciary.

(4) Raymond James Trust N.A. cannot qualify to act as a fiduciary by merely relying upon the affirmation of petitioner's counsel and the unauthenticated copy of an e-mail annexed thereto from a person who self-professes to be the attorney for the bank. Consequently, it can qualify as a fiduciary and receive letters of trusteeship by following the procedure set forth in the statute and filing with the Clerk of the court the following documents: (1) a duly executed instrument in writing of indefinite duration and irrevocable, appointing the Clerk of the Surrogate's Court its true and lawful attorney, upon whom process in any action or proceeding against such fiduciary, affecting or relating to the estate trust or fund represented or held by such fiduciary or the acts of defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state; and (2) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office.

(5) Although the last will and testament does not dispense with a bond for trustees who are not nominated therein, petitioners have filed an affidavit requesting that the court dispense with the bond. Upon filing the above documentation to qualify as a fiduciary, the court shall determine the issue of waiver of the bond utilizing the same criteria as it would with any domestic banking corporation.

g. ***Kuang v. Kuang (In re Est. of Kuang),*** **2024 Ore. App. LEXIS 1572 (Court of Appeals of Oregon 2024).** To overcome the presumption that a marriage is valid on the ground that it is bigamous, the challenging party must prove the parties to the alleged former marriage were eligible to marry, the spouse of such former marriage is still living, and the first marriage has not been dissolved by divorce or death. A dissolution judgment generally does not establish the previous validity of the marriage with respect to third parties who were not parties to the dissolution proceeding.

(1) In 1994, Michael and Yan were married, and they subsequently had a daughter, Tina, who is now an adult. In January 2015, the Clackamas County Circuit Court issued a Stipulated General Judgment of Dissolution of Marriage dissolving the marriage of Michael and Yan (the "2015 Judgment"). Michael and Grace then married in April 2015.

(2) In October 2016, the Clackamas County Circuit Court issued an order (the "2016 Order") granting Yan relief from the 2015 Judgment, concluding that Michael had obtained that judgment by means of fraud and misrepresentation, and it vacated the judgment. After subsequent litigation, in October 2017, the Clackamas County Circuit Court entered a second Stipulated General Judgment of Dissolution of Marriage (the "2017 Judgment"). The 2017 Judgment states that Michael and Yan were married on June 1, 1994, in Guangzhou, China, and ever since that time have been husband and wife. It also orders that Michael and Yan's marriage is "dissolved effective the day of the court's execution of this Stipulated General Judgment for Dissolution of Marriage"—that Michael and Yan were divorced effective October 2017.

(3) Although Grace was present during hearings related to the 2017 Judgment, it is undisputed that Michael and Grace never sought to "remarry" following entry of the 2017 Judgment.

(4) Michael died intestate in October 2021. After Michael's death, Grace filed a petition for administration of Michael's estate and sought to be appointed as the personal representative of that estate, because, in her view, she was Michael's surviving spouse. The trial court then entered a limited judgment admitting Michael's estate for administration and appointing Grace as personal representative.

(5) Tina then moved the trial court to remove Grace as personal representative for good cause. Tina argued that Grace is not an intestate heir of Michael's estate. As Tina saw it, "Michael and Yan were validly married on June 1, 1994, in Guangzhou, China"; "the actual dissolution of marriage" between Michael and Yan did not occur until October 2017; and, therefore, Michael was legally married to Yan at the time he married Grace in 2015. Tina argued that, as a result, Michael and Grace's marriage was void ab initio as a prohibited bigamous marriage. Tina asked the court to rule that she was the sole heir of Michael's estate.

(6) The trial court ruled from the bench in favor of Tina, concluding that, at the time of the second marriage, while technically there was a dissolution judgment in place, that judgment had been obtained by fraud and so there was no "valid divorce decree" between Yan and Michael when Michael and Grace married. The trial court also found that Grace was fully aware that the first dissolution was set aside, that she had time to remarry Michael, but that she did not do so, and Grace did not act in "reasonable reliance" on the 2015 Judgment after it was vacated.

(7) Grace moved to reconsider, which the trial court denied. The trial court removed Grace as personal representative and determined that her marriage to Michael was void. Grace appealed, and the court of appeals reversed and remanded on the following grounds:

(a) In the context of probate proceedings, a party challenging the validity of a marriage has a heavy burden of proof. In such cases the courts have invoked a strong presumption that marriages are valid. To overcome the "strong presumption" of the validity of a marriage on the ground that the marriage is bigamous, the party seeking to overcome the presumption must allege and prove that the parties to the alleged former marriage were eligible to consummate the same, and that the spouse of such former marriage is still living, and that the first marriage has not been dissolved by divorce or by the death of one of the parties.

(b) The presumption of validity is so strong that proof of a former subsisting marriage, in order to be sufficient to overcome the presumption, must be so cogent and conclusive as to fairly preclude any other result. The presumption that marriage is valid is one of the strongest disputable presumptions known in law.

(c) In the context of probate proceedings such as this one, the "net result" of the presumption is that the decedent's wife at the time of his death is, in practical effect, his spouse for purposes of the probate code, because of the nearly insurmountable burden of proving that the last marriage is invalid. The reason that the burden is "nearly insurmountable" is that it is a "virtually impossible" task to prove that the parties to the earlier marriage were eligible to contract it, insofar as that requires proof of a negative: it must be shown that neither party to the earlier marriage had ever, anywhere, been previously married but not divorced.

(d) The presumption of marital validity furthers a policy underlying the probate code, because providing for the distribution of property to the spouse of an intestate decedent provides for one who played the part of spouse in his life, in accordance with the decedent's presumed intent. There is a crucial distinction between invalidating the marriage of a living couple and invalidating a marriage after the death of one of the parties: in the second case the parties cannot correct the deficiency. That is, in the second case, notwithstanding the centrality of marriage to the human condition and the transcendent importance of marriage, the putative spouses are rendered legal strangers—and not family—and must remain that way because any deficiency in the marriage cannot be corrected.

(e) Dissolution judgments, with respect to such third parties, generally do not automatically establish that the dissolved marriage was legally valid.

(f) Grace's arguments relating to whether Tina met her burden of proof as to the validity of Yan and Michael's marriage and whether the 2016 Order and the 2017 Judgment were binding on her were adequately preserved. Grace raised Tina's obligation to prove the validity of Yan and Michael's marriage in her initial response to Tina's motion to remove Grace as personal representative. And Tina clearly understood that she had that obligation, arguing in her reply brief that Yan and Michael had been validly married under Chinese law and pointing to the 2017 Judgment as evidence of the validity of that marriage, and again raising those arguments at the hearing on her motion to remove Grace as personal representative. Further, although Grace's argument prior to reconsideration focused on the fact that there was a 2015 divorce between Yan and Michael prior to Michael's marriage to Grace, Grace later put the validity of Michael and Yan's marriage squarely before the trial court on reconsideration and the trial court expressly ruled on that issue.

(g) Grace adequately preserved her argument as to the preclusive effect of the 2016 Order and 2017 Judgment. Tina does not contend that she was denied the opportunity to respond to that argument in the trial court—and, indeed, she did. Further, in her reply, Tina argued that the 2017 Judgment was dispositive. And, importantly, after hearing the parties' arguments on the issue, the trial court expressly ruled that the 2016 Order and the 2017 Judgment did apply to Grace and that they were dispositive; the trial court did not intend to make gratuitous rulings on issues central to the merits of this dispute. Procedural fairness to Tina does not require a conclusion that Grace's argument is unpreserved.

(h) The trial court erred in removing Grace as personal representative, a ruling that was based on its mistaken determination that Grace and Michael's marriage was void because it was a bigamous marriage.

(i) As against Grace, the 2017 Judgment was not preclusive as to the validity of Michael's and Yan's marriage. The 2017 Judgment was a stipulated judgment, and Michael and Yan both stipulated therein that they were married on June 1, 1994 and ever since that time have been husband and wife, and Grace stated in her brief in response to Tina's motion that Yan and Michael were married in 1994. Neither that stipulation nor that purported judicial admission is legally sufficient to prove that the marriage of Yan and Michael was a legally valid marriage. In the absence of an express stipulation that the prior marriage was valid, the court will not extend the effect of a stipulation beyond the facts expressly stipulated.

(j) Nothing requires a widow or widower's "reasonable reliance" on a prior divorce as a predicate fact for application of the presumption of marital validity or obviates the requirement that, under that presumption, a party challenging a marriage as void after a decedent's death prove, as part of a prima facie case, that the parties to the earlier marriage had been eligible to contract it.

(k) The trial court erred when it concluded that Grace and Michael's marriage was void and erred when it removed Grace as personal representative of Michael's estate. As a matter of law, Tina did not adduce legally sufficient evidence to make out the prima facie case necessary to rebut the presumption that Grace and Michael's marriage was a legally valid marriage.

h. ***Young v. Hartford,* 2024 Cal. App. LEXIS 718 (Court of Appeal of California 2024).** Orders suspending trustees and appointing interim trustees in probate court are not directly appealable.

(1) Defendant Stanley Hartford is the trust protector and defendant Debbie Fleshman is the trustee of the Carolyn Patricia Young Family Trust. Plaintiff is a current beneficiary of the trust. Plaintiff Christa Ann Young alleges defendants are conspiring to improperly withhold trust funds from plaintiff and from certain charities that the trust dictates should receive a portion of the net income of the trust annually. The alleged purpose of the conspiracy is to preserve assets for the benefit of defendant Debbie Fleshman, who (in addition to being trustee) is a residuary beneficiary of the trust, and will inherit half its proceeds upon plaintiff's death.

(2) Plaintiff filed an ex parte application seeking the suspension of defendants' powers arising from their respective roles as trust protector and trustee of the trust and appointment of a private professional fiduciary as interim trustee. The trial court granted the ex parte application and issued a minute order with the following five components: (1) suspending the powers of trustee Debbie Fleshman and trust protector Stanley Hartford; (2) appointing a private professional fiduciary as interim trustee; (3) requiring the interim trustee to post a bond; (4) setting a review hearing; and (5) prohibiting the interim trustee from using trust assets for compensation without prior authorization of the court.

(3) Defendants appealed. Plaintiff filed a motion to dismiss the appeal before completion of the record on appeal, supported by a declaration of plaintiff's attorney. Defendants opposed the motion, filing their own competing declaration, request for judicial notice, and evidentiary objections. The Court of Appeals dismissed the appeal on the following grounds:

(a) A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment.

(b) Finality is a powerful theme in appealability jurisprudence. In ordinary civil cases, appeals are generally not permitted except from the final judgment (though there are many exceptions to this rule). This concept of finality is handled differently in probate court proceedings. Where an ordinary civil case is conceptually structured around a dispute between parties, probate court proceedings are structured around a fiduciary relationship (a probate estate, guardianship, conservatorship, or trust). An ordinary civil case ends with the resolution of the dispute via a judgment or dismissal, while a probate court case will often continue long after the resolution of the original problem or dispute that brought the matter to court. Cases in probate court often persist for long periods of time and may encompass many separate disputes between different parties, each with its own dispositive motion or trial and resulting order. As a result, there is no "final judgment" to serve as the bedrock concept of appealability in probate court.

(c) Instead, the Probate Code makes certain specific categories of orders appealable. In probate court proceedings, the Probate Code provisions concerning appealability are exclusive.

(d) Despite these procedural distinctions, the probate court appealability structure also embraces finality as a concept. The categories of orders listed in Probate Code section 1300 are, for the most part, substantive in character and broadly comparable to the sorts of judgments and orders that are appealable in ordinary civil cases under the Code of Civil Procedure. They include orders "[s]ettling an account of a fiduciary," "approving or confirming the acts of a fiduciary," "[d]irecting or allowing payment of a debt, claim, or cost," and "[f]ixing, authorizing, allowing, or directing payment of compensation or expenses of an attorney." Meanwhile, specifically in the trust context, section 1304 applies only to certain categories of "final" orders.

(e) Suspension of a trustee's powers and removal of a trustee are not the same. Suspension of a trustee's powers is a provisional remedy available to the probate court if it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review. Removal is the final remedy.

(f) Any order surcharging, removing, or discharging a fiduciary is appealable. In keeping with the broader policy of permitting appeals only from final orders, the Legislature deliberately omitted suspension of a fiduciary's powers from the list of orders made appealable by this subdivision. It makes no difference that, as defendants protest, the ex parte application was made pursuant to section 15642, which controls "removal" of trustees. As described above, subdivision (e) of that statute also permits suspension of a trustee's powers as a provisional remedy, and the trial court's order is clear—it provides for suspension of defendants' powers, not removal.

(g) The reference to "final" orders incorporates the concept of finality commonly applied to appealability questions in other civil cases. Suspension of a trustee's powers is a provisional remedy, not a final one. Accordingly, the trial court's order suspending defendants' powers was not a "final" order. Orders suspending a trustee or trust protector's powers are not appealable.

(h) The portion of the order appointing an interim trustee is not appealable. The trial court's order was made pursuant to the statute that authorizes appointment of a "temporary trustee" in the same subdivision as it authorizes suspension of a trustee's powers. Plainly, this is another provisional remedy, not a "final" order. Orders appointing a temporary or interim trustee are not appealable.

(i) Defendants lack standing to appeal from the portions of the order imposing a bond on the interim trustee and forbidding the interim trustee from using trust assets for compensation without prior court authorization. Appeals can only be taken by parties who are "aggrieved" by the trial court's order. A party is "aggrieved" only if his or her rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision.

(j) Hartford, the trust protector, is not a beneficiary of the trust. His rights and interests are unaffected by the court imposing restrictions on the temporary trustee, whether in the form of imposition of a bond or a prohibition on the use of trust funds for compensation. He therefore lacks standing to appeal.

(k) Fleshman, the trustee, holds a contingent beneficial interest in the trust, as a remainder beneficiary. Thus, in theory, the imposition of a bond affects her interests in that the cost of the bond may eventually be paid from trust proceeds, reducing her beneficial share. However, this injury to defendant Fleshman's interests is too "nominal or remote" to support standing to appeal. The order does not set the amount of the bond, leaving that issue for a future hearing (and a future order). The court also has not yet expressly authorized the interim trustee to use trust funds to pay for the bond or approved an accounting wherein the interim trustee lists the cost of the bond as a trust expense and seeks reimbursement. In the absence of these orders, any injury to defendant Fleshman's interests arising from the cost of the bond is speculative and insubstantial. As for the prohibition on the use of trust funds for interim trustee compensation without prior court approval, Fleshman only benefits from this portion of the order, as it preserves trust funds for her recovery and costs her (and the trust) nothing. Therefore, she is not aggrieved and lacks standing to appeal.

12. Third-Party Claims

a. ***Hull v. Polous,* 2023 Ohio 4500 (Court of Appeals of Ohio 2023).** The trial court properly dismissed claims against financial professionals for failure to state a claim where they owed no independent duty to plaintiff under the Uniform Power of Attorney Act, Ohio common law, or the Ohio Constitution.

(1) Toward the end of George Hill's life, he appointed his cousin, plaintiff-appellant Bennie Hull, to be his power of attorney and executor of his estate. Hull alleged that he relied on advice from Hill's financial professionals in the course of his actions as George's agent, which ultimately led to his being removed as executor of the estate and becoming liable for thousands of dollars. Hull sued defendants-appellants Matt Poulos, Ameriprise Financial Services LLC ("Ameriprise"), and Fident Wealth Partners (collectively, "the Advisors"), asserting professional negligence. The trial court granted the Advisors' motion to dismiss, finding that Hull lacked standing.

(2) In the last ten years of George's life, Hull was his primary caretaker. George appointed Hull as his power of attorney ("POA") in November 2007. Hull remained George's POA until George died. The 2007 POA allowed Hull to make changes in George's investments, as long as they conformed with George's estate plans. George also named Hull as the executor of his estate in George's various wills. George had several Ameriprise annuities accounts. Poulos, an Ameriprise employee, served as George's financial advisor. Poulos advised Hull in his capacity as George's POA. As George's health declined, Poulos began to communicate exclusively with Hull about George's accounts. Per Ameriprise's policy, Poulos requested a copy of George's will to ensure that his Ameriprise beneficiary designations matched the will. Hull provided Poulos with a copy of George's will. Ameriprise determined that George's beneficiary designations on his Ameriprise accounts had to change so that the designations would be distributed as provided in George's will.

(3) Although Hull had been George's POA since November 2007, Ameriprise requested George sign a new power of attorney form in 2016. Ameriprise drafted a durable power of "Attorney for Ameriprise Financial Accounts and Products." After George signed the new POA, Poulos suggested that Hull update the beneficiaries on George's accounts. Poulos prepared for Hull's signature in a beneficiary update form changing the Ameriprise account beneficiaries from George's heirs to George's estate. The change in the beneficiary designations from George's heirs to the estate stripped George's daughter, Jacqueline Hill, and George's granddaughter

and niece of their inheritances. While the granddaughter and niece were beneficiaries under the previous Ameriprise designation forms, no bequests were made for them in George's will. Jacqueline was to inherit the residuary of the estate after specific bequests were made to George's cousins—including Hull—totaling $800,455.07.

(4) But for this change in beneficiary designation there would have been no assets to probate. Without these beneficiary changes, the money in George's accounts would have passed to George's relatives based on percentages as provided in the Ameriprise beneficiary designation forms. Following George's death, Hull opened George's estate in the Hamilton County Probate Court. All of George's heirs, including Jacqueline, were notified of the inventory in the estate. After Jacqueline learned about the inventory, she objected and later sued, alleging that Hull took assets that belonged to the estate. The probate court found that the beneficiary changes that Hull made to the Ameriprise accounts, as instructed by the Advisors, amounted to mishandling George's assets.

(5) Hull sued the Advisors alleging that, absent Poulos's instructions, he would not have changed the Ameriprise beneficiaries. The Advisors filed a motion to dismiss and argued that Hull must engage in the arbitration process contained in the Ameriprise financial agreement. The trial court denied the Advisors' motion because Hull was not a party to the Ameriprise financial agreement. The Advisors filed another motion to dismiss, arguing that Hull lacked standing as he was not a party to the Ameriprise financial agreement. Hull had interacted with Ameriprise and signed documents solely in his capacity as George's POA, and, later, as executor of George's estate. The trial court granted the motion, finding that Hull lacked standing.

(6) Hull appealed and the court of appeals affirmed on the following grounds:

(a) To succeed on a negligence claim, a plaintiff must establish the existence of duty, breach of that duty, and damages proximately caused by the breach.

(b) Although this case involves a financial advisor, rather than an attorney, a legal-malpractice action is analogous to this case because Hull sued the Advisors based on damages that he suffered due to allegedly negligent professional services. And whether a party has standing to bring a malpractice action requires the plaintiff to establish that the defendant attorney owed the plaintiff a duty of care, and thus requires a relationship between the attorney and the plaintiff.

(c) The trial court properly dismissed Hull's complaint because he failed to establish that the Advisors owed him a duty of care. Therefore, Hull lacked standing to maintain an action against the Advisors. To the extent that a relationship between the Advisors and Hull existed, that relationship was between the Advisors and Hull in his capacity as George's power of attorney. Hull signed the relevant Ameriprise documents in his capacity as George's power of attorney or executor of his estate, not individually. The Advisors never provided any instruction or advice to Hull in his individual capacity—any advice or instruction was given solely as George's or his estate's agent. The Advisors' only legal duty was owed to George and George's estate. They owed nothing to Hull in his individual capacity. And that lack of duty is fatal to Hull's complaint. Because the Advisors had no legal relationship with Hull individually, they owed him no duty of care. Hull lacked standing to bring his claim.

(d) The Ohio Uniform Power of Attorney Act governs power-of-attorney relationships in Ohio. There is no authority suggesting that a third party owes an individual duty to the holder of a POA. This is because those holding a POA do not act as individuals—instead, they act solely on behalf of their principals. Any advice provided to Hull or interactions between the Advisors and Hull were, legally, advice to and interactions with George. Hull was simply standing in George's shoes. Thus, the Ohio Uniform Power of Attorney Act does not create an individual duty on the Advisors to Hull.

(e) Hull did not allege negligent misinformation. The noneconomic-loss doctrine, as adopted by Ohio, recognizes professional liability, and thus a duty in tort, only in those limited circumstances in which a person, in the course of business, negligently supplies false information, knowing that the recipient either intends to rely on it in business, or knowing that the recipient intends to pass the information on to a foreseen third party or limited class of third persons who intend to rely on it in business. Even if Hull could sustain a negligent-misinformation claim, he failed to allege a negligent-misrepresentation claim. His complaint alleges only negligence. Hull cannot succeed on a claim that he failed to make at the trial level.

(f) The Ohio Constitution and common law do not impose a duty on the Advisors. As discussed above, the Advisors did not owe Hull any individual duty. The Advisors only owed George a duty, and any duty owed to Hull was solely in his capacity as George's POA.

b. ***Petit v. Krohn USAA F.S.B. USAA Inv. Mgmt. Co.,* 2024 S.C. App. Unpub. LEXIS 296 (Court of Appeals of South Carolina 2024).** Investment firm did not breach any duty to anyone by processing change of beneficiary form for IRA signed by decedent, where plaintiff who was disinherited by the change is not a part to the contract with the firm, and the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature, and no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it.

(1) Dr. Edward LeRoy Petit ("Decedent") died in March 2015. He was survived by his daughter, Karen, and two granddaughters, who are Karen's nieces. Decedent was predeceased by his wife, Helen, and his daughter, Kathy, who was Karen's sister. Decedent and Phyllis Krohn ("Phyllis") became companions after Helen died. Decedent transferred his IRA funds from Raymond James to USAA Federal Savings Bank ("USAA IRA"); in 2007, these IRA funds were transferred to USAA Investment Management Co. Decedent completed a designation of beneficiary form, changing his beneficiary from Helen to his two daughters (Karen and Kathy), with Kathy's portion to be held in trust. That designation of beneficiary form stated: "I understand this Change of Designation of Beneficiary will be effective on the date of receipt by the Custodian and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this Plan shall cease. I retain the right to revoke this designation of beneficiary and to designate a new beneficiary at any time by communicating to the Custodian in writing."

(2) Decedent completed a USAA power of attorney form, naming Phyllis as his attorney-in-fact. That form contained the following limitation in section 1(d), addressing investment transactions: "My attorney does not have the authority to make himself or herself or others the co-owner or beneficiary of such investment accounts; does not have the authority to change ownership of such investment accounts; does not have a power of appointment over such investment accounts; and does not have the authority to make a gift of the securities held in such investment accounts to himself or herself or to others."

(3) Decedent completed another USAA power of attorney form, again naming Phyllis as his attorney-in-fact. On the 2010 form, Decedent checked a box indicating Phyllis has "all the powers listed below" and did not preclude her from changing the account beneficiaries. Decedent asked USAA to send him the form required to change his IRA beneficiaries. Shortly after Decedent made this request, Eddie Kramer, a USAA financial adviser, visited Decedent's home in Greenwood to discuss Decedent's investments.

(4) While on a cruise with Phyllis, Decedent lost consciousness and was taken from the ship to a hospital in Key West. He was then transferred to a Miami facility, where he underwent a heart catheterization, ablation, and defibrillator and pacemaker implantation. Decedent was eighty-seven years old at this time.

(5) Decedent was discharged and he and Phyllis returned home to Greenwood. The following day, Decedent executed the USAA designation of beneficiary form naming his two granddaughters ("Granddaughters") as the primary beneficiaries of the IRA; Karen and Kathy were named secondary beneficiaries. Phyllis filled out the printed portion of the form for Decedent, but Decedent signed the form and asked USAA to send him the form in November 2011. Phyllis never executed any documents pursuant to the USAA power of attorney.

(6) On February 27, 2012, Decedent executed two new powers of attorney: a healthcare power of attorney appointing Kathy as his agent for healthcare decisions and a general durable power of attorney appointing his longtime accountant, Henry A. Dorn, as his attorney-in-fact for financial and healthcare purposes.

(7) On May 15, 2013, the probate court found Decedent met the definitions of an "incapacitated person" and a "legally incompetent adult." In this 2013 order, the probate court further declared the two February 2012 powers of attorney would remain in effect. The probate court appointed Karen and Kathy as Decedent's co-guardians.

(8) In 2014, Dorn transferred all funds from the USAA IRA to Wells Fargo ("Wells Fargo IRA"), and closed the USAA IRA. Granddaughters were again designated as primary beneficiaries. Following Decedent's March 2015 death, Wells Fargo released the IRA funds to Granddaughters.

(9) In early 2017, Karen learned of the 2012 USAA designation of beneficiary form naming Granddaughters the primary beneficiaries of the IRA funds. As the new beneficiaries were designated without her knowledge, Karen asked Phyllis about the revision during a June 2017 conversation at the South Carolina Festival of Flowers. According to Karen, Phyllis admitted she changed the beneficiaries after suggesting to Karen's father that he do something nice for Granddaughters. Karen claims Phyllis apologized and stated she thought Karen would receive other funds from Decedent. In addition to her own recollection of this conversation, Karen provided an affidavit from a third-party witness, Wally Dorn, who averred he saw Karen speaking with an older woman at the festival. He noted, "Karen was gesturing with her hands, and Karen's facial expressions showed that she was upset." According to Wally, Karen told him: "Phyllis decided that her father's IRA should go to his granddaughters, and she changed the beneficiary form to exclude Karen and her sister Kathy Petit from inheriting their father's IRA. Phyllis told her that she was sorry for the damage that she had caused her, and also for all of the other things that she had done while being his companion."

(10) Karen sued USAA for breach of fiduciary duty, negligence, and breach of contract. She also sued Phyllis for interference with a contractual relationship, breach of fiduciary duty, negligence, and undue influence. USAA moved for summary judgment, as did Phyllis. Following a hearing, the circuit court issued separate orders granting the motions for summary judgment. The circuit court denied Karen's motion to reconsider, and she timely appealed.

(11) On appeal, the court of appeals affirmed on the following grounds:

(a) The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. Although Decedent had a contract with USAA and later with Wells Fargo, Karen was not a party to either contract. Karen asserts she was a third-party beneficiary with vested rights under the USAA IRA; however, South Carolina law does not support her position. Decedent had the right to change his beneficiaries at any time up until his death (to the extent he was competent to do so). The record reflects that in 2012, with Phyllis's assistance, Decedent executed a designation of beneficiary form naming Granddaughters as primary beneficiaries and his daughters as secondary beneficiaries. Granddaughters remained the beneficiaries at the time of Decedent's death. Karen had no vested rights in either the USAA IRA or the Wells Fargo IRA. Moreover, any expectancy Karen had in the proceeds of the USAA IRA ceased to exist when Dorn closed the USAA account and transferred those funds to Wells Fargo.

(b) Karen further alleges a fiduciary relationship existed between Phyllis and Decedent and that Phyllis breached this duty when she exceeded the authority granted through Decedent's USAA power of attorney by changing the IRA beneficiaries. But Karen presented no evidence that Phyllis owed her a fiduciary duty; the circuit court therefore properly granted summary judgment.

(c) The evidence does not demonstrate Phyllis owed Karen a duty of care. Perhaps equally important is the fact that Phyllis never took any action pursuant to the USAA power of attorney. Thus, the circuit court correctly granted summary judgment on the negligence claim.

(d) The February 2012 instruments Decedent executed included a healthcare power of attorney appointing daughter Kathy as Decedent's agent for healthcare decisions and a general durable power of attorney appointing Dorn as attorney-in-fact over Decedent's finances and healthcare. Although the probate court declared Decedent incompetent as of May 15, 2013, the court ordered the 2012 powers of attorney would remain in effect provided Dorn "shall not have the authority to make any healthcare decisions" due to the daughters' appointment as Decedent's co-guardians. Although Karen and Kathy were once named primary beneficiaries of the USAA IRA, Phyllis testified Decedent wanted to change the beneficiaries to his granddaughters and that she assisted him in doing so. Phyllis is neither related to nor had a significant relationship with either granddaughter.

(e) Here, Decedent signed the change of beneficiary designation form the day after his discharge from a two-week hospital stay during which he underwent two surgical procedures and was prescribed pain medication. Although Phyllis may have had more opportunities for persuasion than Karen, this does not constitute undue influence. There is evidence in the record that Decedent changed his beneficiaries on more than one occasion and that he knew he could change this designation at any time. While the record may demonstrate that the decedent was in poor health at the time the beneficiaries were changed, no evidence was presented demonstrating that the decedent was incompetent to execute the change.

(f) The circuit court found Karen lacks standing to bring this lawsuit against USAA. Karen has not challenged this finding as to USAA, and it is now the law of the case.

(g) It is uncontested that a contractual relationship existed in the past between Decedent and USAA. However, even when Karen was a primary beneficiary of Decedent's USAA IRA, she was not a party to his USAA contract, and she had no vested right in the IRA funds. Although Phyllis filled out the change of beneficiary form for Decedent, Decedent signed the form himself. Other than noticing Decedent's signature appears "wobbly" and "shaky," Karen provided no evidence challenging Decedent's signature on the USAA form changing the beneficiaries.

(h) South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature. However, a bank may be held to a fiduciary duty if it undertakes to advise a depositor as part of services the bank offers. Such a relationship charges the bank with a duty to disclose material facts that may affect its customer's interests. Yet, no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it.

(i) Although Phyllis testified in her deposition that Kramer, a financial adviser with USAA, visited Decedent's home to discuss his investments and the process for changing beneficiaries after Decedent requested the form, Karen presented no evidence that Decedent reposed a special trust in USAA or that USAA was aware of any special trust reposed in it by Decedent. No evidence exists to suggest USAA owed any such duty to Karen.

(j) Karen has not established USAA owed her a duty of care. Moreover, Karen failed to present evidence that USAA breached any duty to anyone by processing the 2012 change of beneficiary form—which was requested by Decedent, filled out by Phyllis, and signed by Decedent—because both Decedent and Phyllis, as his attorney-in-fact, had the power to change his beneficiaries at any time (at least until Decedent was deemed mentally incompetent) before his death. Finally, Karen presented no evidence that she suffered damages proximately caused by USAA because in 2014, Dorn closed the USAA IRA and transferred these funds to Wells Fargo. Wells Fargo released the funds to Granddaughters following Decedent's death in 2015.

c. ***Redus v. JP Morgan Chase Bank, N.A.,* 2024 Tex. App. LEXIS 5170 (Court of Appeals of Texas 2024).** Bank may rely on small estate affidavit, even where later voided, and not liable for wrongful conduct by person that executed the affidavit.

(1) Cubie Beatrice Redus died in 2006. Cubie's daughter Mable Lavell Redus ("Mable") continued living in Cubie's home. In 2017, the home suffered hurricane damage. Mable filed an insurance claim, and the insurance company issued three checks payable to Cubie. The checks were for $16,500, $58,023.77, and $47,051.70, totaling $121,575.47. Mable became aware she had not changed the name on the insurance policy as they were all payable to Cubie. Mable contacted Topangelia Shaw, who represented that she was a legal assistant working with an attorney who could handle the situation. Mable gave Shaw the three insurance checks and information about Cubie's estate. After some time passed without hearing from Shaw, Mable contacted the insurance company, which told Mable that the insurance checks had been cashed. Mable subsequently learned that Shaw had applied for and obtained a small-estate affidavit for the Estate of Cubie Beatrice Redus.

(2) The small-estate affidavit declared that the value of Cubie's estate did not exceed $75,000; that the assets of Cubie's estate included the $58,023 insurance check; and that Mable, Shaw, and Leticia Guidry (another of Cubie's daughters) were Cubie's three inheritors and distributees of Cubie's estate. The probate court approved and signed the affidavit. In 2018, Shaw presented the affidavit and two of the insurance checks (for $58,023.77 and $47,051.70) to JPMorgan Chase Bank, N.A. ("Chase"), which then deposited funds from the insurance checks into Shaw's personal accounts based upon Shaw's endorsements on the checks.

(3) In 2021, the probate court declared the affidavit void and appointed Mable administrator of Cubie's estate. Mable sued Chase and Shaw, among others, for common-law conversion, forgery, fraud, gross negligence, conspiracy, statutory conversion, and money-had-and-received. Chase moved for summary judgment. Mable filed a cross-motion for summary judgment. The trial court denied Mable's motion and granted Chase's motion. Mable appealed and the court of appeals affirmed on the following grounds:

(a) Because Mable did not produce evidence of a false representation made by Chase to Mable, her fraud claim fails as a matter of law.

(b) Civil conspiracy is not an independent tort but is instead a theory of vicarious tort liability derivative of an underlying wrong. Mable's assertion, not supported by any reference to evidence in the record, is insufficient to establish a meeting of minds to commit an unlawful act. Because there is no evidence of one of the essential elements, Mable's conspiracy theory fails as a matter of law.

(c) Chase admits that it did not expressly move for summary judgment on Mable's money-had-and-received claim. By dismissing Mable's money-had-and-received claim, the trial court granted more relief than Chase specifically requested. The summary judgment is therefore erroneous as to Mable's money-had-and-received claim. The error in granting more relief than requested is harmless and not reversible when the omitted cause of action is precluded as a matter of law by other grounds raised in the case. This is a limited exception and applies, for example, if the defendant has conclusively disproved an ultimate fact or element which is common to all causes of action alleged. This exception applies here. All of Mable's remaining claims, including her money-had-and-received claim, are premised on Chase's allegedly tortious conduct, namely payment of the checks to Shaw when that money allegedly belonged to Mable.

(d) Estates Code section 205.007, titled "Liability of Certain Persons," provides that a payor making a payment, delivery, transfer, or issuance under an affidavit described by this chapter is released to the same extent as if made to a personal representative of the decedent. A payor under a small estate affidavit may not be required to: (1) see the application of the affidavit; or (2) inquire into the truth of any statement in the affidavit. The distributees to whom payment is made are answerable for the payment to any person having a prior right. The statute shifts liability to each person who executed the affidavit for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

(e) It is undisputed that Shaw presented Chase with a court-approved small-estate affidavit for Cubie's estate, listing Shaw as a distributee. It is also undisputed that Chase made payment under the small-estate affidavit to Shaw. Unless there is a reason that the statute does not apply, then the plain language of the statute establishes that Chase is released from any liability to Mable for making payment to Shaw.

(f) There is no statutory requirement that Chase act in good faith, that its reliance be proven reasonable, or that Chase investigate the veracity of the affidavit, including any facts relating to the value of the estate assets or liabilities. In fact, the statute specifically prohibits a payor from requesting to see the application of the affidavit or to inquire into the truth of any statement in the affidavit. Although the affidavit listed Shaw, Mable, and Leticia as equal distributees, the statute does not require a payor to pay in accordance with the purported inheritors' proportionate share of the estate. Rather, a payor is released from liability to the same extent as if payment was made to a personal representative of the decedent. The personal representative of Cubie's estate, such as an executor or administrator, would have the statutory duty to recover possession of the estate and hold the estate in trust to be disposed of in accordance with the law. Thus, Chase has no liability for paying the estate funds to Shaw, as if she were the estate representative.

(g) Further, the statute shifts liability to persons other than the payor in two respects. First, the distributees to whom payment is made are answerable for the payment to any person having a prior right. Second, any person who executed the small-estate affidavit is liable for any damage or loss to any person that arises from a payment made in reliance on the affidavit. Both of these provisions make clear that Chase, as payor, is not responsible for any damages to Mable arising out the payment on the insurance checks.

(h) Finally, that the affidavit was subsequently declared void in 2021 does not retroactively impose liability upon Chase. Nothing on the face of the affidavit, at the time of presentation in 2018, indicated that either the affidavit or the probate court's order was void.

d. ***Snead v. Wright,* 2024 U.S. Dist. LEXIS 94764 (United States District Court for the District of Alaska 2024).** Trustee certifications shield bank from liability for completing wire transfer and processing a change of beneficiary form.

(1) At the time of the death of John H. Snead ("Mr. Snead"), his estate included interests in two businesses—Airland Transport, Inc., and J&H Land—as well as trust assets. On December 23, 1998, Mr. Snead established the John H. Snead Revocable Trust and, as sole trustee,

maintained two accounts with Merrill Lynch's Anchorage, Alaska office. Mr. Snead opened the first account ("the 7695 Account") on January 1, 1998, as an individual account and converted the account to a trust account in the name of the Revocable Trust on December 31, 1999. Mr. Snead opened the second account ("the 5343 Account") as a trust account on August 22, 2016. The 7695 Account held an annuity that Mr. Snead purchased from Transamerica Life Insurance Company in 2003, while the 5343 Account held investments managed by Merrill Lynch's advisors. Michael Murphy, a Merrill Lynch financial advisor at its branch office in Anchorage, was responsible for the Revocable Trust at the time of the transactions at issue here. Mr. Snead also allegedly established the John H. Snead Irrevocable Trust ("the Irrevocable Trust"). But Merrill Lynch did not maintain any account on the behalf of the Irrevocable Trust.

(2) Mr. Snead had two children from his marriage to Plaintiff Karen Snead: John G. Snead, adopted by Mr. Snead after marrying Karen Snead, and Monique Snead. Karen Snead and Mr. Snead divorced in October 2005.

(3) Mr. Snead and Ms. Wright met in December 2005 and began dating shortly thereafter. In December 2006, Ms. Wright moved into Mr. Snead's home. Except for two periods of separation in November 2006 and February 2014, the two lived together in Mr. Snead's home until his death. Between July 2000 and August 2017, Ms. Wright worked for the Jay/Kibler group of Advisers at Merrill Lynch. Ms. Wright never worked with Mr. Murphy or the group of advisors responsible for Mr. Snead's accounts, and did not provide account-related services for Mr. Snead. Ms. Wright had access only to the accounts of the clients of the financial advisor for whom she worked.

(4) In 2014, Mr. Snead executed a will, in which he left his estate to his children, John Snead and Monique Snead (then Galosich). In 2016, Mr. Snead requested that his attorney, Peter Brautigam, modify his 2014 will and bequest his residence at 2300 Leopard Circle to Ms. Wright, instead of his children. In January 2017, Mr. Snead also called Mr. Brautigam and asked him to prepare an Alaska transfer on death deed ("TODD"). On January 3, 2017, Mr. Brautigam sent Mr. Snead a draft of his will, amended according to his request. Ultimately, on February 7, 2017, Mr. Snead executed the TODD, which would transfer his residence at Leopard Circle to Ms. Wright upon his death, but decided not to sign the amended will. Mr. Snead signed the TODD in his truck in the parking lot of Mr. Brautigam's office. Mr. Brautigam observed Mr. Snead, who was alone, sign the document and notarized his signature. Later, Mr. Brautigam noted that he believed Mr. Snead understood what he was doing by signing the TODD and did so freely. A few months later, in April 2017, Mr. Snead and Ms. Wright opened a joint bank account at Northrim Bank and added Ms. Wright to Mr. Snead's preexisting account at AlaskaUSA. Ms. Wright had made Mr. Snead a joint accountholder on her account at AlaskaUSA in 2015. Around the same time, on April 4, 2017, Mr. Snead contacted Mr. Murphy at Merrill Lynch and asked that his daughter, Monique, be removed from his accounts.

(5) In his later years, Mr. Snead experienced a number of health issues. He suffered a stroke in 1999 or 2000; was diagnosed with a heart condition that required the placement of a pacemaker in 2003; and suffered from diabetes, neuropathy in certain joints, arthritis, eye disease that impaired his vision, among other conditions. In 2016 and 2017, Mr. Snead's health further deteriorated. In 2016, he chose to stop driving. In 2017, Mr. Snead began to work half days at the Airland office. He continued to work until approximately two months before his death. And, although Mr. Snead's health declined during this period, his colleagues judged that he remained intellectually able and continued to be involved in the operation of Airland and its financials.

(6) In 2017, Mr. Snead's health began to suffer further. In January, Mr. Snead visited the hospital on four occasions due to a malfunctioning pacemaker. Then, in early June 2017, Mr. Snead was hospitalized in Providence Alaska Medical Center because he suffered bouts of

tachycardia that caused his pacemaker to fire. He was admitted to the emergency room or hospitalized again at least four times due to the same issues: tachycardia and his pacemaker repeatedly firing. On August 6, 2017, Mr. Snead visited the Providence emergency room twice—first, in the morning, for a catheter issue, and second, in the evening, when his pacemaker fired. After Mr. Snead arrived in the emergency room in the evening, hospital staff intubated him.

(7) In the several months prior to his death, Mr. Snead made transactions with respect to the trust accounts at issue in this action. In May 2017, Mr. Snead and Ms. Wright decided to move to Tucson, Arizona. They agreed to purchase property in Tucson, together with a home that was to be built on the property. On May 9, 2017, and on June 21, 2017, Mr. Snead instructed Merrill Lynch to transfer funds totaling $15,460 from the Revocable Trust to Richmond American Homes of Arizona to be used as earnest money related to the home purchase. On June 16th, Mr. Snead spoke with Mr. Murphy at Merrill Lynch about his plans to purchase the Tucson home and informed him that he planned to liquidate assets in the 5343 Account to fund his purchase and raise $50,000 immediately, and $300,000 later. Furthermore, he specifically indicated that he did not wish to have a mortgage to finance the purchase but wanted to pay for the property in full. Merrill Lynch duly sold $50,000 worth of securities in the 5343 Account and transferred the proceeds.

(8) On July 25, 2017, while Mr. Snead was hospitalized at Providence, Mr. Murphy conducted a telephonic review of the Trust Accounts with Mr. Snead. In the course of this discussion, Mr. Snead asked who the named beneficiary on the Transamerica Annuity was. Mr. Murphy responded that Mr. Snead's ex-wife, Karen Snead, was listed as the beneficiary and noted that Mr. Snead appeared surprised that this was the case. On July 31, 2017, Ms. Wright emailed Marlaina Haretuku, a Merrill Lynch client associate working with Mr. Murphy, to request that she send a blank Change of Beneficiary Form to Mr. Snead's Airland email address. The next day, on August 1, 2017, Ms. Haretuku emailed a blank Change of Beneficiary Form to Mr. Snead's Airland email as requested. The same day, Ms. Wright, at the direction of Mr. Snead, retrieved a document from Mr. Snead's locked cabinet at the Airland office and printed a copy of the Change of Beneficiary Form. When Ms. Wright brought the documents home, Chris Olsen, an Airland employee and Mr. Snead's power of attorney, was visiting Mr. Snead. Mr. Olsen filled out the Change of Beneficiary Form as instructed by Mr. Snead and Mr. Snead signed the form using a stamp with his signature. Later, Olivia Dekreon, a Merrill Lynch client associate who worked with Mr. Murphy and was a friend of Mr. Snead and Ms. Wright's, visited Mr. Snead and Ms. Wright at their home on the evening of August 1st. When Ms. Dekreon was leaving, Mr. Snead handed her a sealed envelope containing the completed Change of Beneficiary Form and asked her to take the envelope to Mr. Murphy at Merrill Lynch. Ms. Dekreon then delivered the envelope to Ms. Haretuku later that day. Another Merrill Lynch employee, Tara Buchholdt, applied a medallion signature guarantee to the form and Ms. Haretuku faxed the form to Transamerica on August 4, 2017. Following Mr. Snead's death, Ms. Wright allegedly made a claim on the Annuity.

(9) Separately, on July 31, 2017, while Mr. Snead was hospitalized, he called Merrill Lynch and directed them to liquidate the assets in the 5343 Account and transfer those funds to Mr. Snead and Ms. Wright's joint account at AlaskaUSA Federal Credit Union. Ms. Wright was on the line with Mr. Snead during this call to assist with information and Mr. Snead's instructions. However, Mr. Snead confirmed that Merrill Lynch was authorized to transfer funds without her assistance or participation. In total, Merrill Lynch wired $358,000 to the joint account to finance the home purchase.

(10) Mr. Snead went into cardiac arrest, and, despite attempts to resuscitate him, died just after midnight on August 7, 2017.

(11) Monique Snead sued Merrill Lynch for: (1) breach of fiduciary duty as to the John H. Snead Irrevocable Trust; (2) negligence as to the John H. Snead Revocable Trust; (3) vicarious

liability; (4) violation of Alaska Stat. § 45.50.471; (5) breach of fiduciary duty as to the John H. Snead Revocable Trust; (6) negligent hiring, training, and/or supervision; and (6) fraud, as well as Karen Snead's claims for (7) breach of the covenant of good faith and fair dealing and (8) negligence and breach of fiduciary duty. She also sued with respect to Ms. Wright for: (1) wrongful removal of assets/undue influence; (2) conversion; (3) fraud by nondisclosure; (4) fraudulent use of Merrill Lynch's Signature Stamp; (4) fraudulent procurement of a signature; and (5) professional malpractice. In a second complaint Plaintiffs asserted additional claims. Following the Court's order on a motion to dismiss, claims remained for: (1) fraud; (2) conversion; (3) intentional interference with contract; and (4) undue influence against Ms. Wright.

(12) The court granted in part and denied in part Ms. Wright's motion for summary judgment, and granted Merrill Lynch's motion for summary judgment, on the following grounds:

(a) Ms. Wright did not have a duty to use the skill, prudence, and diligence commonly possessed and exercised by registered client associates in the financial industry in her conduct with respect to Mr. Snead. There is no evidence in the record that Ms. Wright undertook to render services to Mr. Snead in the practice of her profession as a client associate. Ms. Wright never interacted with Mr. Snead in her capacity as a Merrill Lynch employee. On the other hand, as Mr. Snead's partner, Ms. Wright routinely assisted him with basic tasks as he aged. Even if Ms. Wright owed a duty to Plaintiffs in her conduct with respect to Mr. Snead, there is no record evidence that she breached that duty or that a breach proximately caused Plaintiffs' alleged damages.

(b) Plaintiffs did not allege any claim of conversion based on Ms. Wright's conduct with respect to the Wire Transfer from the Revocable Trust. And they may not do so at this stage in the proceedings. The record demonstrates that Merrill Lynch did not maintain any account on the behalf of the Irrevocable Trust. And there is no evidence that Ms. Wright acted in any way that interfered with the Irrevocable Trust. Ultimately, there is no evidence that supports Plaintiffs' theory that Ms. Wright intentionally interfered with the Irrevocable Trust by improperly removing funds using her status as a Merrill Lynch employee.

(c) Plaintiffs admitted that they cannot carry their burden of designating specific facts showing a genuine issue for trial on their fraudulent non-disclosure claim related to the Irrevocable Trust and fraudulent use of the signature stamp.

(d) Summary judgment is not appropriate with respect to Plaintiff's claim of conversion related to the Transamerica Annuity. The tort of conversion is an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. To establish a conversion claim, a plaintiff must prove that it had a possessory interest in the property, that the defendant intentionally interfered with the plaintiff's possession, and that the defendant's acts were the legal cause of the plaintiff's loss of property. A future possessory interest is sufficient for a plaintiff to maintain an action for conversion. Plaintiffs need not have had a current possessory interest at the time of the conversion. Alaska law is clear that a future possessory interest is sufficient.

(e) Plaintiffs' claim that Transamerica breached a contract was previously dismissed. And Plaintiffs didn't identify any evidence of breach. Accordingly, Plaintiffs couldn't establish the second element of their claim for intentional interference with contract.

(f) Trustee Certifications Mr. Snead provided when he opened the Trust Accounts and Alaska law shield Merrill Lynch from liability for its role in performing the August 3, 2017, wire transfer ("the Wire Transfer") and processing the Change of Beneficiary form. Under Alaska law, a trustee may furnish to a person other than a beneficiary a certification of trust containing certain information. Furthermore, a person who acts in reasonable reliance on a certification of trust without knowledge that the representations contained in the certification of trust are incorrect is not liable to another person for acting in reasonable reliance on the certification of trust and may assume without inquiry the existence of the facts contained in the certification. When Mr. Snead established the first of Trust Accounts at Merrill Lynch in 1998, he signed a Trustee Certification Form that represented that Merrill Lynch was authorized to "make distributions or transfers" of Revocable Trust assets "to beneficiaries and others as [Mr. Snead] may direct" and "exercise all rights associated with the ownership of . . . annuity contracts, including but not limited to . . . making designations of beneficiaries"; and (2) Merrill Lynch "shall be entitled to assume the existence of a trust power and the proper exercise of trust power by [Mr. Snead] without inquiry" and "shall have no responsibility to assure the proper application of trust funds, securities or other assets by [Mr. Snead]."

(g) Plaintiffs didn't produce any evidence to suggest that Merrill Lynch's reliance on these Trustee Certifications was unreasonable. And the only evidence that might undermine the reasonableness of Merrill Lynch's reliance—the recording of telephone conversations authorizing the Wire Transfer—indicates that Merrill Lynch's reliance was entirely reasonable as Mr. Snead clearly and cogently confirms the transaction. This evidence demonstrates that Merrill Lynch had no reason to suspect Mr. Snead lacked capacity or was subject to undue influence.

(h) Plaintiffs were barred from recovering against Merrill Lynch for injuries they assert they suffered due to Merrill Lynch's completion of the Wire Transfer. Merrill Lynch was permitted to reasonably rely on the Trustee Certifications authorizing it to "make distributions or transfers . . . as [Mr. Snead] may direct," entitling it "to assume the existence of a trust power and the proper exercise of trust power by [Mr. Snead] without inquiry," and absolving it of "responsibility to assure the proper application of trust funds, securities or other assets by [Mr. Snead]." Plaintiffs allege that they were injured when Merrill Lynch completed the Wire Transfer. But when Merrill Lynch did so, it relied on Mr. Snead's express direction to do so and, under the Trustee Certification, was entitled to assume Mr. Snead's capacity to authorize the transfer in the absence of any indication to the contrary.

(i) Plaintiffs could not recover against Merrill Lynch for injuries they suffered due to its processing of the Change of Beneficiary form as it was permitted to rely on the Trustee Certification and "exercise all rights associated with the ownership of . . . annuity contracts, including but not limited to . . . making designations of beneficiaries."

(j) However, the plain language of Alaska Stat. § 13.36.079(f) provides an express exemption from liability—a person is "not liable to another person for acting in reasonable reliance on the certification of trust and may assume without inquiry the existence of the facts contained in the certification." Furthermore, courts in other jurisdictions have concluded that statutes with similar language to Alaska Stat. § 13.36.079(f) bar common law claims like those raised by Plaintiff. Merrill Lynch is therefore immune from liability for carrying out Mr. Snead's instructions to complete the Wire Transfer and process the Change of Beneficiary form. Summary judgment dismissing Plaintiffs' claims for breach of fiduciary duty as to the John H. Snead Irrevocable Trust, negligence as to the John H. Snead Revocable Trust, vicarious liability, violations of the Unfair Trade Practices Act, fraud, and breach of the covenant of good faith and fair dealing is warranted.

(k) Plaintiffs lacked standing to assert claims related to the Irrevocable Trust as they have not demonstrated that they suffered an injury that can be traced to any action Merrill Lynch took. It is undisputed that Merrill Lynch did not maintain any accounts associated with the Irrevocable Trust. Accordingly, they took no actions with respect to the Irrevocable Trust that injured Plaintiffs.

(l) The negligent hiring, training, and supervision claim failed because Plaintiffs didn't produce any evidence that Merrill Lynch knew, or should have known, that hiring Ms. Wright created a particular risk that later materialized or that there was a systemic problem to support their claim. The torts of negligent hiring, training, and supervision impose direct liability on an employer for its negligence as it relates to an employee. Here, Plaintiffs do not argue that Merrill Lynch negligently hired Ms. Wright and do not produce any evidence that Merrill Lynch knew or should have known of a risk in hiring her. Therefore, summary judgment is warranted with respect to Plaintiffs' negligent hiring claim. Second, under Alaska law, a negligent training and supervision claim will succeed where the plaintiff demonstrates a system-wide problem that involves the same wrongdoing or supervisory negligence to correct the problem. The evidence adduced in this case does not suggest a system-wide problem that involves the same wrongdoing or supervisory negligence.

e. ***Zagaris v. Farmers Ins. Group Federal Credit Union,* 2024 Cal. App. Unpub. LEXIS 2083 (2024).** A bank's duty is only contractual in nature and only extends to the person that contracted with the bank regarding the relevant account, but complaint adequately states a cause of action for aiding and abetting fraud or breach of fiduciary duty.

(1) The facts below are as alleged in the complaint. The trust in this case was originally created by Bernard Groesbeck ("Ben") and his first wife, Elsie Groesbeck, in 1993. When Elsie died in 1994, Ben and Elsie's assets were divided under the general trust into an exemption trust and a survivor's trust. The exemption trust was purportedly designed so it was irrevocable and provided Ben with income for the rest of his life, before being split between their children, Kay Zagaris ("Kay") and Neal Groesbeck ("Neal").

(2) Ben later met Bette Groesbeck ("Bette"), and the two married in 1997. Both had substantial assets prior to marriage and allegedly sought to maintain their assets separately throughout their marriage.

(3) In 2017, Ben replaced Kay as the successor trustee to the survivor's trust with Bette. At the same time, he granted Bette a life estate in their personal residence. In 2019, Ben suffered a stroke, and his health began to decline. This decline in health exacerbated existing problems in the family and allegedly led to serious conflicts between Ben, Kay, and Bette regarding Ben's care. During this time, Bette began taking advantage of Ben, including by diverting Ben's assets to Bette's personal use.

(4) Trust accounts were established with the Credit Union. Ben was the original trustee and Kay and Neal were the original beneficiaries. Ben became physically and mentally impaired after his 2019 stroke, such that he was locked out of his online account multiple times and required the Credit Union's assistance to use his account. In addition, the Credit Union's records show Ben gave his password and other confidential information to an unknown third party in July 2019. Then, in March 2020, a Credit Union employee purposefully blocked an attempt by Ben to transfer $77,000 from the exemption trust to Ben's checking account because Ben "was being coached to make the transfer." This action was documented by the employee. By April 2020, Ben required assistance to complete any transaction because he could hardly see, could no longer read, could not recall passwords, could not use a computer, and suffered from dementia.

(5) At that same time, in April 2020, Bette first made contact with the Credit Union to gain control over the exemption and survivor's trusts. Bette informed Debra Whitfield a [Credit Union employee] that Ben was incapacitated, and she was his wife who wanted to disinherit Plaintiff Kay Zagaris and gain control over the accounts as Trustee.

(6) Whitfield agreed to help and painstakingly directed Bette on how to complete beneficiary forms to delete Kay. Whitfield and others at the Credit Union created a new system for modifications to trust accounts that relied on electronic signatures rather than physical

signatures to effectuate changes and used this system for the first time to make Bette's changes. This system allowed Bette's daughter from a different marriage to create an e-mail account on Ben's behalf and sign the documents for him. These documents installed Bette as the trustee for all of the trust assets and named her as the beneficiary for those assets. They were purportedly signed by Ben between April 7 and May 2, 2020.

(7) Ben died on June 22, 2020. In October 2020, Neal went to the Credit Union in order to obtain the assets due to him and Kay as beneficiaries. At the time, the Credit Union issued checks to both Neal and Kay. Neal and Kay were both members at the Credit Union aside from their interests in the trust assets. However, a problem with Neal's check meant it couldn't be cashed and he had to return to the Credit Union multiple times to obtain a proper check.

(8) On the third of these visits, Neal was met by a "Branch Lead Counselor" he had previous interactions with and with whom there was obvious tension due to prior interactions. The Credit Union refused to issue a corrected check and froze the remaining assets in the trust accounts. Branch Support Operations Manager Myra Morales sent an internal e-mail the same day the accounts were frozen to multiple people who were involved with the disputed withdrawals. In that e-mail, Morales wrote, "Neal lied; he is not a successor trustee."

(9) Ultimately, the Credit Union conducted some form of an investigation and determined internally that Bette was the proper beneficiary and successor trustee. It released the remaining funds to Bette and filed a lawsuit to recover those funds that had been issued to Kay.

(10) Neal and Kay sued to recover what they contend are their trust assets as the proper beneficiaries and successor trustees to the relevant accounts. Three causes of action were brought against the Credit Union, labeled the sixth through the eighth causes of action in the complaint. The sixth cause of action alleges the Credit Union was liable for aiding and abetting fraud and breach of fiduciary duty. The seventh cause of action alleges the Credit Union was negligent in its actions. And the eighth cause of action alleges the Credit Union defamed Neal in the aforementioned e-mail.

(11) The Credit Union demurred to the three causes of action brought against it, and the trial court sustained the demurrer without leave to amend. The parties then dismissed the remaining claims without prejudice, and Neal and Kay appealed. On appeal, the court reversed and remanded on the following grounds:

  (a) Appellants sixth cause of action asserts that the Credit Union's conduct aided and abetted fraud and breach of fiduciary duty on the part of Bette.

  (b) California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. Knowledge is the critical element in the claim, as even ordinary business transactions can constitute substantial assistance.

  (c) Liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. Accordingly, one alleging such a tort must be able to allege that the aider and abettor had actual knowledge of a specific primary violation of the law—not just generalized concerns that conduct might be improper. Thus, to test the complaint, one must first identify the underlying tortious conduct or breach of fiduciary duty allegedly aided and abetted.

  (d) The complaint contains a wide-ranging set of allegations that includes a proper indication of the underlying offenses alleged and of the Credit Union's actual knowledge of those wrongs. Specifically, the complaint and the documents submitted show the Credit Union knew Ben was the current trustee of the disputed trust accounts both because he was the one attempting to move money from the accounts and because his signature was required to change the beneficiaries and to make Bette the designated trustee on the account. The complaint then alleges that the Credit Union knew Ben was being improperly coached as of March 20, 2020, when a Credit Union employee "documented fraud and undue influence in [Ben]'s home" after refusing a request to transfer $77,000 because Ben "was being coached to make the transfer." The allegations continue that the next month, in April 2020, Bette worked with the Credit Union to execute several documents on behalf of Ben that added Bette as the active trustee of the Trust and that disinherited Kay. As part of these allegations, the complaint specifically alleges that Bette "informed Debra Whitfield a [Credit Union employee], that Ben was incapacitated, and she was his wife who wanted to disinherit Plaintiff Kay Zagaris and gain control over the accounts as Trustee."

(e) The first underlying primary wrong alleged is fraudulent conduct on behalf of a nontrustee to gain control of the trust of an incapacitated trustee in order to disinherit existing beneficiaries. The Credit Union was made aware of this conduct because, it is alleged, Bette told the Credit Union Ben was incapacitated and that she wanted to be named trustee to disinherit a beneficiary. Any alleged directives for such actions, given by the incapacitated Ben, would likely be either invalid or fraudulent in nature. And an unsupported claim Ben is incapacitated, warranting removal as trustee shortly after Ben was prohibited from making a massive transfer on claims he was being improperly coached, clearly indicates potential fraud. Finally, after learning Ben was incapacitated, the Credit Union still drafted documents at Bette's request for Ben's signature and accepted Ben's electronic signature on those documents—further indicating it knew of the fraud.

(f) While the truth of such a direct admission by Bette to the Credit Union is certainly going to be heavily contested, at the pleading stage it is sufficient to indicate the Credit Union knew of the underlying wrong of fraud by Bette in claiming she could currently be designated by Ben as the trustee.

(g) The second underlying primary wrong alleged is a planned breach of fiduciary duty by a trustee acting to the detriment of the beneficiaries of an irrevocable trust and contrary to the duty owed to the settlor of a revocable trust. Again, the core factual assertion relevant to this is Bette's alleged confession that Ben was incapacitated and that she wished to become trustee to disinherit Kay. To the extent the trust was irrevocable—either due to the death of Ben's first wife or Ben's incapacitation—such a change by a trustee would violate the duty of loyalty to the existing beneficiaries. And to the extent the trust was revocable, Ben's incapacity meant that any actions taken after the change in trustee would violate the trustee's duty to act in conformity with the settlor's intent.

(h) With respect to both allegations of an underlying primary wrong, the complaint also adequately alleges the Credit Union supported Bette's efforts by working with her to make the changes after becoming aware of her tortious intent. Indeed, the complaint goes further, claiming the Credit Union initiated unique procedures that had never been completed electronically before in order to ensure Ben did not have to physically sign any documents making the requested changes. As such, the complaint adequately states a cause of action for aiding and abetting fraud or breach of fiduciary duty, and the trial court erred in sustaining the demurrer.

(i) The Credit Union's arguments do not tackle how it would lack knowledge of Bette's tortious activities after being directly told that Ben was incapacitated, that Bette wanted to become trustee, and that Bette wanted to disinherit a beneficiary. Further, the Credit Union's arguments do not explain why, if it believed Bette was the correct trustee at the time because Ben was incapacitated, it required Ben's signature to make changes to the relevant accounts. Taking the pleadings in the light most favorable to appellants, the facts alleged are sufficient to support the sixth cause of action.

(j) No facts can support a negligence cause of action because the Credit Union owes no duty to appellants. There is a wealth of case law defining the duties a bank owes to account holders. Those duties do not include "policing" other depositors' accounts for fraud. The duty owed to depositors is contractual in nature. This limited duty is applied in a long line of cases confirming that banks owe no duty to those that are not deposit holders when it comes to monitoring account activities. The lone existing exception to this duty comes in a case limited primarily to its facts that holds a bank cannot ignore, and must make a minimal inquiry regarding, large checks written to the bank that are being deposited into an individual's personal account. For appellants' claim of circular reasoning to stand, one must assume that a duty was owed to appellants prior to their disinheriting. Thus, appellants would need to identify a case or principle by which a non-signatory to a trust account would be owed the same or similar duty owed to the signatory on the account. Appellants have cited no such case or principle. Rather, a bank's duty is only contractual in nature and only extends to the person that contracted with the bank regarding the relevant account. Thus, appellants' status as contractual parties to different accounts, as successor trustees on the underlying trusts, and as beneficiaries of the trusts, are legally insufficient bases to claim a duty owed by the Credit Union to appellants regarding an account contractually bound to a third party—even if that third party is related to appellants.

(k) In this case, the allegations contend the Credit Union was presented with an improper attempt by the account holder to change documents related to their account and that the Credit Union had information sufficient to determine the change was fraudulently induced by the current trustee of the account. While a potential basis exists to hold the Credit Union liable for damage done to the account holder or to hold the trustee liable to those harmed by the fraud, there is no exception to the general rule that the Credit Union has no general duty to supervise account activities. Presented with an attempt by the account holder to make changes to their own account, the foreseeability of harm to others is insufficient to warrant a general duty of care and the burden on the banking system in scrutinizing all changes made by elderly or otherwise at-risk account holders to their accounts is too great to justify such a duty even if such harm was reasonably foreseeable.

(l) The common interest privilege states that a privileged communication is one made without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(m) The facts pleaded regarding the challenged communication make clear that the common interest exception applies in this case. Appellants allege that one Credit Union employee e-mailed another Credit Union employee in a manner allowing several other Credit Union employees that were working on or aware of various aspects of the withdrawal dispute to see the communication. Although the communication is alleged to be defamatory, it also relates clearly to the ongoing dispute regarding who is a successor trustee to the relevant account or accounts. While appellant attempts to label the communication as mere "gossip," this label does nothing to dispel the specific facts alleged showing each recipient was an employee of the Credit Union and that the communication was related to ongoing activities at the Credit Union. These facts satisfy the statutory requirement that the relationship between those communicating affords reasonable grounds for supposing the communication innocent. Even under the most favorable reading to appellants, the communication falls generally within the common interest exception.

f. ***Maguire v. Ameriprise Fin. Servs., LLC*, 2024 Conn. Super. LEXIS 1464 (Superior Court of Connecticut 2024).** Claims by child against decedent's estate planning attorney related to disinheritance of child dismissed.

(1) Agnes and her husband had three children, the plaintiff, Bernadette, and Danny. Danny died unexpectedly in 2008. Agnes's husband predeceased her. After her husband's death, Agnes executed documents relating to her investment accounts naming her two surviving daughters, the plaintiff, and Bernadette as 50/50 beneficiaries. In 2016, Agnes executed a will leaving her estate to her two daughters in equal shares and naming them both as co-executors. Subsequent to the execution of the 2016 will, the plaintiff alleged that Bernadette convinced her mother to meet with Bernadette's investment advisor, Anthony Salerno ("Salerno"). On November 22, 2016, Agnes executed a "new business" set-up confirmation with Ameriprise Financial Services, LLC, AMF Holding, LLC, and Salerno and (collectively the "Ameriprise defendants") that named Bernadette as the sole-beneficiary of certain investment accounts.

(2) Counsel delivered to Agnes a draft of a will he had prepared which included the plaintiff as a beneficiary. Bernadette made hand-written changes to the draft will including changes of her surname from Duffy to Kane, and replacing the plaintiff as beneficiary with Bernadette's daughter, Shannon Duffy. According to the complaint, counsel, who had been referred to Agnes by Salerno, did not challenge Bernadette's revisions or advise Agnes as to the consequences of such designations, even though they resulted in the plaintiff, and Agnes' seven grandchildren, being disenfranchised from Agnes' estate. Counsel met with Agnes at her home to execute the will and other estate documents which completely removed the plaintiff from Agnes's new will.

(3) Agnes died on January 22, 2019.

(4) The various Ameriprise Investment accounts were transferred to Bernadette, by virtue of the Ameriprise documents signed by Agnes. Plaintiff filed a motion for appointment of a temporary administrator with the Probate Court, and counsel filed an affidavit in lieu of probate/will administration, representing that Agnes had only $8,325.00 of assets subject to probate. On December 10, 2019, the Probate Court appointed a temporary administrator of Agnes' estate. Plaintiff sued counsel for: Conspiracy to Commit Statutory Theft; Aiding and Abetting Statutory Theft; Forgery; Conspiracy to Commit Forgery; Aiding and Abetting Forgery; Fraud; Violation of the Connecticut Unfair Trade Practices Act; Negligence; Legal Malpractice; and Breach of Contract. The plaintiff alleged that, as of result of the undue influence imposed by Bernadette, Salerno, and counsel, Agnes, inexplicitly executed an entirely different will, and Agnes was highly susceptible to such influence due in part to her advanced age (83), and physical and mental infirmities.

(5) Counsel moved for summary judgment which the court granted on the following grounds:

(a) Certain changes were made on the draft will originally delivered to Agnes by counsel, including the crossing out of the name Duffy, and the insertion of the word Kane, which reflected a change in Bernadette's last name as a result of her divorce. According to her affidavit, Bernadette was divorced in 2014. There is also a handwritten change with regard to tangible personal property being left to Agnes' granddaughter, Shannon Duffy (Bernadette's daughter). This change eliminated the plaintiff as a contingent beneficiary as to personal property which was the only aspect in which the plaintiff had been alluded to in the original draft prepared by counsel. So while the plaintiff alleges that she was a "beneficiary" in the first draft prepared by counsel, the evidence reveals that in that first draft she was a contingent beneficiary only as to personal property in the event that Bernadette predeceased her. In the executed copy finalized after counsel received those handwritten changes from Agnes, Shannon Duffy's name is inserted as a contingent beneficiary of tangible personal property, but she is referred to as her daughter, instead of her granddaughter, and as her residence at Stamford, which is not where she resided, but where the plaintiff resided. The will which left all personal property to Bernadette and included Bernadette as the residuary beneficiary of the estate, was signed by Agnes on December 5, 2017. It was witnessed by David Gossert, and Kathleen Gossert, who were called by Agnes (as opposed to being supplied by counsel). The Gosserts not only signed as witnesses but signed the self-executing affidavit stating that Agnes had signed the will in their presence, acknowledged it to be her will, and at the time of the execution of the will appeared to be of lawful age, sound mind and memory, and free from any undue influence or duress, and that they made that affidavit at her request. Counsel's affidavit also indicates that during all his meetings with Agnes on October 12, and December 5, she appeared to be absolutely capable of understanding and communicating with him, she appeared to be of sound mind and memory, and appeared to be acting free of any undue influence or duress.

(b) Agnes died on January 22, 2019, and Bernadette asked that counsel assist in the administration of her mother's estate. Because the investment accounts held by Ameriprise had a survivorship beneficiary (Bernadette), those accounts passed outside of the probate process, enabling counsel, on behalf of the executor, to file an affidavit in lieu of administration consistent with Connecticut law. In response to a motion by the plaintiff in Probate Court, the Probate Court appointed a temporary administrator, and gave him authority "to investigate any and all changes in designation of beneficiary status or changes in survivorship status, to marshal and protect any other additional assets of the estate and to take steps to protect the assets of the estate." The administrator filed an affidavit with the Probate Court on September 16, 2020, stating that "he found no estate assets," and was closing his probate administration file. The Probate Judge ordered his fees be paid, and that the affidavit in lieu of Probate be submitted to the Court and processed by the Court to complete the estate. In the final paragraph of his affidavit, counsel recites that in her deposition, the plaintiff testified "that she believes that Bernadette and the defendant Flaherty altered Agnes' will by inserting Shannon Duffy's name into it after Ms. Kane signed the will." (Emphasis added.) In his affidavit, counsel denies that he altered Agnes' will after she signed it.

(c) Plaintiff has not filed a sworn affidavit in response to the Motion for Summary Judgment. However, the Court recognizes that the plaintiff is self-represented, and she did file a reply to the Motion for Summary Judgment, in which she details and describes certain exhibits that she believes raise genuine issues of material fact and has attached those exhibits. The trial court should be solicitous of self-represented parties, and the Court will consider the statements contained in the reply and the exhibits, as though they were submitted as sworn affidavits. The problem that the plaintiff has, however, is not the form with which she has submitted the documents, but rather, that none of the documents evidence malfeasance by counsel. First, there is nothing that the plaintiff has submitted which in any way indicates that at the time of the execution of the will prepared by counsel, or at the time she executed any documents forwarded to her by Ameriprise, that she was not of sound mind, that she was not capable of making her own decisions, or that she was under any undue influence. Nothing the plaintiff has submitted indicates that counsel did anything to impede the administrator's efforts in acquiring documents from Ameriprise. Nothing that the plaintiff has submitted evidences any interaction between counsel and Ameriprise. According to the affidavit and exhibits filed by Flaherty, on October 3, 2017, Agnes called counsel indicating that she wanted to make changes to her will. He made an appointment with her for October 12, 2017, at her home in Shelton, Connecticut. No member of her family was present during any part of that meeting. In that meeting, Agnes expressed her desire to omit the plaintiff as a beneficiary under her will, except as a contingent beneficiary only as to tangible personal property. Agnes did not go into detail other than to say that the plaintiff had treated her badly. Agnes stated that she wished to leave the remainder of her estate to her daughter, Bernadette. Agnes brought a copy of her last will and testament dated January 20, 2016, a copy of which is attached to the affidavit. Portions of the 2016 will had been crossed out, including the portion which left fifty percent of the residual estate to the plaintiff, and fifty percent to Bernadette. On October 13, counsel sent Agnes a retainer letter with a flat fee of $600.00. He prepared the will in accordance with Agnes' instructions as detailed above and sent her a letter with a copy of the proposed will. In the November 6, 2017 letter, he set forth a summary of the draft will, and some general comments to assist Agnes' review. The draft letter states in plain English, that, after payment of taxes, personal items will pass to Bernadette, and any remaining property will pass to Bernadette. It also indicates that Bernadette would be the executor, but the successor executor would be Agnes' grandson, Patrick (who is the plaintiff's son). According to the affidavit, Agnes returned the draft will to counsel with the following changes. Bernadette's last name previously identified her as Duffy was changed to Kane. According to other exhibits, Bernadette was divorced in 2014. Additionally, in the original draft will prepared by counsel, the plaintiff had been a contingent beneficiary only as to tangible personal property if Bernadette predeceased her, but instead the changes indicated that Agnes' granddaughter, Shannon Duffy, should be the contingent beneficiary of tangible personal property. Unchanged in that paragraph is a statement that the executor may allocate personal property in compliance with any memorandum or written request which may be found with the will or with such tangible personal property. Counsel then prepared a final will incorporating those changes, however, when he inserted Shannon Duffy's name in-place of the plaintiff's name as a contingent beneficiary for tangible personal property, he did not change the references that had previously been accurate in relation to the plaintiff. So, the final will signed by Agnes refers to Shannon Duffy as her daughter, instead of her granddaughter, and identifies her address as Stamford, Connecticut, which is accurate as to the plaintiff; but not to Shannon Duffy. Counsel's affidavit indicates that at all times in his two meetings and phone conversations with Agnes, she appeared to be of sound mind, capable of making her own decisions, and not subject to any undue influence.

(d) The civil action for statutory theft is synonymous with larceny. It requires an intent to steal. The evidence presented by counsel indicates he went about his normal course of business in preparing a will for Agnes at her request. It indicates that he followed her instructions. There is no evidence that he had illicit communications with either Bernadette or Ameriprise defendants. Witnesses of the will were people who were unknown to counsel and were requested to witness the will by Agnes because they were acquaintances (possibly the landlords) of Agnes. There is no independent cause of action for conspiracy, the acts performed pursuant to the conspiracy must be joined with the allegations of a substantive tort, in this case, statutory theft. There is no evidence whatsoever to suggest that the will signed by Agnes was invalid. Indeed, all the evidence suggests that it was valid and executed in a normal course of business by a testator who was competent to do so. There is no evidence that counsel spoke to Bernadette prior to her mother's death or that he did anything other than draft and supervise the execution of a will at her request. Similarly, there is no evidence that counsel aided and abetted Bernadette and the co-defendants in the transfer of her investment accounts, or the change of the beneficiaries therefore from the two daughters to Bernadette solely. Accordingly, because there is no evidence to support counsel's malfeasance with regard to conspiring or assisting in aiding and abetting statutory theft, and because there is no conceivable damages suffered by the plaintiff by virtue of a valid will executed by Agnes, removing her as a heir, Summary Judgment must be entered in favor of the defendant on the Second and Fourth Count.

(e) Any person who falsely makes, alters, forges, or counterfeits any document, or knowingly utters, as true, any documents falsely made, altered, forged or counterfeited shall pay double damages to any party injured thereby. Once again there is no evidence that counsel participated in such forgery. Even if the Court assumes, though there is no evidence from which it could conclude or which even raises a question of fact, that Bernadette was the one who wrote in Kane versus Duffy on the draft will, such facts would not be material to this case. Regardless of who did the writing on the draft will, the only effect that the writing on the draft will had was that of instructing counsel to change Bernadette's last name to Kane. But regardless of which name is used it refers to the same person, Bernadette. Moreover, the change was not effective until Agnes executed the final will. The change of Bernadette's last name from Duffy to Kane is of no materiality since regardless of the name, the bequest refers to the same person, Bernadette. To the extent that the plaintiff argues that these changes must have been made after the will was executed, it is the sheerest form of bald speculation, supported only by her conjecture that Bernadette did not start using the name Kane until 2018, even though the affidavits and exhibits evidence that she was divorced in 2014. Moreover, whether the name Bernadette Kane or Bernadette Duffy is used, either name identifies the same person and does not in any way affect the disposition of the proceeds pursuant to the validly executed will. The plaintiff has not disclosed a handwriting expert who might testify as to who made the written changes on the draft that was used to prepare the final will. Once again, even if it was Bernadette who made the written changes on draft, that the final will was executed by Agnes and there is nothing in the opposition papers that in any way evidences that Agnes was not of sound mind and free from undue influence at the time of execution. The plaintiff's allegations and speculation that she believes that counsel made a change after the execution is just that. It is not admissible evidence, and it does not raise a genuine issue of material fact.

(f) There is no evidence that counsel made any false representations, let alone that he knew them to be false. He worked with the Probate Court. The Probate Court at the request of the plaintiff appointed a temporary administrator who likewise found that there were no assets other than the personalty to be probated. There is no evidence that counsel made known misrepresentations to the plaintiff, known misrepresentations to Agnes, or known misrepresentations to any of the Ameriprise entities. Accordingly, Motion for Summary Judgment must enter on behalf of the defendant on the Eleventh Count.

(g) It is well established that a claim under the Connecticut Unfair Trade Practices Act will lie against an attorney, but only insofar as the claim is based upon attorney's malfeasance, insofar as it relates to the entrepreneurial aspects of the practice of law, and not insofar as it relates to the professional aspects of the practice of law. The professional conduct of attorneys, which they engage in as a practice of law, cannot form the basis of a CUTPA claim.

(h) In order to establish a negligence or legal malpractice claim, the plaintiff must first establish that the defendant owed a duty to the plaintiff. In Connecticut, our courts have been reluctant to expand the duty owed by an attorney beyond that to the client. The problem in suggesting that counsel, who represented Agnes initially and Bernadette subsequently, owed a duty to the plaintiff, raises the concern over the chilling effect of third-party intrusion into an attorney's primary duty of loyalty to the best interest to his or her client. In order for the defendant Flaherty to have a duty to the plaintiff in her claimed capacity as a third-party beneficiary to the contract, the plaintiff must establish that it was the intent of both parties to contract. The parties to the contract for the provision of legal services (the drafting and supervision of the execution of the will) were counsel and Agnes. In other words, with regard to the contract between Agnes and counsel, the plaintiff would only attain the status of third-party beneficiary if both parties intended her to have such rights. There is no evidence that they intended that. On the contrary, the fact that Agnes approached counsel with the intent of removing the plaintiff initially as a primary beneficiary, and subsequently as even a contingent beneficiary at all, indicates the opposite.

(i) Finally, with regard to any negligence or any legal malpractice claim, the plaintiff would have needed to disclose an expert, who could testify as to the standard of care, and the causative link between breach of the standard of care, and the plaintiff's losses. No experts have been disclosed. The plaintiff cannot prevail in this case on her legal malpractice and negligence claims without an expert testifying as to the standard of care required of counsel and that the breach of that standard of care, if any, caused the plaintiff's losses.

(j) Furthermore, there is nothing in the documents or exhibits submitted by the defendant that indicates that counsel did anything inappropriate in discharging his duties to Agnes in the first instance, and Bernadette in the second instance.

(k) At oral argument, the plaintiff, representing herself, argued sincerely that she did not believe her mother would amend her will to disinherit not only her, but her grandchildren. Moreover, she testified, that she did not believe that her mother would change the beneficiaries on the Ameriprise accounts to eliminate the plaintiff as the beneficiary along with her sister Bernadette. The court believes that the plaintiff's feelings are sincere, and that the circumstances surrounding this case have caused her pain, both financially and emotionally. None the less in a court of law, those feelings are not evidence, and the evidence submitted by counsel demonstrates that he did not aid, abet, or conspire to commit statutory theft, forgery, or fraud, and that he did not breach any contract, or conduct himself in a negligent manner or manner that would violate the laws in this state surrounding the Connecticut Unfair Trade Practices Act or legal malpractice.

g. ***Olteanu v. Gonzales,* 2024 U.S. Dist. LEXIS 197461 (United States District Court for the Northern District of California 2024).** Claims alleging vast conspiracy involving a trust dismissed for inadequate pleading.

(1) Plaintiff Andreea Melissa Olteanu (née Porcelli) alleged a series of complicated schemes and activities aimed at some, one, or all of the ten Defendants in this case. At many points in her amended complaint, Plaintiff makes allegations against "Defendants" but does not specify which of these Defendants is implicated in specific activity.

(2) Plaintiff was the primary beneficiary of the Michael & Anca Olteanu Trust (the "Trust") created by Plaintiff's late father. Plaintiff alleged that certain Defendants were involved in embezzling and laundering the money from the Trust for their own enrichment and also in connection with a Romanian criminal organization. Plaintiff alleged this scheme led to "three assassination attempts" against her as well as the death of her late husband. As a result, Plaintiff sued for: RICO Violations; Wire Fraud; Mail Fraud; Money Laundering; Violating the Bank Secrecy Act; Violating the Patriot Act; Violating the Foreign Account Tax Compliance Act; Child Financial Exploitation; Wrongful Death; Failure to Investigate; Negligent Supervision and Training; Violation of the Fourteenth Amendment; Failure to Uphold Public Duty; Negligent Misrepresentation; Injunction of an Obstruction of Justice; Embezzlement and Conversion; Breach of Fiduciary Duty; Intentional Infliction of Emotional Distress; Civil Conspiracy; Reckless Endangerment; Violations of the California Rules of Professional Conduct and ABA Model Rules; and Elder Financial Abuse.

(3) The Defendants included the following. Eric Gonzalez, an employee of Merrill Lynch and the Trust's financial advisor, as accused of embezzlement. Anca Olteanu ("Mrs. Olteanu"), Plaintiff's mother and the trustee of the Trust, was accused of conspiracy, despite suffering from dementia and legal blindness, and being unwittingly used as a mule in the laundering scheme for a Romanian organized criminal group, and involving Plaintiff's then-minor children in the money laundering scheme. Louis Schneider was counsel for the Defendants and was accused of aiding wire fraud and mail fraud and being involved in a conspiracy to murder Mark Porcelli and falsely arrest Plaintiff in order to auction off property that was at issue in divorce proceedings between herself and her late husband. She was also accused of causing Stage 4 cancer by placing a lien on certain property. Angela, Calin, and Costin Niculescu (the

"Niculescus") were accused of money laundering and "muling" Plaintiff's children. Merrill Lynch was accused of failing to properly protect the Trust assets. Banca BRD, a Romanian financial institution, and Société Générale S.A. ("Société"), a New York institution, were accused of facilitating illegal transactions that "precipitated the murder" of her husband. Christopher Ford and his firm (the "Firm") were Plaintiff's husband's divorce attorneys, and were accused of obstruction, "orchestrating" the death of her husband and terrorizing her family with false arrests and fabricated bench warrants. They were also accused of conspiracy with the Henderson Police Department to obstruct justice and conceal the true circumstances of her husband's death. Horia Tanasescu was accused of logistical and financial support that was essential to the success of the racketeering enterprise. Mr. Brennan was another attorney who is implicated in parts of the complaint but against whom no factual allegations are made. The Napa Police Department ("Napa PD") was accused of failure to conduct a thorough investigation or take appropriate action to protect the Plaintiff's interests, and complicity in the death of her late husband.

(4) Plaintiff first filed a conservatorship against her mother, which she voluntarily dismissed. She then sued in the United States District Court for the District of Hawaii, which was dismissed for improper venue. She then sued in the United States District Court for the District of Nevada, and then some months later initiated this action. She then filed two actions in Napa Superior Court requesting temporary restraining orders against the same defendants she requested temporary injunctive relief against in this action, and those actions were dismissed. She then filed a second conservatorship proceeding in Solano Superior Court against her mother.

(5) Defendants Christopher Ford, Eric Gonzales, Merrill Lynch, and Napa PD moved to dismiss this action. Plaintiff initially failed to respond to these motions and the court ordered Plaintiff to show cause why her case should not be dismissed for her failure to prosecute her case. Plaintiff finally responded and also subsequently filed a motion for a temporary restraining order. Given Plaintiff's numerous filings, the court vacated the hearing originally set and ordered Plaintiff to request leave of court before submitting any more pleadings. Plaintiff then filed a motion for leave to file a motion for a temporary restraining order and a motion for temporary restraining order. Plaintiff filed additional motions and requests for relief, including renewed motions for temporary restraining orders, and a motion for summary judgment. She also moved for joinder of this case and her case pending before the Nevada District Court.

(6) The court granted the motions to dismiss on the following grounds:

(a) The claims against Christopher Ford were dismissed for lack of personal jurisdiction. Mr. Ford was a Nevada attorney with law offices in Nevada, and general jurisdiction does not apply. As for specific personal jurisdiction, Plaintiff's complaint did not allege that Mr. Ford undertook any actions outside of Nevada.

(b) The claims against Eric Gonzales and Merrill Lynch were dismissed for failing to state a claim for relief. Here allegations were conclusory, and Plaintiff did not allege any facts that support an inference Defendant Gonzales actually unlawfully transferred funds from the Trust to a particular foreign account. In sum, Plaintiff does not allege facts that reasonably support the inference that she is entitled to any relief against these Defendants.

(c) The claims against Napa PD were dismissed for failing to create a reasonable inference that Napa PD is liable for any misconduct. The allegations against Napa PD were conclusory. Plaintiff merely concludes Napa PD did not conduct an investigation into her claims and does not allege facts that give Napa PD sufficient notice of what misconduct is alleged against it. No facts are alleged against Napa PD that could lead to a plausible inference that Napa PD is liable to Plaintiff.

(d) The remaining Defendants (except Angela and Costin Niculescu) were all served but have not responded to Plaintiff's complaint. Because the court would be required to consider the merits of the claims against these Defendants were Plaintiff to seek a default judgment against them, the court reviewed those allegations as well. The claims were also dismissed as conclusory and for not plausibly stating any claim against any of these Defendants. For example, Plaintiff makes the conclusory allegation that the Niculescus "used their business accounts to launder" the funds from the Trust. But Plaintiff did not allege any facts that plausibly support an inference the Niculescus did so. Further, from this conclusion Plaintiff made yet another conclusion—that these actions created "a financial crisis and contributed to the circumstances surrounding" her husband's death. No facts were pled that explain how the two were related.

h. ***Carey v. Hartz,* 2024 IL App (1st) 231323 (Appellate Court of Illinois 2024).** Estate planning attorney does not have a general affirmative duty to assess a client's competence.

(1) Alyce K. Newman had two adult sons, P. Andre Katz ("Andre") and Leonard Katz ("Leonard"). In October 2016, Newman prepared an estate plan, which listed both sons as beneficiaries. In the spring of 2017, however, Leonard contacted different counsel about modifying Newman's estate plan and, shortly thereafter, accompanied Newman to counsel's office to meet regarding the estate plan. According to the complaint, at the time Newman met with counsel, she was already suffering the effects of dementia and, at the meeting, Newman displayed signs of her diminished capacity including her inability to accurately answer questions about her life or about her financial situation. During the meeting, Newman also referred to handwritten notes in order to answer questions about her estate or the proposed modifications. At the conclusion of the meeting, counsel requested that Newman prepare notes for a subsequent meeting. Upon returning home, Newman, under Leonard's influence, prepared notes on her proposed modifications at Leonard's direction.

(2) Newman and Leonard met with counsel for a second meeting on May 11, 2017, at which Newman read from her notes as to her proposed modifications. Newman also revealed that she had already given Leonard $660,000 in the past seven months. Newman additionally directed that the details of the proposed modifications not be disclosed to Andre, despite the fact that he was a beneficiary of Newman's estate.

(3) After meeting with Newman, counsel prepared several modifications to Newman's estate plan. Specifically, these modifications included the insertion of a no-contest clause, as well as a requirement that Newman could not be declared incompetent without the concurrence of three physicians who had treated her within the past five years. The latter provision was subsequently further modified to provide that Newman could not be declared incompetent without the concurrence of a physician of Leonard's choosing. The modified estate plan also directed that Newman's trust for her sons should be liquidated, with her sons receiving all of the money under the trust in a single lump-sum distribution. Previously, Leonard's share of the trust assets was to be held in a special needs trust due to Leonard's inability to manage his own finances in part due to his significant and long-standing gambling addiction.

(4) Newman executed the documents evidencing the modified estate plan on May 31, 2017, at counsel's office, where she was accompanied by Leonard, despite the fact that a number of open issues remained. At this meeting, Newman met with another of the firm's attorneys.

(5) On June 9, 2017, Andre was appointed temporary guardian of Newman's estate and person. In the order appointing him as guardian, the probate court identified the "harm" necessitating the appointment as including Leonard's isolation of Newman, concerns about the validity of the letters Newman allegedly signed, and attempted transfer of funds away from her long-time financial advisors. As part of the order, Newman was prohibited from executing any estate planning documents until testamentary capacity is authenticated before the court. After his appointment, Andre contacted Newman's estate planning counsel to notify him about the temporary guardianship. Counsel then called Newman's home, but spoke with

Leonard, not Newman. In July 2017, Newman paid counsel for estate planning services provided through May 31, 2017. Despite having knowledge that Newman was under a guardianship, counsel did not make any efforts to determine whether she had the capacity to execute the check.

(6) In June 2019, Andre, as limited guardian of Newman's estate, sued the attorneys for legal malpractice for failing to adequately investigate whether Newman had the capacity to make changes to her estate plan, and also sued for tortious interference with testamentary expectancy and unjust enrichment. The attorneys moved to dismiss the complaint, which was granted by the circuit court. Andre appealed, and a different division of the court of appeals reversed, finding that it was not clear as a matter of law that the statute of limitations barred the claims.

(7) On remand, the circuit court granted the attorneys' motion to dismiss. Upon dismissal of the complaint, Andre filed an amended complaint, alleging counts for legal malpractice and unjust enrichment. In response, the attorneys filed a motion to dismiss the amended complaint, which the circuit court granted without prejudice, granting Andre leave to file a second amended complaint.

(8) Newman passed away in early 2023, and an independent executor of her estate was appointed on February 28, 2023. The independent executor filed a second amended complaint against the attorneys. The attorneys moved to dismiss the second amended complaint, which the circuit court granted with prejudice. The independent executor appealed, and the court of appeals reversed on the following grounds:

   (a) Rule 1.14 of the Illinois Rules of Professional Conduct concerns clients with diminished capacity and generally requires that, when a client's capacity to make adequately considered decisions in connection with a representation is diminished, the attorney should, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. When, however, the attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the attorney may take reasonably necessary protective action, including consulting with individuals or entities having the ability to take action to protect the client. The comments to Rule 1.14 further explain that in determining the extent of the client's diminished capacity in considering whether protective measures are necessary, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

   (b) To have testamentary capacity, a testator must be capable of knowing what her property is, who are the natural objects of her bounty, and be able to understand the nature, consequence, and effect of the act of executing a will. An individual is presumed to possess testamentary capacity until the contrary is proved. Thus, an attorney working with a client begins the relationship with the presumption that the client has testamentary capacity, until proven otherwise. Plaintiff's position, by contrast, begins from the opposite perspective—namely, requiring the attorney to essentially make a finding of competence before embarking on representation of the client. Such a position turns the presumption of competence on its head, making it something that needs to be affirmatively established instead of something that needs to be rebutted in appropriate circumstances. Rule 1.14 does not stand for such a proposition, especially in light of the well-established presumption of competence.

   (c) An affirmative duty to determine a client's competence is not supported by public policy. There is a public policy in favor of protecting the elderly from abuse and harm. Similarly, there is a public policy in favor of "vigilant protection" of the disabled. There is also, however, a public policy in support of testamentary freedom. The state supreme court has long balanced these policies by establishing a presumption that a person is capable of exercising that testamentary freedom unless it has been established that they are unable to do so. Public policy does not require the court to impose an affirmative duty for an attorney to assess a client's competence.

(d) Both parties appear to accept that, if defendants were on notice of Newman's disability at the time they rendered services, defendants would have been obligated to determine the extent of that disability with respect to her capacity to alter her estate plan. Such an obligation is consistent with the provisions of Rule 1.14, and at least one court has suggested that a failure to comply with Rule 1.14 may support a claim for legal negligence in such a circumstance.

(e) The circuit court erred by finding that, even if there was a duty to assess Newman's competency, the second amended complaint failed to allege sufficient facts to demonstrate that defendants were on notice of Newman's disability. The second amended complaint alleges that, at the time defendants rendered services, Newman was suffering from dementia and that signs of her impairment would be apparent upon any significant questioning. Specifically, the second amended complaint alleges that Newman was unable to accurately answer questions about her financial condition or even to answer basic questions about her life. The second amended complaint further alleges facts that suggest that the proposed modifications may have been unusually influenced by Leonard, such as the fact that the modifications were sought less than a year after the estate plan was formed, the fact that the changes all benefited Leonard, and the fact that Newman had recently made several large gifts to Leonard. At this early stage of the proceedings, these allegations are sufficient to withstand summary dismissal.

(f) The court did not express any opinion as to whether plaintiff will ultimately prevail in proving legal malpractice, and it is possible that the evidence will establish that Hartz's conduct was entirely appropriate. Here, there are well-pleaded facts in the complaint which allege that Newman lacked the capacity to modify her estate plan at the time she engaged defendants' services and that her diminished capacity would have been apparent upon any significant questioning. Consequently, plaintiff stated a cause of action for legal malpractice, and dismissal of that count of the complaint was therefore improper.

13. Charities

a. ***Matter of Lipson,* 2024 N.Y. Misc. LEXIS 174 (Surrogate's Court of New York, Monroe County 2024).** Successor trustee breached duties by paying joint charitable pledges out of revocable trust assets during settlor's incapacity.

(1) Dawn Lipson ("Dawn") married Dr. Jacques M. Lipson ("Dr. Lipson") on May 1, 1998. Dawn was Dr. Lipson's third wife; his previous two marriages having ended in divorce. Dr. Lipson had two children from his first marriage, Judi Lipson and Elaine Dwyer (the "Objectants").

(2) In August 1999, Dr. Lipson established as his primary estate planning vehicle the Jacques M. Lipson Living Trust (the "Trust"). He subsequently amended the Trust five times, most recently on April 19, 2013. The Trust names Dr. Lipson as the sole trustee and sole beneficiary. Upon his death or incapacity, Dawn Lipson would become successor trustee.

(3) The Trust provided under Article Six for "Specific Distributions of Trust property" upon the death of the Grantor: (1) $10,000 to his long-time medical secretary; (2) $1 million to his wife, Dawn; (3) $2 million to the Rochester Area Community Foundation, with Dawn as advisor; and (4) $125,000 in trust for the benefit of a grandson, Richard Tamblin, and an equal amount to be held in trust for his granddaughter, Maria Tamblin. The Trust also distributed the marital

residence to Dawn Lipson, and for three separate timeshare units in Florida to be distributed, one each, to Judith Tamblin, to Dawn Lipson, and to Elaine Dwyer. The residue, after payment of charges, passed one-third to Dawn Lipson, one-third to Elaine Dwyer, one-ninth to Judith Tamblin, one-ninth to granddaughter Maria Tamblin, and one-ninth to grandson Richard Tamblin.

(4) In March 2012, Dr. Lipson suffered a devastating thalamic stroke, suffered from multi-infarct dementia, and experienced hallucinations. Shortly after he closed his medical practice. On April 19, 2013, Dr. Lipson gave his wife Dawn authority to act as attorney-in-fact ("power of attorney"). Dr. Lipson had another significant medical event requiring his hospitalization on September 11, 2013, and he was afterward admitted to the Jewish Senior Home on September 20, 2013. In November 2013, Dr. Lipson was determined by two physicians to be incapacitated. On December 13, 2013, Dawn formally accepted her position as Successor Trustee. Dr. Lipson died in 2015.

(5) At his death, the Trust assets consisted of the marital residence, the three timeshare units, and funds in three Wells Fargo Living Trust accounts with a valuation of $3,928,748. Separately, at the time of his death, Dr. Lipson had more than $10 million in non-Trust assets, all of which passed to Dawn. Those included an IRA, which was valued at $2,172,991 at the time of Dr. Lipson's death and names Dawn as beneficiary; checking and saving accounts with Chase Bank valued at between $200,000-$300,000; and a joint account that Dr. Lipson had with Dawn, which was valued at $8,217,659 at the time of his death.

(6) As successor trustee, Dawn began to pay out sums from the Trust to several charitable institutions to fulfill pledges that Dr. Lipson made before his incapacity. All pledges were made and paid out in the name of Dawn Lipson and Dr. Jacques Lipson as joint donors. After Dr. Lipson's incapacity, Dawn made more "joint" pledges, in the name of herself and Dr. Lipson, to many other charitable institutions, and satisfied those pledges from the Trust accounts, making payments even after Dr. Lipson had died. She also used Trust money to pay for household expenses, totaling $176,236.80.

(7) By the term of a 1974 Separation Agreement with his first wife, Dr. Lipson had agreed to pay $50,000.00 to each of his daughters, the Objectants Judi Lipson and Elaine Dwyer. Following Dr. Lipson's death, Dawn made some of the required distributions out of the Trust funds but not others. She distributed to herself the entire $1,000,000, the residence, and the timeshare. She distributed $1,735,633.97 to the Rochester Area Community foundation, and made the distributions of $10,000.00 each to Judith Marchese and Linda Loughborough. After those payments were made, nothing was left in the Trust to fund the specific distributions to Dr. Lipson's grandchildren, Richard Tamblin and Maria Tamblin. And there was nothing in the Trust to fund the remaining distributions under Article Seven. Objectants also alleged that Dawn failed to appraise and sell the timeshares bequeathed to Dr. Lipson's daughters (Objectants Judi Tamblin and Elaine Dwyer) causing the timeshares to lapse.

(8) Dawn petitioned to settle her accounting, and Objectants moved for summary judgment on their objection to her accounting concerning the payment of the charitable pledges, which the court granted on the following grounds:

   (a) In New York, charitable pledges are enforceable because they constitute an offer of a unilateral contract that—when accepted by the charity by incurring liability in reliance thereon—becomes a binding obligation. Dawn Lipson, once she became successor trustee, paid out money from the Trust to fulfill charitable pledges Dr. Lipson had made (all jointly with Dawn) before he became incapacitated in September 2013.

   (b) The clear and unambiguous intent of the Trust Agreement is that during the period of Dr. Lipson's incapacity trust assets are to be preserved to provide for the care and comfort of Dr. Lipson. Secondarily, the successor trustee "shall" be concerned "for the welfare of my (Dr. Lipson's) lineal descendants," but with consideration of tax planning and consequences. No language gives the successor trustee the discretion to pay jointly made promises out of trust money, especially not when, as is admitted, Dawn had access to joint accounts containing several million dollars. The gifting authority is limited to "lineal descendants." It is not as if had Dawn not paid the total pledge amounts out of trust money, that the pledges would not have been fulfilled and Dr. Lipson would have failed to pay his "valid obligations." But Dawn had access to substantial other funds held in both her name and Dr. Lipson's. In breaching her fiduciary duty to preserve assets for Dr. Lipson's "welfare," and to fulfill his intended testamentary scheme, her use of Trust money to pay her share of the pledges was self-serving to an extraordinary degree.

(c) The Trust provides that "Except as otherwise provided in this agreement my trustee shall have the power to do all acts that might legally be done by an individual in absolute ownership and control of property." However, that grant of authority appears in a section devoted to the Trustee's "Investment Powers," and is limited to exercises of discretion for that purpose. It is not inconsistent with the provisions requiring the successor trustee to act with regard to Dr. Lipson's care and comfort, i.e., his circumstances, and other provisions which refer to the extent of gifting authority.

(d) This point carries considerable weight. Why else create a trust that provides for specific distributions to his descendants and provides for them to receive the residuary, if it could all be given away in the event he became incapacitated, thus defeating the entire testamentary scheme? It is not as if Dr. Lipson left Dawn with no other assets with which to fund her lifestyle and pay her share of the pledges. He left her nearly ten million dollars in joint accounts and IRAs. The parties assume he had the capacity to amend his Trust even after he suffered a "devasting thalamic stroke" in 2012, but the fact that he did not change the testamentary scheme and the distributions even after he had the stroke allows the reasonable inference that he did not intend to countenance wholesale depletions of the trust once he became incapacitated.

(e) Even when the trust instrument vests the trustee with broad discretion to make decisions regarding the distribution of trust funds, a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust.

(f) Dawn's duty as successor trustee was to "pay any valid obligations, . . . medical expenses, and provide for (Dr. Lipson's) comfortable maintenance and welfare, taking into consideration . . . other income or resources," a responsibility further cemented by the language of Article Four Section 3 (d); which reads that "In making distributions under this section, my trustee shall give primary consideration to my circumstances."

(g) Objectants have established entitlement to judgment as a matter of law with respect to the disbursements made after Dr. Lipson's incapacity to cover charitable pledges he made before he became incapacitated, because in using trust funds to cover her one-half share of the obligations, she was depleting trust money to the possible detriment of Dr. Lipson's "circumstances," contravening Dr. Lipson's intent to provide for the "welfare" of his lineal descendants and was exercising discretion not given to her by the Trust agreement.

(h) Custom and practice would indeed be relevant to Dr. Lipson's intent, however, the only evidence of Dr. Lipson's "custom and practice" is Dawn's self-serving testimony concerning her conversations with her late husband, which is inadmissible under the Deadman's Statute. Petitioner has put forward no evidence other than the testimony regarding conversations with the decedent, that he intended his pledges to be paid entirely by him out of Trust money. Conceivably she could have submitted the checks and other financial information to establish how and from what accounts pledges were paid before Dr. Lipson became incapacitated, but she opposed any discovery regarding her and her husband's finances for the period prior to incapacity. The Objectants having been denied access to that information, it would be patently unfair to allow Dawn to rely on it now to defeat summary judgment. She is estopped from making that argument or relying on that information. Thus, Dawn has not raised a material issue of fact as to whether the payments of her one-half obligation out of Trust money were a breach of her fiduciary duty. They were.

b. ***Israel Acad. of Sciences v. Am. Found. for Basic Rsch. in Israel, Inc.,* 2024 U.S. App. LEXIS 16289 (United States Court of Appeals for the Second Circuit 2024).** Special interest standing denied.

(1) Plaintiff-Appellant Israel Academy of Sciences and Humanities (the "Academy") appealed from the district court's dismissal of its amended complaint against Defendant-Appellee American Foundation for Basic Research in Israel, Inc. (the "Foundation") for lack of standing.

(2) The Academy, an academic body created to advance scientific research in Israel, brought claims under New York law seeking declaratory relief, financial accounting, imposition of a constructive trust, and monetary damages against the Foundation, a charitable nonprofit corporation in New York, based on the Foundation's refusal to turn over charitable donations to the Foundation. Applying New York law, which both sides agree governs the action, the district court concluded that the Academy lacked standing to challenge the Foundation's actions.

(3) The Academy appealed and primarily argued that it has standing due to its special interest in the Foundation. Alternatively, it asserted that it has standing as a donor to, or co-trustee of, the Foundation. The Court of Appeals affirmed the district court on the following grounds:

(a) Under New York law, standing to challenge actions of a nonprofit corporation is generally unavailable to who is merely a possible beneficiary or a member of a class of possible beneficiaries. Instead, New York law allows the New York Attorney General to bring such suits on behalf of beneficiaries, in order to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter.

(b) A narrow exception to the general rule applies when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number. Although New York's highest court has not expressly spoken to the issue of what forms of evidence can serve as the basis for this determination, the Second Department of the Appellate Division has clarified that in the case of a charitable trust, this "special interest" is found by looking to the trust's chartering documents to discern the purpose of the trust, and whether there is a class of intended beneficiaries that is entitled to a preference and is sharply defined and limited in number.

(c) The Foundation's chartering document is its certificate of incorporation, which states that its purpose is to support "charitable, scientific, or educational purposes, including to support and encourage the conducting of basic scientific research in the State of Israel or elsewhere." It makes no mention of the Academy, nor describes any ascertainable class of intended beneficiaries.

(d) The Academy makes no allegation that the donors played any role in establishing the Foundation. Because the donors did not create the Foundation, their communications are not relevant to understanding the purpose for which the Foundation was created.

(e) Although the Academy suggests that New York law allows us to consider the Foundation's Form 1023 on the question of standing, prior decisions that specifically relied on the charitable entity's Form 1023 application in finding special-interest standing were reversed on appeal.

(f) The Academy alternatively argued that, if it is denied special-interest beneficiary standing, then it has standing as either a donor to the Foundation or its co-trustee. New York law accords standing to donors to enforce the terms of their own gifts concurrent with the Attorney General's standing to enforce such gifts on behalf of the beneficiaries thereof. However, as alleged in the amended complaint, the Academy merely requested that certain private donors pay funds intended for the Academy to the Foundation instead. Arrangements like the one here—in which donors fund an American charitable entity that in turn issues grants to foreign non-profit entities—are prevalent due to their tax advantages for the donors. Despite the prevalence of such relationships, there is no case in which a New York court has held that the foreign recipient is a "donor" to the American charitable entity, nor have we identified one. Thus, the district court properly concluded that the Academy did not have standing as a donor.

(g) The Academy's remaining argument, that it is a "co-trustee" of the Foundation, is similarly unavailing. The Academy has failed to allege that it was involved in any gift to the Foundation containing a clear statement of intent in the donative instrument that the gift be held in trust. Even assuming, arguendo, that the Foundation, as a charitable corporation, is also a charitable trust, the Academy does not allege sufficient facts to conclude that it is an overall trustee of the Foundation. That assertion is primarily based on the fact that it was designated by the Foundation "to act as a trustee in the management of" a particular bank account and a particular securities account of the Foundation at the Israel Discount Bank in Jerusalem. Despite having nominal co-trustee status over these accounts, the Academy had limited authority over them: its representatives were only allowed to serve as authorized signatories of those accounts and were authorized to instruct the Israel Discount Bank to execute financial transactions within and between the aforementioned [bank and securities] accounts only.

(h) Even this limited status was revoked more than two years before this action was commenced. Finally, the Academy's argument that the court should consider it a trustee based on the fact that the Foundation's board has included senior officers of the Academy is unavailing: the inclusion of certain individual officers on the Foundation's board is not the equivalent of naming the Academy itself as a co-trustee. In short, based on this record, the Academy failed to establish that it is a co-trustee of the Foundation, and the district court correctly found no standing on that ground.

14. Arbitration

a. ***Marshall v. Ameriprise Fin. Servs.,* 2024 U.S. Dist. LEXIS 97255 (United States District Court for the Eastern District of California 2024).** Broker's failure to disclose arbitration provisions in investment management agreement was a breach of fiduciary duty and fraud in the execution, making arbitration agreement unenforceable against individual, but not individual signatory; court rejects choice of law in investment management agreements; and court holds provisions that limit recovery that client may seek, and provide no reciprocal limitation on investment firm, as unfairly one-sided and unconscionable.

(1) John R. Marshall and the John Marshall Irrevocable Trust ("Trust"), by and through its Trustee Michael Marshall, brought suit against Ameriprise Financial Services ("Ameriprise") for fraudulent and negligent misrepresentation, churning, and breach of fiduciary duty related to several of Plaintiffs' investments. Plaintiffs allege that Plaintiff J. Marshall's long-time financial adviser and broker, an agent of Ameriprise, persuaded J. Marshall to invest a substantial amount of his assets into variable annuities based on misrepresentations about the nature of the investments, and added income riders without J. Marshall's knowledge. In 2017, J. Marshall transferred the annuities to the John Marshall Irrevocable Trust and named his brother M. Marshall as Trustee. As part of investing in the annuities and creating the Trust, both Plaintiffs signed multiple agreements with Ameriprise which included

agreements to arbitrate claims related to the accounts and the agreements and contained a choice of law provision designating Minnesota law as the applicable law.

(2) In December 2020, the broker passed away and a different Ameriprise representative was assigned to J. Marshall's and the Trust's accounts. The new broker allegedly told Plaintiffs about the true nature of the annuities and said they were not good investments for Plaintiffs. Thereafter Plaintiffs removed their assets from Ameriprise, save for one annuity owned by the Trust which cannot yet be transferred without incurring a significant penalty. The Trust sought to have the contract for this annuity rescinded.

(3) Defendants asserted that each of the accounts at issue are subject to arbitration and sought to compel arbitration. The federal district court granted the motion to compel arbitration in part on the following grounds:

(a) To decide on a motion to compel arbitration, the court must determine: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If a valid arbitration agreement encompassing the dispute exists, arbitration is mandatory. However, parties may use general contract defenses to invalidate an agreement to arbitrate. The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of a valid agreement to arbitrate.

(b) Plaintiffs argued that the first broker breached his fiduciary duty to Plaintiffs by failing to inform them of the arbitration agreements which constitutes constructive fraud in the execution, and the arbitration agreements are unconscionable.

(c) Here, the agreements contain a choice of law provision that requires the application of Minnesota law to disputes about the agreements and the brokerage accounts. However, the choice of law provision does not govern which state's fiduciary laws the broker operated under before the agreements were signed. The broker allegedly owed a fiduciary duty which preexisted the agreements, and the parties agreed to the choice of law provision only after the broker allegedly breached his fiduciary duty. Under the governmental interest test, first, the court must determine if the foreign law "materially differs" from the forum law; next the court must determine if the foreign state has an interest in applying its law; and finally, only if the first two steps are satisfied, the court must select the law of the state whose interests would be "more impaired" if its law were not applied. Applying the governmental interest test here, the interests of California prevail. Under California law, it is a "long-settled rule" that a stockbroker owes a fiduciary duty to his or her customer in every broker-customer relationship. However, in Minnesota, there is no fiduciary duty owed by a broker unless the parties enter into a special agreement to that effect. Plaintiffs had no special agreement with the broker that would satisfy Minnesota's requirement, and as such, the laws "materially differ." The only connection that Minnesota has to the case is that Defendant is headquartered in that state, and therefore may have an interest in regulating the conduct of financial institutions headquartered there. The Ninth Circuit regards this sort of interest as "minimal." California, however, has a much greater interest in enforcing its fiduciary duty laws in the instant case. Fiduciary duties are ultimately imposed for the protection of person to whom the duty is owed, and in this case, the duty would be owed to the Plaintiffs who are both residents of California. Therefore, California has an interest in protecting Plaintiffs. Moreover, California also has a significant interest in regulating the conduct of financial professionals operating in its state. The conduct at issue here occurred in California through a financial professional employed by Defendant in California. Application of Minnesota law would subvert California's strong interest in imposing a fiduciary duty in this case. Therefore, California law is controlling with respect to whether Defendant, through the broker, breached its fiduciary duty in the execution of the agreements.

(d) The scope of a broker's duty to disclose is delimited by the nature of the broker's relationship with the customer. The scope of a stockbroker's fiduciary duty is directly tied to the extent of the broker's agency over the client's accounts, the comparative vulnerability of the client, and the extent of trust in the relationship. Where a customer is more vulnerable because of, for example, mental disability or advanced age, the broker has a heightened duty to that customer. Similarly, the level of trust and control that the customer places in the broker, of which the broker is aware and accepts, imposes a heightened duty. Plaintiff J. Marshall alleges a longstanding relationship of trust with the broker which gave rise to a similar duty to disclose and explain the material terms of the agreements. Significantly, Plaintiff J. Marshall first opened an investment account and began relying on the broker's investment advice nearly 10 years prior to signing the first of the agreements at issue. Plaintiff J. Marshall is also dyslexic and has trouble reading documents. He would remind the broker of his dyslexia and tell the broker he was relying on him to explain the forms he was signing instead of reading them, and the broker undertook the responsibility of explaining the forms. Because of the longstanding relationship, the control the broker had over Plaintiff's accounts, and most significantly the broker's acceptance of the responsibility to explain the agreements, the broker had a duty to disclose the material terms of the agreements he advised Plaintiff to enter. Defendant does not contest Plaintiff J. Marshall's allegation that the broker did not disclose the arbitration agreement to him. That failure to disclose was a breach of the broker's fiduciary duty and constitutes fraud in the execution, making the arbitration agreement unenforceable against Plaintiff J. Marshall.

(e) The relationship between the broker and the Trustee Plaintiff M. Marshall, however, was materially different and did not give rise to a fiduciary duty toward M. Marshall. There are no allegations that M. Marshall had any prior relationship with the broker before entering into the agreement. A trust is a separate entity which is represented by the trustee. It is the trustee (M. Marshall) that holds legal title to a trust, not the settlor (J. Marshall). In the case of an irrevocable trust, like here, the settlor has no rights, liabilities or powers with regard to the trust administration. Broker's duties do not extend to a third-party Trustee. As there was clearly no prior relationship between Plaintiff M. Marshall and the broker, it would be unreasonable to impose a fiduciary duty on the broker to disclose the terms of the agreements. Similarly, it was unreasonable for M. Marshall to have chosen to not read the forms before signing based solely on the relationship that existed between J. Marshall and the broker. The arbitration agreement was therefore validly formed with the Trust through M. Marshall, Trustee.

(f) Unlike the fiduciary duty, the contractual choice of law necessarily covers the arbitration provisions because the choice of law applies to the agreement and its enforcement. Applying Minnesota choice of law in this instance would conflict with fundamental California policy because Minnesota does not recognize the same standards of unconscionability. For example, under Minnesota law, a contract will only be considered a procedurally unconscionable contract of adhesion if the party "had no meaningful choice" but to sign the contract, meaning there was no alternative for the goods or services, or the goods or services were a necessity. California does not have such a requirement, but instead defines a contract of adhesion as one which is standardized, generally on a preprinted form, and offered by the party with superior bargaining power "on a take-it-or-leave-it basis." Because Plaintiffs do not argue that they had no alternative to opening an account, applying Minnesota law would deprive Plaintiffs of the ability to challenge the unconscionability of the agreements, and would militate toward enforcement of an agreement that may otherwise be unenforceable under California law. This presents a significant conflict with the fundamental policy of California. As with its fiduciary duty laws, California has a substantially greater interest in applying its laws of unconscionability than Minnesota. Where the only connection to the chosen state is that the defendant is headquartered in that state, the chosen state has little to no interest in the application of its law of unconscionability to Plaintiffs' challenge to the validity and enforceability of the arbitration greements when compared to California's substantial interest in applying its law of . . . unconscionability to agreements formed by California residents in California. While Minnesota may have an interest in regulating the contract law for a company headquarters in its state, the Ninth Circuit considers such an interest to be minimal. Defendant has failed to provide any further interest Minnesota may have in applying its laws to this case. In contrast, the California unconscionability doctrine was designed to protect parties with weak bargaining positions, such as individuals like Plaintiffs, from unreasonable terms imposed by more powerful parties, including larger corporations like Defendant. Imposing Minnesota law would eliminate Plaintiffs' ability to argue unconscionability using California public policy as a measuring stick for enforceability and frustrate California's interest in protecting its residents from unreasonable contracts entered into within its borders. Therefore, California has a "materially greater interest" than Minnesota in applying its law of unconscionability and the Court will apply California law.

(g) Under California law, an arbitration agreement, like any other contractual clause, is unenforceable if it is both procedurally and substantively unconscionable. In order for an arbitration agreement to be unconscionable, there must be both procedural and substantive unconscionability, though they need not be present to the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. The burden of proving unconscionability rests on the party asserting that the provision is unconscionable.

(h) A contract is procedurally unconscionable if it is a contract of adhesion, that is, one which is standardized, generally on a preprinted form, and offered by the party with superior bargaining power "on a take-it-or-leave-it basis." In addition, there must be "circumstances of the contract's formation which created such oppression or surprise that closer scrutiny of its overall fairness is required." Plaintiffs have shown a low degree of procedural unconscionability, there must be a higher level of substantive unconscionability. As the agreements are signed by both parties, incorporate the arbitration provision, and state that each party is giving up its right to sue, the agreements are mutually binding and require both Plaintiffs and Defendant to submit to arbitration. They are not substantively unconscionable in this respect.

(i) The parties are agreeing to submit to jurisdiction in Minnesota, but the clause does not contemplate that venue would only be proper in Minnesota, or that the parties must arbitrate in Minnesota. Indeed, Counsel for Defendant confirmed this understanding at oral argument. While the Parties could initiate an action in Minnesota, Plaintiffs are not required to travel in order to initiate their action. It is only when Plaintiffs are required to endure the cost and inconvenience of travelling in order to pursue arbitration that the agreement is seen as being substantively unconscionable. Therefore, this permissive venue provision is not unconscionable.

(j) The arbitration agreements here incorporate the limitation on liability provision by stating that controversies "shall be determined by arbitration in accordance with the terms of this Agreement." Because Plaintiffs would ordinarily be entitled to additional damages for their claims, the agreement would deprive Plaintiffs of remedies otherwise available to them in court. Most of the cases cited by Plaintiff have held that limitations on statutory damages are substantively unconscionable, but a few have determined that one-sided limitations on recovery for other claims, including common law and contract claims, also render an agreement substantively unconscionable. Here, because the provisions only limit the recovery that Plaintiff may seek, and provide no reciprocal limitation on Defendant, the provisions are unfairly one-sided and therefore unconscionable.

(k) An arbitration agreement which contains unconscionable terms may still be enforced if the terms are severable, and the decision whether to sever the objectionable clauses or refuse to compel arbitration is within the trial court's exercise of discretion. Because the agreements contain only one unconscionable provision and otherwise have minimal procedural unconscionability, and because each of the agreements at issue contain a severability clause, the court will strike the liability limitation provisions and compel arbitration rather than refuse to enforce the agreement. After striking the unconscionable limitation on recovery present in the arbitration agreements, the arbitration agreements are not unconscionable and therefore enforceable. However, because the arbitration agreements are void as to J. Marshall, the motion to compel arbitration is granted only as to the Trust.

(l) Where claims are subject to arbitration, federal courts must stay the action until the arbitration is resolved. Because the Trust is subject to arbitration, the claims brought by J. Marshall are stayed until resolution of the arbitration.

b. ***In re Est. of Moncrief,* 2024 Tex. App. LEXIS 7284 (2024).** Divided Texas Court of Appeals holds that issues of testamentary capacity and undue influence are subject to corporate arbitration provisions.

(1) Moncrief Partners, L.P. was formed in 1995. William Alvin Moncrief, Jr. ("Tex") owned ninety percent of the partnership, and his son Charlie owned the other ten percent. The partnership was managed through two general partners, each of which was a corporation created for each partner. In 1998, Tex and Charlie executed a First Amended and Restated Limited Partnership Agreement of Moncrief Partners, L.P. ("MPA"). As a result, the partnership became a Delaware limited partnership. The general partners were CBM GenPar, Inc. ("CBM"), Charlie's company, and WAMJR GenPar, Inc. ("WAMJR"), Tex's company. Each general partner held one percent interest in the limited partnership. The limited partners were Tex (89% interest) and Charlie (9% interest). In 2002, WAMJR merged into CBM, making CBM the sole general partner.

(2) The MPA provided for substituting general and limited partners with the consent of the remaining partners. It also provided that the terms of the agreement applied to all substituted partners. In the MPA, when the term "partners" was used without specifying "general" or "limited," it was defined to include both general and limited partners. This definition tied into the arbitration provision of the MPA, which provided for arbitration of "any dispute, difference[,] or question, as to any matter whatsoever . . . between any of the Partners or Assignees, or between any of the Partners or Assignees and the Partnership and/or the General Partners." The MPA provided that the MPA was governed, construed, and enforced under Delaware law.

(3) MPA Exhibit G specifically dealt with arbitration of claims, and set forth: (1) a detailed process for arbitration through the American Arbitration Association (AAA), addressing matters such as payment of fees, giving of notice, selection of arbitrators, and location of arbitration sessions; (2) that all arbitration proceedings were to be conducted in accordance with the Commercial Arbitration Rules of the AAA; and (3) that the rules would be interpreted and applied, and that questions regarding the arbitration process not resolved under such rules would be determined in accordance with Delaware law, to the extent required by applicable Delaware law (i.e., the Delaware Revised Uniform Limited Partnership Act), or if not so required then in accordance with Texas law.

(4) In 2010, Tex created the W.A. Moncrief, Jr. Management Trust ("Management Trust") to hold the significant share of his property during his life and to distribute it upon his death. In December 2010, the MPA was amended to admit Management Trust and the Estate of Deborah B. Moncrief (Tex's deceased spouse) as substituted limited partners. The limited partner interests in MPA became (1) Management Trust (44.5%), (2) the Estate of Deborah B. Moncrief (44.5%), and (3) Charlie (9%). The general partner, CBM, held the remaining 2%

interest. In this amendment, Management Trust, through Tex as its Trustee, agreed to be bound by all the terms of the MPA.

(5) Tex had the sole power to appoint successor Trustees for Management Trust. In June 2019, Tex signed a Sixteenth Amendment and Complete Restatement of Management Trust naming Charlie, Tom Oil Moncrief ("Tom"), and Gary R. Allen ("Gary") as successor Co-Trustees. He also provided that if Charlie failed to qualify or act as successor Co-Trustee, Gloria Marie Moncrief ("Gloria") would become successor Co-Trustee in his place. In May 2020, Tex signed a Twenty-Second Amendment of Management Trust, appointing Richard W. Moncrief ("Dick") as successor Co-Trustee with Charlie, Tom, and Gary. In August 2020, Tex signed a Twenty-Third Amendment which left substantial property to Gloria. And in October 2020, Tex signed the Thirty-Second Amendment to Management Trust, which restated a series of amendments he made earlier in October, including naming Dick and Marshall M. Searcy ("Marshall") as the sole successor Co-Trustees of Management Trust. Tex signed further amendments to Management Trust in the latter part of 2020 and into 2021, including Amendments and Restatements in March, April, July, and September of 2021—all of which named Dick and Marshall as the sole successor Co-Trustees of Management Trust. No version of Management Trust contained an arbitration provision.

(6) On April 6, 2022, Charlie, Tom, and Gary ("Appellants"), as the named Independent Executors under Tex's Last Will and Testament and as alleged Co-Trustees of Management Trust, filed suit against Gloria in the trial court seeking declarations that they are the sole Trustees of Management Trust and that Gloria is not a Trustee. Gloria opposed the suit. Gloria and Gary, as alleged Co-Trustees of Management Trust, simultaneously filed a counterclaim, petition in intervention, and third-party petition in the trial court challenging Appellants' status as Trustees of Management Trust. Their allegations were based, in large part, on alleged fraudulent inducement of Tex, Tex's lack of mental capacity, or Tex being unduly influenced by Appellants ("Tex's capacity issues") regarding signing of the amendments to Management Trust that designated Appellants as successor Co-Trustees, which capacity issues they claimed rendered those amendments unenforceable.

(7) Appellants, as alleged Co-Trustees of Management Trust, filed an arbitration demand with AAA against Moncrief Partners, L.P. and its general partner, CBM ("MPA arbitration"), asserted their rights to proceed as Co-Trustees of Management Trust, and sought determination of their partnership interests, an audit or accounting of the flow of funds in and out of Moncrief Partners, a determination of the breaches of fiduciary duties, waste of assets, self-dealing, and financial wrongs of CBM, and damages. Moncrief Partners and CBM responded to the MPA arbitration demand contending that Appellants were not signatories to the Management Trust agreement and had no authority or standing to pursue arbitration since they were not signatories. They also contended that the issue of Appellants' status as successor Trustees was being contested as a "gateway issue" and that the MPA arbitration should be suspended pending judicial resolution of this issue by the trial court. Appellants claimed that the capacity issues should be determined by the arbitrator under the arbitration clause in the MPA.

(8) Moncrief Partners and CBM intervened in the trial court and claimed that Appellants, based on the capacity issues, lacked the standing, capacity, and authority to act on behalf of Management Trust. Gloria and Gary, as alleged Co-Trustees of Management Trust, Moncrief Partners, and CBM, jointly sought to enjoin the MPA arbitration.

(9) The trial court denied the Appellants' motion to compel arbitration because it was directed only at Moncrief Partners and CBM (whose interventions it struck). The trial court did not expressly rule on Appellants' alternative request to stay Appellees' counterclaims based on Tex's capacity issues. The court granted Appellees' Motion to Stay the MPA arbitration and issued a temporary injunction against Appellants from proceeding further with the MPA arbitration.

(10) Tex formed OGM, a Texas limited liability company, in 2010, with Tex and the Estate of Deborah B. Moncrief each owning a 50% membership interest. Tex, individually and as personal representative of Deborah's Estate, signed an Amended and Restated Limited Liability Company Agreement on July 28, 2010 (the "OGM Agreement"). Under the OGM Agreement, Tex and Deborah's Estate each held a 50% membership interest, and the manager was Tex, acting both individually and as personal representative of Deborah's Estate. The OGM Agreement provides for the admission of substitute members with the consent of the remaining members. The Agreement applies to substitute members and requires substitute members to adopt and acknowledge it in writing. The OGM Agreement contained a broad arbitration clause.

(11) Also in 2010, Tex created the Moncrief 2010 Trust ("2010 Trust"). Tex was the settlor of the 2010 Trust and Charlie was the Trustee. Appellees subsequently became Co-Trustees of the 2010 Trust. The 2010 Trust Agreement generally benefitted Charlie, Tom, and Dick. The 2010 Trust Agreement reserved to Tex the power to substitute trust property with property having equal and equivalent value (the "Power of Substitution").

(12) In 2012 Tex amended the OGM Agreement to admit Management Trust as a substituted member of OGM in his place. Tex remained a manager of OGM in his individual capacity and a manager as personal representative of Deborah's Estate. Management Trust agreed to be bound by the terms of the OGM Agreement.

(13) In 2013, Tex again amended the OGM Agreement to admit the Deborah Beggs Moncrief Family Trust ("Deborah's Family Trust") as a substitute member and manager in place of Deborah's Estate. Deborah's Family Trust (through Tex as Trustee) agreed to be bound by the terms of the OGM Agreement. Thus, after the 2013 Amendment, the OGM members were Management Trust (50%) and Deborah's Family Trust (50%), and the managers were Tex, individually, and Deborah's Family Trust (by Tex as Trustee). Charlie was named an additional manager in a 2015 Amendment to the OGM Agreement. Amendments in July 2017 and June 2019 provided for successor managers. As a result, Tom and Gary were named successor managers for Tex, individually, and Gloria was named successor manager for Charlie.

(14) In March 2018, Tex assigned Management Trust's 50% membership interest in OGM to the 2010 Trust. He purportedly did so in exchange for a promissory note maturing in 2027, signed by Charlie as Trustee of the 2010 Trust, and made payable to Management Trust (the "2010 Trust Note"). At the same time, the OGM Agreement was amended to admit the 2010 Trust as a substitute member in place of Management Trust. This Amendment also amended the OGM Agreement to require the consent of the managers and all non-transferring members to any disposition of a membership interest.

(15) In 2010, Tex formed SBR by signing the Limited Liability Company Agreement ("SBR Agreement"). SBR is a Colorado entity and the SBR Agreement is "governed by and construed in accordance with" Colorado law. Like OGM, Tex and Deborah's Estate each held a 50% membership interest, and the managers were Tex individually, and Tex as personal representative of Deborah's Estate. The SBR Agreement also provides for the admission of substitute members with the consent of the remaining members. Substitute members must adopt and acknowledge the SBR Agreement in writing. Further, the SBR Agreement is expressly binding upon the parties hereto and their respective heirs, personal representatives, successors, and assigns. The SBR Agreement contains the identical arbitration clause found in the OGM Agreement and was governed by and construed in accordance with the laws of Colorado. In 2012, Tex amended the SBR Agreement to admit Management Trust as a substitute member in place of Tex. Management Trust agreed to be bound by all the terms of the SBR Agreement. Tex remained a manager both individually and as personal representative of Deborah's Estate. In 2013, Tex again amended the SBR Agreement to admit Deborah's Family Trust as a substitute member and manager in place

of Deborah's Estate. Deborah's Family Trust (through Tex as Trustee) agreed to be bound by all the terms of the SBR Agreement. Thus, after the 2013 Amendment, the SBR members were Management Trust (50%) and Deborah's Family Trust (50%), and the managers were Tex, individually, and Deborah's Family Trust (through Tex as Trustee). In 2017, Tex again amended the SBR Agreement, naming Charlie as successor manager for Tex. This Amendment also named Gloria and Tom as successor managers for Charlie. So, by October 2020, Tex and Deborah's Family Trust (through Tex as Trustee) were managers of both OGM and SBR (Charlie was also a manager of OGM); Deborah's Family Trust (through Tex as Trustee) was a member of both OGM and SBR; the 2010 Trust was the other member of OGM; and Management Trust (with Tex as Trustee) was the other member of SBR.

(16) On March 24, 2021, Tex purportedly exercised his power of substitution in the 2010 Trust. Management Trust (through Tex as Trustee) assigned the 2010 Trust Note (and associated lien) to Tex individually. Tex then purported to exercise his power of substitution to reacquire the 2010 Trust's 50% membership interest in OGM in exchange for the forgiveness of all amounts due and owing on, and cancellation of, the 2010 Trust Note. Tex allegedly directed the Co-Trustees of the 2010 Trust to assign the membership interest directly to Management Trust, thus avoiding a two-step process whereby the membership interest would be assigned to Tex and then assigned by Tex to Management Trust.

(17) Management Trust (through Tex as Trustee) agreed to be bound by the OGM Agreement. Tex, as Trustee of Deborah's Family Trust (the other member and a second manager of OGM), also consented to the transfer of the 2010 Trust's membership interest to Management Trust. Gloria, Gary, and Tom (Co-Trustees of the 2010 Trust) refused to consent. According to Appellants, since Tex had the right to exercise the power of substitution in his absolute discretion, the consent of the Co-Trustees of the 2010 Trust was not required.

(18) Tex signed a Fourth Amendment to the SBR Agreement in August 2021. The Fourth Amendment provided that in the event of Tex's resignation, removal, death, disability, or legal incapacity, Dick, Marshall, and Tom shall automatically become the successor managers of SBR, and Deborah's Family Trust shall automatically be removed as a manager. The Fourth Amendment also expressly provided that the successor managers would act by majority vote. Tex signed the Fourth Amendment as manager, both individually and as Trustee of Deborah's Family Trust (the managers of SBR), and as Trustee of the two members of SBR, Deborah's Family Trust and as Trustee of Management Trust.

(19) Appellants filed an application to probate Tex's will and have themselves appointed as independent co-executors of his will. Gloria contested the will and accused Appellants of engaging in fraudulent conduct in having Tex execute the will they sought to have admitted to probate and in seeking to be appointed as executors, among other things. She then filed to admit an earlier will to probate and have herself appointed independent co-executor of Tex's estate.

(20) Appellants, as alleged Co-Trustees of Management Trust, filed a declaratory judgment suit against Gloria in the trial court seeking a declaration that they are the sole Trustees of Management Trust and that Gloria is not a Trustee, based on the last amendments to Management Trust. Gloria and Gary, purportedly as Co-Trustees of Management Trust, counterclaimed challenging Appellants' status as Trustees of Management Trust based on Tex's capacity issues. Others intervened, some claiming to be Trustees of the 2010 Trust, as well as Trustees of other trusts purportedly being beneficiaries under the 2010 Trust (the "2010 Trust Intervenors"), and Deborah's Family Trustees, as a member and manager of SBR (the "SBR Intervenors"). The 2010 Trust Intervenors raised Tex's capacity issues to challenge the validity of the documents signed by Tex regarding his exercise of the power of substitution regarding OGM. The SBR Intervenors (and derivatively on behalf of SBR) raised

Tex's capacity issues to challenge the validity of the Fourth Amendment to the SBR Agreement.

(21) Appellants filed an arbitration demand with AAA against Appellees as Co-Trustees of the 2010 Trust, for declaratory relief and specific performance that Management Trust holds a 50% membership interest in OGM (the "OGM Arbitration"). Appellants also filed an arbitration demand with AAA against SBR Intervenors, Gloria and Tom, as purported Co-Trustees of Deborah's Family Trust as a member of SBR (the "SBR Respondents"), seeking declaratory relief that the Fourth Amendment to the SBR Agreement is valid and enforceable (the SBR Arbitration).

(22) Appellees raised Tex's capacity issues in both arbitration proceedings to assert the absence of an agreement to arbitrate with Appellants, claiming that they are "gateway issues" being addressed by the trial court. Appellees raised Tex's capacity issues in both the OGM and SBR arbitrations. In both arbitrations, Appellants contended that Tex's capacity issues should be determined by the arbitrators, not the trial court. Appellants filed in the probate court motions to compel arbitration and to stay litigation regarding both the OGM and SBR Arbitrations ("Motions to Compel Arbitration and Stay Litigation") Appellees moved stay and enjoin both arbitration proceedings.

(23) The trial court partially granted Appellants' Motion to Strike Intervention, dismissing the 2010 Intervenors and SBR Intervenors from the lawsuit, and striking their interventions, and denying Appellants' Motion to Compel Arbitration against the intervenors as moot. The probate court did not rule on Appellants' alternative motion to stay litigation pending the outcome of the arbitrations, but it implicitly prohibited Appellants from pursuing the arbitrations and stayed the arbitrations.

(24) On appeal, the Texas Court of Appeals, over a dissenting opinion, reversed the trial court on the following grounds:

(a) When a valid arbitration agreement exists and its scope covers the dispute between the parties, it is an abuse of discretion for the trial court to enjoin arbitration of the dispute. Both the federal (FAA) and Texas (TAA) arbitration acts require courts to stay litigation of issues that are subject to arbitration. Under the FAA, the claims of a non-signatory against a signatory to an arbitration agreement must be stayed pending the outcome of the arbitration between other parties if (1) the arbitrated and litigated disputes involve the same operative facts, (2) the claims asserted in the arbitration and litigation are "inherently inseparable," and (3) the litigation has a "critical impact" on the arbitration.

(b) Appellants are parties to a valid and enforceable arbitration agreement within the MPA, the arbitration provisions in the MPA agreement delegate arbitrability disputes to the arbitrator, and Tex's capacity issues were raised in the arbitration between the parties to the MPA agreement. Therefore, the trial court abused its discretion by enjoining and staying the MPA arbitration and by denying Appellants' request to stay litigation of Tex's capacity issues in the trial court.

(c) The MPA provides that it is governed by Delaware law generally. For all purposes relevant to this analysis, Delaware and Texas law are in accord. First, parties to a contract are generally free to determine which state's law will govern their agreement so long as the jurisdiction chosen bears some material relationship to the transaction. The MPA's general language adopting Delaware law does not mandate the use of the Delaware Uniform Arbitration Act. Therefore, under Delaware law, the FAA governs applications for courts to stay or enjoin arbitrations because the parties did not specifically reference the Delaware Arbitration Act as the governing law.

(d) Both states' laws strongly support enforcement of arbitration agreements. The two states have adopted similar approaches regarding who decides the validity of challenges to arbitration. If the challenge is to the validity of a broader contract (container contract) but not to the arbitration provision contained within the container contract, then courts must enforce the arbitration agreement and require the arbitrator to decide the validity or scope of the arbitration agreement. However, if a party challenges the scope or validity of an arbitration provision within a container contract, courts generally resolve the issue of whether the parties agreed to arbitrate the controversies. An exception to this rule exists when parties to an agreement agree to arbitrate disputes in accordance with third-party arbitration rules that provide that the arbitrator has the power to determine the arbitrability of any claim. In such a case, the parties are considered to have "clearly and unmistakably" intended to delegate arbitrability issues to the arbitrator.

(e) In this case, the MPA's language constitutes a clear and unmistakable intent to delegate arbitrability to the arbitrator as demonstrated by the broad scope of the arbitration provision and the clear and extensive adoption of the AAA rules and processes.

(f) Texas law and Delaware law are in accord regarding successors in interest being bound to the contracts of those to whom they have succeeded. In Delaware, non-signatories to contracts may be bound to contracts not signed by them under what it describes as the principle of adoption. Adoption may occur when successors expressly adopt contracts of predecessors or when they adopt contracts of predecessors through conduct such as accepting the benefits of a contract made for their benefit. Texas law is similar; successors in interest are bound to arbitration agreements entered into by their predecessors.

(g) A party who seeks to obtain judicial relief to enforce rights under a contract that contains an arbitration clause cannot avoid enforcement of the arbitration provision in the same contract.

(h) The MPA arbitration should not have been stayed and Appellants should not have been enjoined from pursuing the MPA arbitration. Proceedings involving Tex's capacity issues should have been stayed in the trial court pending the outcome of the arbitration.

(i) Because arbitration is a matter of contract, parties cannot be compelled to arbitrate disputes unless they have agreed to do so. The MPA, from its original version, contained the arbitration provision and that the terms of the MPA are binding on all original and substituted partners, both limited and general. Management Trust, Moncrief Partners, and CBM are all partners in the MPA and are bound to its arbitration provisions. The AAA arbitration brought by Appellants was on behalf of Management Trust. Facially, Appellants had a right to bring that arbitration based on the amendments to the Management Trust appointing them as successor Trustees involving disputes which facially fell within the scope of the arbitration provision. Thus, Appellants, Moncrief Partners, and CBM were parties to a container contract containing an arbitration clause that was binding on them.

(j) Tex's capacity issues, which were asserted defensively to defeat Appellants' facial rights to assert claims on behalf of Management Trust, were for the arbitrator to decide.

(k) The MPA arbitration agreement here is broad, providing "for the resolution of any dispute under this Agreement that is not otherwise resolved pursuant to other procedures under Exhibit F of the Agreement, or that specifically refers to this Exhibit G." The MPA also provides that the arbitration proceedings under Exhibit G "shall be conducted in accordance with the Commercial Arbitration Rules of the AAA." Thus, the arbitrator decides the "second question" in this case.

(l) Based on clear precedent from both Texas and Delaware, the arbitration agreement in the MPA clearly and unmistakably delegated arbitrability to the arbitrator, not the court. Despite Moncrief Partners' and CBM's dismissals from the case when their interventions were struck, Appellants, as facially designated Trustees of Management

Trust, were still parties to the MPA arbitration with Moncrief Partners and CBM that was based on an arbitration provision in the MPA. Tex's capacity issues, as defenses to Appellants' status as rightful Trustees with authority to bring the arbitration claims on behalf of Management Trust, were defenses to MPA (the container contract)—not the arbitration provision—and were for the arbitrator to decide.

(m) The trial court abused its discretion by not granting Appellants' Motion to Stay proceedings in the trial court on Tex's capacity issues pending the results of the arbitration.

(n) If Appellees are signatories to the MPA, then their claims in the trial court on Tex's capacity issues must be stayed. If Appellees are non-signatories to the MPA, under the FAA the court's focus on deciding whether to stay non-signatories' claims against signatories when similar issues are pending in an arbitration is the preservation of meaningful arbitration, not the potential harm to the interests of a non[-]signatory. Under the FAA, claims of a non-signatory must be stayed if (1) the arbitrated and litigated disputes involve the same operative facts, (2) the claims asserted in the arbitration and litigation are "inherently inseparable," and (3) the litigation has a "critical impact" on the arbitration.

(o) The capacity issues related to Tex in both proceedings involve the same operative facts and are inherently inseparable. Finally, the trial court litigation could have a critical impact on the arbitration as either collateral estoppel or res judicata could attach to the trial court's determination of the capacity issues. Since the capacity issues are pending in both proceedings and meet the requirements for a stay under the FAA, the trial court abused its discretion by denying Appellants' Motion to Stay action in the trial court on Tex's capacity pending resolution of the MPA arbitration.

(p) The trial court abused its discretion by enjoining and staying pursuit of the OGM arbitration by Appellants and in denying Appellants' Motion to Stay proceedings involving Tex's capacity issues in the trial court pending the outcome of the arbitration.

(q) The OGM Agreement created a Texas limited liability company expressly governed by Texas law, and its arbitration provision adopted the rules of the AAA and the statutory arbitration law in Texas. From this, we conclude that Texas arbitration law applies, which includes the TAA and the FAA since no provision expressly excludes the FAA or provides exclusive application to the TAA.

(r) It is undisputed that the OGM Agreement, with the arbitration provision embedded, was created by Tex originally in his different capacities and that substitute members of OGM were expressly bound by the terms of the Agreement when they became members. It is also uncontested that Management Trust first became a member in 2012, replacing Tex as a member. On the face of the OGM amendments, Management Trust was replaced as a member by the 2010 Trust in 2018 with Appellees as Trustees of both the 2010 Trust and the Management Trust. Then, on the face of the OGM amendments, Management Trust replaced the 2010 Trust as a member in OGM in 2021 with Appellants as sole successor Co-Trustees of Management Trust. No one has challenged the arbitration clause issue.

(s) Trusts are not legal entities, so the trustees of a trust are the legal representatives of the trust. Thus, Management Trust and 2010 Trust, and their Trustees as their representatives on the face of the governing documents, were successor members to the OGM Agreement, including the arbitration clause. Therefore, there is no "bona fide dispute" about whether there is a valid "agreement to arbitrate." The OGM Agreement, as amended, was the container agreement with an agreement to arbitrate. The only dispute is whether Appellants were the legitimate Trustees of Management Trust to assert the arbitration rights of Management Trust in the OGM arbitration. This is a challenge to the container agreement, not the arbitration agreement, and is for the arbitrator to decide.

(t) There is only one OGM Agreement with one arbitration clause. The amendments to the OGM Agreement do not address the arbitration clause or dispute resolution. The amendments deal with the right to control the whole OGM entity, which is a matter affecting the container agreement, not the arbitration clause specifically.

(u) The OGM arbitration was brought by Management Trust (through Appellants claiming to be sole successor Co-Trustees) as a member of OGM, against Appellees (as Co-Trustees of the 2010 Trust) as a member of OGM, seeking a declaration and specific performance that Management Trust owns fifty percent of OGM. Comparing this dispute to the OGM arbitration agreement, this is a disagreement between two parties claiming to be members of the company (OGM), concerning the company (OGM)-a dispute squarely within the language of the arbitration agreement.

(v) The issues regarding Tex's "capacity," which give rise to the challenge to Appellants' capacity to sue on behalf of Management Trust, are merits defenses, and the merits of a claim are irrelevant to this determination. The arbitration provision in the OGM Agreement is broadly worded and provides for arbitration to be conducted in accordance with the AAA commercial arbitration rules. The OGM Agreement delegates arbitrability issues, including the capacity issues, to the arbitrator.

(w) Since Appellants and Appellees both claim to be successors to the OGM Agreement that contains an agreement to arbitrate, the dispute is subject to the arbitration agreement. And because the capacity issues were pending in the OGM arbitration, the probate court abused its discretion by granting Appellees' the temporary injunction and stay prohibiting Appellants from proceeding with the OGM arbitration and implicitly denying Appellants' Motion to Stay the trial court's proceedings on the capacity issue.

(x) The SBR Agreement issues on appeal were the same as those for OGM, and were resolved in the same manner. Colorado arbitration law is consistent with Texas arbitration law. The trial court abused its discretion by enjoining Appellants from pursuing (and by staying) the SBR arbitration and by not staying the proceedings involving the capacity issues in the trial court pending resolution of the SBR arbitration.

(25) A dissenting justice would affirm the rulings of the statutory probate court in all respects because the mental incapacity of a contracting party is a contract formation defense, not a merits defense, and a question for adjudication by a court, not an issue of arbitrability for an arbitrator. The testamentary capacity of the decedent, William Alvin "Tex" Moncrief, Jr., was the subject of litigation in the probate courts and no party has yet argued that his testamentary capacity is meaningfully different from his capacity to contract during the same time frame. The majority's arbitrability holding deprives the statutory probate court of its exclusive jurisdiction to probate the last will and testament of the decedent—and thereby to adjudicate whether he lacked testamentary capacity or, alternatively, was subject to undue influence at the time of its execution. As a matter of law, the questions of testamentary capacity and undue influence cannot be the subject of arbitration but must always be determined by a court with probate jurisdiction. As the probate proceeding currently stands, Dick and Marshall maintain that Tex possessed testamentary capacity and was not subject to undue influence when he executed the 2021 Will, the 2010 Will, the Sixth Codicil, and the Holographic Codicil, while Gloria, Gary and Tom contest the validity of all but the 2010 Will, as amended by the First, Second, Third and Fourth Codicils, all on the basis of testamentary incapacity and undue influence. Accordingly, the issues are squarely framed for the statutory probate court to adjudicate for purposes of determining which will or codicil to admit to probate. By holding that the issues of mental capacity and undue influence are subject to arbitration in the ancillary trust litigation, however, the majority effectively deprives the statutory probate court of its exclusive jurisdiction to adjudicate the exact same questions

for purposes of determining which will and codicil(s) to probate. If Dick and Marshall obtain favorable capacity and influence findings from arbitration, they will no doubt assert the obligation of the statutory probate court to confirm those findings. The same can be expected of Gloria, Gary, and Tom if they prevail in arbitration. Absent any legislative authority for the arbitration of testamentary capacity and undue influence—and for arbitration findings to bind a statutory probate court for purposes of probating a will—these fundamental questions are not subject to determination by an arbitrator, but solely by the statutory probate court.

c. ***Yederlinic v. Heather Hill Nursing Ctr., LLC,* 385 So. 3d 1109 (Court of Appeal of Florida, Second District 2024).** Nursing home admission agreement with arbitration provision signed by health care surrogate and not attorney-in-fact pursuant to a durable power of attorney is not enforceable.

(1) Heather Hill Nursing Center, LLC; Health Services Management, Inc.; Health Services Management of Florida, LLC; Shelby Scott Jackson; and Christina Brancato (collectively the "Defendants").

(2) Rose was admitted to Heather Hill Nursing Center after Don Burleson-Castillo signed the Heather Hill admission agreement on her behalf. Burleson-Castillo was Rose's attorney-in-fact pursuant to a durable power of attorney ("DPOA"), and he was her designated health care surrogate ("HCS") pursuant to a separate document. The voluntary dispute resolution procedure portion of the agreement was unambiguously signed by Burleson-Castillo on behalf of Rose in his capacity as her HCS. The admission agreement contained spaces in several areas requiring a signature by the resident or the resident's legal representative. However, the agreement also contained a preselected, printed designation of "HCS" adjacent to the words "Relationship to Resident." It was undisputed that the designation of "DPOA" could have been inserted rather than the designation "HCS." Burleson-Castillo signed as Rose's authorized representative, and nothing on the form reflected that he was signing pursuant to the authority granted him in the DPOA. Notably, the HCS document did not grant any authority to Burleson-Castillo to enter into an agreement providing for binding arbitration and waiving Rose's rights to a jury or nonjury trial.

(3) Sometime after Rose's admission to Heather Hill, Emily Yederlinic, as personal representative of the Estate of Rose Castillo, and Don Burleson-Castillo (together, the "Estate") filed a lawsuit against Heather Hill Nursing Center, LLC, Health Services Management, Inc., Health Services Management of Florida, LLC, Shelby Scott Jackson, and Christina Brancato (collectively the "Defendants") alleging nursing home negligence during Rose's residency. After the lawsuit was initiated, the Defendants filed motions to compel arbitration and to stay the proceedings arguing that Burleson-Castillo signed the admission agreement on behalf of Rose as her attorney-in-fact pursuant to the DPOA.

(4) The trial court granted the Defendants' motions and the Estate appealed. On appeal, the court of appeals reversed on the following grounds:

(a) Although arbitration is a preferred method of dispute resolution, the general rule favoring arbitration does not support forcing a party into arbitration when that party did not agree to arbitrate.

(b) While arbitration agreements generally bind only those parties that enter it, nonsignatories may be bound by an arbitration agreement if dictated by ordinary principles of contract law and agency. Though DPOAs may confer broad grants of authority to enter arbitration agreements on behalf of a principal, health care proxies do not have authority to waive the right to a jury trial and bind a nursing home patient to arbitrate claims because that is not a health care decision. An agreement to arbitrate executed on behalf of a nursing home resident is unenforceable when the signor does not sign in his or her capacity as attorney-in-fact pursuant to a DPOA.

(c) Here, the signatory designation pertaining to the arbitration provision in the Heather Hill admission agreement is explicit. Burleson-Castillo signed the document in his capacity as HCS as indicated by the "HCS" designation appearing throughout the admission agreement. Although the agreement has preprinted language indicating that it is being signed by a "legal representative," that term is not defined within the document and does not alter the fact that the agreement specifically reflects Burleson-Castillo's status as Rose's HCS. Further, nothing in the admission agreement references that Burleson-Castillo was Rose's attorney-in-fact under a DPOA or that he signed in that capacity. Under these circumstances, Burleson-Castillo did not necessarily sign the document as Rose's attorney-in-fact pursuant to the DPOA.

(d) Because Burleson-Castillo was acting in his capacity as HCS when he signed the Heather Hill admission agreement, the trial court erred when it compelled arbitration and stayed the proceedings.

d. ***Johnson v. Johnson,* 2024 U.S. Dist. LEXIS 204383 (United States District Court for the Eastern District of Michigan, Southern Division 2024).** The Federal Arbitration Act ("FAA") does not provide federal courts with an independent basis for subject matter jurisdiction. Probate exception to federal diversity jurisdiction bars claims about enforcement of arbitration clause in trust.

(1) Amos C. Johnson, M.D. and the Johnson Family Trust ("Dr. Johnson," collectively) sued Rita Johnson, individually and in her capacity as personal representative of her mother's estate. The complaint sought to compel Rita Johnson to arbitrate the disputed ownership of certain estate assets pursuant to the Federal Arbitration Act.

(2) Dr. Johnson and Rita Johnson are siblings. Their parents, Amos G. Johnson and Marjorie Johnson, created the Johnson Family Trust in May 2000 as a revocable trust. They intended the Trust to receive "all their assets" and "to be named beneficiary" of all their current and future property interests. The Trust names Dr. Johnson as the first successor trustee in the event of his parents' death. The Trust names Rita Johnson as the second successor trustee in the event of Dr. Johnson's death. Both Dr. Johnson and Rita Johnson are the Trust's primary beneficiaries. The Johnson parents are the only parties to the Trust. They are also the only signatories.

(3) Among other things, the trust document contains an arbitration clause that reads: "The Trustors and Trustees of this Trust have agreed that alternative dispute resolution should be utilized to preserve the total Trust Estate from the expenses of legal fees and litigation. For that reason, THIS TRUST IS SUBJECT TO ARBITRATION. The Trustee shall submit all disputes to arbitration as provided in this Trust and arbitration awards shall be fully enforceable under the terms of state law and common law to the extent they are not inconsistent."

(4) Amos G. Johnson died on June 8, 2007. Marjorie Johnson died on May 21, 2020. Dr. Johnson alleges that his mother's will contains a "pour over" clause directing that all her estate assets be transferred to the Trust upon her death. According to him, the Trust currently owns all the assets formerly in his mother's estate by operation of her will. Rita Johnson contests this interpretation. On May 11, 2021, she commenced a proceeding to probate her mother's estate. The probate court formally appointed her as the Estate's personal representative on August 27, 2021. Dr. Johnson contested whether the assets designated in the Estate's inventory actually belong to the Trust. He moved to compel arbitration of the dispute pursuant to the trust document's arbitration clause. The state probate court denied the motion.

(5) Dr. Johnson filed this lawsuit in response, invoking both federal question and diversity jurisdiction, and sought to compel the Estate to arbitration under the Federal Arbitration Act, and stay the state probate court case pending the arbitration's resolution. Dr. Johnson also moved for judgment on the pleadings. (ECF No. 6.)

(6) The court dismissed the complaint of lack of subject-matter jurisdiction on the following grounds:

(a) The Federal Arbitration Act ("FAA") does not provide federal courts with an independent basis for subject matter jurisdiction.

(b) The Supreme Court has long recognized a "probate exception" to otherwise proper federal jurisdiction. The exception deprives federal courts of subject-matter jurisdiction when they are asked to probate a will or administer an estate, interfere with the probate proceedings, assume general jurisdiction of the probate, or assume control of the property in the custody of the state court. This litigation is not geared towards probating or annulling a will or administering an estate. The only pertinent question is whether Dr. Johnson's request falls within the probate exception's third contingency, i.e., where the plaintiff seeks to reach the res over which the state probate court has custody.

(c) To answer this inquiry federal courts must first ascertain whether the asserted claims are in personam or in rem actions. In personam actions are actions brought against a person rather than property, where the judgment is binding on the judgment-debtor and can be enforced against all the property of the judgment-debtor. In rem actions are actions determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property, or actions in which the named defendant is real or personal property. In rem actions are basically contests over a property or a person in the court's control. The property within the court's custody or control is the res.

(d) Property falls within in the probate court's custody once a court-appointed personal representative or administrator takes possession of the property on behalf of the decedent's estate. Under Michigan law, personal representatives take title to estate property that an absolute owner would have, in trust for the benefit of creditors or others interested in the estate. They assume this power upon the probate court's appointment. Here, (1) the state probate court appointed Rita Johnson as the Estate's personal representative on August 27, 2021, (2) she took title to the Estate's property upon her appointment, (3) the probate court assumed custody of the Estate's property at this same juncture, (4) the Estate's property is now the res, and (5) Dr. Johnson disputes the Estate's claim of title to the assets forming part of that res. These factors all indicate that Dr. Johnson's claims are in rem in nature.

(e) Having reached this determination, the second question is whether Dr. Johnson is asking the Court to elbow its way into an ongoing fight over a property or a person in another court's control. The complaint seeks (1) a stay of the state probate court proceeding "concerning or involving" assets that form part of the res, and (2) an order compelling "the disposition of those assets to binding arbitration." But awarding such relief would interfere with the state probate court's custody over the disputed assets as it would place them at the disposal of the arbitral body charged with adjudicating the dispute. Since the Court cannot accomplish this result without encroaching upon the state probate court's custody over the res, the probate exception to federal diversity jurisdiction bars further consideration of this case.

(f) Application of the probate exception turns on whether the state court has "custody" or "control" of the property — not whether the estate has good title to it. Because ordering "the disposition" of the disputed assets "to binding arbitration" would necessarily intrude upon the state probate court's custody over the res, the probate exception to federal diversity jurisdiction precludes the Court from entertaining this matter.

(g) Under the prior-exclusive-jurisdiction doctrine, the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of another subsequent tribunal. The doctrine applies to a federal court's jurisdiction over property only if a state court has previously exercised jurisdiction over that same property and retains that jurisdiction in a separate, concurrent proceeding.

(h) The prior-exclusive-jurisdiction doctrine is similar — if not identical to — the probate exception. And like the probate exception, the doctrine applies at the time of filing, and not at any time thereafter. Because the court has already decided that granting the requested relief would meddle in the state probate court's custody over the res, there is no principled reason why that same conclusion does not equally trigger the prior-exclusive-jurisdiction doctrine.

15. Mediation, Settlement, Releases, & Indemnification

a. ***Combs v. Spicer,* 686 S.W.3d 151 (Supreme Court of Kentucky 2024).** Release by personal representative does not preclude claim by same person individually for intentional infliction of emotional distress.

(1) On April 17, 2020, James Combs was driving his four-wheeled ATV on a highway while he was intoxicated, when he crashed the ATV. His wife Tiara, who was a passenger on the ATV at the time of the accident, died. The Kentucky State Police ("KSP") investigated. Combs's blood was drawn and submitted for testing, but he was not immediately cited for any crimes involving the accident.

(2) Less than one month after Tiara's death, Tiara's estate was opened, and Teresa Spicer (who is Tiara's mother) and Combs were appointed co-administrators. Combs argued that the only reason why Spicer was appointed as a co-administrator was because Combs was also the tortfeasor in the subject accident and could not sign any Release for himself. Both parties were represented by counsel at all relevant times.

(3) On July 20, 2020, Spicer, on behalf of the Estate, entered into a settlement and release agreement ("Release") tendered by Progressive Casualty Insurance Company ("Progressive"). The Release relieved both Progressive and Combs from any further liability arising from the underlying accident in exchange for $25,000.00 paid by Progressive. Spicer received the entire payout from this policy.

(4) Spicer claimed she did not learn until after entering into the Release as co-administrator that Combs had been drunk when the accident occurred. Spicer claimed Combs repeatedly told her that Tiara's death was purely "an innocent accident" which occurred under circumstances similar to when he had driven the ATV with Tiara "a hundred times before." Spicer went to the KSP post in Hazard, Kentucky, where she was informed by an officer that Combs's toxicology report indicated that his blood alcohol concentration ("BAC") was 0.18, meaning he was legally intoxicated at the time of the accident with a BAC more than twice as high as the legal limit.

(5) A grand jury declined to indict Combs. A summons was issued against Combs on a charge of Driving Under the Influence ("DUI"). That same day, Spicer filed a wrongful death claim against Combs on behalf of the Estate. That complaint was subsequently dismissed on the basis that it was barred by the Release. Spicer did not appeal that dismissal.

(6) Spicer filed a second complaint, this time in her individual capacity, against Combs alleging intentional infliction of emotional distress claiming he "intentionally and cruelly lied about the fact that Tiara's death was a direct result of Comb's drunken, wanton, and reckless operation" of the ATV. Spicer did not seek to set aside the settlement or the release.

(7) Combs moved to dismiss Spicer's complaint, which the trial court granted. Spicer appealed. While the appeal was pending, Combs pled guilty to DUI. The Court of Appeals reversed the dismissal of Spicer's IIED action. Combs further appealed, and the Kentucky Supreme Court affirmed the Court of Appeals on the following grounds:

(a) The release provided as follows: "The undersigned, Teresa Spicer ("Releasor"), as Personal Representative of the Estate of Tiara Kinder Combs ("Estate"), being of lawful age, for and in consideration of the sum of Twenty Five Thousand Dollars ($25,000), the receipt and sufficiency of which is hereby acknowledged, does on behalf of the Estate and for its principals, agents, successors, heirs, personal representatives, executors, administrators and assigns, knowingly release, acquit, and forever discharge James Combs ("Releasee"), Progressive Casualty and Insurance Company and Releasee's principals, agents, successors, heirs personal representatives, executors, administrators, and assigns and all other persons and entities of any kind or nature liable or who may be claimed to be liable, of and from any and all actions, causes of action claims, demands, damages, costs, loss of services, loss of consortium, expenses, compensation and liability of any kind, including but not limited to wrongful death and survivor actions, on account of, or any way growing out of, any and all known and unknown personal and bodily injuries and death resulting or to result from the accident that occurred on or about April 17, 2020 at or near Highway 15 in Breathitt County, Kentucky."

(b) Spicer only signed as "Personal Representative of the Estate" and not in her individual capacity. While the Release does state that Spicer entered the Release not only "on behalf of the Estate" but also on behalf of "its principals, agents, successors, heirs, personal representatives," the only claims to be released were those possessed by the estate, not Spicer's individual claims.

(c) Spicer's complaint is sufficient to proceed and allow for her to engage in discovery. Whether Spicer can ultimately, and sufficiently, establish her claim or whether it may later be subject to summary judgment is a matter properly left for the circuit court to resolve at a later time.

b. ***Finley v. Finley,* 683 S.W.3d 328 (Court of Appeals of Missouri 2024).** Settlement agreement controls over trust terms, and parties were free to bargain away their bequests in order to settle their disputes.

(1) Steven R. Finley ("Steven") and Karen I. Finley ("Karen") are the children of Susan M. Finley and the sole beneficiaries of the Susan M. Finley Living Trust ("Trust"), of which Karen is the trustee. The Trust provided for equal distribution of assets between Karen and Steven upon their mother's death after payment of expenses, and the Trust allowed Karen to continue living in their mother's home (the "Hargrove House"), during the administration of the Trust and distribution of Trust assets. Steven filed an action alleging that Karen had breached her fiduciary duties in administering the Trust and unjustly enriched herself by delaying administration of the Trust while she resided at Hargrove House. He sought to remove her as Trustee and to be appointed as successor trustee, compensatory and punitive damages, attorney's fees, an accounting, and an order compelling Karen to properly administer the trust. Karen filed an action against Steven and his wife, Cynthia Finley, for breach of contract and conversion, alleging they had borrowed and failed to repay at least $88,800 from the Trust and she could not by law distribute Trust assets to Steven until he either repaid the debt or agreed to a setoff.

(2) Karen and Steven executed and filed a Memorandum of Understanding with the court, purporting to settle all issues regarding the Trust. The parties amended the Memorandum of Understanding to reflect a change in circumstances regarding the sale price of one of the Trust properties (the "Scott County Farm"). The amended Memorandum of Understanding ("MOU") canceled the pending trial date and stated, "except as amended hereby," the MOU was "to remain in full force and effect." The MOU was filed as an order and signed by the trial court.

(3) The MOU required the "Hargrove House to be distributed to Karen at the value of $335,000.00." The amended MOU changed the sale price of the Scott County Farm to

$294,000.00, which was $14,000.00 less than originally contemplated by the parties. They agreed in the amended MOU that Karen as Trustee would withhold $14,000.00 from the sale proceeds pending resolution of the allocation of such amount, which the parties reserved for determination at a later date.

(4) The MOU provided that all of Steven's debt pled by Karen in her suit would be "compromised to the amount of $20,000.00 due the estate and shall be distributed to Steven." Karen was granted an "additional distribution of cash of $45,000.00 in lieu of all trustee & attorney fees." The MOU further stated, "Karen shall not receive additional fees" and provided for a "cash distribution to Steven of $167,500.00 in consideration of the distribution of Hargrove House to Karen to be made within 14 days after closing sale of Scott County Farm." The MOU also provided that "all of Trustee's legal fees and expenses and all court costs here, publication expenses, and other expenses of litigation shall be paid by the Trust."

(5) The sale of the Scott County Farm closed on March 28, 2019. Following the sale, Karen, as Trustee, made a cash distribution of $167,500 to Steven from the Trust on April 5, 2019, and executed a Trustee's Special Warranty Deed transferring the Hargrove House from the Trust to Karen individually on April 17, 2019. Karen, as Trustee, also distributed $75,000 from the Trust each to Karen individually and to Steven on April 9, 2019.

(6) Thereafter, Steven and Karen filed multiple motions alleging, among other things, the other had failed to follow the terms of the settlement agreement and requesting attorney's fees, sanctions, and other relief. The trial court found that Paragraph 9 of the MOU, which provided for a "cash distribution to Steven of $167,500.00 in consideration of the distribution of Hargrove House to Karen to be made within 14 days after closing sale of Scott County Farm," was ambiguous in that it did not specify the source of the $167,500.00 payment. The court noted that making the distribution from the Trust resulted in Steven essentially paying half of that amount to himself, while Karen received the entire Hargrove House, valued at $335,000.00, the result being that Steven was compensated for only one-fourth of the value of the Hargrove House, rather than half. The trial court therefore found that Karen owed Steven an equalizing distribution of $83,750.00 from her share of the Trust or her personal funds. The trial court further found that Karen's outstanding legal fees as Trustee must be paid by the Trust pursuant to Paragraph 12 of the MOU. The trial court ordered that the $14,000.00 withheld from the sale proceeds of the Scott County Farm be split equally between Steven and Karen, pursuant to an agreement they had reached. The trial court also denied a motion for contempt filed by Steven and Karen's motion to vacate or modify its amended judgment.

(7) Karen appealed to this Court, which was dismissed for lack of a final judgment. The parties had agreed to voluntarily dismiss the claims they had filed prior to executing the MOU, but Steven's claims had not yet been dismissed. The trial court found that Karen had utilized Trust funds to pay attorney's fees associated with protecting her individual interest in $83,750.00, which the trial court had ordered her to pay Steven as an equalization payment in its May 27, 2020 judgment. The trial court therefore ordered Karen to pay $12,300.00 from her share of the Trust or her personal funds to Steven. The court further granted Karen's motion to dismiss Steven's underlying petition, resulting in a final judgment.

(8) Karen appealed and the court of appeals reversed and remanded on the following grounds:

   (a) Steven did not file a motion to enforce the MOU. Multiple motions were in front of the trial court when it entered judgment, including a motion for sanctions, equitable relief, and accounting Steven filed on April 25, 2019; a counter-motion for sanctions and attorney's fees filed by Karen on May 24, 2019; a motion for accounting, equitable relief, appointment of a special fiduciary, and sanctions filed by Steven on July 28, 2019; and a counter-motion to sanction Steven for breaches of the settlement agreement filed by Karen on July 3, 2019. The substance of his motions appealed to the MOU and that Karen asserted the MOU as a defense in her motions, thus enforcement of the MOU was properly before the trial court. A pleading is judged by its subject matter—not its caption. Steven's and Karen's pleadings adequately raised the issue despite not being clearly labeled as either a motion to enforce the settlement agreement or an affirmative defense. The trial court was familiar with the MOU given it had previously entered two orders memorializing the agreement. Further, even had the pleadings not raised the issue, Karen testified at the evidentiary hearing regarding the details of the MOU, including how she and Steven arrived at particular provisions such as the values of the Hargrove House, Steven's debt, and her Trustee fees. She explained the distributions she made as Trustee according to the terms of the MOU. Given the foregoing, she cannot now argue that she was denied due process because Steven failed to file a specific motion to enforce the settlement agreement.

(b) The trial court erred in finding Paragraph 9 of the MOU ambiguous because the language unambiguously requires a cash distribution of $167.500.00 to Steven from the Trust. The courts consider the whole instrument in determining whether a particular provision is ambiguous, and the fact that the parties disagree regarding its meaning does not automatically render a provision ambiguous. The test is whether the disputed language, in the context of the entire agreement, is reasonably susceptible of more than one construction. The court's role is to determine the intent of the parties from the four corners of the document rather than what the parties now say they intended, resorting to extrinsic evidence only where the language is ambiguous.

(c) Here, the disputed language of Paragraph 9 is set amid multiple provisions of the MOU, and each reference to a "distribution" concerns the transfer of a Trust asset from the Trust to either Karen or Steven. To read one of the two distributions called for in Paragraph 9 as a payment from Karen's personal funds or her Trust share rather than from the Trust as a whole would be to single it out as an anomaly in the entire document, which is not called for by the language of the MOU. The fact that it is a "cash distribution" does not merit a different interpretation, given that Paragraph 8 also calls for a "distribution of cash" for Karen's trustee and attorney's fees, which no doubt the parties intended to come from the Trust. There simply is no reasonable alternative way to interpret the distribution language in Paragraph 9.

(d) The trial court focused on Paragraph 9's statement that the distribution is "in consideration of distribution of Hargrove House to Karen," reading it in isolation with Paragraph 1's distribution of the Hargrove House. The trial court referred to the terms of the Trust, which called for equal distribution of Trust assets, as well as to Steven's testimony that he wanted to be treated equally, to conclude that the intent of the MOU could not be that Steven's consideration in exchange for the asset allocated to Karen would be less than equal to its value. However, the trial court erred in considering this evidence. The parties entered the MOU to resolve all of their disputes concerning the Trust. Thus, the language of the MOU controls over any provision of the Trust, and the parties were free to bargain away their bequests granted by the Trust in order to settle their many disputes in this matter.

(e) Steven's statements regarding his intent are excluded by the unambiguous language of the agreement. It is undisputed that the parties' attorneys drafted this agreement in the presence of the parties, at the courthouse. Had they intended for the assets to be split equally, these sophisticated drafters could have simply designated a $335,000 cash distribution from the Trust to Steven—equal to what the parties determined was the value of the Hargrove House. Alternatively, they could have specified that Steven's one-half interest in the value of the house come from Karen's Trust share or from her personally. They did neither.

(f) In light of the MOU as a whole, it is not clear that its results are inequitable. The agreement itself says in Paragraph 4 that Steven's debts were "compromised" to the amount of $20,000.00, indicating the amount was reduced in Steven's favor. The provision limiting Karen's trustee fees to $45,000.00 despite the ongoing requirements for her to administer and distribute the Trust assets indicates she accepted a lesser rate. Though the distribution of the Hargrove House appears in Paragraph 1, the cash distribution to Steven as consideration does not appear until Paragraph 9, after mention of the Scott County Farm sale and adjustments to Steven's debt and Karen's fees, suggesting that all of these provisions are to be read together and taken into account by the time Paragraph 9 sets the consideration. Further, we cannot quantify the value each party placed on ending the dispute without protracted litigation. Thus, read as a whole, the MOU does not present as clearly inequitable.

(g) There is simply no statement in the MOU that the parties intended to receive equal amounts across the board. Any appeal to the Trust language is improper given the existence of the MOU. Nor is it for the trial court to determine whether the value of consideration in a contract was adequate; it needs only to be present. Here, consideration is present, is not necessarily inequitable in light of the whole agreement, and the provision for the cash distribution to Steven is unambiguous that it was to be made from the Trust.

(h) The trial court's specific order of attorney's fees here must be reversed. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. The subject of the settlement agreement here is the administration of the Trust, and all of the MOU's provisions direct the Trustee in administering the Trust. The MOU states that "all of Trustee's legal fees and expenses shall be paid by the Trust." This provision designates the payment of Trustee's legal expenses, but says nothing about any expenses Karen may incur in her individual capacity. The trial court had discretion to delineate such expenses and make an award accordingly as justice and equity required. However, this particular award of $12,300 in fees was based on the trial court's finding that Karen improperly expended them to protect her individual interest in $83,750.00, which the court determined was not rightfully hers. As the trial court erroneously interpreted the MOU in this regard, the trial court's reliance on its interpretation in this award of fees is misplaced.

c. ***Minshall v. Ahner,*** **2024 Ohio 3428 (Court of Appeals of Ohio 2024).** The nature of concealment actions requires probate courts to adjudicate the accused's conduct in a quasi-criminal proceeding. The interested parties that first allege wrongdoing are not elevated to the status of a party to the action that can settle the claims with the accused.

(1) Frances died on March 2, 2014. Upon her death, her son William E. Minshall filed her last will and testament and a related codicil with the court. The will identified an inter vivos trust that Frances had established prior to her death. The trust contained some property. The will devised that any property not specifically bequeathed to a named beneficiary was to "pour over" into the trust upon Frances's death.

(2) William was appointed executor the following day. William filed an inventory of estate assets that consisted of a single asset—an annuity valued at $78,795.54. William filed a certificate of termination with the court, stating that all estate liabilities had been satisfied, taxes and any fees owed had been paid, and that all estate assets had been distributed. The trial court approved the certificate that same day.

(3) Nearly five years later, Peter and Werner Minshall filed a complaint alleging that William concealed assets of Frances's estate when he filed his inventory with the trial court. The trial court vacated the certificate of termination. During this first day of trial, William confirmed that the only item he included in the estate inventory was his mother's annuity account. He stated that he did not include any other property that belonged to Frances at the time of her

death and that he compiled the inventory based on his "memory." He also testified that at the time he prepared the inventory, he recalled "numerous items" that were in her possession but still failed to include those additional items in the inventory. The trial court determined that William's testimony indicated that an accounting of Frances's trust was necessary to determine what assets belonged to her trust at the time of her death and would not be subject to the concealment as alleged in the underlying action. The trial was then continued indefinitely pending resolution of that accounting.

(4) The third-party administrator appointed to conduct the accounting, Richard R. Gillum, confirmed that he had completed his accounting and had filed an amended inventory identifying estate assets not identified in William's original inventory. He testified that other than a golf cart that was no longer in operation, all other assets identified in the amended inventory were available to be reclaimed and distributed in accordance with the provisions of Frances's will and any trial court orders. William argued that he had not concealed these assets because Peter and Werner were aware of the assets at all times but had not made a claim for them. He also defended his failure to include those items based on the fact that he had prepared and signed the original, incorrect inventory under the advice of his counsel.

(5) The trial court determined that he had concealed assets from the estate and scheduled a hearing on the damages resulting from that concealment. The parties discussed a proposed resolution regarding damages. The parties began the potential resolution with a stipulation as to the value of each asset that William was found to have concealed from Frances's estate. After stipulating to the valuation of these assets, the parties sought to resolve which party would be assessed the costs of the action and the amount of attorney's fees to be awarded to Peter and Werner. The parties agreed that $250 was a reasonable hourly rate for attorneys' fees.

(6) William's counsel restated the parties' agreement on the record. He stated that the terms of the agreement were that Gillum would be responsible for distribution of the durable assets in the estate, that the only unresolved issue related to the concealment action was a chose in action pending in the general division that was owned jointly by William and Frances—99% by Frances and 1% by William—at the time of Frances's death, that the parties each agreed to pay 1/3 of Gillum's costs and 1/3 of court costs, and that the trial court would separately determine the amount of attorney's fees owed to Peter and Werner with the hourly rate of those costs established at $250 per hour. The parties briefly argued over the splitting of court costs and payments to Gillum but the trial court stated that each party would be required to pay 1/3 of those costs.

(7) The trial court then invited William's counsel to draft and circulate a proposed judgment entry reflecting the terms of the agreement. Peter and Warner objected to the terms of the proposed judgment entry, arguing that it did not reflect the parties' entire agreement. The trial court ordered that the parties had reached a settlement and outlined the basic terms of that settlement—those terms being consistent with the terms identified at the hearing. The court's entry also ordered the parties to "file a proposed Judgment Entry which incorporates the above basic terms of settlement for the Court's review and approval on or before September 20, 2021." Peter and Werner continued to decline executing William's proposed judgment entry. William moved to enforce the settlement agreement.

(8) The trial court entered judgment on the concealment action. The trial court found that William was guilty of concealing $225,338.92 from Frances's estate—the total of the stipulated value of assets in the amended inventory. The court further held that Gillum had offered services with a reasonable value of $24,412.50 with additional expenses of $1,160.00 for his work identifying the estate assets. Finally, the trial court determined that Peter and Werner's co-counsel, having previously submitted itemized statements reflecting the work performed on their respective client's behalf, had earned reasonable attorney's fees in the amounts of $36,500.00 plus $665.50 in expenses, and $36,250.00, respectively. The court entered

judgment against William and in favor of Frances's estate in the amount of $225,338.92 for money and other personal property concealed, embezzled, conveyed away, or in the possession of William, together with a 10% penalty, and all costs of the Estate and these proceedings. The court also ordered William to pay Gillum's fees and expenses as well as Peter and Werner's attorney's fees in the amounts described above.

(9) The trial court denied William's motion to enforce a settlement agreement, holding that concealment actions were quasi-criminal in nature and, therefore, could not be settled by the parties but had to be resolved by the trial court with a finding of guilt and a calculation of damages.

(10) William appealed and the court of appeals affirmed, in part, reversed, in part, and remanded on the following grounds:

(a) Concealment actions are not subject to settlement by the parties as a matter of law. Concealment actions as a special proceeding which is inquisitorial in nature and involves a charge of wrongful or criminal conduct on the part of the accused. In such a proceeding, a finding of guilty or not guilty is required with the imposition of a penalty upon a finding of guilty. A concealment action is a summary means, inquisitorial in nature, to recover specific property or proceeds or value thereof belonging to an estate, title to which was in a decedent at their death or in a ward when his guardian was appointed; or to recover property belonging to an estate, concealed, taken or disposed of after the appointment of the fiduciary. It is not a proceeding to be used by individuals to collect a debt, obtain an accounting or adjudicate rights under a contract and bears little resemblance to a civil action, either in purpose or execution. It is not a matter of a dispute between two private parties.

(b) Concealment actions are not a matter of dispute between two private parties. It is a summary, inquisitorial, quasi-criminal proceeding which must be conducted not merely in the probate court, but by the probate court. In essence, the accused is one party and the court itself, as the superior guardian of the ward, is the other. The fact that an "interested party," such as a surety or a family member or heir of the ward, may bring a complaint to begin the inquisitorial process does not, in the long-held view of the Supreme Court of Ohio, transform it into a matter akin to a private dispute.

(c) When Peter and Werner first alleged William's concealment of estate assets, the trial court was tasked with conducting the inquisitorial concealment proceedings and determining William's guilt or innocence. While the trial court's attempts to facilitate a settlement in this case may have been well-intentioned, they were not authorized by law—an error the trial court apparently realized at the time of its December 7, 2021 order denying William's motion.

(d) The nature of concealment actions requires probate courts to adjudicate the accused's conduct in a quasi-criminal proceeding. The interested parties that first allege wrongdoing are not elevated to the status of a party to the action that can settle the claims with the accused. The settlement agreement was not permitted as a matter of law.

(e) The parties to the present action were not authorized to settle Peter and Werner's concealment claims as a matter of law.

(f) If the accused in a concealment action is found guilty, the probate court shall assess the amount of damages to be recovered. The amount of the judgment rendered against the guilty party is determined by whether they are the fiduciary for the estate. A "fiduciary" includes executors of a testamentary estate. If the guilty party is a fiduciary, the probate court shall render judgment against the fiduciary for the amount of the moneys or the value of the personal property or choses in action concealed, embezzled, conveyed away, or held in possession, together with penalty and costs. However, if they are not the fiduciary, the probate court shall render judgment in favor of the fiduciary for the amount of the moneys or value of the personal property or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of the proceeding or complaint, except that the judgment shall be reduced to the extent of the value of anything specifically restored or retuned in kind as provided in this section. The reduction in judgment for assets that are restored or returned to the estate is not applicable when the fiduciary of an estate is found guilty of concealing its assets.

(g) William was the executor of Frances's estate and, therefore, a fiduciary under the statute. The trial court, relying on the parties' stipulation as to the value of the concealed assets at trial, determined that William concealed $225,338.92 from Frances's estate. The trial court was obligated to enter judgment against William in that amount plus a 10% penalty and costs. William, as fiduciary, was not entitled to any reduction in the amount of the judgment rendered against him based on the alleged recovery of those assets by the estate through their placement in Frances's trust. Therefore, the trial court did not err in rendering judgment against William for the full amount of the concealed assets.

(h) Whether the trust has been made whole, or whether those assets have been properly recovered by the estate may be issues that need to be addressed in future proceedings. The trial court rendered its judgment in accordance with the statute and William has not identified any bases on which the trial court erred. The trial court was obligated to conduct a hearing prior to awarding Peter and Werner their attorney's fees. William did not waive his right to that hearing and the trial court abused its discretion in making an award without first conducting a hearing.

d. ***In re Est. of Maclay,*** **2024 MT 261N (Supreme Court of Montana 2024).** Beneficiary's actions, conduct, and failure to act waived right both to participate in mediation of will contest and object to settlement.

(1) Martin Maclay ("Marty") executed a valid will in September 2007 ("2007 Will"), providing equally between his two children—Appellees Jesse and Michael. Shari and Marty were married on December 17, 2020. In late October or early November 2021, Marty was admitted to the ICU at St. Patrick's hospital due to complications with COVID-19. On November 8, 2021, Marty signed a document purporting to be a new will ("2021 Will") while in the ICU. This purported will disinherited Jesse and devised a life estate in Marty's primary residence to Shari; the document devised the rest of his estate to Michael. Marty died five days later, while still in the ICU.

(2) Michael opened an informal probate of the 2021 Will. Shari and Jesse jointly filed a Petition for Formal Probate to Determine Will and Heirs and Appointment of Personal Representative ("Petition"). In it, Shari and Jesse challenged the 2021 Will, arguing that the circumstances surrounding it potentially caused it to be invalid under Montana law. For example, they noted that the purported will was only witnessed by one individual; that Marty signed in the other space reserved for a second witness; that at the time he signed it, Marty was very ill in the ICU, on many medications, and was intubated the next day; and that the purported will reflected an unnatural disposition in that it differed from the 2007 Will by entirely disinheriting Jesse and favoring Michael over Shari, where the 2007 Will provided generously for Marty's prior spouse and treated Jesse and Michael equally. Shari and Jesse were therefore petitioning for a formal determination of whether the purported will is valid, the decedent died intestate, or if an earlier will should be revived.

(3) Shari filed an Unopposed Motion to Dismiss, requesting the court dismiss her from the Petition because she was not contesting the 2021 Will, which the District Court granted. Jesse continued to contest the 2021 Will and Michael continued trying to validate it. On April 11, 2023, Shari emailed Jesse's counsel to explain Marty's relationship with Jesse and

Michael and why she felt that Marty would not have disinherited Jesse. She explained that she "realize[d] this could jeopardize [her] position in the case" but felt it was necessary to see justice served. On April 13, Shari—represented by counsel—was deposed in this matter. She testified that she believed Marty's competency to execute a will was questionable given his condition and all the medications he was on in the ICU and that she further understood she would lose her life estate if the 2021 Will was invalidated: "I don't believe that he was thinking clearly." She testified she did not think Marty would have disinherited Jesse and she understood her testimony was not in her best interest.

(4) Michael's counsel emailed all parties to propose mediators and a time for mediation, explicitly stating that Shari should feel free to suggest mediators as well. The next day, Shari replied stating that she was "ONLY an INTERESTED PARTY to this case—that means I want to be kept informed of what is going on. That's all." She replied several more times throughout the next week verifying that she was only an interested party, did not want to participate in the mediation, and did not feel she should have to pay any mediation expenses because of that.

(5) On June 1, 2023, Jesse's counsel emailed Shari: "We are filing a motion early next week on the 2021 Will—our position is that it is not a Will because it does not comport with the statutory requirements. I have to state in my motion if you object or agree with our motion. Do you agree?" Shari replied later that day: "I am in total agreement with your motion." Jesse filed her motion for summary judgment on June 5. In it, Jesse argued that the purported 2021 Will did not meet the statutory requirements to be a will and that Michael could not meet his burden to show Marty intended it to be his will. On June 7, with the subject heading "Brilliant!!!!," Shari again emailed Jesse's counsel that she had "just finished reading your Motion—I love it! You are brilliant."

(6) Michael's counsel emailed Shari: "Do you object to Michael's motion for summary judgment that the November 8, 2021 Will is valid?" Shari replied: "I do object to Mike's motion for summary judgment re the November 8, 2021 Will." Michael filed his motion for summary judgment on June 26, arguing the 2021 Will was a valid will and that Marty was of sound mind and possessed the requisite testamentary capacity to execute the will.

(7) The parties engaged in mediation—Shari was present and was represented by counsel in the mediation although she did not participate per her prior comments. As relevant to this appeal, Jesse and Michael agreed during mediation to settle the case by dismissing the motion to formally probate the 2021 Will and instead admitting the 2007 Will to probate. Shari—in contrast with her prior positions—then filed the motion to set aside the settlement agreement, arguing that she was required to agree to the settlement. Because she did not sign the settlement agreement, Shari argued the court must set it aside. The District Court held a hearing, where Shari again represented that if the beneficiaries wish to settle the case, then she had to be involved in that decision. She acknowledged that she had been present at the mediation with counsel but argued that she had not been given an opportunity to negotiate or agree to the settlement before it was finalized. The District Court found, among other things, that Shari had waived her right to seek enforcement of the 2021 Will and to complain about the settlement agreement based on her statements and actions throughout the case.

(8) Shari appealed and the Montana Supreme Court affirmed on the following grounds:

  (a) Shari's actions, conduct, and failure to act show an intent to waive her right both to participate in the mediation and to object to the settlement. Initially, counsel emailed Shari so she could be a part of choosing the mediator, the time for mediation, and to participate in the mediation. Shari responded no fewer than three times adamant that she was only an interested party, did not want to participate in the mediation or pay for it, and only wanted to be kept informed of what happened—even after Jesse's counsel told Shari that they would be participating in the mediation in good faith to seek a resolution of the issues. Shari's own words, actions, and inactions belies her argument that she was hedged out of the settlement by the other parties. She was given a full opportunity to participate in the mediation, knowing that the parties hoped to settle the issues without further litigation, and chose to sit on the sidelines.

(b) Additionally, the position she takes now is inconsistent with the position she has shown throughout the entirety of the will challenge and supports that Shari has waived her ability to object to the settlement. That she now objects to a settlement that achieved everything she was "in total agreement with," is in opposition to all of her prior actions and conduct throughout the case. Shari waived her right to object to the settlement when she refused to participate in mediation and when it achieved everything she had previously agreed with in Jesse's motion for summary judgment.

e. ***Peters v. Activist of San Diego,* 2024 Cal. App. Unpub. LEXIS 2290 (Court of Appeal of California 2024).** Charity that does not participate in mediation cannot object to settlement that eliminated its interest in trust.

(1) Larry D. Hampshire created the Larry D. Hampshire 1992 Trust on June 30, 1992 ("Trust"). On August 11, 2015, Larry executed a restatement of the Trust, which omitted several prior beneficiaries, including Activist San Diego ("ASD"). On November 16, 2017, Larry executed another restatement of the Trust—the subject of this litigation—and made several changes, including eliminating Gerry Hampshire as a beneficiary and reinstating a $100,000 bequest to ASD, an organization that Larry had long supported.

(2) Gerry filed a petition to invalidate Larry's November 16, 2017 amendment to the Trust on the grounds of his alleged incapacity. ASD was properly served with the petition. The probate court entered a stipulated order appointing Diane Peters as the temporary trustee.

(3) The following month, ASD's executive director Martin Eder sent a letter to all counsel and parties in the probate proceeding stating that ASD was in receipt of court documents related to the Trustee successor of the Larry D. Hampshire 1992 Trust, and requesting that the parties use ASD's correct address. Gerry served a notice of the hearing set for April 6, 2021 on his petition on all interested parties. He served ASD at the P.O. Box address set forth in Eder's letter and Eder's home address. On March 30, 2021, Irene Hampshire filed a response to Gerry's petition, which she served on all interested parties, including ASD at the same P.O. Box address. ASD did not file a response to the petition and did not appear at the April 6, 2021 hearing.

(4) At the hearing, the probate court set a case management conference. ASD did not attend the Case Management Conference or otherwise appear in court. Gerry filed an amended petition to invalidate the restatement to the Trust. He served a notice of hearing on the amended petition on all interested parties, including ASD. This notice was served both to the P.O. Box and Eder's home address. Irene filed her response and objection to Gerry's amended petition and served her response on all parties, including ASD at the P.O. Box address. Again, ASD did not file a response to the petition or appear at the hearing. ASD did not appear in court or attend the case management conference. Following the conference, the court continued the matter to another conference. Again, ASD did not attend or appear at that conference. At the hearing, the court ordered all parties and interested persons to participate in mediation. Irene served a notice of mediation on all interested parties, including ASD. It informed interested parties of their option to participate in the mediation in person or virtually, including interested persons who do not have counsel, and instructed parties who wished to participate in mediation to contact the persons listed in the notice. The notice further stated that non-participating persons or parties who receive notice of the date, time, and place of mediation may be bound by the terms of any settlement reached at the mediation without further action by the Court or further hearing. The notice warned that failure to participate in the mediation could result in beneficiaries losing their rights and stated that if a party claimed an interest in or money owed from the Trust, you should attend the

mediation—or you will waive your right to participate in any settlement reached in this matter and/or waive your right to receive a beneficial interest in or money owed from the Trust.

(5) Interested parties, including Gerry and Irene, virtually participated in mediation and settled the matter. ASD did not participate in the mediation and the settlement provided ASD with nothing from the Trust. Peters, the court-appointed trustee, filed a petition to approve the settlement and served a notice of hearing on the petition to approve the settlement on all interested parties. Peters served ASD at the P.O. Box address, Eder's home address, and at ASD's prior business address.

(6) This service finally prompted a response from ASD, which filed an opposition to the petition. ASD also submitted Eder's declaration in support of its opposition, which detailed ASD's long relationship with Larry, addressed the letter sent on February 22, 2021, and stated that Eder did not become aware of the mediation until he received the petition to approve the settlement. ASD appeared at the hearing and argued it had received insufficient notice of the mediation in violation of its due process rights, and asked the court for relief. Eder testified that he resigned as ASD's Executive Director the third Monday of September 2021. He was vague about his involvement with ASD in the period following his resignation. Eder recalled receiving between "15 to 20 or more" legal documents related to the trust contest. He also stated that he sent the February 22, 2021 letter to the lawyers involved in the case, specifying that they use the P.O. Box address for legal mailings. Eder testified that he understood the trust contest involved a dispute between siblings but thought it best to "remain neutral" out of "respect" for the Hampshire family. Eder stated he did not understand the impact of the contest on ASD or that ASD's gift could be lost by failing to participate.

(7) The court overruled ASD's objections and granted the petition to approve the settlement agreement regarding the Trust. ASD appealed and the court of appeals affirmed on the following grounds:

   (a) Due process requires reasonable notice of any proceeding adversely affecting a property interest. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party if that party's name and address are reasonably ascertainable. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. The presumption of receipt may be rebutted by testimony denying receipt.

   (b) The probate court found that the P.O. Box was a proper address for service on ASD, that Eder's testimony did not serve to rebut the presumption under Evidence Code section 641, and that even if it did, the evidence established that the notice of mediation was received by ASD in the ordinary course of mail. The court rejected ASD's argument that it should have been served at Eder's home address. These findings of fact were sufficiently supported by the evidence presented at trial.

   (c) The court reasonably interpreted ASD's letter as a request for documents regarding the Trust dispute to be mailed to the P.O. Box. Although Eder listed his personal address in the letter, he specifically directed the parties to serve ASD at the P.O. Box. ASD has presented no authority that would require a serving party to separately inquire about the continued viability of an address provided in written instructions, or to follow up service with an inquiry as to its receipt.

   (d) The probate court did not permit ASD to call Renee Brown, the paralegal who signed the proof of service for the notice of mediation, as a trial witness because she was not subpoenaed to testify and because her proffered testimony was contained in the parties' stipulated facts. ASD provides no argument or legal authority to support its assertion that Brown's testimony was improperly excluded.

(e) The probate court reasonably determined that Eder's testimony was not credible as to the issue of non-receipt for three reasons. First, as the probate court found, Eder was "specific only as to the non-receipt of the Notice," but was "vague" about what mailings in his possession he had reviewed. Second, Eder testified that on May 10, 2022, the date of service of the notice, he was not ASD's Executive Director and ASD presented no evidence to show in what capacity Eder would have been receiving and reviewing legal documents for ASD at that time. Third, ASD's interrogatory responses admitted that the organization "went through turnover as to persons accessing the P.O. Box during that period." Because of this, the court found it likely "that persons other than Mr. Eder were receiving the mail from the Post Office box during the relevant time period."

(f) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. The court's inquiry is whether a reasonably prudent person under the same or similar circumstances' might have made the same error. Under a separate, mandatory provision of the section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

(g) The probate court found that ASD's neglect in failing to pick up and review its mail from its P.O. Box was not reasonable or excusable. This finding was amply supported by the facts adduced at trial. As the probate court observed, the evidence presented to clarify ASD's mail-handling practices showed that ASD went through turnover regarding persons with access to the P.O. Box, that Eder was not ASD's executive director at the time the notice of mediation was served, and that prior to his resignation he had deliberately chosen not to participate in the probate proceeding. The court was well within its discretion in concluding that ASD's conduct was not reasonably prudent.

(h) For the first time on appeal, ASD argued that it was entitled to relief under the mandatory relief provision. Because this argument was not raised in the trial court, it has been waived. ASD has not shown relief on this basis is warranted. The mandatory provision applies only to mistakes made by an attorney. Nowhere does ASD assert its failure to participate in the mediation was due to an attorney's error. On the contrary, ASD states that it was not represented by counsel.

16. Self-Dealing

a. ***Vouk v. Chapman,* 171 Idaho 324 (2024).** Trustee breached duty of loyalty by retaining death benefit of life insurance owned by trust but naming trustee as sole beneficiary.

(1) Bill and Margaret Chapman (the "Chapmans") established the irrevocable Chapman Family Multiple Power Liquidity Trust ("Trust") in 1993. The Chapmans named their seven children as beneficiaries of the Trust, and three of the children, Wade, Pamela, and VonDel, were named as trustees. The Trust held two assets at the time it was settled: a Phoenix Home Life policy insuring Bill's life for roughly $2,500,000, and a second Phoenix Home Life policy insuring the life of another person (who is not directly involved in this appeal) for roughly $1,000,000.

(2) In 2004, the Phoenix Home Life policy insuring Bill's life was replaced with a Jackson National Life Insurance Company policy (the "Jackson Policy") as part of a tax free 1035 like kind

exchange. The Jackson Policy provided a death benefit of $7,000,000. The policy listed the Trust as its owner and Wade as its sole beneficiary. At some point before August 2007, the Trust also acquired shares in Idaho Supreme Potatoes, Inc.

(3) In August 2007, the trustees and beneficiaries entered into an Agreement for Distribution of Assets and Assignment of Shares ("Distribution Agreement"). The Distribution Agreement stated that the Trust has served its purpose and was not necessary, the Trust was terminated, and the Trust Assets would be distributed to the beneficiaries in equal shares. The Distribution Agreement described the Trust's assets as "35 shares of the common shares of Idaho Supreme Potatoes, Inc., . . . and certain life insurance policies."

(4) Margaret Chapman passed away in June 2018, and Bill passed away in October 2018. Wade applied for the death benefit under the Jackson Policy in November 2018. Wade did not know he was named the sole beneficiary of the policy until he applied for the benefit and was informed of this by a representative at the Jackson National Life Insurance Company. According to Wade, he told the representative that his understanding was that the policy was a Trust asset with the proceeds to be divided equally between him and his siblings. However, after the death benefit was paid to Wade, he kept all $7,000,000.

(5) Wade's siblings sued Wade for breach of fiduciary duty. The trial court required Wade to deposit $6,000,000 with the court pending resolution of the case. Siblings moved to amend and add a claim for mutual mistake of fact and sought reformation of the Jackson Policy by the district court, and moved for summary judgment. Wade also moved for summary judgment.

(6) The district court denied Wade's motion to strike and granted Siblings' motion to amend their complaint, denied Siblings' request for reformation, but granted Siblings' motion for summary judgment regarding their breach of fiduciary duty claim and denied Wade's motion for summary judgment.

(7) After prevailing on their claim, Siblings filed a memorandum of costs and attorney fees, alleging they were entitled to an award of fees. Wade filed a motion for reconsideration. Wade objected to Siblings' motion for attorney fees. The district court agreed with Wade that the motion was premature but held that the fees provision of TEDRA applied to the case.

(8) Siblings submitted a proposed final judgment, which included an award of prejudgment interest in the amount of $1,548,000.00, minus interest actually earned while on deposit with the court, resulting in an outstanding total of $1,432,393.65. Wade objected to the proposed judgment. The district court held that prejudgment interest was due to Siblings and awarded Siblings $1,755,616.44 in prejudgment interest, minus interest actually earned, resulting in an outstanding total of $1,603,521.66. The district court subsequently entered an order awarding Siblings attorney fees in the amount of $148,551.45 pursuant to TEDRA.

(9) Wade appealed and the Idaho Supreme Court vacated and remanded on the following grounds:

   (a) The district court properly granted summary judgment to Siblings on their breach of fiduciary duty claim. A trustee owes a fiduciary duty of loyalty to administer the trust in the interest of the beneficiaries alone, and to exclude from consideration his own advantages and the welfare of third persons. A trustee must obtain court approval before engaging in a transaction where his personal interest conflicts with his interest as a trustee. Good faith is not a defense to a breach of the fiduciary duty of loyalty because in enforcing the duty of loyalty the court is primarily interested in improving trust administration by deterring trustees from getting into positions of conflict of interests, and only secondarily in preventing loss to particular beneficiaries or unjust enrichment of the trustee. By keeping the entirety of the Jackson Policy proceeds for himself, Wade engaged in a disloyal transaction. Furthermore, regardless of whether

Wade acted under a good faith belief that the death benefit was solely his to retain, he could not do so without court authorization.

(b) Wade argues that Bill, as grantor of the Trust, had a right to make contributions to the Trust after it was established and, furthermore, that Bill had the right to direct that a contribution be made unequally among beneficiaries.

(c) Insofar as Wade argues it would have been permissible for Bill to have contributed the Jackson Policy to a separate trust established for Wade's benefit, he is correct. However, Wade's argument that Bill contributed the Jackson Policy to a specific trust for Wade is not supported by any facts in the record. No facts support Wade's claim that the Jackson Policy was Bill's to contribute in the first place. The application for the policy indicates it was acquired in a 1035 exchange with the Phoenix Home Life policy, which belonged to the Trust, not to Bill. Nor do any facts suggest that Bill paid premiums on the Jackson Policy. No facts alleged to support the assertion that separate trusts were ever created for the benefit of Wade or any other beneficiary. Even though Wade was a trustee tasked with the duty to establish individual trusts, he did not provide evidence supporting that he or his co-trustees took steps to do so, discussed individual trusts, or paid taxes on individual trusts. There is no mention of individual trusts anywhere in the record outside of Wade's allegations.

(d) The Trust allows the Trust to acquire insurance policies (including in individual trusts for each beneficiary), but it requires that the trust holding a policy must also be designated as the beneficiary of the policy. The Trust provides "that as long as any policy constitutes a part of the property of the trust, the benefits thereunder shall be payable to that trust." Because the Policy Data Page names the Trust as the owner of the policy, it must also be the beneficiary of the policy under the terms of the Trust. To the extent Wade argues that the trustees acquired the Jackson Policy but intended to name his individual trust as its sole beneficiary, he is essentially arguing that the trustees—himself included—intentionally breached the terms of the Trust. The Jackson Policy named the Trust as its owner. Whether by accident or intention, the Trust was not named as the beneficiary of the policy's death benefit. Such an arrangement was expressly prohibited by the Trust. Because Wade failed to comply with the terms of the Trust and distributed the death benefit only to himself, the district court correctly concluded Wade breached his fiduciary duty of loyalty.

(e) Next, Wade argues that: (1) the Distribution Agreement stated that the Trust was terminated and its provisions control, (2) the district court erroneously concluded that the Trust continued to hold property after 2007, and (3) he is indemnified from liability by the terms of the Distribution Agreement.

(f) Regardless of whether the Distribution Agreement stated there would be a winding up period, the law is clear that trustees owe fiduciary duties until a trust is wound up. There is no evidence that the ownership of the Jackson Policy was transferred from the Trust to the beneficiaries.

(g) The release provisions in the Distribution Agreement do not relieve Wade from any potential liability, because they are conditioned on the distribution and termination of the Trust in equal shares. Because this never happened—and Wade offered no cogent argument to the contrary—this provision does not relieve Wade from liability.

(h) While the designation of Wade as the sole beneficiary of the death benefit may have constituted a breach of fiduciary duty in 2004 because it was done in violation of the Trust, Wade's unilateral decision in December 2018 to retain the entire $7,000,000 death benefit for himself was a separate, actionable breach of fiduciary duty. Siblings filed their claim within months of Wade's 2018 breach of fiduciary duty, so it was well within the statute of limitations.

(i) While the district court did not err in awarding prejudgment interest to Siblings, the accrual of interest started on December 26, 2018, and ended on August 8, 2019, when Wade deposited the money with the district court. On remand, the court must recalculate the prejudgment interest owed and enter an amended judgment to reflect that amount. Wade received the death benefit from the insurance company via wire on December 26, 2018, and retained the money for his own use without the consent of Siblings. His retention of that money was unreasonable from the outset, but he eventually stipulated to deposit the money with the district court on August 8, 2019. Once he deposited the money with the district court he no longer "retained" the money and prejudgment interest should have ceased at that time.

(j) Although Siblings invoked TEDRA as part of the declaratory judgment claim set forth in their complaint, they did not pursue that claim as part of the litigation, it was not part of the claim upon which relief was granted, and Siblings voluntarily dismissed the claim after the district court granted summary judgment in their favor. An award of attorney fees under TEDRA was improper. Whether attorney fees can be granted under TEDRA turns first on the form of relief sought and granted. The district court granted full relief to Siblings for their breach of fiduciary duty claim without the necessity of any declaratory judgment under TEDRA.

17. Fiduciary Duties Generally

a. ***Crain v. Fulmer,* 2024 Ark. App. 484 (2024).** Administrator properly made himself the sole shareholder and director of corporations owned by decedent to ensure that the companies were not being mismanaged.

(1) Shirley Crain and H.C. "Dude" Crain, Jr. married in 1989. Shirley had an adult son from her first marriage, and Dude had four adult daughters from his first marriage. Dude executed a will in 1993 in which Shirley was named as sole beneficiary, but that will was revoked by a subsequent will executed in April 2012. The 2012 will provided for Shirley but also had provisions for their adult children. Dude died in 2017. Shirley did not attempt to open an estate and instead ran her husband's business interests, kept the assets as her own, and paid herself from the assets.

(2) In 2020, Dude's daughters sought to open their father's estate. Although Shirley was nominated in the will to be the executor of the will and the trustee of any trust created under the will, she declined to be the executor. The daughters sought the appointment of an attorney to serve as administrator.

(3) The will referenced the "Bypass Trust" and the "Marital Deduction Trust" to be the recipients of the bulk of the estate's assets. Upon Shirley's death, the balance in the trusts would be distributed equally among Dude's daughters and Shirley's son. The will also granted the executor and trustee broad fiduciary powers. The will also gave the trustee power to continue any business, incorporated or unincorporated. However, this trustee power did not expressly require the trustee to be the sole person authorized to continue business of the estate. The will defined "fiduciary" to include any executor or trustee serving under the will.

(4) An attorney was appointed as administrator of the estate. In 2021, a federal court ruled that the estate was the owner of 100 percent of the shares of Dude, Inc. and Premier Foam, Inc. The administrator began to examine the two corporations and attempt to ascertain their values. Shirley would not cooperate and instead resisted mightily. She did not allow the administrator access to corporate documentation or personnel. She took the assets of Dude, Inc. and deleted the company's computer data. Shirley and a company CPA refused to respond to a subpoena to provide corporate documents to the administrator. The administrator then took action to ensure that the companies were not being mismanaged. The administrator executed paperwork making him the sole shareholder and director of each corporation.

(5) Shirley filed a formal objection to the administrator's actions and asked the probate court to invalidate the business actions he had taken. Shirley argued that he should first have obtained the circuit court's permission, that this action was not consistent with Arkansas's probate code, and that this action violated his fiduciary obligations to the estate. Dude's daughters filed objections to Shirley's motion.

(6) The circuit court rejected Shirley's arguments and approved all of the administrator's actions. Shirley appealed and the Arkansas Court of Appeals affirmed on the following grounds:

(a) Personal representatives are directed by Arkansas's probate code to marshal all assets of the estate. After being stonewalled and stymied by Shirley regarding the books and operations of the two companies, the administrator acted to place himself in a position to marshal the assets of the estate and determine how best to preserve the assets for the benefit of the heirs. The administrator's acts were proper and in line with probate and corporate law.

(b) Shirley also contended that the administrator violated his fiduciary duty and created a conflict of interest and an environment for self-dealing. However, Shirley did not obtain a ruling on those issues. It is an appellant's responsibility to obtain a ruling to preserve an issue for appeal, and Shirley's failure to obtain a ruling precludes review on appeal.

b. ***Bentley v. Cywes,* 2024 U.S. Dist. LEXIS 193835 (United States District Court for the Southern District of Ohio, Eastern Division 2024).** Forged trust amendment and trustee resignations were invalid, and trustee breached duties by forging documents that removed co-trustee and changed trustee powers.

(1) Plaintiff Colette Cywes Bentley and Defendant Robert Cywes are the only children of Sidney and Marlene Cywes. Sidney resided in South Africa until his death in April 2020. Marlene is still living in South Africa and suffers from Alzheimer's-related dementia. Colette and Robert moved to the United States before 1998. In 2017, Robert married Janae Nuspl (now Janae Cywes). Robert was previously married to Irene Wolfe.

(2) On May 29, 1998, Sidney formed the Cywes Trust ("Trust") as a revocable trust. Sidney, Colette, and Robert were named Trustees. The Trust document requires the Trustee to make any distribution directed by Sidney during his lifetime. After Sidney's death, the document gives the Trustee discretion over distributions of income and principal to Marlene, Robert, and Colette. The document designates Colette and Robert as the ultimate remainder beneficiaries after the death of Marlene. The remaining income and principal is to be divided into equal shares and distributed to Robert and Colette.

(3) The Trust document requires the Trustee's written consent to any amendment that would change the duties or immunities of the Trustee. "Trustee" refers to the co-Trustees collectively. Sidney resigned as Trustee in 2003, leaving Colette and Robert as co-Trustees.

(4) By 2012, the Trust's assets were held by UBS. Robert instructed UBS to make several distributions to his personal accounts. At issue in Plaintiff's Motion are five distributions: $30,000 on August 2, 2012 to Robert's joint personal account with his then-wife Irene Wolfe; $15,000 on September 20, 2016 to Robert's personal account; $15,000 on October 26, 2016 to Robert's personal account; $22,100 on November 9, 2016 to Stanley Friedland to pay for an engagement ring for his current wife, Janae; and $11,000 on December 21, 2016 to Robert's personal account.

(5) Robert testified that he didn't recall the purpose of the four distributions to his personal accounts and that Sidney approved all the distributions. UBS wired the $22,100 for Janae's engagement ring on Robert's email instruction. In his email, Robert indicated that UBS could call him to verify the transaction at his parents' telephone number in South Africa. Robert testified that he paid the money for the ring back to his father.

(6) UBS also sent $18,300 to Janae in February 2017. An email from Sidney to Irene Wolfe states that this was a Cywes family contribution to Robert and Janae's wedding. That email also states that Sidney did ask a Trustee to act, at his direction, and sign on his behalf for several transactions over the years. In May 2017, UBS received email instructions from Sidney, Robert, and Janae to close the account and transfer the remaining balance to Janae's investment account. UBS sent Janae the $93,034.44 balance and closed the account.

(7) On August 14, 2015, the Trust purchased a condominium in Jacksonville, Florida. Robert was in the midst of a divorce from Irene Wolfe and planned to use the condominium while visiting his children. A document purporting to amend the Trust was created around the time of the condo sale ("2015 Document"). In 2017, after the divorce, Robert married Janae. The Trust sold the condominium in 2019. To facilitate closing the sale, Robert sent the title company a document purporting to replace Colette with Janae as co-Trustee ("Resignation Document").

(8) The 2015 Document's text allows Robert to make unilateral investment decisions for the Trust during Sidney's lifetime. Under the 2015 Document, after Sidney's death, the Trustee would be required to distribute all income to Marlene in quarterly payments. The 2015 Document also changes the remainder beneficiary structure to favor Robert over Colette. Following the death of Sidney and Marlene, the Trustee would be required to continue to administer the Trust for Robert's benefit and, after Robert's death, distribute the remaining income and principal according to Robert's will. The 2015 Document's signature page is dated August 12, 2015, two days before the Trust purchased the Jacksonville condominium. It contains signatures labeled as Sidney Cywes, Robert Cywes, and Colette Bentley.

(9) Robert admitted that he signed Colette's name without her authorization. Robert stated under oath that Sidney signed his own name and sent Robert a photo of the signature page. But, his prior testimony conflicts with the statements in his affidavit. In his deposition and interrogatory responses, Robert testified that he signed Sidney's name himself. In his divorce proceeding in October 2016, Robert testified that he had "never seen" and "never signed" the 2015 Document. While the 2015 Document is dated August 12, 2015, the title company involved in the subsequent condominium sale produced a version of the same document dated February 1, 2015 that also bore signatures for Sidney Cywes, Robert Cywes, and Colette Bentley.

(10) In July 2015, Sidney emailed his financial advisor Willie Grove that "we are making certain changes to the Trust as Robert has no doubt mentioned." On August 10, 2015, Sidney emailed Grove that "[f]rom now on the sole beneficiary will be Robert and he will be responsible for the running with you."

(11) In 2019, in closing for the condominium's sale, the title company asked Robert for Colette's signature on a warranty deed. Robert attached a Microsoft Word version of the Resignation Document. The Resignation Document stated that Colette resigned as trustee and Janae agreed to be a trustee. Metadata from the Microsoft Word document indicates that it was created on August 13, 2019. A signed version of the Resignation Document was recorded in Duval County, Florida in conjunction with the sale. That version is dated December 23, 2016 and has signatures for Sidney Cywes, Robert Cywes, Colette Bentley, and "Janae J. Cywes." On December 23, 2016, Robert and Janae were not yet married—Janae's last name was still Nuspl. Robert admitted to signing all four names himself—and admitted to signing Colette's name without her consent. He testified that it was "plausible" that he created and backdated the document in response to the request from the title company.

(12) Robert testified in his deposition that the Trust had been closed. He initially stated through counsel that the condo sale effectively closed the Trust because Sidney gave the proceeds to Janae, leaving no assets. However, the check for the proceeds was delivered to Robert's home in Jupiter, Florida. Days later, Robert and Janae took the check to a Fidelity branch location in Idaho to deposit it into a new account in the Trust's name that listed only Janae as Trustee and did not list Colette as a beneficiary. After Fidelity trust account records were

produced in discovery, Robert's counsel sent a letter advising that the sale proceeds were still held in the Trust.

(13) In 2022, Colette, in her individual capacity and as co-Trustee, sued Robert individually and as co-Trustee, seeking declaratory judgments, bringing claims for breach of fiduciary duty, and asking the Court to remove Robert as Trustee. The parties filed competing motions for summary judgment. Robert was sanctioned twice for his failure to comply with discovery orders.

(14) The Court granted summary judgment for Collette on the following grounds:

(a) The court exercised its discretion to exercise jurisdiction over Colette's claims brought pursuant to the Declaratory Judgment Act. The choice to exercise jurisdiction in a declaratory action is discretionary and not jurisdictional. When deciding whether to exercise jurisdiction, this Court considers the following factors: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective. Here, the first two factors weigh in favor of exercising jurisdiction. While resolution of the declaratory actions would not settle the entire controversy, resolution would clarify the legal relationship between the parties by settling the threshold matters of which trust document governs and whether Colette or Janae is a co-Trustee. The third and fourth factors are neutral as there is no present or imminent state court proceeding. The fifth factor favors resolution because the declaratory judgment claims are intertwined with Colette's other claims before the Court.

(b) Colette is still a Trustee and that she did not provide written consent to the amendment, did not receive notice of the amendment, and did not sign the 2015 Document although it bears a signature above her name. Under the Trust document, an amendment that would change the Trustee's duties requires written consent of the Trustee. "Trustee" refers to the co-Trustees collectively and an act of the Trustee is an act of the majority of the co-Trustees. Sidney resigned as Trustee in 2003, leaving Robert and Colette as co-Trustees in 2015. As one is not a majority of two, an amendment that would change the Trustee's duties required written consent from both Robert and Colette. The 2015 Document would change the Trustee's duties. Under the 2015 Document, after Sidney's death, the Trustee would no longer have discretion over income distributions and would be required to distribute all income to Marlene in quarterly payments. Further, rather than dividing the assets following the death of Sidney and Marlene, the Trustee would be required to continue to administer the Trust for Robert's benefit. After Robert's death, the Trustee would be required to distribute the remaining assets according to Robert's will.

(c) The original Trust document does not limit the written consent requirement to changes to the Trustee's duties during the life of the grantor. Accordingly, there is no genuine dispute of material fact that the 2015 Document did not amend the Trust.

(d) The entire 2015 Document is not "forged" as matter of law. It is undisputed that the 2015 Document contains a forged copy of Colette's signature—Robert signed her name on the 2015 Document without her consent and presented that signature as if it were hers. However, Robert has testified that Sidney actually signed the 2015 Document and delivered that signature to him. Robert has identified emails between Sidney and his financial advisor that suggest Sidney approved of the potential amendment. If this evidence were believed, the 2015 Document would have become a valid amendment had Colette provided written consent. The 2015 Document did not lawfully amend the Trust.

(e) There is no genuine dispute of material fact that the Resignation Document was forged, that Colette did not resign, and that Colette remains a co-Trustee. The forged Resignation Document did not accomplish Plaintiff Colette Cywes Bentley's resignation and Plaintiff remains a Trustee of the Trust.

(f) There is a genuine dispute of material fact as to whether Sidney directed the distributions, which precludes summary judgment as to whether Defendant breached his fiduciary duty when he made the five distributions.

(g) There is no genuine dispute of material fact as to whether Robert forged Colette's signature on the 2015 Document and forged the Resignation Document. Robert does not argue that the forgeries did not breach his duty to administer the Trust in good faith. The 2015 Document purported to all but dissolve Colette's beneficiary interest and allow Robert to make unilateral investment decisions—such as buying or selling the condo. Robert used the forged Resignation Document to facilitate the condo sale. It is undisputed that the condo sale proceeds are Trust assets. The proceeds were deposited in the Fidelity trust account that lists Janae as the sole trustee and does not list Colette as a beneficiary. Robert concedes that Colette remains a Trustee. As a result of Robert's forgeries, the Trust assets were moved outside the control of the legitimate Trustees in a manner that extinguished Colette's beneficiary interest in violation of the Trust. This transfer injured the Trust and is itself a breach of trust.

(h) To the extent Robert argues that the laches defense applies here, the defense is barred by the doctrine of unclean hands. In this litigation, Robert initially told Colette that the Trust had no assets. Robert has since admitted that he forged Colette's signatures and that the condo sale proceeds are Trust assets held in an account controlled by Janae. Robert now concedes that Colette remains co-Trustee. These concessions are clear and convincing evidence that Robert acted fraudulently causing Trust assets to be deposited outside the Trust and that Robert hid his actions from Colette. As to this issue there is no genuine dispute of material fact. Robert breached his fiduciary duty when he forged Colette's signature on the 2015 Document, when he forged the Resignation Document, and when he allowed the condo sale proceeds to be deposited in the Fidelity trust account.

(i) The Court may remove a trustee if: (1) the trustee committed a serious breach of trust, (2) there is lack of cooperation between co-trustees, or (3) removal is in the best interests of the beneficiaries based on the trustee's ineffective administration of the trust. A serious breach of trust can consist of a single act that causes significant harm or involves flagrant misconduct. The secret transfer of trust property to a separate trust account in a manner that extinguishes a co-residual beneficiary's interest in violation of the trust document constitutes a serious breach of trust by itself. As does the wrongful removal of a co-trustee in order to control trust assets without accountability to remainder beneficiaries. Removal is more likely to be appropriate where the breach may make it impossible for the beneficiaries to protect their interests or may mask more serious violations by the trustee.

(j) There is no genuine dispute of material fact that, by clear and convincing evidence, Robert forged Colette's resignation as co-Trustee to facilitate the sale of the Trust's condo, leading to the deposit of the proceeds in the Fidelity trust account. Robert admits to forging Colette's signature on the Resignation Document. In this litigation, Robert initially claimed that the condo sale proceeds were distributed from the Trust to Janae by Sidney. He has now admitted through counsel that the proceeds are the Trust's property and are held in the Fidelity trust account. It is undisputed that the account documents list Janae as the sole Trustee and does not list Colette as a beneficiary.

Robert's forgery of his co-Trustee's resignation is flagrant misconduct. Further, as a result of Robert's misconduct, the proceeds—accounting for the entirety of the Trust's assets—were deposited without Colette's knowledge into the Fidelity trust account controlled by Janae. As the account did not name Colette as a beneficiary, the deposit extinguished Colette's interest, in violation of the 1998 Trust. Robert moved all the Trust's assets to an account outside the control of the legitimate Trustee. This is a serious harm to the Trust. Robert's misconduct amounts to a serious breach of trust and warrants removal.

18. Attorneys' Fees & Costs

a. ***Soble v. Soble (In re Allen R. Soble Revocable Trust),* 2024 Mich. App. LEXIS 3590 (Court of Appeals of Michigan 2024).** Trust terms that trustee should not be individually liable for attorneys' fees overrides UPIA provision that would allocate half of fees to income, where trustee is also income beneficiary.

(1) In 1969, Allen R. Soble established the Allen R. Soble Revocable Trust (the "Trust"). The Trust designated Allen and his wife, appellee Shelda Soble, as co-trustees. Allen and Shelda had three children together, Richard, Melinda Soble Greenberg, and Jeffrey Soble, who are named as equal remaindermen beneficiaries of the Trust. Allen Soble died in 1982, survived by Shelda. Richard, a tax attorney, succeeded Allen as co-trustee of the Trust with Shelda.

(2) The terms of the Trust direct that the Trust assets be held by the trustees in a marital trust for the benefit of Shelda during her lifetime and require the trustees to pay to Shelda at convenient intervals, but no less than annually, "the entire income of the Marital Trust." If the income of the Trust becomes insufficient for Shelda's support in the manner to which she is accustomed, the Trust provides for payments to Shelda from the Trust principal as reasonably required for that purpose. Shortly after Allen's death, Shelda executed a Disclaimer renouncing her interest in the Trust's principal, but not her interest in the Trust's income.

(3) The co-trustees administered the Trust peaceably for nearly 30 years. In 2012, however, Shelda sought to remove Richard as co-trustee and also to invalidate the Disclaimer. According to Shelda, Richard began moving assets among various family trusts, made generous gifts to his and Jeffrey's families, began charging a fee for his services as co-trustee, and withheld Shelda's income distributions for three years because Shelda had not repaid an advance of $300,000. The probate court found that Richard may have breached his fiduciary duty, but held that the breach did not require his removal. The probate court also upheld the Disclaimer. More litigation ensued in 2015 to 2016 related to Richard's requests for trustee and attorney fees accrued during a first and second accounting. Fees related to a third accounting were approved by stipulation.

(4) This case was initiated by Richard filing a fourth annual accounting of the Trust assets and a petition for fees of $9,542.50 related to trust administration and preparation of the accounting between July 2016 and June 2017. Shelda objected to the accounting and the petition for fees and filed a second petition to remove Richard as co-trustee. Shelda alleged that Richard unilaterally prepared the fourth accounting, refused to cooperate with her in the preparation of annual accounts, refused to communicate through her attorney, and delayed the Trust's income distributions.

(5) Richard moved for summary judgment. The probate court denied Richard's motion for summary disposition and denied Richard's request to disqualify Shelda's counsel, finding no conflict of interest.

(6) After an evidentiary hearing, the probate court denied Shelda's petition to remove Richard. The probate court found Richard's failure to cooperate with Shelda, by unilaterally filing an annual accounting and refusing to communicate through her lawyer, to be a form of breach

of trust by failing to follow the intent of the settlor that the co-trustees work collaboratively. The probate court nonetheless declined to remove Richard, finding that the Trust otherwise had been properly administrated. The probate court approved the fourth annual accounting and Richard's request for Trust administration fees and accounting fees between 2016 and 2017, and granted Shelda's expenses and attorney fees incurred during that period, minus 3 1/2 hours (approximately $12,570.33 in fees). To facilitate the co-trustees working together, the probate court's order included specific instructions to the parties to work cooperatively.

(7) After entry of the February 2021 order, the parties petitioned the probate court for fees arising from the litigation. Richard moved for attorney fees of $47,784.75 for legal work he performed related to the accounting and the litigation and $66,000.63 for fees incurred by his attorney, Monica Moons, related to the litigation. Richard also filed a petition to allow and regularize his trustee and attorney fees as a recurring yearly regular fee of $10,000, seeking Trust administration fees in the amount of $34,995.25 for the period between July 2017 and December 2020, and seeking $3,624.14 in Moons' attorney fees related to legal work performed in administration of the Trust.

(8) Shelda filed a petition for attorney fees and Trust administration expenses for 2017 through April 2021, seeking $12,625.36 in administration fees, $120,086.72 in attorney fees, and $3,870 in fees related to accounting services. Shelda stipulated to the payment from the Trust of Moons' attorney fees related to the litigation, i.e., $66,000.63, and $3,624.14 in attorney fees related to Moons' legal work performed in administration of the Trust. Richard made no reciprocal stipulation for the payment of Shelda's fees.

(9) Shelda asserted that a portion of Richard's request for $34,995.25 for Trust administration from July 2017 to December 2020, and a regularized fee of $10,000 each year, was excessive and unreasonable given that Richard was merely reviewing accounts or tax returns or performing simple, straightforward accounting. Shelda also argued that $4,712.50 of Richard's attorney fees related to the litigation was unreasonable because that amount was incurred for attending court hearings during which Moons acted as Richard's counsel. Shelda further argued that Richard's failure to cooperate necessitated the litigation, that the probate court had found Richard to be in breach of trust, and that Richard's fees should therefore be denied.

(10) Richard contested all Shelda's requested fees. Richard argued that Luckenbach's representation of Shelda as both trustee and beneficiary, and her representation of Melinda, caused Luckenbach's bills to include services for Shelda and Melinda individually. Richard also asserted that Shelda's requested attorney fees were unreasonable because Shelda pursued the litigation for personal reasons that did not benefit the Trust, failed to achieve Richard's removal, were not necessary for the result obtained, were for unrelated litigation, and that the rates charged were not supported.

(11) The trial court rejected Richard's contention that Luckenbach had a conflict of interest, found that Shelda's expenses incurred for Trust administration were compensable, and found the billing from Luckenbach's firm supported by the evidence. The probate court held that Shelda's expenses were to be reimbursed from the Trust principal. The probate court reasoned that the Trust provides that the trustee shall not be "individually liable" for the trustee's expenses and compensation related to the Trust administration, and allocating Shelda's reimbursement to the Trust income would make Shelda individually liable. The probate court denied Richard's motion for litigation fees and expenses due to Richard's "numerous and significant breaches of his fiduciary duties."

(12) Richard appealed and the court of appeals affirmed on the following grounds:

(a) Under the Michigan Trust Code ("MTC"), a breach of trust occurs when a trustee violates a duty the trustee owes to a trust beneficiary. The MTC provides broad authority to the probate court to remedy a breach of trust, including reducing or denying compensation to the trustee.

(b) Richard breached a trust duty by failing to follow the intent of the Trust settlor that the co-trustees work collaboratively by unilaterally filing an annual account without the co-trustee's knowledge and by refusing to communicate with Shelda's lawyer. Richard breached a trust duty by unilaterally filing the fourth accounting without cooperating with the co-trustee and filing a baseless motion to disqualify Shelda's attorney.

(c) The probate court did not abuse its discretion by denying Richard compensation. Richard argues that the probate court gave the term "breach of trust" a broader meaning than the term is given in the MTC, but does not support this claim with citation to authority, thereby abandoning this issue. The probate court's finding in the February 2021 order that Richard breached a trust duty was necessary to the court's decision resolving Shelda's petition to remove Richard as co-trustee, and thus is not obitur dictum.

(d) A probate court is authorized to remedy a breach of trust by reducing or denying compensation to the trustee. The circumstances of this case do not indicate that denial of a portion of Richard's fees was excessive. The probate court's denial of compensation was for Richard's request for the time Richard himself provided attorney services related to the litigation, as well as Richard's Trust administration fees between July 2017 and December 2020. Although the probate court did not find that Richard's breach of trust substantially impaired the administration of the Trust, and therefore did not support removal of Richard as co-trustee, it found that nonetheless Richard's misconduct was the primary reason for the repeated lengthy trials costing the trust hundreds of thousands of dollars in legal and fiduciary fees. Under these circumstances, denying Richard compensation for services Richard himself performed related to the litigation and Trust administration was not an abuse of the probate court's discretion.

(e) Although the terms of a trust control over the general provisions of the MUTC, the Trust terms do not prohibit the probate court's denial of fees predicated on breach of trust. The Trust terms do not address appropriate sanctions for a trustee's breach of trust, and did not preclude the authority of the probate court under the MUTC to reduce or deny Richard's compensation for breach of trust.

(f) Richard failed to establish a conflict of interest in Luckenbach's representation of Shelda. The party seeking to disqualify an attorney on the basis of an alleged conflict of interest has the burden to demonstrate specifically how and as to what issues in the case there is a likelihood of prejudice arising from the alleged conflict. In this case, Richard has not demonstrated a conflict of interest nor that Luckenbach's representation of Shelda resulted in prejudice in any aspect of the conflict.

(g) Shelda, as a trustee, is entitled to fees incurred in connection with her participation in proceedings involving the administration of the Trust, regardless of whether she was successful in the litigation, as long as she acted in good faith. The law does not require that a trustee participating in a civil action enhance, preserve, or protect trust property to be entitled to attorney fees. Because there is no requirement that Shelda's participation in the litigation benefit the Trust, the probate court did not err by not imposing this requirement.

(h) Michigan's Uniform Principal and Income Act ("UPIA") creates a set of default rules applicable to the manner in which receipts and expenditures of trusts are credited and charged between income and principal when a trust is silent in that regard.

(i) In this case, the probate court relied on section NINTH C of the Trust when allocating Shelda's fees to the Trust principal. Section NINTH C provides: "A Trustee shall be entitled to receive reasonable compensation for services in the performance of his duties hereunder and shall be reimbursed for all costs, expenses, charges and liabilities incurred or paid in respect thereto, including fees and expenses of his counsel or any other agents hired by him, and he shall not be liable therefor individually."

(j) Under the terms of the Trust, Shelda is entitled to the entire Trust income. The probate court allocated reimbursement of her fees to the Trust principal, reasoning that Section NINTH C mandates that a trustee shall not be individually liable for the expenses of his or her trustee duties, including attorney fees. The probate court concluded that reimbursing Shelda for her expenses from the Trust income would result in Shelda paying her attorney fees from her own money and thus being liable individually for those expenses.

(k) Here, the trust language in question uses the phrase "liable therefor individually." That language is synonymous with "personal liability," which means "liability for which one is personally accountable and for which the wronged party can seek satisfaction out of the wrongdoer's personal assets." It follows that, under Section NINTH C, trustees shall not be individually liable, out of their own personal assets, for the satisfaction of fees related to the administration of the Trust. The probate court in this case correctly observed that any of Shelda's expenses allocated to income would be an expense borne by Shelda individually. The probate court observed:

(l) The UPIA provides in relevant part that allocated to income are one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests. The UPIA also provides that expenses of a proceeding that concerns primarily the principal, including a proceeding to construe the trust or to protect the trust or its property, should be allocated to principal. Assuming, without deciding, that under these circumstances the provisions of the UPIA control, they provided for the distributions from principal given that Shelda initiated the proceedings to protect the Trust principal by seeking removal of Richard as co-trustee. Because under the circumstances of this case the probate court's decision to allocate Shelda's fees to Trust principal is supported under both section NINTH C of the Trust and the UPIA, the probate court's determination is not subject to reversal.

b. ***In re Jorgenson Fam. Trust Agreement Dated March 12, 2001,* 2024 Minn. App. LEXIS 331 (Court of Appeals of Minnesota 2024).** UTC modifies the common law and governs a beneficiary's ability to recover attorney fees from trust assets.

(1) Respondent Michael Jorgenson and appellant Sharlene Jorgenson divorced in 2001 and created the Jorgenson Family Trust to provide income for themselves and an inheritance for their four now-adult children. This dispute primarily between Michael and Sharlene arose over the management of a trust asset—a nearly 300-acre Chippewa County parcel that the trust leases for farming. The district court replaced Michael as trustee in 2012 with Bremer Bank, which, in 2020, petitioned the district court to authorize an approximately $680,000 drain-tile project on the property. The district court rejected the petition as too costly and found that any drain-tile project would require both Michael and Sharlene's approval. When Bremer proposed a less costly plan, Michael petitioned the district court in opposition. Most relevant here, Michael also asked the district court to order that the attorney fees incurred by the parties regarding the request be borne by the parties incurring the fees and not the Trust. And he maintained in his written closing argument after a hearing, Bremer's acts breach several fiduciary duties of the trustee, and therefore the burden of these breaches (such as attorney fees) should fall to Bremer.

(2) The district court denied Bremer's drain-tile plan and ordered the trustee to pay the legal fees and costs of Michael associated with his challenge. And it ordered Bremer to pay its own legal fees and costs. Michael's attorney submitted an affidavit of attorney fees and costs

totaling $18,960 in fees based on about 95 hours of work at a $200 hourly rate. Bremer's attorneys likewise submitted an affidavit detailing their attorney fees of $22,715 based on an hourly rate of $390.

(3) Sharlene submitted a written argument before the hearing, contending that Bremer, not the trust, should pay Michael's attorney fees and that Michael's requested fee amount was unreasonable. Michael likewise briefed the issues before the hearing, arguing that the trust should pay his fees. The district court found that Michael's requested fees were reasonable and that, when it previously ordered the trustee to pay Michael's fees, it intended that the trust itself pay the fees. It removed Bremer as trustee and ordered that the successor trustee, on behalf of the trust, shall pay Michael Jorgenson's legal fees and costs related to his petition for instructions in the amount of $18,960.00. It appointed Heartland Trust Company to succeed Bremer.

(4) Sharlene appealed and the court of appeals affirmed on the following grounds:

(a) Sharlene maintained that the district court was required to apply the common-law standard governing a beneficiary's entitlement to attorney fees. The parties' dispute over Bremer's proposed drain-tile project did not require the district court to construe ambiguous language in the trust instrument so as to justify the attorney-fee award under the common law. But the narrow common-law does not apply here.

(b) The legislature has instituted a broad, different standard, providing that "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party from the trust that is the subject of the judicial proceeding." The legislature has also directed courts under which circumstances the trust statutes supplant the common law: "The common law of trusts . . . supplement[s] this [trust] chapter, except to the extent modified by this chapter or another law of this state." Paraphrased succinctly, the trust code rather than the common law applies wherever the trust statutes modify the common law.

(c) The new UTC provision clearly modifies the common law. Under the common-law standard, among other requirements, a beneficiary could obtain attorney fees from the trust only in disputes over ambiguous trust-instrument language. But under the trust code, any party may be entitled to attorney fees in trust disputes without limit by subject matter, based only on whether the district court concludes that justice and equity require the award. The statute changes rather than mirrors the common-law standard of attorney fees for beneficiaries and third parties. The UTC, not the common law, governs a beneficiary's ability to recover attorney fees from trust assets.

(d) The district court did not abuse its discretion by awarding Michael attorney fees in the dispute over the drain-tile project. The litigation arose from a project that the district court decided was too expensive, a decision that protected the trust assets for all six beneficiaries, not just Michael. The litigation also involved a trustee that arguably failed to abide by the district court's orders restraining its power. Although the district court did not explicitly reference the statute, the court was implicitly awarding Michael the attorney fees out of fairness to him. A remand to the district court to more expressly provide its rationale is therefore unnecessary.

(e) Michael's attorney was skilled and experienced, and her hourly rate was about half the rate Bremer's attorneys charged. It is true, as Sharlene emphasizes, that the cost of the modified drain-tile project Bremer eventually proposed would be borne by tenants rather than the trust, but the success of the plan and any potential negative impact on the land were uncertain. And although the billing statements were not as detailed as they might have been, the descriptions were not so vague as to lead us to conclude that the district court mistakenly found the fees reasonable under the circumstances. Sharlene has not shown that the district court's reasonableness finding constitutes a clear error.

(f) Sharlene's contention that the district court violated her right to due process is not convincing. The United States and Minnesota Constitutions prohibit the state from depriving persons of property without due process of law. Sharlene had sufficient notice and the opportunity to be heard before the district court directed that Michael's requested attorney fees be drawn from the trust assets. It is true that Michael's petition challenging the drain-tile project had requested that Bremer, not the trust, pay his attorney fees. But before the district court conducted the hearing on the attorney-fee request, the parties provided the district court their written arguments. Sharlene specifically argued against the trust having to pay Michael's requested attorney fees. She argued that charging the trust would be inappropriate for three reasons: because the district court had previously directed that the "trustee" pay those fees, because the law prohibited the trust from having to pay the fees, and because the amount of requested fees was not reasonable. Sharlene's counsel repeated the same arguments during the hearing. Sharlene therefore had notice of, and the opportunity to be heard on, the issue of whether the trust might be bound to pay Michael's attorney fees. A remand is unnecessary to provide Sharlene the opportunity to be heard on an issue on which she has already been heard. The district court did not violate Sharlene's right to due process.

c. ***Nelson v. Goldberg,* 2024 UT 15 (Supreme Court of Utah 2024).** An attorney can represent a trust, but an attorney-client relationship with the trust does not arise merely because an attorney represents a trustee. Attorneys represented the former trustees only, not the trusts, which were not named in the suit, and are not prevented from continuing to represent the former trustees.

(1) Decades ago, siblings Stanley and Sandra Goldberg created two trusts in their names. As amended, the trusts named dozens of beneficiaries, two of which—C. Leon Nelson and Marilynn Tetrick—became co-trustees in 2015 after Stanley and Sandra passed away.

(2) Soon afterward, the trustees retained Thomas E. Nelson as legal counsel. At the start of the relationship, Mr. Nelson stated in an engagement letter that he did "not represent the beneficiaries" of the trusts; he represented the trustees "only . . . in [their] capacity as . . . trustees." Mr. Nelson explained in the letter that he would, among other things, assist the trustees "in administering the [trusts] and ultimately distributing" the trusts' assets. He also agreed to advise them "on any related questions or matters arising out of the administration of the . . . trusts." Under the engagement letter's terms, Mr. Nelson would bill the trustees monthly for his work.

(3) A few months later, the trustees retained a separate law firm, Kesler & Rust, which, like Mr. Nelson, represented them in their "capacities as . . . trustee(s) of the [trusts]." Kesler & Rust stated in its engagement letter that it would be "co-counsel" with Mr. Nelson and that it had been tasked with researching the validity of recent trust amendments and preparing for possible litigation on that question.

(4) The trustees' administration of the trusts was rife with disputes. A few years after Leon and Marilynn became trustees, several beneficiaries sued them for breach of fiduciary duty in both their individual and official capacities. The beneficiaries' claims were substantial; they alleged that the trustees had engaged in self-dealing, malfeasance, and tax fraud, among other things. The trustees' actions, the beneficiaries asserted, harmed both the beneficiaries and the trusts. As a result, the beneficiaries asked for damages from the trustees "individually." They also sought the return of money from the trustees "to the Trust[s]."

(5) The case went to trial, where Mr. Nelson and Kesler & Rust represented the trustees in defending against the beneficiaries' claims. After hearing the evidence, the jury was tasked with deciding whether the trustees had breached their fiduciary duties in administering the

trusts. The court instructed the jury that if it found a breach, it "must determine what amount will fairly and adequately compensate the Trust[s] for the harm caused by that breach."

(6) The jury found the trustees liable for their actions, and the district court entered a judgment of over $1.8 million against them personally. Under the court's order, most of that money was "to be paid to the Trusts." The beneficiaries then asked the court to remove the trustees. The court obliged and appointed successor trustees in their place. The now-former trustees, still represented by Mr. Nelson and Kesler & Rust, moved to alter or amend the judgment, arguing that the court should reduce the judgment in favor of the trusts by several hundred thousand dollars. The beneficiaries opposed the motion, and the newly appointed successor trustees moved to disqualify Mr. Nelson and Kesler & Rust under rule 1.9(a) of the Utah Rules of Professional Conduct.

(7) Rule 1.9(a), which governs an attorney's duties to former clients, provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

(8) The district court ruled that the circumstances created a conflict under rule 1.9(a) of the Utah Rules of Professional Conduct, held that establishing an attorney-client relationship with a trustee establishes an attorney-client relationship with the corresponding trust, and imposed attorneys' disqualification as a sanction for the conflict of interest.

(9) The former trustees appealed, and the Utah Supreme Court reversed on the following grounds:

  (a) An attorney-client relationship can exist between an attorney and a trust. But whether such a relationship exists depends on context; it does not automatically follow from the attorney's representation of the trustee. Here, the context shows that the attorneys did not formerly represent the trusts in the relevant matter—the litigation between the beneficiaries and the former trustees—and rule 1.9(a) does not apply. Accordingly, the district court erred in granting the successor trustees' motion to disqualify.

  (b) Rule 1.9(a) applies only if three conditions are met. Here, we must evaluate whether the attorneys (1) "formerly represented" the trusts (2) "in the same or a substantially related matter" (3) in which the former trustees' interests are "materially adverse" to those of the trusts.

  (c) There is no per se rule that an attorney representing a trustee necessarily represents the corresponding trust.

  (d) A trust is capable of forming an attorney-client relationship.

  (e) To the extent the district court here assumed that an attorney automatically represents a trust whenever he or she represents a person who serves as its trustee, the court erred. Under Utah law, an attorney may establish an attorney-client relationship with a trust. An attorney can establish an attorney-client relationship with a trust. But context ultimately determines whether such a relationship exists.

  (f) The trusts were not represented by counsel in the litigation for the simple reason that they were not a party. The beneficiaries sued only the former trustees. The attorneys never entered an appearance as counsel for the trusts, and the former trustees' filings indicated their attorneys represented them alone.

  (g) Nor did the attorneys advocate for the trusts in the litigation. At bottom, the case pitted the former trustees, on the one hand, against the beneficiaries and the trusts, on the other. The beneficiaries sought redress for harm that the former trustees inflicted on the beneficiaries and the "Trust corpus." If the jury agreed that the former trustees committed torts and breached their fiduciary duties, the former trustees would be on the hook personally, paying damages to "the . . . Beneficiaries" and returning money "to The Trust[s]."

(h) Sure enough, that is precisely what happened. The jury sided with the beneficiaries, who were "awarded monetary judgment in their favor and against Defendants C. Leon Nelson and Marilynn Tetrick in . . . a total amount of $1,820,185.70 to be paid to the Trusts." If anyone advocated on behalf of the trusts' interests throughout the case, it was the beneficiaries, who sought to increase the trusts' assets by recovering damages from the former trustees, and not the former trustees themselves, who wanted to avoid personal liability.

(i) When the former trustees asserted in the Removal Opposition that removal would not "serve . . . the material purposes of the Trusts," they were not advocating on the trusts' behalf; they were simply invoking relevant statutory language to defend against the allegation that their service as trustees harmed the trusts.

(j) Although the record does indicate that the attorneys (or at least Mr. Nelson) advised Leon and Marilynn in administering the trusts, rule 1.9(a) is not concerned with whether the attorneys ever represented the trusts, but only with whether they represented the trusts "in the same or a substantially related matter." And the parties agreed below that the relevant matter was "the same lawsuit." That means that the relevant period did not begin until the beneficiaries sued the former trustees for breach of fiduciary duty. And during that period, the attorneys' loyalty remained constant. From the start, the attorneys defended the former trustees against claims of malfeasance, for which the beneficiaries sought—on behalf of the trusts—money from the former trustees individually. Even assuming that the attorneys represented the trusts when assisting the former trustees with trust administration, that representation did not involve "the same or a substantially related matter" as the successor trustees defined it below.

(k) The successor trustees' assertion that attorney fees were paid with trust funds does not change the calculus. As an initial matter, the engagement letters are unclear about who was responsible for paying attorney fees, and the district court made no findings on this point. But even if the attorneys were paid with trust funds, that fact is not determinative. The decisive factor, rather, is the attorneys' role in the representation. Even assuming that the former trustees used trust funds to pay attorney fees, that fact standing alone does not establish an attorney-client relationship with the trusts.

(l) The engagement letters, too, are ambiguous at best. Neither letter contains any indication that the attorneys were retained to represent the trusts. The attorneys did, however, affirmatively state that they did not represent the trusts' beneficiaries, suggesting they may have intended to represent the former trustees only.

(m) The engagement letters suggest that the attorneys tried to make clear their relationship to the parties involved. Under the heading "Identification of the Client," Mr. Nelson informed the former trustees, "You should understand we represent . . . both of you as trustees . . . . We do not represent the beneficiaries." And although Kesler & Rust's engagement letter did not expressly convey that the firm did not represent the beneficiaries, it specified that the firm represented the former trustees "in [their] capacities as . . . trustee(s)" as "co-counsel with . . . attorney [Mr.] Nelson." So while there is some ambiguity in the engagement letters, the letters evince an attorney-client relationship with the trusts.

(n) Under these circumstances, we hold that the district court erred in concluding that the attorneys represented the trusts under rule 1.9(a). Throughout the lawsuit, the attorneys consistently challenged the beneficiaries' allegations and defended against claims that the former trustees were liable for damages payable to the trusts. Because the attorneys did not formerly represent the trusts in this case, rule 1.9(a) does not apply. Therefore, the district court erred in disqualifying the attorneys based on the perceived conflict.

d. ***In re Estate of Tyner,* 682 S.W.3d 431 (Court of Appeals of Missouri 2024).** Attorneys' fees in a will contest are not to be awarded from an estate to a litigant who stood to personally benefit from the determination of the will's validity.

(1) Dennis Tyner, Earl Tyner, Theresa Schultz, Cecile Gregory, and the late Charla Broughton were the only heirs to their mother Anna Tyner's estate at the time she died testate. The will named Dennis and Earl as co-personal representatives, and they presented the will for probate. The fifth paragraph of the will granted Dennis the right to purchase all of the decedent's real property at the price of $400 per acre, with the proceeds of the sale to be divided among her children in five equal shares. Dennis indicated his intent to exercise that right. The daughters filed a petition to contest the will, naming Dennis and Earl as defendants in their capacities as personal representatives of the estate. The petition claimed the fifth paragraph of the will was procured through Dennis's undue influence and sought to have that paragraph declared invalid. A jury rejected this claim, finding the contested portion of the will to be valid.

(2) Dennis and Earl petitioned the trial court for reimbursement of the attorney fees they expended defending the will contest and asked that those fees be awarded from the estate prior to distribution of the assets therein. The daughters objected on the ground that each party must bear his or her own fees in a will contest. The trial court granted the request for fees. The daughters filed a motion to reconsider. After a hearing as to the amount of fees, the trial court denied that motion and ordered that Dennis shall have judgment against the estate for $46,855.70 and that the same shall be paid from the estate prior to any distribution of the net proceeds of the estate to the heirs.

(3) The daughters appealed and the court of appeals reversed on the following grounds:

(a) As a circuit court exercising jurisdiction in a probate matter, the trial court here had the same general equitable powers as any other court sitting in equity. To the extent there is an applicable exception to the American Rule that litigants pay their own attorney fees, a court in a probate matter has the equitable power to award them. And, under certain circumstances, a court may award attorney fees from an estate.

(b) It has long been held that attorney fees are not recoverable from an estate in a will contest like this one. While the technical purpose of a will contest is to determine the validity of the will, the ultimate object—the real object—is to determine the rights of the parties to the property. Because the estate itself is not to be affected by the result of a will contest between the parties, they, and not the estate, should bear the expense of the litigation.

(c) The question is whether the personal representative of a will, who is also a beneficiary under it, and whose interest depends entirely upon its validity, is entitled to reimbursement from the assets of the estate for sums paid to attorneys, for other expenses paid, in defending a statutory suit contesting the validity of the will, he being himself a party to the suit. Because the personal representative was also a beneficiary under the will, he was largely interested in its establishment and, since the expenses incurred by him in the litigation were incurred on his own behalf, none of it should be paid out of the estate.

(d) Here, the daughters—beneficiaries under the will—brought this action to contest the validity of the fifth paragraph of the will. But "the real object" of the suit was to determine Dennis's right to purchase the real property in the estate pursuant to that paragraph. Because he was also a beneficiary, Dennis was not merely acting in his capacity as personal representative, interested only "in seeing that the formal proof of the due execution of the will was made." Rather, Dennis was interested in the validity of the fifth paragraph of the will because he stood to personally benefit from it. Because the estate itself was "not to be affected by the result" of this will contest, the parties and not the estate should bear the expense of the litigation.

(e) Precedent does not lose its value simply because it is old. The fact that the citations to precedent in this case are not numerous or more recent does not diminish its precedential authority. Rather, because no case of any vintage has called precedent into question—much less overruled it—and it is directly on point, the court is bound to follow it. Attorney fees in a will contest are not to be awarded from an estate to a litigant who stood to personally benefit from the determination of the will's validity. The only cases addressing this particular scenario hold that attorney fees may not be awarded from the estate and the litigants must bear their own expenses. The trial court had no authority to award attorney fees from the estate to Dennis for his defense of the will contest.

e. ***Glass v. Faircloth,* 370 Ga. App. 867 (Court of Appeals of Georgia 2024).** The trial court erred by presuming trustees' interests can only be served by hiring the highest caliber legal counsel that money can buy, where issues involve contract interpretation and motions practice that, even if complex, do not fall within an esoteric area of law that is highly specialized or technical such that only a handful of attorneys in Georgia can effectively engage in this practice.

(1) In December 2017, after ongoing disputes over trustee fees and disbursements from the Glass Dynasty Trust ("the Trust"), Ashley, Joshua, Gregory, and Samuel Glass ("the Beneficiaries") sued Phillip Faircloth and Ted Sexton ("the Former Trustees"). The Beneficiaries' verified complaint sought removal of Faircloth and Sexton as trustees, damages for breach of fiduciary duty, disgorgement of trustee fees, attorney fees, appointment of a receiver, an accounting, declaratory and injunctive relief, and punitive damages. According to the complaint, as of 2017, the Trust held approximately $43 million in assets, and the trustees had paid themselves at least $2,972,500 in total compensation from 2008 to 2017.

(2) The Beneficiaries moved for an interlocutory injunction seeking immediate removal of Sexton and Faircloth as trustees and to prevent them from paying any trustee fees or attorney fees. That same day, the defendants moved to dismiss the complaint, and the trial court issued a summary order denying the motion to dismiss. In January 2019, the trial court entered an order denying the motion for an injunction (the "January 2019 Order"). The order also provided for the appointment of a Special Master to determine the reasonableness of the attorney fees.

(3) In April 2019, the Beneficiaries filed a separate petition seeking to modify the Trust. The same month, the superior court amending the Trust to allow removal of any trustee by a majority of the most senior generation of Sherwin Glass's descendant beneficiaries. Sexton and Faircloth moved to vacate the order, and following a hearing, the superior court denied the motion. The Beneficiaries appealed the January 2019 Order denying the motion for an interlocutory order to enjoin the payment of Faircloth and Sexton's attorney fees and the order granting the modification of the Trust. The court of appeals affirmed the January 2019 Order, finding that the beneficiaries had not shown that they would suffer irreparable harm without an interlocutory injunction, as money damages would provide an adequate remedy at law. The court of appeals also affirmed the trial court's order granting the Trust modification.

(4) The Beneficiaries subsequently removed Faircloth and Sexton as trustees and replaced them with an institutional successor trustee. The trial court directed payment of the amount of outstanding attorney fees as determined by the Special Master out of the Trust. The trial court directed the Trust to advance 50 percent of the fees incurred by one of Faircloth and Sexton's law firms, with the remaining 50 percent subject to indemnification at the conclusion of this action; and 100 percent of the fees incurred by a second law firm (the

"Enforcement Order"). The Enforcement Order provided that "[s]uch fees shall be advanced by the [Trust] within 20 days of [Faircloth and Sexton's] requests during the pendency of this litigation without being reviewed for a determination of reasonableness," as long as counsel certifies that their fees are reasonable.

(5) The Beneficiaries appealed and the court of appeals held that the trial court failed to engage in the proper analysis for granting what was essentially an interlocutory injunction requiring the prospective payment of attorney fees by the Trust before a final judgment had been reached on that question.

(6) On remand, the trial court applied the standard and held that Sexton and Faircloth would, in fact, suffer irreparable injury if an injunction is not granted because, Sexton and Faircloth would not be able to afford the caliber of counsel necessary to defend this action. It also expressly held that there is a substantial likelihood that Sexton and Faircloth will prevail on the merits of the Beneficiaries' claims against them.

(7) The Beneficiaries appealed and the court of appeals affirmed in part and reversed in part on the following grounds:

   (a) It is undisputed that pursuant to a back-up agreement with Farmers Home Furniture (where the Former Trustees have served as officers), Farmers has been loaning money to the Former Trustees to cover their legal fees in connection with the Trust litigation. Thus, although Farmers is charging interest on this loan, that does not amount to an irreparable injury should it turn out that the Trust needs to reimburse the Former Trustees and/or Farmers for the attorney fees paid. Thus, contrary to the trial court's ruling, the stakes are not that the Former Trustees go unrepresented; rather, the stakes are simply whether the Trust will be obligated to repay interest accrued during the time it did not pay. This is not the type of harm deemed irreparable in these scenarios. Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law. Thus, any payments later deemed unwarranted can be recouped through an award of damages as authorized by law.

   (b) The trial court erred in its presumption that the Former Trustees' interests can only be served by hiring the highest caliber legal counsel that money can buy. The billing in this case so far is "stunning." But nothing suggests it must be so for the Former Trustees to have their day in court and even win. While the record is voluminous, the case boils down to issues of contract interpretation and motions practice that, even if complex, do not fall within an esoteric area of law that is highly specialized or technical such that only a handful of attorneys in Georgia can effectively engage in this practice.

   (c) The record lacks evidence to support a finding that the interlocutory injunction is necessary to prevent an irreparable harm having no adequate legal remedy.

   (d) Given that the Former Trustees bear no risk of going without legal counsel, the weight of their harm is dramatically diminished, contrary to the trial court's ruling. Thus, it cannot be said that the potential harm to them outweighs the harm to the Trust if it is unnecessarily depleted by fees it did not need to pay.

   (e) The underlying action sought removal of Faircloth and Sexton as trustees, damages for breach of fiduciary duty, disgorgement of trustee fees, attorney fees, appointment of a receiver, an accounting, declaratory and injunctive relief, and punitive damages. Faircloth and Sexton have already been removed by another method, but the trial court's order does not provide any substantive analysis of these issues, nor of the subsidiary issue of the enforceability of the 2013 agreement relied upon by the Former Trustees in seeking payment of their fees by the Trust. Given the interwoven and unresolved nature of these issues, it is not clear at this point that the Beneficiaries will suffer no success in their claims whatsoever. Nor is there clarity about the viability of the 2013 agreement at this time.

(f) The trial court held that there is no real public interest implicated in whether the Trust pays the legal fees of the Former Trustees.

(g) The trial court erred by holding that Faircloth and Sexton would be irreparably harmed without an adequate legal remedy. Due to the loan by Farmers, they have not been harmed by going unrepresented, and any monetary harm can be remedied by repayment of interest paid pursuant to the loan. As Justice Bleckley observed regarding equitable power, an interlocutory injunction is a part of equity police. It is a device to keep the parties in order and prevent one from hurting the other whilst their respective rights are under adjudication. There is often a cry for the police when there is no real danger.

(h) In light of the unique procedural posture of this case, and the prior payment of fees under an order in effect at that time, it was not an abuse of discretion by the trial court to preserve the status quo at the time of the Enforcement Order, at least with respect to the Interim Fees. The portion of the order denying the Beneficiaries' request to return the Interim Fees already paid to the Former Trustees' attorneys is affirmed.

f. ***Rudd v. Branch Banking & Trust Co.,* 2024 U.S. Dist. LEXIS 137312 (United States District Court for the Northern District of Alabama, Southern Division 2024).** Because there was no evidence of damages suffered by beneficiary because trustee shirked its alleged auditing and reporting obligations under the UTC, trustee did not commit a material breach of the trust that barred payment of its attorneys' fees from the trust.

(1) Branch Banking & Trust Company ("BB&T") is a former trustee of the 1989 Trust. Katherine M. Rudd ("Kate") and Tiffany Rudd Atkinson ("Tiffany") (collectively, "the sisters") are the current trustees of the trust. The court entered a memorandum opinion and order on March 22, 2023, granting summary judgment in favor of BB&T on the breach of fiduciary duty claim asserted against it by the sisters. That claim alleged wrongdoing in relation to the 1989 Trust and the "Shares Trust." In relation to the 1989 Trust, the question was whether BB&T committed a breach of fiduciary duty by failing to audit the trust annually and provide Kate and Tiffany, as beneficiaries of the trust, with annual accounting reports. Kate and Tiffany asserted BB&T owed them auditing and accounting obligations under the instrument governing the 1989 Trust and the Alabama Uniform Trust Code (the "AUTC"). The court concluded the breach of fiduciary duty claim failed on the merits insofar as it relied on the instrument governing the 1989 Trust because a determination made by Judge Robert S. Vance in a related state case that no reporting obligation was owed Kate or Tiffany individually under the instrument now was entitled to preclusive effect in this proceeding. The court concluded the claim failed on the merits insofar is it relied on the AUTC because there was no evidence Kate or Tiffany suffered damage because BB&T shirked its alleged auditing and reporting obligations.

(2) BB&T filed its fee motion on April 4, 2023. It stated it had incurred attorneys' fees exceeding $1.1 million and expenses exceeding $66,500.00 in defending itself in this action, proposed an equal division of attorneys' fees and expenses between the 1989 Trust and the Shares Trust, and indicated it would submit evidence to support the amount of attorneys' fees and expenses requested once the court made a determination regarding liability.

(3) Shortly thereafter, the court ordered the parties to mediate their dispute. The mediation was not successful. Kate and Tiffany filed an opposition to the fee motion. On the same day, BB&T supplemented its fee motion with a request for a specific amount of attorneys' fees and expenses — $614,791.62 — and two affidavits supporting that sum. The court entered an order on July 20, 2023, requesting additional information from the parties (the "order for clarification"). BB&T filed its response to the order for clarification. Kate and Tiffany filed their own response.

(4) BB&T's fee motion was approved on the following grounds:

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate for expenses that were properly incurred in the administration of the trust, including the defense or prosecution of any action, whether successful or not, unless the trustee is determined to have willfully or wantonly committed a material breach of the trust.

(b) This provision of the UTC "unequivocally" entitles a trustee to attorneys' fees and expenses for the successful defense of a breach of fiduciary duty claim against the trustee. BB&T asserted a straightforward argument it is entitled to recover attorneys' fees and expenses from the 1989 Trust because it successfully defended the sisters' claim it committed a breach of fiduciary duty in relation to the 1989 Trust.

(c) Kate and Tiffany alleged all assets held in the 1989 Trust have been distributed to them and a fees award would be futile. However, courts do not refrain from entering a judgment for money damages or a fee award against a party because the party cannot satisfy the judgment or award. The financial ability to pay does not figure into the calculus. Kate and Tiffany have not come forward with any authority that would preclude a fee award against an existing but empty vessel.

(d) The representation no assets remain in the 1989 Trust was not accurate when Kate and Tiffany first made it in their July 7, 2023 opposition to BB&T's fee motion or when the sisters doubled-down in their August 1, 2023 response to the order for clarification. An account statement submitted by the sisters in response to the order for clarification shows that as of July 1, 2023, the 1989 Trust held assets totaling $14,000.35. That sum fell far short of the attorneys' fees and expenses BB&T seeks, but it was not the nothing the sisters claimed in their July 7, 2023 opposition. Very little and nothing are not equivalent, and nothing is what Kate and Tiffany represented remained in the 1989 Trust.

(e) Moreover, while the 1989 Trust may currently hold very little assets from which BB&T can be reimbursed, that may not remain the case. BB&T's briefing suggests it intends to attempt to claw back the $13,800.00 withdrawal from the 1989 Trust made on July 20, 2023, as a fraudulent transfer to evade a creditor, as well as distributions purportedly made to Kate and Tiffany. BB&T has not placed the claw back issues squarely before the court or asked the court to pass judgment on the issues. The availability of these and other potential collection theories simply illustrates the flaw in the sisters' assertion it necessarily would be "futile" to enter a fee award against the 1989 Trust.

(f) Prior state law was replaced with the Alabama Uniform Trust Code, and reliance on cases decided under repealed prior law is misplaced.

(g) The first question is how can the sisters maintain BB&T committed a breach of material trust willfully or wantonly after the court entered judgment in the former trustee's favor on the breach of fiduciary duty claim against it? This is a question Kate and Tiffany do not address directly.

(h) The UTC references a determination a trustee committed a material breach of trust willfully or wantonly. It does not reference a determination the elements of a breach of trust claim are or have been established. The court did not address the element of breach in the discussion of the sisters' claim BB&T committed a breach of fiduciary duty in relation to the 1989 Trust contained in the March 22, 2023 memorandum opinion and order. As stated, the court concluded the claim failed on the duty element insofar as it relied on the instrument governing the 1989 Trust and on the damages element insofar as it relied on the AUTC. Additionally, Alabama Supreme Court precedent could be read as allowing for the possibility a trustee could defend a breach of fiduciary duty claim successfully — either on the substantive merits of the claim or on grounds other than the claim's merits — but be denied attorneys' fees based on a determination made in relation to a later-filed motion for attorneys' fees that the trustee committed a material breach of trust willfully or wantonly. This reading seems out of step with the United States Supreme Court's instruction that a request for attorney's fees should not result in a second major litigation. Nonetheless, in the interest of thoroughness and because the burden is not a heavy one in this case, the court will entertain the possibility a plaintiff's breach of fiduciary duty claim could fail because the plaintiff did not prove all elements of the claim and yet a trustee would not be entitled to attorneys' fees because the plaintiff at least proved or could prove the trustee committed a material breach of trust willfully or wantonly.

(i) In the related state case, the court granted summary judgment in favor of Wells Fargo based on a statute-of-limitations defense but denied Wells Fargo's motion for attorneys' fees based in part on the finding that while the claims asserted against it had suffered from "several legal infirmities," "the evidence show[ed] that Wells Fargo was complicit in a pattern of abuse and neglect that allowed [] Joy [] to plunder the various trusts that her father had established" and "ignored its oversight responsibilities over several years, in what can easily be regarded as a wanton dereliction of its fiduciary responsibilities." Kate and Tiffany assert BB&T is in privity with Wells Fargo so the finding regarding Wells Fargo's wanton dereliction of fiduciary responsibilities in the state case translates to a finding here that BB&T committed a wanton dereliction of fiduciary responsibilities.

(j) The sisters' argument conflates two separate requirements for application of the collateral estoppel doctrine: (1) that the issue presented in the prior action is "identical" to the issue presented in the subsequent action and (2) that the prior action involved the "same parties" as the subsequent action, which may include a party in privity with a party to the prior action. The issue presented in the related state case was whether Wells Fargo's conduct as a trustee disentitled it to attorneys' fees and expenses. The issue presented in this case is whether BB&T's conduct as a trustee disentitles it to attorneys' fees and expenses, and that is an entirely different issue. BB&T's privity with Wells Fargo, if any, does not transmogrify the one into the other.

(k) Kate and Tiffany alternatively ask the court to make an independent determination now that BB&T committed a material breach of trust willfully or wantonly. It bears emphasizing at the outset of the discussion of this basis of the sisters' opposition to BB&T's fee motion that the more precise question is whether BB&T committed a material breach of the 1989 Trust willfully or wantonly. BB&T seeks to recover attorneys' fees in relation to the 1989 Trust, and so its conduct in relation to the 1989 Trust is what matters. Kate and Tiffany's recitation of the ways in which BB&T allegedly breached its fiduciary duties in relation to the Shares Trust is irrelevant.

(l) It also bears emphasizing at the outset of the discussion that the only breach of fiduciary duty claim Kate and Tiffany asserted in relation to the 1989 Trust that made it to, if not past, summary judgment was the claim BB&T failed to audit the trust annually and provide Kate and Tiffany, as beneficiaries of the trust, with annual accounting reports, either under the governing trust instrument or under the AUTC. The sisters' assertion of other ways BB&T allegedly breached its fiduciary duties in relation to the 1989 Trust has no bearing on BB&T's fee motion.

(m) It is self-evident there can be no breach of any magnitude absent an underlying obligation. A trustee cannot breach a fiduciary duty that does not exist. The court concluded in the March 22, 2023 memorandum opinion and order that the sisters' claim BB&T committed a breach of fiduciary duty in relation to the 1989 Trust failed insofar as it relied on the governing trust instrument because the sisters were not owed any reporting obligation under that instrument. Kate and Tiffany have given the court no reason to reconsider that conclusion, and the conclusion forecloses the argument that BB&T committed a material breach of trust willfully or wantonly under the instrument governing the 1989 Trust by failing to audit the trust annually and provide the sisters with annual accounting reports. Whether there can be a willful or wanton material breach absent damage suffered because of the breach merits more consideration.

(n) Kate and Tiffany offer no view of the requirements for a finding of materiality, willfulness, or wantonness. The court has undertaken its own survey of authority. Alabama courts have not addressed what constitutes a material breach of trust under the UTC or when a material breach is committed willfully or wantonly under that section. And the court found no helpful discussion of the concepts of materiality, willfulness, or wantonness in Alabama caselaw addressing trust administration claims outside the context of the UTC or the caselaw of other states.

(o) The court did find helpful discussion of the concept of materiality in the context of claims for breach of contract. Where a breach causes no damages or prejudice to the non-breaching party, it may be deemed not to be material. It makes intuitive sense a breach that causes no damage or prejudice to the non-breaching party is not a material breach. In the absence of guidance from Alabama courts or argument from Kate and Tiffany regarding what constitutes a material breach of trust that precludes a trustee from recovering attorneys' fees, the court will apply the "rule" and adopted by courts outside Alabama in the context of breach of contract claims. Because there is no evidence of damages Kate and Tiffany suffered because BB&T shirked its alleged auditing and reporting obligations under the AUTC in relation to the 1989 Trust, BB&T did not commit a material breach of the trust, if it committed a breach at all.

(p) BB&T is entitled to recover attorneys' fees and expenses from the 1989 Trust because it successfully defended the sisters' claim it committed a breach of fiduciary duty in relation to the 1989 Trust.

(q) The Alabama Supreme Court has identified 12 criteria a court "might consider" when determining the reasonableness of attorneys' fees: (1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed, (4) the professional experience and reputation of the attorney, (5) the weight of his responsibilities, (6) the measure of success achieved, (7) the reasonable expenses incurred, (8) whether a fee is fixed or contingent, (9) the nature and length of a professional relationship, (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances."

(r) The court has considered the 12 criteria identified by the Alabama Supreme Court and concluded the attorneys' fees and expenses BB&T sought to recover from the 1989 Trust are reasonable. The factors that weigh most heavily in the balance are the third, fifth, and sixth factors. When BB&T filed its fee motion, this case was seven months shy of ten years old and had consumed nearly 4,000 hours of attorney time from BB&T's perspective. The parties engaged in multiple rounds of motion practice with extensive briefing. This case was factually complex insofar as Kate and Tiffany challenged trustee conduct going back decades, legally complex insofar as the parties raised and argued unsettled issues of Alabama trust law, and procedurally complex insofar as the defense of BB&T in this action required counsel to stay abreast of developments in the related state case, which itself was factually, legally, and procedurally complex. The factual, legal, and procedural complexity, coupled with the great amount of damages Kate and Tiffany claimed, would have imposed an immense responsibility on even seasoned trust attorneys. Counsel for BB&T ultimately achieved dismissal or judgment in BB&T's favor on all claims asserted against the former trustee by Kate and Tiffany, including the claim

BB&T committed a breach of fiduciary duty in relation to the 1989 Trust. Also relevant to the court's determination of reasonableness is the fact that Kate and Tiffany have not challenged the amount of attorneys' fees and expenses BB&T seeks.

g. ***Kendrick Finkbeiner,* PLC v. Est. of Scott, 2024 Mich. App. LEXIS 2492 (Court of Appeals of Michigan 2024).** A fact-finder's findings regarding lack of capacity and undue influence equate to a lack of good faith, and counsel for the person committing undue influence cannot have attorneys' fees paid by the estate.

(1) Law firm represented Phillip Sprague, the former personal representative of defendant, during three probate court cases. One of these was decided via summary disposition, but the other two proceeded to trial. The outcome of that trial was appealed.

(2) Matthew G. Scott ("Matthew") died on July 30, 2020, at the age of 82. His two sons, Christopher G. Scott ("Christopher") and Matthew T. Scott ("Tad"), and their families survived him. After his father's death, Christopher commenced two cases in the probate court by petitioning to set aside Matthew's will and contest the validity of his estate planning documents and the disposition of his estate, and by petitioning to set aside Matthew's trust and contest the validity of his estate planning documents after Christopher learned that Matthew appointed Sprague as the personal representative of the estate and as the successor trustee of Matthew's trust.

(3) Matthew had significant health problems and periodically received medical care at the Mayo Clinic in Rochester, Minnesota, during which he stayed with Christopher and his family. During July 2019, during such stay, Matthew fell down steps and suffered a traumatic brain injury which caused him significant physical and mental impairments. After months of hospital inpatient and outpatient care and rehabilitation, Matthew returned to Michigan and moved into an assisted living facility in Gladwin, Michigan, not far from his home, which he approved and selected with assistance from his family members. While living at the assisted living facility, Sprague, a neighbor who had worked for Matthew a decade earlier until they had a falling-out, renewed his acquaintance and frequently visited Matthew. Although Matthew initially appeared to enjoy his assisted living arrangement, over time his attitude and demeanor changed to the point that he displayed aggression and anger, and increasing paranoia about his living situation and closest family members. Staff at the facility noted that Matthew's demeanor changes correlated with Sprague's open hostility toward the facility and Matthew's sons which he communicated to Matthew. Sprague moved Matthew out of the assisted living facility to live with Sprague, and over his remaining months of life Matthew became isolated from his family.

(4) During December 2019, Sprague arranged for Matthew to meet with lawyer Joseph Barberi to change his estate planning documents. In late February 2020, Matthew executed estate planning documents including an amended trust which designated Sprague as the successor trustee and a deed transferring his real property to himself from his trust with a provision that the property would be conveyed to Sprague upon Matthew's death. Matthew executed estate planning documents on July 9, 2020, while hospitalized just weeks before his death, including a new will and an amended and restated trust. The will appointed Sprague the personal representative of Matthew's estate and integrated the estate into the trust. The trust named Sprague as Matthew's successor trustee and provided for the distribution of money and a percentage of the value of the trust assets to Matthew's grandchildren, his church and Sprague, a combine and two tractors to Christopher, and a newly purchased skid loader to Sprague.

(5) The petitions filed by Christopher alleged that Sprague influenced Matthew to distrust his sons and change his estate plan to benefit Sprague. After Matthew's death, Sprague took possession of Matthew's property, books and records, and his remains, and claimed the power to do so. The petitions asserted that the estate planning documents were invalid because Matthew lacked the capacity to create them and that all of the estate planning

documents were the result of the undue influence Sprague imposed on Matthew to benefit himself. The petitions requested among other relief that the court set aside estate planning documents created after December 24, 2011, order Sprague to turn over all of Matthew's property including documents and records and copies of estate planning documents in his possession, restrain Sprague from using estate or trust property for fiduciary fees, legal fees, or costs until the matters were decided or settled.

(6) After the parties conducted extensive discovery and the trial court ruled on various motions, the cases were tried to a jury in a five-day trial during which 15 witnesses testified. The jury found that Matthew lacked capacity to make the changes to his estate plan and that these changes were taken as a result of Sprague's undue influence. Christopher petitioned for the removal of Sprague, which the probate court granted, and Christopher was installed as personal representative. Sprague appealed and raised a number of arguments, including the denial of his judgment notwithstanding the verdict, arguing that there was insufficient evidence to show that Matthew lacked capacity, and that Sprague unduly influenced him. The court of appeals ejected each of Sprague's arguments and determined that there was sufficient evidence to support the jury's verdict about capacity and undue influence.

(7) In July 2020, which was before the jury's verdict, Matthew—through Sprague—initiated a case against Christopher to establish ownership of a Fidelity investment account, which was jointly held by Christopher and Matthew. Soon after the lawsuit was initiated, Matthew passed away, and Sprague continued the case on defendant's behalf. Christopher voluntarily removed himself from the account, and Sprague requested that the probate court formally declare the account as an estate asset. Christopher subsequently opposed this, arguing that Sprague had unduly influenced Matthew and that, if Christopher had known this, he would not have relinquished his ownership interest in the account. Although the probate court recognized Christopher's arguments of undue influence, the probate court focused its analysis on whether Christopher had been improperly influenced or coerced to remove himself from the account. The probate court granted summary disposition in Sprague's favor because it determined there was no question that Christopher had voluntarily relinquished his ownership interest in the account, thereby making it an estate asset.

(8) Throughout the 2020 cases, plaintiff represented Sprague, and the present case involves plaintiff's attempts to secure from defendant payment for its services. The amount and reasonableness of the fees are not at issue. Rather, the only issue is whether such fees may be recovered in the first place. The probate granted summary disposition dismissing the claim for the fees. Plaintiff appealed and the court of appeals affirmed on the following grounds:

(a) The Estates and Protected Individuals Code provides that a personal representative, acting reasonably for the benefit of interested persons, may properly employ an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

(b) Additionally, MCL 700.3720 provides: "If a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." However, when the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary [i.e., the personal representative] rather than the estate should be responsible for the attorney's fees.

(c) A fact-finder's findings regarding lack of capacity and undue influence equate to a lack of good faith. The jury in the 2020 cases found that Sprague unduly influenced Matthew to modify his estate plan to significantly benefit Sprague as a beneficiary. Accordingly, the probate court properly determined that Sprague's undue influence necessarily meant that he could not have acted in good faith when he initiated and defended the 2020 cases. To hold otherwise would conflict with the plain language of the statute, which requires personal representatives to initiate or defend litigation in the estate's best interest, not their own self-interests.

(d) Additionally, we are unpersuaded by plaintiff's attempts to distinguish the Fidelity account litigation from those two cases that went to trial. The jury found that, between February and July 2020, Matthew lacked capacity and that Sprague unduly influenced Matthew to change his estate plan. Sprague pursued the Fidelity account in July 2020, which was during and after the period in which the jury already found that Sprague unduly influenced Matthew. Therefore, as a result of his undue influence over Matthew, Sprague stood to significantly benefit from the litigation regarding the Fidelity account because he was already an improper beneficiary of Matthew's estate. Accordingly, although the jury did not explicitly address the Fidelity account, it did not need to for purposes of the probate court's decision.

(e) Regardless of whether Sprague did provide some benefit to defendant, this did not change the fact that he was partially to blame for bringing about and defending improper litigation in the first place because doing so provided an improper benefit to himself. To hold otherwise would subject estates to payment of attorney fees for litigation initiated or defended in personal representatives' self-interests, i.e., bad faith, merely because some benefit was provided to the estates. Such an interpretation conflicts with the plain language of the statute.

(f) The probate court did not err by determining that there was no genuine issue of material fact that Sprague did not act in good faith when he initiated and defended the 2020 cases. Sprague's actions occurred when he was unduly influencing Matthew, who lacked capacity to modify his estate plan to benefit Sprague. Accordingly, Sprague's actions were self-serving, and plaintiff was not entitled to attorney fees from defendant. Plaintiff's remedy is to seek such fees from Sprague.

19. Standing & Parties

a. ***In re Trust of John S. Middleton,* 2024 Pa. Super. Unpub. LEXIS 727 (Superior Court of Pennsylvania 2024).** A settlor's right to seek removal of a trustee under the Uniform Trust Code does not confer upon settlor standing in the proceedings of the appointment of a co-trustee and the change of the situs.

> John S. Middleton ("Settlor") established an irrevocable trust under an agreement dated March 3, 2002 ("Trust Agreement"), naming Larry P. Laubach ("Laubach") as the trustee. Under the Trust Agreement, Settlor retained an annuity interest for two years. At the conclusion of the two-year period, the trust was divided into two equal trusts — one for the benefit of Settlor's son, John P. Middleton ("John P."), and the other for the benefit of Settlor's daughter, Frances B. Middleton. The Trust Agreement grants Settlor no interest in the Trust created for John P.'s benefit, other than the limited right to appoint a "non-family member" successor trustee in the event that Laubach should become unable to serve. Settlor "expressly relinquished any right to revoke or modify the Trust"."

(1) Laubach was removed from his position as trustee. The following day, Settlor exercised the sole power he retained with respect to the Trust and appointed Patrick J. Riley ("Riley") as Laubach's successor trustee. Subsequently, Riley executed a document in which he

purportedly appointed Bridgeford Trust Company ("Bridgeford") as a co-trustee and, together, Riley and Bridgeford changed the situs of the Trust from Pennsylvania to South Dakota.

(2) John P. filed a petition seeking a declaratory judgment that Riley's purported appointment of Bridgeford and their attempted change of situs are void and invalid ab initio ("Declaratory Judgment Petition"). Settlor filed an answer and new matter to the Declaratory Judgment Petition, in which he countered that Bridgeford's appointment and the change of situs to South Dakota were, indeed, valid, as Riley was the sole trustee at the time and did not need John P.'s consent. John P. filed preliminary objections to Settlor's answer and new matter, arguing that Settlor does not have standing to participate in the proceeding regarding his Declaratory Judgment Petition. Settlor filed a response to the preliminary objections, in which he admitted that he established the irrevocable Trust for the benefit of John P. and that he is not a beneficiary of the Trust. However, Settlor averred that he has a statutory right to enforce the Trust under the Uniform Trust Act ("UTA"), which he claimed gives him standing to file an answer to the Declaratory Judgment Petition.

(3) The orphans' court sustained John P.'s preliminary objections and struck Settlor's answer and new matter. Settlor appealed and the Superior Court affirmed the orphans' court on the following grounds:

(a) The order from which Settlor appeals is not a final order, as the issues raised in the underlying Declaratory Judgment Petition remain pending before the orphans' court. The order in question was not certified as a final order, nor did Settlor seek permission to appeal the order.

(b) The Pennsylvania Rules of Appellate Procedure provide that an appeal may be taken as of right from an order interpreting a will or a document that forms the basis of a claim against an estate or trust, an order interpreting, modifying, reforming or terminating a trust, or an order determining the status of fiduciaries, beneficiaries, or creditors in an estate, trust, or guardianship. The orphans' court order does not fall within any of the categories.

(c) The order in question sustained John P.'s preliminary objections on the grounds that Settlor lacks standing to respond to the Declaratory Judgment Petition. The orphans' court was not required to "interpret" the Trust Agreement in reaching its decision.

(d) Settlor does not point to any specific terms of the Trust Agreement — other than his limited right to appoint Laubach's successor trustee — which grant him an interest in the Trust or that would permit him to participate in the underlying proceeding.

(e) Instead, it is evident that the orphans' court's determination regarding Settlor's standing was largely based on its analysis of the statutory rights asserted by Settlor. A settlor's right to seek removal of a trustee under Section 7766(a) does not confer upon Settlor standing in the proceedings. Settlor cannot bootstrap the right to request removal of a trustee under Section 7766(a) to expand his standing to allow him to participate in other proceedings concerning the Trust.

(f) Settlor makes no claim that he is a fiduciary, beneficiary, or creditor of the Trust, nor are there any facts of record to establish him as such. The court rejects Settlor's claim that the order determined an interest in Trust assets and is therefore appealable. The August 25, 2022 order made no determination regarding the assets of the Trust. To the contrary, it merely determined that Settlor has no standing to participate in John P.'s petition regarding the validity of Riley's purported appointment of Bridgeford as a co-trustee and their subsequent attempt to change the situs of the Trust to South Dakota.

(g) The orphans' court's August 25, 2022 order made no declaration regarding Settlor's "status or rights" under the Trust Agreement or the UTA. It merely made the threshold determination that Settlor does not have standing to participate in the underlying proceeding. No final judgment or decree has been entered.

(h) The order from which Settlor appeals does not meet all three prongs necessary to establish a collateral order. While the order may be separable from the merits of the underlying issues raised in the Declaratory Judgment Petition, Settlor's claim does not involve interests deeply rooted in public policy. Rather, resolution of this matter is only ***important to the parties involved in this litigation. The orphans' court's August 25, 2022*** order is interlocutory and that the instant appeal is not proper.

(i) Nevertheless, even if the court were to reach the merits of Settlor's claim, the court would affirm the orphans' court's ruling that Settlor has no standing to file a responsive pleading to the Declaratory Judgment Petition.

(j) Settlor will not be impacted in any way by the outcome of the declaratory judgment proceedings, as he has no substantial, direct, or immediate interest in the Trust.

b. ***In the Matter of the Estate of Birkenfeld,*** **103 Mass. App. Ct. 628 (2023).** The Uniform Probate Code definition of "interested person" does not displace the common-law requirement that a person have a legally cognizable interest in a probate estate to have standing to challenge the appointment of its personal representative.

(1) On October 25, 2007, Ronald Birkenfeld ("Birkenfeld") executed a will giving his tangible personal property to his wife, Pamela Birkenfeld ("Pamela"), with the residue of his estate to pour over into a revocable trust ("trust"). Explicitly excluded from the will were Birkenfeld's three sons from a previous marriage and a daughter from another relationship. As to the sons, the will stated that they were excluded because adequate provisions had been made for them under the trust. As to the daughter, the will stated that her exclusion was deliberate, and not the product of inadvertence, mistake, or other error. The will named Pamela as executor, with a financial advisor named as successor. If neither Pamela nor the financial advisor were able to serve as executor, the office was to be filled by a person nominated by a majority of the trustees of the trust.

(2) The trust was structured to maximize the federal estate tax marital exemption by dividing the trust res into two subtrusts: subtrust A was to receive the minimum amount that would wholly qualify for the exemption, and subtrust B was to receive the remainder. Pamela was to receive all of the income of subtrust A during her lifetime, as well as distributions from principal as the trustees determined in their uncontrolled discretion. Upon Pamela's death, the remaining accumulated and undistributed income of subtrust A was to go to Pamela's estate. The remaining principal of subtrust A, however, was to be distributed to Birkenfeld's three sons "in such amounts and proportions as" Pamela directed in her will. As to subtrust B, Pamela was to receive during her lifetime so much of the income and principal as the trustees determined in their uncontrolled discretion. The remaining principal and undistributed income of subtrust B was to be distributed upon Pamela's death to the three sons "in such amounts and proportions as" directed in her will.

(3) The trust's initial trustees were Birkenfeld and Pamela. Pamela was to remain as a trustee after Birkenfeld's death, but the trust required that, from then on, there always be a professional trustee as well.

(4) A little over thirteen years after executing the estate planning documents, Birkenfeld died on December 25, 2020. Birkenfeld's son Bradley immediately sued Pamela in the Superior Court, asserting fraud, unjust enrichment, and tortious interference with expectancy. The first two claims were based on a $500,000 gift Bradley made in 2012 to Birkenfeld and Pamela after Bradley received a whistleblower award of more than $100 million dollars from the federal government. In essence, Bradley claimed that his gift was not used to pay off the mortgage on Birkenfeld and Pamela's home as Pamela had represented to Bradley that it would be. These claims were dismissed as time barred. Bradley's interference with

expectancy claim was based on his allegation that Pamela interfered with his interest in the trust by diverting assets from Birkenfeld's estate. This claim was dismissed for lack of standing.

(5) The dismissal of Bradley's Superior Court claims was affirmed on appeal because Bradley lacked standing to pursue an interference with expectancy claim because he had no legally cognizable interest in the trust.

(6) In addition to the Superior Court litigation, Bradley opened a separate line of attack in the Probate and Family Court and filed a petition seeking formal proceedings to have his brother Douglas appointed as personal representative of Birkenfeld's estate instead of Pamela, who was named executor in the will. Bradley did not challenge the validity of the will, nor did he contend that it was the product of undue influence. Bradley sought only to thwart Birkenfeld's desire that Pamela be personal representative of Birkenfeld's estate.

(7) Pamela objected to Bradley's petition and filed a counterpetition in which she sought to be appointed personal representative as contemplated by the will. Bradley objected to Pamela's appointment. Pamela then moved to strike Bradley's objections and to dismiss his petition. Ultimately, a judge of the Probate and Family Court concluded that Bradley lacked standing to object to Pamela's appointment as personal representative of the estate. The judge accordingly dismissed Bradley's petition and struck his objections. The propriety of these rulings is now before us.

(8) Bradley appealed and the court of appeals affirmed on the following grounds:

   (a) The central question in this case, which is one of first impression, is whether a person has standing to challenge the appointment of a personal representative of an estate simply by virtue of falling within the Massachusetts Uniform Probate Code's ("MUPC") definition of "interested person." The MUPC's definition of "interested person" does not displace the common-law requirement that a person have a legally cognizable interest in a probate estate to have standing to challenge the appointment of its personal representative. Because the objector in this case does not receive anything under the will, nor does he challenge the will's validity, he has no standing to object to the appointment of the personal representative even if he (the objector) is an "interested person" under the MUPC.

   (b) The question whether a person has standing to challenge the appointment of a personal representative is different from the question whether a person has standing to challenge the allowance of a will. Under the MUPC, a formal testacy proceeding seeking to determine whether a decedent left a valid will "may be commenced by an interested person." By contrast, the MUPC is silent as to who may bring a petition concerning appointment of a personal representative. Although notice of such petitions must be given to "interested persons," it does not identify the class of persons who may bring such a petition.

   (c) In the absence of statutory language on the issue, pre-MUPC case law imposed a common-law requirement that a person have a legal interest in the decedent's estate, such as that of legatees and creditors, in order to have standing to petition to remove, or to oppose the appointment of, a personal representative. A cognizable legal interest in the estate is required because courts are not established to enable parties to litigate matters in which they have no interest affecting their liberty, rights or property.

   (d) The MUPC — despite the breadth of its provisions — did not replace all common-law principles concerning the affairs of decedents. Instead, unless displaced by a particular provision, the principles of law and equity are to supplement the MUPC's provisions. The MUPC does not identify the class of persons entitled to challenge the appointment of a personal representative. Thus, it did not displace the common-law requirement of standing.

(e) Bradley does not have a sufficient legal interest in the estate subject to the will to have standing to challenge Pamela's appointment as personal representative. The will gives Birkenfeld's personal property to Pamela, with the residue of his estate to pour over to the trust. Bradley was explicitly excluded from receiving anything under the will, which he acknowledges as Birkenfeld's valid will. Nor is Bradley's contingent remainder interest in the trust sufficient to confer standing to challenge Pamela's appointment as personal representative of the estate.

c. ***Carmel v. Fleischer,* 2024 Fla. App. LEXIS 4841 (2024).** Trust beneficiary has standing to object to accounting by personal representative, and virtual representation does not apply where conflicts of interest are present.

(1) Herbert Carmel died in 2017 and was survived by three children, including Mark. Shortly before his death, Herbert executed a codicil to his will providing that Mark's share of the estate would be held in trust, with Mark's brother Randall, and Allen Lamberg, as trustees. Mark's children became remainder beneficiaries. Estate litigation between the brothers commenced over the will provisions which Mark claimed Randall had procured through undue influence. A settlement was reached which included appointing Norman Fleischer to act as personal representative and administer the estate.

(2) After the settlement agreement, the trial court entered an order terminating the trust, but Mark and one of his sons then moved to vacate the order with claims of forgery. The trial court ultimately vacated the order terminating the trust. Thus, Randall and Lamberg remained the trustees of Mark's testamentary trust, even though another part of the settlement agreement had specified that Randall and Mark were not to communicate.

(3) While litigation continued over the settlement agreement, Fleischer administered the estate. In 2019, after receiving a trustee's accounting and the trustee's waiver of any accounting of the estate, Mark objected to both and demanded an inventory and accounting of both the estate and trust. The trial court did not rule on these motions.

(4) In January 2023, Fleischer filed a final accounting of personal representative, and a petition for discharge. Fleischer's petition acknowledged Mark's filings, but stated that Mark lacked standing because he was not an interested person in the proceedings. According to Fleischer, Mark was only a qualified beneficiary of a testamentary trust, and Fleischer himself was not a trustee of that trust. Mark immediately filed an objection to Fleischer's petition for discharge, based on Fleischer's purported failure to serve the petition and the final accounting on Mark. Mark also filed a motion to compel Fleischer to serve Mark with a copy of the final accounting and a motion for a hearing on the same. Mark then filed a surcharge petition against Fleischer, alleging improper administration of the estate. Mark alleged that Fleischer had acted based upon an invalid and unenforceable settlement agreement, had improperly assessed estate administration expenses against the trust, and had also failed to fund the trust agreement with the proper amount from the estate.

(5) Fleischer filed a motion to strike Mark's surcharge petition due to lack of standing as an interested person because Mark was not a beneficiary of the estate but rather the beneficiary of a testamentary trust. In response, Mark filed a "brief" explaining his position as an interested party and supporting his surcharge petition and his objection to Fleischer's final accounting and petition for discharge. The trial court granted Fleischer's motion to strike Mark's petition and granted Fleischer's petition for discharge because no "real parties in interest" objected to the petition.

(6) Mark appealed, and the Court of Appeals reversed and remanded on the following grounds:

(a) Mark does not seek to bring an action on behalf of his trust, but rather asserts standing to object to Fleischer's final accounting and petition for discharge based on his status as the beneficiary of his testamentary trust. Mark seeks to prevent the testamentary trust for his benefit from being dissipated. The trial court erred in determining that Mark did not have standing to file objections as an interested person.

(b) The virtual representation provisions of the Florida Uniform Trust Code do not apply. In this case, a conflict exists between Randall, a trustee, and Mark, the beneficiary. Not only do the brothers have substantial disagreements about the settlement agreement, but Randall, as a beneficiary of the estate, stands to benefit to the extent that Mark's trust is required to incur more of the estate expenses. Because a conflict of interest exists between Mark and Randall, orders binding the trustees cannot bind Mark.

d. ***Fallon v. Easley,* 686 S.W.3d 287 (Court of Appeals of Missouri 2024).** Attorneys do not owe a duty of care to non-client prospective beneficiaries of unexecuted testamentary documents.

(1) A.F. ("Decedent") and her husband had four living children: L.B., M.F., and Appellants Brian and Lara Fallon. Decedent listed these four children as beneficiaries in her Revocable Living Trust initially executed on June 20, 2000. On August 15, 2002, Decedent executed a First Amendment to the trust.

(2) In June 2016, Decedent's husband passed away. Decedent and her four children, L.B., M.F., and Appellants, survived Decedent's husband. Following her husband's death, Decedent retained Respondent to prepare a Second Amendment to the Revocable Living Trust. Under the Second Amendment, M.F. would receive a $10,000 distribution. The three other children, L.B. and Appellants, each would receive an equal share of the remaining assets with each child's equal share distributed to that child's living descendants should said child predecease Decedent.

(3) After the execution of the Second Amendment, L.B. passed away leaving L.B.'s twin daughters as recipients of L.B.'s share of the trust distribution. In response to L.B.'s death, Decedent, as alleged by Appellants, wanted to remove L.B. and her descendants from the trust to avoid distributing money to some grandchildren but not others. Under the proposed change, Appellants would evenly split L.B.'s one-third share. Respondent never met or spoke directly with Decedent to ascertain her intentions and her mental capacity to make decisions related to amending the Revocable Living Trust. On February 25, 2019, Decedent passed away without having executed any amendment to the Second Amended Revocable Living Trust. Thus, an amendment naming Appellants as beneficiaries of the one-third interest of their deceased sibling, L.B., was never executed.

(4) Appellants sued Respondent for legal malpractice for allegedly failing to timely prepare a third amendment to the Irrevocable Trust and have it executed in a timely fashion. Respondent moved for summary judgment which the trial court granted. On appeal, the court of appeals affirmed on the following grounds:

(a) A plaintiff claiming legal malpractice by an attorney must prove four elements: (1) the existence of an attorney-client relationship; (2) negligence by the attorney; (3) proximate causation of plaintiff's damages; and (4) damages. The failure to satisfy any one of these elements defeats a claim for legal malpractice.

(b) The Missouri Supreme Court created an exception to the traditional rule requiring privity in the form of the existence of an attorney-client relationship, and allowed non-client, intended beneficiaries of executed (but failed) testamentary transfers to sue the donor's attorney for legal malpractice. Another Missouri court declined to extend the exception to the traditional privity requirement to permit a malpractice claim by a non-client prospective beneficiary for negligent failure to draft and secure execution of a testamentary document. The court reasoned that imposing a duty before execution of the instruments to non-client prospective beneficiaries to timely prepare testamentary instruments would interfere with (or at the very least compete with) the estate planning attorney's duty of undivided loyalty to the client to see that the client has adequate time to reflect on what he desires, including the opportunity to change his mind and/or execute a plan that is not what the non-client prospective beneficiary desires.

(c) Respondent never met with or spoke with Decedent to ascertain her intentions and mental capacity to make decisions related to amending her trust for a third time. On February 25, 2019, Decedent passed away without executing any amendment to the Second Amended Revocable Trust.

(d) The undisputed material facts establish that Decedent failed to execute a third amendment to her trust prior to her death. Accordingly, Appellants are at best non-client prospective beneficiaries of the undrafted, unexecuted third amendment to the trust. Attorneys do not owe a duty of care to non-client prospective beneficiaries of unexecuted testamentary documents and the privity exception does not apply, and for good reason.

(e) Expanding the exception to impose a duty on an estate planning attorney to non-client prospective beneficiaries, like Appellants here, to timely prepare and gain execution of testamentary documents would compromise the attorney's undivided duty of loyalty to the client to determine her intent, including to execute a plan that may be contrary to what the non-client prospective beneficiaries desire.

(f) This concern applies with additional force in the circumstances of this case. Here, the uncontroverted facts are that, not only did Decedent not execute a third amendment prior to her death, Respondent never met or spoke with Decedent to ascertain her intentions and mental capacity to amend her trust a third time. Thus, no one can know with any confidence whether, as Appellants allege, Decedent wanted to amend her revocable trust to remove her predeceased child, L.B., so that Appellants would receive L.B.'s one-third share, or whether her intent diverged from that of Appellants.

(g) Without proper proof of Decedent's intent to benefit Appellants by a third amendment to her trust, Appellants could not prove at trial that Respondent's alleged negligence in failing to draft and secure execution of the amendment was the proximate cause of Appellants' damages, or that they were damaged at all.

20. Torts, Slayers, & Bad Actors

a. ***Salmon v. Tafelski,* 235 N.E.3d 867 (Court of Appeals of Indiana 2024).** Tort claimant may not maintain an independent claim where a remedy under the probate code is available and would provide adequate relief, even where decedent dies intestate, and a will contest is not an available cause of action.

(1) Rita Tafelski is the daughter and sole heir of Suzanne Neitzel, who died intestate on April 14, 2012. Linda Salmon is Neitzel's sister, and following Neitzel's death, Salmon was appointed personal representative of her estate. Prior to her death, Neitzel's health had been failing for some time, and in 2010, Neitzel gave her power of attorney to Salmon. She also changed two of her bank accounts to joint accounts with Salmon with right of survivorship. And, according to Tafelski, Neitzel transferred to Salmon her shares in two family trucking companies in exchange for $100.00. Consequently, none of these assets were included in Neitzel's probate estate.

(2) Tafelski sued Salmon for tortious interference with an inheritance, conversion, fraud, constructive trust, breach of fiduciary duty, and intermeddling (hereinafter collectively "tortious interference with an inheritance"). Tafelski alleged that Salmon had exerted undue influence over Neitzel and engaged in fraud when Neitzel established joint bank accounts with Salmon and transferred her shares of stock to Salmon. Tafelski maintained that the assets involved in these inter vivos transfers would have been included in Neitzel's estate were it not for Salmon's misconduct. Tafelski claimed that Salmon's conduct amounted to

a tortious interference with her inheritance. This civil action was consolidated with the Neitzel estate for purposes of discovery and pre-trial proceedings.

(3) Tafelski sought to remove Salmon as personal representative. Salmon voluntarily resigned, and Tafelski was appointed as successor personal representative. Thereafter, Salmon filed her final accounting showing she had distributed to Tafelski all the assets of the estate, which totaled over $1 million. The accounting also showed that the funds from the two joint bank accounts totaled $126,645 and had been transferred to Salmon as surviving joint tenant.

(4) Salmon moved to dismiss the estate action. The probate court found that Tafelski had taken no significant action on behalf of the estate for more than six years and granted the dismissal. Tafelski appealed the dismissal, and the court of appeals affirmed. This separate action was then transferred back to the trial court's docket. Salmon subsequently moved for summary judgment and asserted that Tafelski had failed to designate evidence that would support her claims, that she lacked standing to maintain an independent action, and that only the personal representative of the decedent's estate would be a proper party plaintiff. The court denied Salmon's motion and held that Tafelski could maintain an independent action for tortious interference with her inheritance.

(5) Salmon appealed, and the court of appeals reversed and remanded on the following grounds:

(a) Tortious interference with an inheritance arises when one who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift. This tort is not permitted where the remedy of a will contest is available and would provide the injured party with adequate relief.

(b) The trial court determined precedent that involved will contests were not controlling because Neitzel died intestate and, therefore, that Tafelski had no ability to contest a will. Thus, the court held that it is permissible for Tafelski to bring an independent action for tortious interference with an inheritance.

(c) The precedent that an action for tortious interference with an inheritance is not permitted where the remedy of a will contest is adequate does not mean the inverse is true—that where there is no will and thus no will contest, a claimant has an unrestricted right to pursue a claim for tortious interference with an inheritance.

(d) The distinction between whether the decedent died testate or intestate and, hence, whether a will contest is available, is not dispositive of whether an interested person has standing to maintain an independent tort claim for interference with an inheritance.

(e) The harm alleged here, if proven, would be a harm against Neitzel during her lifetime, which flowed through to her estate upon her death. Thus, Tafelski's claims are derived from her standing as an heir of her mother's estate. While the harm alleged may be "personal" to Tafelski in an ordinary sense, her claims are subject to exhaustion of available remedies found in our probate code.

(f) When an estate is administered, the rights of the heirs or devisees, as the case may be, are subordinate to the first right and responsibility of the personal representative to administer the assets and liabilities of the decedent for the heirs or devisees and creditors of the estate. The personal representative is "the focal point" for collecting and managing estate assets, including the prosecution of lawsuits on behalf of the estate. This includes lawsuits filed on behalf of the estate to recover assets that may at first blush appear to be non-probate assets but were wrongfully diverted or misappropriated from the decedent through undue influence, fraud, or other nefarious conduct.

(g) In certain circumstances the probate code confers statutory standing on heirs to intervene in the administration of an estate. The code allows "interested persons"—specifically defined to include heirs—to petition the probate court and allege that a person has concealed, embezzled, converted, or disposed of any real or personal property of the estate. Another means of intervention for heirs allows heirs to petition the probate court for a determination of the proper action for collection when a person is indebted to the estate and the personal representative is not diligently pursuing collection of the indebtedness. And, a personal representative shall have full power to maintain any suit for any demand due the decedent or her estate or for the recovery of possession of any property of the estate. Thus, although adequate relief was available to Tafelski under the probate code, she pursued none of these options, and she has not shown that these remedies were not available to her or were inadequate.

(h) The probate code gives the personal representative plenary authority to collect and manage the assets of the estate and specifically circumscribes the instances when heirs may inject themselves into the administration of the estate. When an heir believes the personal representative is neglecting his duty to the detriment of the estate, the heir must follow the procedures of the probate code to rectify the problem.

(i) The court previously qualified the Restatement (Second) of Torts approach when it recognized the independent tort of tortious interference with an inheritance but prohibited the tort to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief. Those cases did not contemplate or consider more broadly whether and, if so to what extent, an independent common law cause of action outside the estate where no will contest is involved must also honor the requirements of our probate code.

(j) During administration, as well as when administration of an estate is available, the action must be brought within the probate proceeding. This rule applies not only where a will contest is available and would provide the injured party with adequate relief, but across the board where, as here, a remedy under probate code provisions is available and would provide adequate relief to heirs and other persons interested in the estate who claim to have been injured. Of course, this rule does not apply where there is no administration or where administration is neither anticipated nor viable.

(k) Tafelski has common law standing as Neitzel's heir who claims to have been injured by Salmon's tortious interference with her inheritance. While standing is inherent in the alleged tort, it is not alone dispositive. Tafelski had adequate remedies under the probate code to pursue her claim against Salmon and that she failed to avail herself of these remedies. Accordingly, she is now precluded from maintaining an independent claim for tortious interference with an inheritance, including its various alleged subparts and iterations.

b. ***Haddad v. Maalouf-Masek,* 2024 Ohio 1983 (Court of Appeals of Ohio 2024).** Application of forfeiture clause following unsuccessful will contest litigations bars contestant from pursuing tort claims for interference with expectancy of inheritance.

(1) Tina Haddad ("Tina") and Nina M. Maalouf-Masek ("Nina") are sisters. In 1995, their parents divorced. Shortly thereafter, their father was murdered. After their father died, Tina and Nina had joint ownership interests in the family business. In or around 1999, Tina bought out Nina's share of the family business. Tina and Nina's relationship thereafter deteriorated.

(2) At the age of 85, their mother, Rosaline Haddad ("Rosaline"), died testate, with Tina and Nina as the sole heirs of her estate. In 2000, Rosaline executed a will that left her assets to Tina and Nina equally (the "2000 will"). In 2004, Rosaline executed a second will that revoked her prior will and left all of her assets — except for a $5,000 bequest to Tina — to Nina (the "2004 will"). The 2004 will contained a no-contest clause that stated that anyone

who contested the will would receive only $1. The 2004 will named Nina as the executor of her mother's estate. The 2004 will was admitted to probate in the Cuyahoga County Court of Common Pleas, Probate Division, 2019 EST 244746. Nina was appointed executor of the estate.

(3) Tina sued Nina for tortious interference with expectancy of inheritance, and then added claims for intentional interference with expectancy of inheritance (the "IIEI claim"), unjust enrichment, conversion, constructive trust/accounting, and damages (the "general division action"). In her amended complaint, Tina alleged that Rosaline suffered from dementia and Alzheimer's disease, had limited ability to read and write in English, relied heavily upon her daughters, and that Nina (with whom Rosaline had lived from 1998 until she was placed in an assisted living facility or nursing home in 2016 or 2017) had a "confidential relationship" with Rosaline and "complete access and control over" Rosaline's finances, bank accounts and other assets, isolated Rosaline, diverted Rosaline's $2 million in assets, and unduly influenced Rosaline to change her will. She alleged that Nina wrote checks to cash to deplete accounts, gave Rosaline's property to her husband, children, and stepchildren, bought herself a car, and paid her own taxes with her mother's assets.

(4) Nina moved to dismiss the complaint and stay discovery. Tina then filed a will contest action (the "will contest action"), asserting that the 2004 will was the product of undue influence by Nina and that Rosaline had lacked testamentary capacity to execute the 2004 will. The trial court staying the general division action until the will contest action was resolved. A jury returned a verdict finding the 2004 will to be valid and that it was not the result of undue influence. Tina appealed and the court of appeals affirmed. A final account was filed in Rosaline's estate that showed a distribution of $1 to Tina. The probate court approved the final account.

(5) Tina moved to lift the stay on the tort actions. Nina moved for summary judgment dismissing the suit. The trial court lifted the stay, and Nina's motion to dismiss was converted into a motion for summary judgment. The trial court granted Nina's motion for summary judgment without explaining the basis for its ruling.

(6) Tina appealed and the court of appeals affirmed on the following grounds:

(a) The trial court did not err in lifting the stay and ruling on Nina's motion for summary judgment without allowing Tina to conduct additional discovery. The party opposing summary judgment must submit affidavits with sufficient reasons stating why it cannot present by affidavit facts sufficient to justify its opposition. Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment. There must be a factual basis stated and reasons given why it cannot present facts essential to its opposition to the motion. If this is done, the trial court has several alternatives. It may refuse the application for summary judgment; it may order a continuance to permit affidavits to be obtained in opposition to the motion for summary judgment; it may grant a continuance for further discovery; or it may make such other order as is just. These are all within the trial court's discretion and are not mandatory.

(b) Tina did not file a motion for continuance, she did not submit an affidavit explaining her need for additional discovery to obtain facts necessary to oppose Nina's summary judgment motion, she did not oppose Nina's motion to convert her motion to dismiss into a motion for summary judgment and, although she reportedly served requests for admission on Nina prior to the stay, she did not seek to have the stay lifted with respect to those requests and did not engage in any additional discovery after the stay was lifted. There is nothing in the record to indicate that Tina had served any interrogatories or requests for production on Nina, had issued any additional third-party subpoenas or had noticed any depositions prior to filing her opposition brief. A party who fails to seek relief in the trial court based on a need for discovery fails to preserve the issue for appeal.

(c) Tina acknowledges that she cannot relitigate, in this case, the probate court's determination in the will contest action that the 2004 will was valid and was not the product of undue influence by Nina. The tort of intentional interference with the expectancy of inheritance cannot be used to bypass the probate court or to overturn the probate court's determination of the validity of a will due to the probate court's exclusive jurisdiction in these areas.

(d) To prevail on her motion for summary judgment, Nina was not required to present affidavits or other evidence disproving the allegations of wrongdoing in Tina's amended complaint. Rather, Nina, as the moving party, bore the initial burden of informing the trial court of the basis for her motion and identifying those portions of the record that demonstrated the absence of a genuine issue of material fact relevant to the basis on which she moved for summary judgment. Summary judgment may be granted in favor of a defendant where the pleadings, other relevant materials, and the applicable law clearly establish that the plaintiff has no legally cognizable cause of action against the defendant based on the alleged facts. Nina met her initial burden by Tina's amended complaint and the affidavit of Nina's counsel attaching copies of the judgment entries from the will contest action and the administration of Rosaline's estate — that showed that Tina could not establish essential elements of her claims against Nina and that Nina was, therefore, entitled to judgment as a matter of law. This triggered Tina's reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial on her claims. Tina, however, did not meet her burden here. Viewing the evidence in the light most favorable to Tina, there are no genuine issues of material fact and that Tina cannot prevail on any of her claims against Nina as a matter of law.

(e) To prevail on an IIEI claim, a plaintiff must prove the following elements: (1) the existence of an expectancy of inheritance in the plaintiff, (2) an intentional interference by the defendant with that expectancy of inheritance, (3) conduct by the defendant involving the interference that is tortious in nature, such as fraud, duress, or undue influence, (4) reasonable certainty that the expectancy of inheritance would have been realized but for the interference by the defendant and (5) damage resulting from the interference.

(f) The first element of an IIEI claim requires the plaintiff to identify what he or she expected to inherit and to show that the plaintiff, in fact, had an "expectancy" of "inheritance" with respect to that property. Tina has conceded that she cannot relitigate in this case the probate court's determination in the will contest action that the 2004 will was valid and was not the product of undue influence by Nina. Given that Tina contested the 2004 will, her inheritance under the will was limited to $1 regardless of the amount of assets in her mother's probate estate.

(g) The fact that Tina was one of Rosaline's daughters and had once had a close relationship with her mother was not enough to establish an expectancy of inheritance. Tina offered no evidence of a promise or other statements by her mother that indicated her intent to gift Tina any particular assets or property (either during her lifetime or upon her death) or her intent to make Tina a joint owner or beneficiary of any particular asset that would have transferred outside of probate following her death. The only evidence of specific facts presented regarding Rosaline's intent with respect to Tina's inheritance was the 2004 will. Tina did not claim that Rosaline had ever expressed a desire (or had taken any steps) to change her 2004 will. The vague, nonspecific assertions in the affidavits Tina submitted and Tina's speculation that Rosaline would have given her more were it not for Nina's alleged interference do not create a genuine issue of fact that Tina had a reasonable expectation of inheritance beyond the inheritance provided in the 2004 will.

(h) Even assuming Nina had made all the property transfers alleged in the amended complaint, Tina has not shown that a genuine issue of fact exists as to whether those transfers "interfered" with, or otherwise resulted in, a reduction of any inheritance she would have otherwise received — through probate or otherwise — causing damages to Tina. It is undisputed that Tina's inheritance under the 2004 will was limited to $1. Tina has not claimed, much less presented any evidence, that she had ever been a joint owner or beneficiary of any of Rosaline's accounts. Tina has not alleged Nina had removed Tina (or used her influence to compel Rosaline to remove Tina) as a joint owner or beneficiary on any account.

(i) If any beneficiary or joint ownership designation on Rosaline's accounts had been successfully challenged and invalidated, or if any other inter vivos transfer of Rosaline's assets had been successfully challenged and invalidated, the subject assets would have either been returned to Rosaline's accounts (and, in accordance with the terms of those accounts, become the exclusive property of Nina upon Rosaline's death) or reverted to Rosaline's estate and distributed to Nina in accordance with the 2004 will. Likewise, any personal property Rosaline owned at the time of her death, e.g., jewelry, gold, artwork or furniture, would have been part of her probate estate and distributed to Nina in accordance with the 2004 will. Thus, even assuming Nina made all of the transfers alleged in the amended complaint, Tina would still have received only $1. Accordingly, based on the facts alleged by Tina, there is no genuine issue of material fact that Tina has not sustained any recoverable damages as necessary to sustain her IIEI claim, and the trial court did not err in granting summary judgment in favor of Nina on Tina's IIEI claim.

(j) Tina has not shown that a genuine issue of material fact exists as to any of her other causes of action.

(k) Tina contended that the trial court's ruling on summary judgment violated her right to remedy under Article I, Section 16 of the Ohio Constitution by "destroying a judicially recognized remedy and delaying justice." Article I, Section 16 of the Ohio Constitution provides, in relevant part: All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. The trial court properly granted Nina's motion for summary judgment because, based on the evidence presented, there was no genuine issue of material fact that Tina could not prove essential elements of her claims against Nina. Tina has not cited any relevant legal authority to support her claim that, under such circumstances, the trial court's decision to grant summary judgment violated Article I, Section 16 of the Ohio Constitution. Simply because Tina was unsuccessful in demonstrating the existence of a genuine issue of material fact for trial on her motion for summary judgment does not mean her rights under the Ohio Constitution were violated.

21. Spendthrift Trusts & Asset Protection

a. ***Gartrell v. Gartrell,* 2024 Ala. Civ. App. LEXIS 9 (Alabama Court of Civil Appeals 2024).** Trust beneficiary maintained only an interest in the corpus of the trust that considered his separate property in divorce proceedings. Family's regular use of a truck owned by the trust would not transform the corpus of the trust into marital property.

(1) Sharon Smith Gartrell ("the wife") and Edward Conant Gartrell, Jr. ("the husband") married in 1998 and separated in 2021. The wife filed a complaint for a divorce and husband filed a counterclaim for a divorce. The wife sought alimony and an equitable division of the marital property, including the property held by the Gartrell Family Express Trust ("the trust"), a testamentary trust established for the benefit of the husband by his mother when she died in 2014. The parties presented competing evidence as to whether the husband had regularly

used the corpus and income from the trust for the common benefit of the parties during the marriage. The parties also disputed whether the proceeds of the trust could be used by the husband to pay periodic alimony.

(2) The trial court entered a final judgment that declared the husband's interest in the trust to be the separate property of the husband, divided the marital property without including the trust property, and declined to award the wife periodic alimony.

(3) The wife appealed and the Court of Civil Appeals affirmed in part, reversed in part, and remanded on the following grounds:

(a) The trial court determined that the husband's interests in the corpus and in the income of the trust were his separate property because neither were regularly used for the common benefit of the parties during the marriage. While the analysis employed by the trial court was not completely correct, it correctly determined that the trust property and the trust income were not subject to equitable division.

(b) For purposes of equitable distribution, "property acquired" by a spouse refers to property to which a spouse has obtained a right to legal ownership. Generally, the assets of an irrevocable trust are considered the property of a third party. As a beneficiary of a trust, a person does not acquire the assets of the trust. The corpus of the trust could not be classified as marital property so long as it remained within the legal ownership of the trust. The wife did not argue for dissolution of the trust, and none of the assets of the trust were ever distributed to the husband, so the trust assets remained the property of a third party and, thus, were not subject to equitable division. As a beneficiary, the husband maintained only an interest in the corpus of the trust, which, because it was bestowed solely upon him by gift or inheritance, was properly considered his separate property. Despite the wife's argument to the contrary, the family's use of a truck that was owned by the trust, even if the use was regular, would not transform the corpus of the trust into marital property.

(c) As opposed to the corpus of a trust, income received by a beneficiary from a trust may be treated as marital property once the beneficiary obtains a vested interest in the income. At the point the income becomes payable, the beneficiary has "acquired" the income because the beneficiary has a legal right to payment. Assuming, without deciding, that income received from a testamentary trust can be classified as property acquired by gift or inheritance even though the income is realized after the original transaction, that income would be divisible as marital property only if it was used regularly for the common benefit of the parties during the marriage.

(d) The wife primarily relies on evidence indicating that the husband deposited trust income into his personal bank account throughout 2020 and 2021. The wife maintains that, because the husband used his personal bank account to pay the marital living expenses, the deposits proved that the husband had regularly used the trust income for the common benefit of the parties. The husband testified that, before 2020, he had deposited the trust income into a trust account maintained by Morgan Stanley. During the COVID-19 pandemic, he lost access to that account so, he said, he deposited the trust income into his personal bank account. The husband denied that any distributions of trust income had ever been used to pay for the marital living expenses, and the wife admitted that she had no evidence indicating that any distributions had been used to pay for marital debts or to purchase marital assets.

(e) The wife also references the purchase of a recreational vehicle that the husband purchased using trust income. The parties used the recreational vehicle to attend football games and to visit Lake Guntersville before selling it. Other than the recreational vehicle, the husband made no other purchases using trust income during the marriage. The husband testified that he had routinely returned any distributions into the trust account for reinvestment to build up the account. The lone purchase of the recreational vehicle is not sufficient to prove a regular use of trust income.

(f) When dividing marital property, a trial court may not consider property inherited by a spouse unless that property "has been used regularly for the common benefit of the parties during their marriage." That statute, however, does not govern determinations of claims for periodic alimony, which are governed by a separate statute. The trial court erred in applying the property division statute when denying the wife's claim for periodic alimony. That error was not a mere scrivener's error but was a substantive error that prejudiced the wife and one that only reversal of the judgment can cure. The evidence showed that the trust held assets worth approximately $1,600,000 and consistently generated income, including a gross income of approximately $50,000 in 2021. If the trial court had considered that income as a source from which periodic alimony could be paid, the trial court may have reached a different determination regarding the periodic-alimony claim. On remand, the trial must vacate the portion of the judgment adjudicating the claim for periodic alimony and reconsider that claim without applying the equitable division statute.

(g) On remand, the trial court may consider additional reasons husband asserted in the trial court why the trust should not be considered a source from which to pay periodic alimony in ruling on the wife's periodic-alimony claim. Because property-division and alimony awards are considered to be interrelated, courts often reverse both aspects of the trial court's judgment so that it may consider the entire award again upon remand. Accordingly, the judgment with respect to the property-division award is also reversed so that the trial court can reconsider it along with the wife's claim for periodic alimony.

22. Powers Of Attorney

a. ***Garner v. Univ. of Tex. at Austin,*** **317 A.3d 333 (District of Columbia Court of Appeals 2024).** Even where a durable general power of attorney appears to grant the attorney-in-fact virtually unfettered authority, the attorney-in-fact must prove that his actions were in accordance with the principal's reasonable expectation or best interest.

(1) In 2001, John Michael Garner ("the Decedent"), a long-time employee of the United States Department of State living in Washington, D.C., executed several estate-planning documents, including a trust and a durable general power of attorney ("DGPOA"). The trust document names the Decedent as the trustor and first trustee of the trust. It designates the Decedent as its sole beneficiary during his lifetime and specifies that, after the Decedent's death, the trustee shall distribute forty percent of the trust assets to the University of Texas at Austin (for the purchase of books, manuscripts, and materials for the Nettie Lee Benson Latin American Library Collection); forty percent to Catholic Relief Services World Headquarters; ten percent to St. Stephen Martyr Roman Catholic Church; and ten percent to St. Mary's Roman Catholic Church and School.

(2) Among the powers of the trustor is the right to revoke or vacate the trust at any time during the trustor's lifetime as well as the right to "change, alter, or amend [the trust] . . . and to change any or all of the beneficiaries of [the] Trust, or to wholly divest them of any rights to property comprising the Trust Estate, or to limit said beneficiaries in any of their interests or rights herein." The trust provides that, "[a]fter the death of Trustor, the Trustee shall hold, manage and distribute the remaining Trust Estate" to the beneficiaries.

(3) The trust designates Decedent's nephew, Patrick Garner, as successor trustee in the event the Decedent is unwilling or becomes unable, for any reason, to continue to serve as Trustee. The Decedent made this designation despite the fact that he and Mr. Garner had had extremely limited, and almost no face-to-face, interaction over many years. At the time, Mr. Garner was approximately twenty-one years old and was attending college.

(4) The Decedent appointed Mr. Garner as attorney-in-fact under the DGPOA and granted the attorney-in-fact broad powers. The DGPOA provided, in relevant part, that the attorney-in-fact has authority "to take any action with respect to any existing trust created by the Decedent or on the Decedent's behalf, including the right to exercise on the Decedent's behalf the power to amend any trust and to make any decision whatsoever without limitation with respect to any trust. The DGPOA also exculpates the attorney-in-fact from liability for actions taken under that provision. The DGPOA, among other things, broadly released and forever discharged the attorney-in-fact from any and all liability upon any claim or demand of any nature whatsoever by the Decedent or his heirs and assigns arising out of the acts or omissions of the Decedent's Attorney-in-Fact, except for willful misconduct or gross negligence. It also provides that the attorney-in-fact shall have no liability for entering into transactions authorized by this instrument with the attorney-in-fact in the attorney-in-fact's individual capacity as long as the attorney-in-fact believes in good faith that such transactions are in the Decedent's best interests or the best interests of the Decedent's estate and those persons interested in the Decedent's estate.

(5) From 2003 (the year of Mr. Garner's college graduation, which the Decedent attended) through mid-2020, Mr. Garner did not interact with the Decedent, except for the occasional thank-you note or Christmas card. Around the summer of 2020, the Decedent fell and was admitted to George Washington University Hospital. The Decedent's physical and mental health deteriorated precipitously thereafter. In August 2020, the hospital filed a Petition for a Temporary Guardian, requesting the appointment of a ninety-day healthcare guardian. In conjunction with this proceeding, the hospital filed two certificates of incapacity from physicians who had personally examined the Decedent during his stay in the hospital. Both physicians certified that the Decedent suffered from mental incapacity brought on by "acute encephalopathy," a deterioration of brain function.

(6) After becoming aware of the DGPOA, the trial court denied the hospital's petition for the appointment of a guardian because Mr. Garner was empowered, as attorney-in-fact, to make healthcare and financial decisions on behalf of the Decedent. In August 2020, after the Decedent had become incapacitated, Mr. Garner was contacted and learned for the first time of his roles under the estate documents. Mr. Garner found the fact that the Decedent had named him "surprising."

(7) On or around December 7, 2020, the Decedent suffered a stroke or series of strokes and was admitted to Howard University Hospital. Mr. Garner did not communicate with the Decedent after this point and it is undisputed that he never attempted to communicate with the Decedent about his estate plan.

(8) On December 23, 2020, Mr. Garner, acting as attorney-in-fact for the Decedent due to the Decedent's incapacity, executed the amendment to the trust. The amendment removed the existing contingent beneficiaries and substituted Mr. Garner in their place. The amendment therefore had the effect of distributing one hundred percent of the trust assets—which by that point amounted to approximately $3,000,000—to Mr. Garner upon the Decedent's death. Mr. Garner knew that the Decedent's death could be imminent and did not discuss the amendment with the Decedent. The Decedent died on January 5, 2021.

(9) Mr. Garner filed a petition in the Probate Division of the Superior Court seeking abbreviated probate and unsupervised administration of the Decedent's estate. That petition did not identify the charitable beneficiaries as interested persons, instead listing only Mr. Garner as the trust's beneficiary. The Superior Court denied the petition.

(10) Mr. Garner sought a declaratory judgment as to the efficacy of the Amendment, naming the charitable beneficiaries as defendants. The parties filed cross-motions for summary judgment. The trial court concluded that Mr. Garner as successor trustee owed a duty of loyalty to the beneficiaries, that the Amendment created a conflict between Mr. Garner's fiduciary duties [under the Trust] and his personal interests, and that the amendment

harmed the beneficiaries because they had future interests in the Trust. Second, the trial court concluded that Mr. Garner as attorney-in-fact under the DGPOA owed the Decedent a common-law fiduciary duty requiring him to act in good faith and that Mr. Garner breached this duty because the Decedent never discussed his finances, estate plan, or the disposition of his assets upon his death with Mr. Garner and, considering the material benefit Mr. Garner would acquire if the Amendment were enforced, Mr. Garner could not rely solely on the language of the DGPOA to divest all previous beneficiaries without seeking informed consent from Decedent or providing proof of acting in good faith and disclosure of necessary facts to Decedent. Finally, the trial court determined that Mr. Garner executed the Amendment in bad faith and with reckless indifference to the purposes of the trust and interests of the beneficiaries and that the exculpatory clause was therefore unenforceable and against public policy.

(11) On appeal, the court of appeals affirmed on the following grounds:

(a) Applying (without deciding the correctness of) the parties' consensus view that, notwithstanding the terms of the DGPOA, Mr. Garner was subject to a non-waivable duty to act consistently with his uncle's reasonable expectation or best interest, and a reasonable factfinder could not conclude that Mr. Garner did so.

(b) The terms of the DGPOA are unquestionably broad and it is unclear whether they are limited by good-faith and best-interest standards. However, the parties agreed at oral argument and in supplemental briefing that, irrespective of whether the express terms of the DGPOA give Mr. Garner unfettered authority to amend the trust, the common law imposes an external, non-waivable duty to act in good faith, in accordance with the reasonable expectations of the principal to the extent known or otherwise in the principal's best interest, and within the scope of the authority granted by the principal.

(c) The parties, moreover, agree not only that Mr. Garner must have acted in accordance with the Decedent's reasonable expectation or otherwise in the Decedent's best interest but also that this duty entails an objective inquiry regarding the reasonableness of Mr. Garner's view that his actions were consistent with the Decedent's wishes or interests. On the undisputed facts, a reasonable factfinder could not conclude that Mr. Garner reasonably believed that he was acting in accordance with the Decedent's expectation or in the Decedent's best interest.

(d) The summary judgment record does not support a conclusion that Mr. Garner reasonably believed that the amendment was consistent with the Decedent's expectation or best interest. Mr. Garner by his own admission had scant contact with the Decedent over almost two decades and never spoke with the Decedent about his finances or estate. He had no affirmative basis to believe that the Decedent had changed his mind about his selection of beneficiaries—a selection that had been in place for nineteen years and that the Decedent could have changed before his incapacity if he had wanted to. Simply put, Mr. Garner presented no evidence that he had any reason to believe that the Decedent would have wanted an amendment to the trust, let alone the amendment Mr. Garner made.

(e) Mr. Garner posited theories for why the Decedent named the charitable beneficiaries without really meaning it, but those theories were, by his own word, mere "speculation." Mr. Garner asserted that the Decedent and the Decedent's brother had an acrimonious relationship, but, even taking that assertion as true, it does not explain why the Decedent chose the beneficiaries he chose rather than naming other family members and simply disinheriting that brother. Mr. Garner also claimed that the Decedent had affection for his nieces and nephews and named the beneficiaries only because Mr. Garner and his cousins were too young, but that does not explain why the Decedent did not amend the trust himself once his nieces and nephews were older (and we note that Mr. Garner was an adult at the time the Decedent created his estate documents; if the Decedent had wished to name Mr. Garner with the hope that he would later distribute the assets to all of the cousins, he could have designated Mr. Garner in 2001). Nor does it explain why Mr. Garner amended the trust to make himself the sole beneficiary rather than including his cousins.

(f) After he made himself the sole beneficiary of the Decedent's trust, Mr. Garner tried to probate the Decedent's will through an abbreviated process that would not have alerted the prior trust beneficiaries of the Decedent's designation.

(g) Mr. Garner relies primarily on the broad authority set forth in the DGPOA and the apparent waiver of any self-dealing liability as evidence that the Decedent reasonably expected that Mr. Garner could amend the trust in essentially any manner. But if broadly permissive language in a DGPOA could by itself serve as evidence that the attorney-in-fact acted in accordance with the principal's wishes, then the external, non-waivable duty—which all parties agree applies—would function as no constraint at all. Thus, proceeding on the parties' shared understanding of the law, even where a DGPOA appears to grant virtually unfettered authority, the attorney-in-fact must point to something else supporting their claim that a particular act was in accordance with the principal's reasonable expectation or best interest. Mr. Garner has failed to do so here.

(h) There are two "exculpatory" clauses potentially at issue here. One is the more general provision in Article IV of the DGPOA that "release[s] and forever discharge[s]" the attorney-in-fact "from any and all liability upon any claim or demand of any nature whatsoever by [the Decedent] or [the Decedent's] heirs and assigns arising out of the acts or omissions of [the Decedent's] Attorney-in-Fact, except for willful misconduct or gross negligence." Regardless of the enforceability of this exculpatory clause, it does not appear to apply here: Mr. Garner does not face liability from a claim or demand by any party; rather, he affirmatively sought a declaratory judgment as to the efficacy of his amendment. The second clause at issue is in a specific DGPOA paragraph relating to the trust, and it states that "no action taken by [the Decedent's] Attorney-in-Fact pursuant to this paragraph shall be considered self-dealing or a violation of his fiduciary duty." Whether or not this clause would be enforceable as a matter of public policy, the parties agree that an attorney-in-fact's duty to act in accordance with the principal's reasonable expectation to the extent actually known or in the principal's best interest is not waivable. Accordingly, this clause could not have relieved Mr. Garner of his duty to act in accordance with the Decedent's reasonable expectation or best interest.

b. ***Est. of Goldstein v. JP Morgan Chase Bank, N.A.,* 2024 NYLJ LEXIS 1164 (Surrogate's Court of New York, New York County 2024).** Agent breaches duties under power of attorney by making gifts to herself without specific authorization.

(1) Paulette Feiler Goldstein died on October 18, 2016, at age 83, survived by two children, Robert Feiler ("Feiler") and Hillary Goldstein ("Goldstein"). In her propounded will, executed in 2003, decedent left her entire estate to Feiler and named her sister and Feiler as co-executors. Feiler petitioned to have this instrument probated and he received preliminary letters.

(2) A few months prior to decedent's death, Feiler attempted to withdraw funds from decedent's JP Morgan Chase Bank, N.A. ("Chase") accounts by using a power of attorney executed by decedent in 2006. However, Feiler discovered that Goldstein had transferred all the funds in decedent's account into her own account at Chase by using a power of attorney executed by decedent in 2013. Feiler complained to Chase that the 2013 power of attorney used by Goldstein was invalid, and Chase responded by placing a hold on decedent's accounts and, a few months later, on Goldstein's accounts.

(3) Thereafter, in December 2016, Goldstein commenced this action against Chase seeking the release of funds from her accounts. Chase, in turn, filed an interpleader complaint in

February 2017 against Feiler in his individual capacity. After his appointment as preliminary executor, Feiler moved to intervene in this action on behalf of the estate, seeking to assert causes of action against Goldstein for, inter alia, breach of fiduciary duty, conversion and unjust enrichment, and against Chase for negligence and breach of contract.

(4) In September 2017, the Supreme Court granted Feiler's motion to intervene and to transfer the action to the surrogate's court. The Supreme Court's decision also denied Chase's motion for an order requiring Feiler and Goldstein to interplead and settle their claims and discharging Chase from liability. After the case was transferred to this court, Goldstein and Chase filed answers to Feiler's intervenor complaint and Chase asserted a cross-claim against Goldstein for indemnification.

(5) Feiler, as preliminary executor of the estate, moved summary judgment on all of the causes of action in his intervenor complaint against Goldstein and Chase. Chase cross-moved for summary judgment. Plaintiff/intervenor-defendant Goldstein cross-moved to amend her complaint to assert additional causes of action against Chase for damages. The parties appeared for a settlement conference with the court and entered into a stipulation dated April 4, 2024, discontinuing all claims by or against Chase. As a result of the parties' partial settlement, the only motion that remained before the court was Feiler's motion for summary judgment on his claims against Goldstein. The court granted Feiler's motion for summary judgment in part on the following grounds:

(a) Feiler sued Goldstein for breach of fiduciary duty, conversion, money had and received, unjust enrichment, tortious interference with contract, constructive trust, accounting and for a preliminary and permanent injunction, based on the transfers of funds from decedent's Chase accounts to Goldstein's accounts pursuant to an allegedly defective power of attorney. These transactions, which span from April 2014 through May 31, 2016, totaled $905,163.25.

(b) Goldstein, as the attorney-in-fact for the deceased, owed a duty of loyalty to the decedent. This required her to act in the best interest of the principal in accordance with the highest principles of morality, fidelity, loyalty and fair dealing. Absent a specific provision in the power of attorney instrument authorizing gifts, an attorney-in-fact, in exercising her fiduciary responsibilities to the principal, may not make a gift to herself or to a third party of the money or property which is the subject of the agency relationship. Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make a gift. Moreover, any gifts made pursuant to a power of attorney must be in the best interest of the principal.

(c) The power of attorney document executed by decedent on August 1, 2013, appointing Goldstein as her agent, does not contain any specific provision authorizing gifts.

(d) Goldstein contended that some of these transfers were not gifts but were used to pay decedent's expenses, but failed to support this argument with any documentation or with any testimony detailing the expenses she allegedly paid on behalf of decedent.

(e) Goldstein testified that decedent told her that she wanted her to have a power of attorney over her affairs so that she could take care of not only decedent but also her grandchildren. In addition, as further support of decedent's intent, Goldstein submits a copy of a holographic will decedent executed in France simultaneously with the 2013 power of attorney in which decedent left all her financial assets to Goldstein and her grandchildren. Given Goldstein's financial interest in the outcome of this litigation, her testimony regarding decedent's intentions runs afoul of the Dead Man's Statute. Generally, evidence, otherwise relevant and competent upon a trial or hearing, but subject to exclusion on objection under the Dead Man's Statute, should not predetermine the result on summary judgment in anticipation of objection.

(f) Goldstein primarily relies on her own self-serving testimony to show that decedent authorized the transfers. While Goldstein also submits a copy of a holographic will purportedly executed by decedent in France, this document is only probative of decedent's testamentary plan and it does not show decedent's intention to make an irrevocable present transfer of ownership. Where, as here, the sole relevant evidence submitted in opposition to the motion is barred by the Dead Man's Statute, an award of summary judgment is appropriate since a trial would seem unnecessary if it were certain that all the proof were excludable.

(g) Even if the court were to consider this evidence, it would not convey the "clearest showing of intent" required to overcome the presumption of impropriety. Goldstein's self-serving and vague testimony that decedent told her to "do as [you] see fit with [my] funds" is simply insufficient to create a question of fact as to decedent's intent to make an inter vivos gift. Further, Goldstein has presented no evidence to show that the transfers at issue were made in decedent's best interest to carry out her "financial, estate or tax plans." Indeed, by the time decedent's account was frozen in May 2016, the account had been drained due to Goldstein's transfers, with a balance of approximately $8,000 remaining in the account. Clearly, such conduct, which essentially impoverished the decedent, was not in her "best interest," particularly where her estate plan, as demonstrated by the propounded will executed in 2003, contradicts any desire to benefit Goldstein. Even under the purported holographic will executed by decedent in 2013, Goldstein's actions run contrary to decedent's wishes as this instrument leaves half of Goldstein's financial assets to decedent's grandchildren. Accordingly, Goldstein has failed to rebut Feiler's prima facie showing and his motion for summary judgment on this claim must be granted.

(h) The two key elements of conversion are (1) petitioner's possessory right or interest in the property and (2) respondent's dominion over the property or interference with it, in derogation of petitioner's rights. Here, Feiler has met his prima facie burden by submitting evidence which shows that Goldstein transferred funds from decedent's bank account into her own account pursuant to a power of attorney document which did not include a specific provision authorizing gifts. In opposition, Goldstein has failed to create an issue of fact because, as discussed above, she has failed to show that the funds were used for decedent's benefit or that decedent intended to make an inter vivos gift. Accordingly, Feiler is entitled to summary judgment on this claim.

(i) An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, to support the claim, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. Here, Feiler has met his prima facie burden by showing that Goldstein transferred money out of decedent's account into her own account without authority and Goldstein has failed to rebut this showing. Accordingly, Feiler is entitled to summary judgment on this claim.

(j) In order to prevail on a cause of action for money had and received, a petitioner must show that (1) the respondent received money belonging to the petitioner, (2) the respondent benefitted from receipt of the money, and (3) under principles of equity and good conscience, the respondent should not be permitted to keep the money. Here, Feiler has met his prima facie burden by demonstrating that Goldstein took decedent's funds without authority and Goldstein has failed to rebut this showing. Accordingly, Feiler is entitled to summary judgment on this claim.

c. ***Bass v. Bogle,* 2024 Tex. App. LEXIS 5034 (2024).** Agent under power of attorney exceeded authority when amending distribution provisions of revocable trust agreement.

(1) George E. Bogle ("George") and Nancy T. Bogle ("Nancy") were married and had two children, George Michael Bogle ("Mike") and Katherine Leigh Bogle Leavitt ("Katie") (collectively, the "Children"). George and Nancy signed a revocable trust agreement that created the "George E. and Nancy T. Bogle Joint Revocable Trust Dated January 5, 1999" (the "1999 Trust"). The primary asset in the trust was 1,500 shares in USA Managed Care Organization (the "Company"). The 1,500 shares were 60 percent of the outstanding shares in the Company. The trust agreement named George and Nancy as the original trustees, and it designated George to act as the sole trustee if Nancy became incapacitated. If George was the first to die and Nancy was incapacitated, the trust agreement provided that the Children would serve as successor co-trustees. The trust agreement also provided that the trust's income and principal were for the benefit of George and Nancy during their lifetimes, that George and Nancy "together reserve the right from time to time during their joint lifetimes . . . to amend or revoke this instrument in whole or in part," that the Children were the primary beneficiaries to whom the trust assets would be distributed if they survived George and Nancy, and that the trust agreement was to be interpreted and governed by Arizona law.

(2) On the same day that George and Nancy signed the revocable trust agreement that created the 1999 Trust (the "1999 Trust Agreement"), George and Nancy signed durable powers of attorney ("POA") under the laws of the State of Arizona. Nancy's POA appointed George to serve as her agent, effective on her incapacity, and if he was unable, unwilling, or unavailable to act as her agent, she appointed Mike as the substitute or successor agent to serve with the same powers and discretions. The POA gave the agent broad powers over securities, allowed the agent certain powers to create, fund, amend, and terminate revocable trusts. The POA also provided that, if it was necessary to liquidate assets to provide support, the agent should, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan, whether or not such estate plan is embodied in a will, a trust, nonprobate property, or otherwise.

(3) In 2011, George and Nancy amended the 1999 Trust Agreement to provide that after they both had died and if the Children were alive, the Company shares being held in the trust would be distributed 75% to Mike and 25% to Katie.

(4) In 2020, George became the sole trustee of the revocable trust because Nancy became incapacitated, and in March 2021, George signed the "Amended and Restated George E. Bogle and Nancy T. Bogle Joint Revocable Trust Agreement" ("2021 Trust Agreement") in his capacities as the trustee, one of the grantors, and on behalf of Nancy as her agent under the POA. The 2021 Trust Agreement stated that it was the second amendment to the 1999 Trust Agreement and "a complete restatement of that document," that it "completely superseded and replace[d] all of the terms and provisions of [the 1999 Trust Agreement including the 2011 amendment]"; and that it was subject to Texas law. The document appointed Karen Bass as the successor trustee; and if Bass was unable or unwilling to serve, it appointed Mike and Katie as the successor co-trustees. It also provided a different distribution of the Company shares after the deaths of George and Nancy. The Company shares that were held in the trust were to be distributed between six persons: "10% of the 60% of the outstanding shares of [the Company] owned by the Trust" to Bass, Smith, Mike, Katie, and two other individuals involved with the Company. The distribution to the four non-family members was by life estate with their shares to be transferred to George's nephews when they died. The document also contains a severability clause.

(5) George, in his capacities as the trustee, one of the grantors, and on behalf of Nancy as her agent under her POA, also signed: (1) in May 2021, a first amendment to the 2021 Trust Agreement, appointing Smith and Bass to serve as successor co-trustees; and (2) in February 2022, a second amendment that removed Mike from receiving Company shares held in the trust on Nancy's death. George also signed a POA that appointed Katie as his agent in the event he was incapacitated. After George became incapacitated in May 2022,

Bass and Smith signed an acceptance of appointments as successor co-trustees of the trust.

(6) In October 25, 2022, Mike signed "The Fifth Amendment and Restatement to the George E. Bogle and Nancy T. Bogle Joint Revocable Trust Agreement Dated January 5, 1999" (October 2022 Fifth Amendment and Restatement), signing the document on behalf of his parents as their agent under their 1999 POAs. The amendment revoked the 2021 Trust Agreement and its first and second amendments and named Mike and Katie as co-trustees of the trust. George died on November 26, 2022, and in December 2022, an attorney on behalf of Mike notified Bass and Smith that they were removed as successor co-trustees pursuant to the October 2022 Fifth Amendment and Restatement.

(7) At the end of December 2022, Bass and Smith, in their capacity as successor co-trustees on behalf of the "Amended and Restated George E. Bogle and Nancy T. Bogle Joint Revocable Trust, dated March 2, 2021" (the "2021 Trust"), sued the Children, seeking declaratory and injunctive relief and attorney's fees. Because of the trust dispute, the Company's accounts had been frozen, and Bass and Smith were unable to pay expenses to administer the trust, such as paying for Nancy's care. They sought a declaration that the operative trust was the 2021 Trust with its first and second amendments and that the 1999 Trust was void and inoperable, and they sought an injunction against the Children from acting as trustees. They also sought reformation of George's 2022 POA to expressly revoke his 1999 POA, and sought reformation of the operative trust to the extent that beneficial provisions were inadvertently omitted.

(8) Mike and Katie counterclaimed, seeking declarations that: (1) the 2021 Trust Agreement and its amendments be set aside, (2) they were the successor co-trustees and that the October 2022 Fifth Amendment and Restatement that Mike signed on behalf of his parents was valid and enforceable or, alternatively, the 1999 Trust Agreement was valid and enforceable; and (3) the May 2022 acceptance of trusteeship by Bass and Smith was invalid. They also sought to have Bass and Smith removed as the successor co-trustees, asserted breach of fiduciary claims against Bass and Smith, and sought injunctive relief and the recovery of attorney's fees.

(9) In February 2023, the probate court appointed a guardian ad litem ("GAL") to act in the best interest of Nancy, and in March 2023, the GAL filed a motion for partial summary judgment seeking for the probate court to find as a matter of law that, other than the 2011 amendment that was signed by both George and Nancy, the purported amendments to the 1999 Trust were void and invalid. The GAL asserted that Nancy's estate plan was to leave her residuary estate to the Children and to have them named as the successor co-trustees and that George's purported use of Nancy's POA to amend the trust agreement "to drastically change her estate plan" and later Mike's purported use of her POA to amend the trust to change her estate plan were void and invalid.

(10) In April 2023, the Company and non-family individuals who were designated in the 2022 Trust Agreement to receive Company shares on Nancy's death intervened in the suit, and Bass and Smith filed a response to the GAL's motion for partial summary judgment. They contended that the express terms of the POA allowed the amendment of the 1999 Trust, that there were genuine issues of material fact that precluded summary judgment, and that the GAL had failed to establish for purposes of summary judgment that the 2021 Trust Agreement and its amendments were invalid as a matter of Arizona law.

(11) Following a hearing on the GAL's motion for partial summary judgment, the parties also filed briefs addressing choice of law issues.

(12) The probate court's order granted the GAL's motion for partial summary judgment and held that the following amendments to the 1999 Trust Agreement were "void and invalid as a matter of law": (1) the 2021 Trust Agreement and its first and second amendments, and (2)

the October 2022 Fifth Amendment and Restatement. On the same day that the probate court signed the order granting partial summary judgment, the probate court also signed an order granting Mike's petition to strike the plea in intervention and ordered that the purported intervenors' claims and causes of action were dismissed.

(13) Mike, Katie, and the GAL filed a motion for entry of final judgment. Mike and Katie also waived their claim for attorney's fees if the motion was granted. In its final judgment, the probate court determined that its summary-judgment order moots all other claims and causes of action asserted herein by or against any party, and that (1) the purported Trust amendments executed on March 2, 2021, June 7, 2021, February 11, 2022 (the "2022 Trust Agreement and its amendments"), and on October 25, 2022 (the "October 2022 Fifth Amendment and Restatement"); (2) the Trust is governed by the original Trust agreement dated January 5, 1999 as amended on November 14, 2011; (3) the Plaintiffs' May 2022 Acceptance of Trusteeship is invalid because the amendments appointing the Plaintiffs as successor co-trustees are invalid; and (4) G. Michael Bogle and Katherine Leigh Bogle Leavitt are the successor co-trustees of the Trust. The probate court also approved and ordered that the GAL's fees and expenses and the fees and expenses of a court-appointed receiver be paid from funds belonging to the trust.

(14) On appeal, the Court of Appeals affirmed the probate court's final judgment to the extent it declared that the purported trust amendment executed in October 2022 by Mike on behalf of his parents was void and invalid and awarded fees and expenses to the GAL and the receiver, affirmed the final judgment to the extent that it declared that the provisions in the 2022 Trust Agreement and its amendments that changed the distribution of the trust assets on Nancy's death were void and invalid, and reversed the remainder of the final judgment and remanded on the following grounds:

(a) Powers of attorney, unlike deeds and wills, are to be strictly construed, and authority delegated is limited to the meaning of the terms in which it is expressed. Where there is a 'very comprehensive' grant of general power and an enumeration of specific powers, the established rules of construction limit the authority derived from the general grant of power to the acts authorized by the language employed in granting the special powers.

(b) Nancy authorized her agent in the agent's "sole and absolute discretion from time to time and at any time, as follows:" the "Power to Create, Fund, Amend, and Terminate Revocable Trusts," and in contrast to the general rules for construing a POA, Nancy's POA contains a directive that her agent's powers be interpreted "broadly." This provision expressly provides that "the authorization granted herein shall not be limited by any specific grant of power made in any other provision of this Durable [POA], but that instead, these authorizations, limited only as described above, shall be given the broadest possible construction permitted by law" and that rules requiring a narrow construction "have no application" to her POA. Nancy also authorized her agent "to exercise, in whole or in part, . . . any power of amendment or revocation under any trust, including any trust with respect to which I may exercise any such power only with the consent of another person, even if my Agent is such other person." Considering these provisions in the context of Nancy's POA as a whole, they make clear that the POA authorized George to amend the 1999 Trust on Nancy's behalf. The GAL did not argue, and the probate court did not conclude, that any provision in Nancy's POA was void or invalid.

(c) The 1999 Trust Agreement, which George and Nancy signed on the same day as their POAs, explicitly provides that George and Nancy "together reserve the right from time to time during their joint lifetimes . . . to amend or revoke this instrument in whole or in part" and that the trustee's powers included the power "in general to deal otherwise with trust property in such manner . . . and on such terms and conditions as any individual might do as outright owner of the property." And as to the Arizona statutory provisions that the GAL cited to the probate court, even if these provisions conflicted with Texas law, neither provision generally prohibits a POA from authorizing an agent to act on the person's behalf to amend or revoke a trust.

(d) Considering Nancy's intent as expressed in the language of the POA, the GAL failed to establish as a matter of law that the POA did not grant George power to amend the 1999 Trust Agreement on Nancy's behalf. This conclusion, however, does not resolve whether George had the authority to amend the distribution of trust assets on the death of Nancy and to replace the named successor co-trustees.

(e) Nancy authorized her agent to amend a revocable trust but expressly limited this authority by stating that "on my death any remaining income and principal shall be paid to my personal representative." Under the terms of the 1999 Trust Agreement, the remaining trust property was to be distributed to the Children, consistent with Nancy's estate plan. In direct conflict with this term, the 2021 Trust Agreement and its second amendment provided that on the death of Nancy, the Company shares held by the trust would be distributed to persons other than the Children. By changing the distribution of Company shares on Nancy's death in the 2021 Trust Agreement and its amendments, George exceeded his authority under the POA as a matter of law. The probate court did not err in part by granting summary judgment and declaring that the 2021 Trust Agreement and its amendments were void and invalid to the extent that they amended the distribution of the trust property on Nancy's death to persons other than her personal representative.

(f) Nancy explicitly authorized her agent "to execute a revocable trust agreement with such trustee or trustees as my Agent shall select." Nancy authorized George to amend the 1999 Trust to appoint different trustees.

(g) The provision directing her agent to "avoid disrupting" her estate plan specifically addresses the situation when it has become necessary for her agent to liquidate her assets. In several other provisions of the POA—the provisions addressing her agent's powers to demand and receive certain assets, as to employment benefits, to withdraw funds from trusts, and to make gifts to Nancy's "descendants and their spouses"—Nancy also included a similar directive to her agent concerning the disruption of her estate plan. In contrast to those provisions, the provision authorizing her agent to select trustees in the context of amending revocable trusts—does not include similar language concerning the disruption of her estate plan. Had Nancy intended a similar restriction, she could have said so. Even if this provision applied and naming successor co-trustees disrupted Nancy's estate plan, whether it was "reasonably possible" for George to name different successor co-trustees without disrupting Nancy's estate plan is a fact in question. And the 2021 Trust Agreement contains a severability clause, such that "[i]f any wording, sentence, or article of the Trust is determined to be invalid [or] unenforceable," "the remaining portions of the Trust remain legally valid and enforceable."

(h) The probate court erred to the extent that it granted summary judgment and declared that the appointments of Bass and Smith as successor co-trustees in the 2021 Trust Agreement and its amendments were void and invalid. Except as to the provisions in the 2021 Trust Agreement and its amendments that amended the distribution of trust assets on Nancy's death, the GAL did not establish as a matter of law that the remaining portions of the 2021 Trust Agreement and its amendments exceeded George's authority under Nancy's POA. Except as to the provisions amending the distribution of the trust assets on Nancy's death, the probate court erred in granting summary judgment and declaring in the final judgment that: (1) the 2021 Trust Agreement and its amendments were void and invalid, (2) Bass and Smith's acceptance of trusteeship was invalid, and (3) Mike and Katie are the successor co-trustees.

(i) Because the probate court erred in part when it granted the GAL's motion for partial summary judgment and declared the 2021 Trust Agreement and its amendments void and invalid, it follows that the probate court necessarily erred when it dismissed the remaining claims of Bass and Smith based on that ruling.

d. ***C.A.B. v. Perpich,* 682 S.W.3d 800 (Court of Appeals of Missouri 2024).** Agent under power of attorney as priority right of sepulcher and possession of decedent's remains.

(1) Kaitlin Boster ("Decedent") died in January 2021 in Missouri. She was unmarried and was survived by her parents and her three minor children. After her death, her father, G.W.B., had Decedent's body delivered to a funeral home for cremation. G.W.B. believed that Decedent's children had the right of sepulcher, meaning the right to choose and control the burial, cremation, or other final disposition of Decedent's body. That statute prioritizes the sepulcher rights of a decedent's next-of-kin, but gives first priority to an attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact. Surviving children are further down the statute's priority list. Decedent's mother, Kendra Perpich, asserted that she was Decedent's attorney in fact—and her rights trumped those of the children—because she was granted the right of sepulcher by a durable health care power of attorney ("HCPA") executed by Decedent in July 2019 in Arizona.

(2) The HCPA designated Perpich as Decedent's agent "for all matters relating to [her] health care, including, without limitation, full power to give or refuse consent to all medical, surgical, hospital and related health care, including the provision of life-sustaining treatment and artificially administered food and fluids." The HCPA provided that the power of attorney was effective upon Decedent's "inability to make or communicate health care decisions." It also granted Perpich the authority to carry out Decedent's funeral and burial disposition wishes—specifically, that her body be cremated and her remains put into the ocean—"in accordance with this power of attorney, which is effective upon my death." The HCPA was signed by "Kaitlin Boster" and also contained the signature of a witness who stated he was "present when Kaitlin Boster signed" the HCPA and that she appeared at that time to be of sound mind and under no duress.

(3) The funeral home cremated Decedent's remains in March 2021. The minor children, by G.W.B. as next friend, then filed this lawsuit, naming the funeral home and Perpich as defendants and seeking a declaration of the parties' rights. The petition challenged the validity of the HCPA, alleging that Decedent's signature was "spurious" and asserting that the HCPA contained "questionable items"—specifically, that the state abbreviation for Perpich's address was incorrect, there was no street address for Decedent, and the witness's address was inconsistent with the address listed in Decedent's will, which he also witnessed the same day. Petitioners further alleged that the HCPA never became effective because, prior to her death, Decedent was not unable to make or communicate health care decisions. Petitioners sought a judgment ordering the funeral home to deliver to the children Decedent's remains and her personal property in its possession.

(4) Petitioners moved for summary judgment which the trial court granted and ordered the funeral home to deliver Decedent's remains to the children via their next friend. The judgment also ordered the funeral home to deliver Decedent's personal property to the estate of the decedent via its personal representative. Perpich appealed and the court of appeals reversed and remanded on the following grounds:

(a) Although Petitioners' statement of uncontroverted material facts referred to the HCPA as a "purported" power of attorney, it did not cite anything in support of its alleged invalidity. In fact, the only assertions regarding the validity of the HCPA in the summary judgment record were contained in Petitioners' response to Perpich's additional material facts in which Petitioners denied the validity of the HCPA and listed the "questionable items" alleged in the petition, but did not include supporting references to discovery, exhibits, or affidavits.

(b) Some of the allegedly questionable aspects of the HCPA are evident on the face of that document or other material that was part of the summary judgment record, although Petitioners were still required to specifically reference those materials to comply with the rule. In any event, as Petitioners note, Perpich's address on the HCPA was listed as being in "AR" instead of "AZ" for Arizona; there was no street address listed for Decedent, only the city, county, and state; and the witness who signed the HCPA and the will listed different addresses on each document. But even if these facts are undisputed, Petitioners failed to show they are material to the validity of the HCPA or otherwise demonstrate Petitioners' entitlement to judgment as a matter of law. As to Decedent's signature, Petitioners asserted in their response to Perpich's statement of additional material facts that the signature appeared to be "spurious" based on "careful examination of several facets of the signature including line quality, speed, letter formations, height relationships, and size when compared for instance to [Decedent's] signature on her Missouri Non-Driver Identification Card issued October 22, 2020[.]" On its face, this was not an assertion of fact showing that the signature is inauthentic; rather, it was a speculative suggestion about what someone might conclude about the authenticity of that signature. Moreover, Petitioners did not even assert—with the required references to discovery, exhibits, or affidavits—that anyone qualified to compare the facets of a signature had actually conducted such an examination or reached any conclusions.

(c) Petitioners alleged the HCPA was invalid in that it was not "affirmed" by the witness as required by Arizona law because the witness did not use the word "affirm" before signing the document.

(d) The applicable Arizona statute requires HCPAs to be witnessed in writing by at least one adult who affirms that the witness was present when the person dated and signed or marked the HCPA and that the person appeared to be of sound mind and free from duress at the time of execution of the HCPA. Nothing in the plain language of this statute requires that the witness use the word "affirm" or any particular language when signing an HCPA. Nor, as Petitioners contend, does the HCPA form provided by the Arizona attorney general's office mandate use of the word "affirm." Even putting aside the fact that Petitioners provide no authority showing the attorney general can mandate certain language be used in HCPAs, the form's mere use of the phrase "I affirm" does not equate to a direction that HCPAs must include that specific wording.

(e) Petitioners also contend that, even if the HCPA was valid, the condition necessary to trigger its effectiveness—Decedent's "inability to make or communicate health care decisions"—never occurred. But the power to make health care decisions under the HCPA is entirely separate from the power it granted to make decisions regarding the disposition of Decedent's remains. The Arizona statute authorizes a person to designate another person "to make health care decisions on that person's behalf or to provide funeral and burial arrangements in the event of the person's death[.]" Decedent followed the format and verbiage suggested by the Arizona legislature for an HCPA that made both of those designations. The plain and unambiguous language of Decedent's HCPA made it clear that disposition duties were distinct from health care decisions and were triggered by a different condition precedent—the death of the Decedent.

(f) Petitioners also contend that—even if the HCPA was valid and effective—it only authorized Perpich to carry out her duties regarding sepulcher at an Arizona funeral home. This argument is without merit. Petitioners cite to no language in the Arizona statute or the relevant Missouri statutes to support this argument, and there is none. Missouri's right-of-sepulcher statute requires only that the attorney in fact be "designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact." The HCPA in this case granted that right to Perpich. The fact that the HCPA was executed by a principal residing in another state is of no consequence because Missouri law expressly permits an agent to carry out "in this state all acts permitted to be delegated to an agent by the laws of the state of the residence of the principal, the laws of the state where the power of attorney is executed, or the laws of this state, whichever law is most favorable toward authorizing such delegation." There is no question that both Arizona—the principal's residence at the time and where the HCPA was executed—and Missouri permit the particular act delegated here, namely, disposition of a decedent's remains.

(g) The facts and the legal arguments presented by Petitioners do not support the conclusion that the HCPA is invalid, ineffective, or inapplicable. Therefore, Petitioners did not demonstrate they were entitled to judgment as a matter of law declaring that the children's rights of sepulcher were superior to Perpich's.

e. ***Piton v. Sprenger (In re Estate of Patrick E. Piton),* 2024 IL App (3d) 240051 (Appellate Court of Illinois, Third District 2024).** Persons never named as beneficiaries of retirement accounts are not successors in interest with standing to sue agent under power of attorney for not naming them as beneficiaries.

(1) Patrick E. Piton died on March 28, 2022. He had no children and no surviving spouse. His parents and one sibling, V. Lawrence Piton, predeceased him. One sibling, Dorothy Sprenger, survived him. During his lifetime, Patrick owned several Vanguard retirement accounts, nonretirement accounts, and a joint tenancy account with Dorothy. At the time of his death, Patrick had more than $1 million in his Vanguard retirement accounts and more than $3 million in his Vanguard nonretirement accounts.

(2) During his life, Patrick named "Transfer on Death (TOD) Plan beneficiaries" for his Vanguard accounts. Prior to 2017, Patrick named Dorothy as the sole beneficiary of all his Vanguard accounts. Then, in 2017, Patrick designated Dorothy and V. Lawrence each as 50% beneficiaries of his Vanguard retirement accounts. At that time, V. Lawrence was named Patrick's agent in a healthcare power of attorney, with Dorothy named as successor agent.

(3) On April 1, 2018, V. Lawrence died, and Dorothy became Patrick's healthcare agent. In early 2019, Patrick's health began to deteriorate. In June 2019, Patrick signed a power of attorney giving Dorothy "Full Agent Authorization" over his Vanguard accounts, which allowed her to change the beneficiaries of the accounts. In December 2020, Dorothy removed V. Lawrence as a beneficiary of the Vanguard retirement accounts and designated herself as the sole beneficiary of those accounts. Thereafter, Dorothy designated her children as contingent beneficiaries on the Vanguard accounts.

(4) Petitioners Larisa A. Piton, Lawrence Piton, Alexei Piton, and Lucille A. Moll, V. Lawrence's children and Patrick's nieces and nephews, filed a complaint against Dorothy alleging undue influence and fraud. Dorothy filed a petition in probate court to probate Patrick's estate. According to Dorothy, Patrick's estate had a value of approximately $37,000. Dorothy attached to the petition a copy of Patrick's will, dated January 8, 1968, which gave his residuary estate to Dorothy and V. Lawrence's children. Dorothy was appointed as independent administrator of Patrick's estate.

(5) Petitioners, along with their mother (also named Larisa Piton), contested Patrick's will. Dorothy filed a motion to dismiss the petition, which the trial court granted. Petitioners then alleged breach of fiduciary duty by Dorothy and alleged that in 2019 and 2020 Patrick directed Dorothy to add petitioners as beneficiaries to his Vanguard nonretirement accounts, but Dorothy never did so.

(6) Dorothy filed a motion to dismiss the petition with prejudice for lack standing to bring a breach of fiduciary duty claim. Petitioners filed an amended complaint against Dorothy alleging breach of fiduciary duty, tortious interference with inheritance expectancy, undue influence, and fraud. Dorothy filed a motion to dismiss for lack of standing, which the trial court granted. Petitioners filed a second amended complaint alleging tortious interference with inheritance expectancy. The trial court consolidated cases over Dorothy's objection, and denied Dorothy's motion to dismiss the petition alleging breach of fiduciary duty. Dorothy filed a motion for reconsideration, which the court granted and dismissed the petition for breach of fiduciary duty against Dorothy based on lack of standing.

(7) Petitioners appealed and a divided court of appeals affirmed on the following grounds:

(a) An agent appointed under a power of attorney owes a fiduciary duty to the principal. An agent is liable to the principal or the principal's "successors in interest" where the agent violates her fiduciary duties.

(b) The term "successors in interest" is not defined in the Illinois Power of Attorney Act (the "Act"). Black's Law Dictionary defines "successor in interest" as "[s]omeone who follows another in ownership or control of property." Black's Law Dictionary defines "successor" as "[s]omeone who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor." The American Heritage Dictionary offers a similar definition: "[o]ne that succeeds another." This same dictionary defines "succeed" as "to come after and take the place of."

(c) An individual named as beneficiary of an account is entitled to ownership of the account and all sums in it upon the account owner's death as long as the beneficiary survives the account owner. Because a beneficiary follows an account holder in ownership of an account, a beneficiary falls within the definition of a successor in interest. Even before an owner's death, named beneficiaries have an interest in the property of which they are named beneficiaries. Thus, a beneficiary may assert a cause of action for breach of fiduciary duty related to that property. However, a nonbeneficiary does not have standing to assert a claim for breach of fiduciary duty.

(d) Here, Patrick appointed Dorothy as his agent by giving her "Full Agent Authorization" over his Vanguard accounts. As such, Dorothy owed Patrick a fiduciary duty and had to act in good faith for his benefit. Nevertheless, only Patrick or his "successors in interest" could institute an action for breach of fiduciary duty against Dorothy. Petitioners incorrectly contend they are successors in interest because they allege they would have been named beneficiaries on Patrick's Vanguard nonretirement accounts if Dorothy had done what they allege Patrick instructed her to do.

(e) To qualify as successors in interest, petitioners had to show they were entitled to receive the Vanguard accounts upon Patrick's death. Despite petitioners' allegations that they should have been named beneficiaries of Patrick's accounts, petitioners were not named beneficiaries of the Vanguard nonretirement accounts when Patrick died or at any time prior to his death. Therefore, they failed to establish that they had a right or interest in the accounts that would qualify them as successors in interest who could bring a breach of fiduciary duty claim against Dorothy.

(f) Petitioners do not qualify as "successors in interest" under the Act because they would come within the definition of an "interested person" under the Act. Where the legislature uses certain language in one statutory provision and wholly different language in another, the court assumes the legislature intended different meanings. In the Act, the legislature created a procedure by which an "interested person" can file a petition on behalf of a principal who has appointed an agent under a power of attorney while the principal is still alive. The legislature then defined the term "interested person" and specified that the definition applies only "in this Section." Notably, the legislature used a different term, "successors in interest," in identifying who may file a claim for breach of fiduciary duty after a principal's death. By using different terms in sections 2-7 and 2-10 of the Act, the legislature intended them to have different meanings. It is inappropriate to employ the definition of "interested person" to the term "successors in interest."

(g) The facts of this case are not analogous to cases in which a beneficiary's name has been removed on an account by an agent acting under a power of attorney. If petitioners had been named as beneficiaries on the accounts at issue and then removed by Dorothy, they would have had standing to raise a breach of fiduciary duty claim. In such a situation, petitioners would be successors in interest as named beneficiaries on the accounts. However, those are not the petitioners' allegations. Petitioners do not allege that they were ever named beneficiaries on the accounts but, instead, allege that they would have been designated beneficiaries on the accounts if the defendant, as the decedent's agent, had done what the decedent instructed her to do. Neither petitioners nor the dissent provided any case law to support petitioners' position that they possess standing to bring a breach of fiduciary duty claim based on these allegations.

(h) Because petitioners were not named beneficiaries of Patrick's accounts, the circuit court properly ruled that petitioners lack standing to pursue their cause of action for breach of fiduciary duty against Dorothy. Petitioners failed to establish that they possessed "some personal claim, status, or right" to the accounts that is necessary to establish standing.

(i) One dissenting justice would find standing because the nieces and nephews qualify as heirs at law. The petitioners' position as heirs was not in dispute; they were clearly recognized as such in the probate case and were provided with the proper notices under the Probate Act. These were not strangers or distant relatives who have suddenly appeared to make a claim; they are relatives, recognized under the Probate Act as descendants, who, additionally, had a relationship with Patrick during his lifetime. The dissenting justice would hold that the petitioners are clearly interested persons that had standing to challenge capacity and an agent's actions prior to Patrick's death. Thus, they would have had standing to their current claim if they had become aware of Dorothy's actions before their uncle's death. The justice observed that it leads to an absurd result to find now they do not have standing to challenge the same action merely because Patrick has since passed.

23. Marriage

a. ***In re Est. of Reinitz,* 2024 N.J. Super. Unpub. LEXIS 542 (Superior Court of New Jersey, Chancery Division 2024).** Husband naming wife as life insurance and retirement account beneficiary, coupled with his refusal to make a will benefitting wife, preclude wife's pretermitted spouse claim against estate.

(1) Plaintiff Deborah Scully-Reinitz was married to Arthur James Reinitz, Jr., when he died on January 7, 2022. His probated June 25, 2001 Last Will and Testament was made and executed eleven years before he ever met Deborah and twelve years before their September 9, 2013 marriage. The Will directed an equal division of his estate to his four children; it didn't provide for Deborah.

(2) Deborah filed this probate action for a finding that she was an omitted spouse. The state statute declares that a surviving spouse, who married the testator after execution of the testator's will, is "entitled to receive, as an intestate share, no less than the value of the share of the estate" the omitted spouse "would have received if the testator had died intestate." The statute provides a basis for a recovery by an omitted spouse but not if one of three circumstances is present. Under N.J.S.A. 3B:5-15(a)(3), recovery is precluded where the testator provided for the spouse by transfer outside the will and the intent that

the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(3) This case first requires the court's legal determinations about where to place the burden of introducing evidence and the burden of persuasion, and whether the latter is governed by the preponderance of a clear and convincing standard. Second, the court must reach an understanding about the scope of the word "transfer." And third, this action requires the court's determinations about whether Arthur intended transfers to Deborah outside the Will to be in lieu of his testamentary provisions or, if there is no evidence that Arthur made written or oral statements that would reveal such an intent, whether that intent may be "reasonably inferred" from the overall circumstances.

(4) The court dismissed Deborah's complaint on the following grounds:

(a) The burdens of introducing evidence and persuasion belong to the omitted spouse but only to show the occurrence of the marriage after the Will's execution and the omission of any testamentary disposition for the surviving spouse in the Will. On the other hand, the burdens of introducing evidence and persuasion about the existence of one of the three statutory exceptions fall on the contestants. Although the Legislature did not say in N.J.S.A. 3B:5-15(a) whether the preponderance or clear and convincing standard governs — it was silent there — N.J.S.A. 2A:81-2 (the so-called "Dead Man's Act") declares that any party who asserts a claim "that is supported by oral testimony of a promise, statement, or act of . . . the decedent . . . shall be required to establish the same by clear and convincing evidence." That is, it is not the party who has the overall burden of persuasion on a claim that must prove that claim by clear and convincing evidence. It is the party who alleges a decedent made an oral statement who must prove the truth of that allegation by clear and convincing evidence. So, Deborah is correct that the clear and convincing standard applies to any attempt by Arthur's children to prove that Arthur made some statement about his intentions but it also applies to her to the extent she offered any evidence that Arthur made some statement that would reveal a contrary intent.

(b) This clear and convincing standard requires that the claim that Arthur made an oral statement about his intentions — one way or the other — must establish in the mind of the trier of fact a firm belief or conviction as to the truth of that allegation." The reason for this higher standard is obvious: Arthur is no longer here to respond to such an allegation and his plan — whatever it may have been — should not be upset by less than firmly persuasive evidence about the alleged expressions of his intentions.

(c) Arthur made Deborah the beneficiary of a $200,000 policy of insurance on his life and that she was either the joint owner with a right of survivorship or the beneficiary of two retirement accounts. Despite how the word "transfer" is commonly used and understood in everyday parlance, the court is persuaded to the broader connotation favored by Arthur's children because of the context in which the word "transfer" is found, a highly relevant consideration. That is, while "transfer" usually describes a movement of something from one person or from one place to another — and the naming of someone as a beneficiary of a life insurance policy would not seem to comfortably fit that understanding — the word "transfer" is used in N.J.S.A. 3B:5-15(a) as a substitute for a testamentary provision, and a testamentary provision is similar to an insurance-beneficiary designation in that no actual transfer takes place immediately but instead occurs at a later date, namely, the benefactor's death. The act of designating a purported omitted spouse as a beneficiary of life insurance should be understood to be a "transfer."

(d) The same should be said about Arthur's naming Deborah as a beneficiary of his retirement accounts; no immediate transfer occurred when those accounts were set up so as to then pass to Deborah; the transfer would occur only on Arthur's death. This is not dissimilar to when a testator has created or maintains a joint bank account that becomes the property of the other account holder when the testator dies. A testator's creation or ownership of a joint account like the retirement accounts here — that benefit the omitted spouse when the testator dies — is a "transfer" because the legislative intent, considering the circumstances, must have been to incorporate any type of vehicle by which property or interests would go to the omitted spouse on the testator's death.

(e) Arthur's children were also required to prove that Arthur intended that these transfers "be in lieu of a testamentary provision." The statute provides multiple modes by which that intent may be shown. A proponent of this exception may show that intent with proof of the testator's written or oral statements "or" by presenting evidence by which the testator's intent may be "reasonably inferred from the amount of the transfer."

(f) On Arthur's death, Deborah became entitled to the proceeds of a $200,000 life insurance policy, and the owner of two retirement accounts that amounted to approximately $57,000. Despite the close relationship they all had to the testator, no one offered any testimony to suggest Arthur had explained the specifics about his estate plan, let alone that he had determined to provide for Deborah only outside the Will. Indeed, some of the witnesses expressed doubt about whether Arthur had a Will, let alone that he had ever discussed his estate plan. Scott Stewart testified about how Arthur had lent money to him and Audra on occasions with the admonition that if they didn't pay him back, he would cut them out of his Will, but the way Scott expressed this suggested only that Arthur may have said this more in jest than in fact. At best, this testimony suggested that Arthur had a Will and that it may have provided for Scott and Audra; it does not reveal whether he did or did not provide for Deborah in that Will or otherwise. Nor is there anything about Scott's testimony — when he testified that Arthur said he had his estate plan "covered" — that would provide any illumination about what Arthur was or may have been thinking as to providing for Deborah.

(g) If anything, it was Deborah's testimony about Arthur's words or actions that came closest to encompassing what he may have intended about his estate plan and his provision for her. Deborah credibly testified about discussions she had with him on her birthdays or at Christmastime and how, when Arthur asked what she wanted, she would reply that she wanted him to make a Will, presumably to incorporate her as a beneficiary within it, but that he refused and never did. She testified credibly, consistently with the other witnesses, all of whom the court also finds credible but largely unenlighteningly, that no one was sure about what Arthur's Will may have provided or even if he had a Will.

(h) The court is not persuaded — through application of the clear and convincing standard (or even the preponderance standard) — that any of the oral statements attributed to Arthur suggest he intended to provide for Deborah outside his Will or otherwise.

(i) There being no persuasive evidence of any oral statements made by Arthur of an intent to provide for Deborah outside his Will, the court turns to consider whether it may be "reasonably inferred" from all the evidence and circumstances that the transfers outside the Will were intended to be in lieu of a testamentary provision. An inventory of the assets of Arthur's estate lists values for Arthur's Howell home, his Florida condominium, three vehicles, a brokerage account, a business account, jewelry, and household furniture, amounting to $1,077,199 at the time of death. Consideration of the value of the estate would result in the adult children benefitting to the tune of approximately $250,000 each; those shares are about the same as what Deborah received by the outside transfers mentioned above. This struck the court as more than just a coincidence.

(j) Although it would have been better — to avoid this unfortunate disagreement among those he left behind — for Arthur to have been more explicit about his intentions, the Legislature clearly understood that individuals may act in unusual ways in directing the division of their assets upon death. The Legislature thus painted in broad strokes the scope of a court's authority to determine whether an omitted spouse may or may not be entitled to an intestate share because of omission from a Will. The court is satisfied that Arthur's intent is reasonably inferable even if the clear and convincing standard would apply to all aspects of this exception. The court has a "firm belief and conviction" that Arthur intended to provide for Deborah by way of his retirement accounts and life insurance rather than through his Will.

(k) It may be reasonably inferred that Arthur intended to provide for Deborah not through the Will but outside it. On his death, Arthur would have understood that Deborah would receive outside the Will approximately $270,000 in property, and that, by being the only beneficiaries under his Will, his four adult children would each receive approximately the same amount, a completely natural disposition of his property and interests. This intention is further buttressed by the fact that Arthur fended off all Deborah's entreaties that he make a new Will, even to go so far as to refuse to execute a later-crafted Will that, if signed, would have provided for her.

b. ***In re Est. of Reis,*** **2024 Minn. App. Unpub. LEXIS 173 (Court of Appeals of Minnesota 2024).** Naming spouse as beneficiary of retirement account precludes pretermitted spouse claim.

(1) In early 2020, doctors told Joseph Andre Reis (the "decedent"), who had been diagnosed with cancer over a decade beforehand, that he may only have a few months left to live. The decedent asked his sister, respondent Jessica Reis, to help him find an attorney to update his will because he wanted to name Reis as personal representative and make sure their mother was taken care of financially. Reis referred him to Douglas Murch. Murch thereafter met with the decedent on several occasions throughout the latter half of 2020, and the decedent executed a will on November 6, 2020.

(2) On December 3, 2020, the decedent married appellant Jennifer Eid. The decedent and Eid met in 2009 and had been in a long-term relationship, but the decedent's will did not include a provision for Eid. The decedent never revised the will after his marriage to Eid. However, in October 2020, the decedent named Eid as the beneficiary of his retirement account, which was worth approximately $90,000. The decedent also added Eid to the title of a Volkswagen Jetta automobile on March 24, 2021.

(3) The decedent passed away on March 28, 2021. Eid petitioned for probate of the decedent's will and to have Reis formally appointed as personal representative. Reis filed an objection asserting that North Dakota was the proper venue, but the district court determined that Minnesota was the proper venue and appointed Reis as personal representative. In September 2021, Eid filed a petition requesting, as relevant here, that the district court (1) determine that Eid is an omitted spouse from a premarital will and therefore entitled to a share of the decedent's estate, and (2) order Reis to turn over possession of a Ford F350 pickup truck owned by decedent to Eid as exempt property.

(4) The district court denied Eid's request to be deemed an omitted spouse and determined that Eid is not entitled to the pickup truck as exempt property because she received the Jetta. Eid appealed and the court of appeals affirmed in part, reversed in part, and remanded, on the following grounds:

(a) The relevant statute provides: "If a testator married after making a will and the spouse survives the testator, the surviving spouse shall receive a share of the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless . . . the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's written statements or may be reasonably inferred from the amount of the transfer or other evidence."

(b) Eid and the decedent married after the decedent executed his will, and Eid survived the decedent. Eid is therefore entitled to be treated as an omitted spouse under the statute unless the decedent provided for her by transfer outside of the will and intended for that transfer to "be in lieu of a testamentary provision" as demonstrated by extrinsic evidence.

(c) Decedent provided for Eid by transfer outside of the will. Decedent made Eid the beneficiary of his retirement account worth approximately $90,000. Accordingly, the key question is whether the decedent intended "the transfer be in lieu of a testamentary provision."

(d) The district court credited Murch's testimony that the decedent consistently stated throughout the will-creation process that he intended to make Eid the beneficiary of his retirement account and leave everything else to Reis. Second, the district court found that "from the evidence provided, it appears as though Decedent's intent was that Decedent chose not to include Eid in his will, with the understanding that she would receive some additional property if the parties married." In making this finding, the district court observed that "there is no evidence or testimony that following their marriage, Decedent did not want [Eid] to receive the benefits that Murch told him she would receive if they were married." Third, the district court found: "Given the short term nature of the marriage, the lack of contribution by Eid to the assets of the estate outside of the homestead, the statements and clearly expressed intent of the Decedent, along with the value of the retirement account provided for Eid's benefit as compared to the value of the estate, the Court finds that the Decedent provided for Eid outside of the will but also expected that she would receive some additional property if they were to marry."

(e) The district court credited Murch's testimony that the decedent consistently stated that his intent was to provide for Eid by naming her the beneficiary of his retirement account and leave everything else to Reis. Reis and Eid similarly testified as to the decedent's intent to leave everything to Reis and have Reis use the estate to provide for his mother. Murch and the decedent discussed the decedent's relationship with Eid and the decedent declined to provide for Eid in the will. This supports a determination that the decedent intended for the transfer to be in lieu of a testamentary provision.

(f) Notably, Murch and the decedent also discussed what would happen if decedent and Eid were to marry, and Murch explained that a surviving spouse may be entitled to claim an elective share of the augmented estate and exempt property including $15,000 in household furnishings. When the district court's order is read as a whole, it is clear that this is the "some additional property" that the district court found the decedent expected Eid would receive if they were to marry. Eid did not make a claim for an elective share of the augmented estate, but she did receive exempt property. Thus, Eid received some additional property due to her marriage to the decedent, as the decedent intended. And contrary to Eid's argument, it is entirely consistent that the decedent could intend for the transfer outside of the will to be in lieu of a testamentary provision and that Eid would receive some additional property in the form of exempt property if they were to marry.

(g) Minn. Stat. § 524.2-403(a). The district court determined that Eid was entitled to $15,000 in cash from the estate in lieu of the personal property she selected—a fish house—because Reis had sold that property. But the district court determined that Eid was not entitled to the pickup truck as the "one automobile" based on the finding that Decedent intended to provide a vehicle to Eid and did so with his transfer of the Jetta. Because Eid became the sole owner of the Jetta upon the decedent's death, the Jetta did not become part of the estate. Eid did not select the Jetta from the estate—she was the owner because she was on the title. The district court erred by seemingly relying on the decedent's intent to provide Eid with the Jetta to conclude that the statutory provision was satisfied. The intent of the decedent is irrelevant for purposes of the exempt-property allowance. The statute does not establish the duty of a spouse to provide a surviving spouse with an automobile; it establishes the right of a surviving spouse to select an automobile from the estate, regardless of value. And notably, the statute further provides that "[t]he rights granted by this section are in addition to any benefit or share passing to the surviving spouse . . . by the decedent's will." Thus, even if a decedent's will provided that a surviving spouse would receive an automobile, the spouse would still be entitled to select an automobile under the exempt-property statute. The district court erred in determining that Eid is not entitled to the pickup truck. The exempt-property statute allows a surviving spouse to select one automobile from the estate of the decedent, and Eid did not select the Jetta from the estate—ownership passed directly to her upon the decedent's death. Moreover, the fact that the decedent intended to provide her with the Jetta does not impact her entitlement to select one vehicle from the estate pursuant to the exempt-property statute.

c. ***Hillam v. Loveland,* 2024 UT App 102 (Court of Appeals of Utah 2024).** Court considered challenges by wife to irrevocable trust created by husband and funded prior to filing of divorce proceedings; half truths and omissions by husband may support claim for dissipation of marital assets in trust creation.

(1) John Hillam and Tara Hillam married in June 2000, and they had three children between 2001 and 2005. Except for occasional hairdressing jobs, Tara stopped working once the parties had children. John earned the vast majority of the household income during the marriage.

(2) In August 2010, John started working for Maverik, Inc. His compensation consisted of two components: (1) salary and (2) deferred compensation, under which John shared in a portion of the company's profits and which the parties have referred to during the litigation as "stock options" or "stock payouts." In 2010 and 2011, Maverik granted John 1,000 shares of stock options. The deferred compensation scheme changed in 2012 such that John received stock payouts between the years 2013 to 2017. The district court later found that the payouts made from 2013 to 2016 presumably were used for marital expenses. John received a stock payout in 2017 after he had initiated divorce proceedings, and that payout, which was for about $570,000, was placed into John's personal bank account.

(3) In late 2012, John consulted with an attorney ("Attorney") for two purposes. The first was that John and Tara were experiencing marital difficulties, so John sought assistance with the negotiation of a postnuptial agreement. John later testified that the couple's marital difficulties during that period were no different than what they had experienced in earlier portions of the marriage, though he acknowledged that Tara had threatened divorce somewhere around that time. In spite of John's discussions with Attorney about a postnuptial agreement, the couple didn't execute such an agreement.

(4) John's second purpose in consulting with Attorney was to discuss the potential creation of a trust. John and Tara had discussed creating a trust before John met with Attorney, and Tara understood that other Maverik executives who were starting to retire were establishing trusts as a means of saving money on the taxes of a stock buy-back. John asked Tara to meet with Attorney regarding the formation of the trust. Though Tara would later testify that she did not feel she had a choice in the matter, she also testified that she trusted John and trusted that he was doing what was in the best interest of the family.

(5) Tara met with Attorney on one or perhaps two occasions, during which they discussed "the assets used to fund the trust. While it is not clear the extent to which Tara understood which assets would ultimately fund the Trust, she knew that marital assets of some kind would

be used to form what she believed was a family trust. The district court later found that Tara was not provided any draft documents to review but that, even so, Tara did not object to the formation of the trust at the time that it was created.

(6) The Trust (formally, the John D. Hillam 2012 Irrevocable Trust) was finalized on November 27, 2012. The Declaration of Trust and Agreement (the "Trust Agreement") listed John as settlor, with Dustin Hancock as trustee (the "Investment Trustee"). The listed beneficiaries included, among others, John, John's "spouse," and John's "children." The Trust Agreement named Tara as the "spouse," but it then defined the term by providing: "All references to John's spouse are to Tara Hillam. However, if John and John's spouse divorce after the date of this Trust Agreement, then as of the date the divorce is effective, the terms "spouse" and "John's spouse" shall no longer refer to Tara Hillam, and for all purposes of this Trust Agreement, she shall be deemed to have died on the divorce's effective date." The Trust Agreement contained a spendthrift clause, a provision designating its situs and choice of law as Nevada, and various terms rendering the Trust irrevocable.

(7) On the same day the Trust was finalized, John transferred his rights in the 1,000 shares of Maverik stock options that he had received in 2010 and 2011 to the Trust as a gift, and those options were valued at $350,000.

(8) John filed for divorce in January 2017. What followed was, as later described by the district court, a "high conflict" multi-year divorce case.

(9) Tara submitted a proposed Bifurcated Decree of Divorce. The district court apparently believed that the terms contained in this proposal had been agreed to by both parties, so it soon signed and entered this as the Bifurcated Decree of Divorce (the "First Decree"). John almost immediately filed a motion under rule 60(b) of the Utah Rules of Civil Procedure, wherein he asked the court to set aside the First Decree. In this motion, John alleged that the parties had not actually agreed to its terms and that Tara had engaged in "objectionable conduct" by submitting the proposed decree to the court. Around the same time, John filed an amended divorce petition (the "Amended Petition"). The Amended Petition added a new claim in which John requested a declaration from the court that the Trust was valid and enforceable. The Investment Trustee was notified of this and was subsequently involved in proceedings on behalf of the Trust. Tara later answered the Amended Petition, and in her answer, she denied that the Trust was valid or enforceable.

(10) The court later set aside the First Decree, and in December 2018, it entered an Amended Bifurcated Decree (the "Second Decree") that reflected a stipulation by the parties. The Second Decree reiterated many of the same terms concerning custody, parent-time, child support, alimony, and the division of property that were present in the First Decree, but it now included a broader list of reserved issues. Specifically, it outlined that the main remaining issue is a complex trust issue, and it also reserved the allocation of attorney fees, as well as "issues, objections, and defenses" raised following the Settlement Conference.

(11) The Investment Trustee filed a motion for summary judgment on the portion of the Amended Petition relating to the Trust. As part of this motion, the Investment Trustee noted that, a month earlier, John had renounced his rights in the Trust as both settlor and beneficiary. In light of this renunciation, the Investment Trustee argued that John no longer had any "right to receive any Trust proceeds." From this, the Investment Trustee argued that the Trust's assets were no longer the property of John or Tara, so those assets were not subject to equitable division in the divorce proceedings. The district court granted the Investment Trustee's motion for summary judgment.

(12) The court concluded that none of the factors weighed in favor of dissipation, it rejected Tara's request for a determination that John had dissipated marital assets. The court also rejected Tara's request for a division of the 2017 stock payout as part of the marital estate.

(13) Tara appealed and the court of appeals affirmed most of the trial court's determinations on the following grounds:

(a) John was the settlor of the Trust. Tara now argues that, because John and Tara were contemplating divorce when the Trust was created, Tara became his creditor. As a result, Tara claims that she is authorized to reach the maximum amount that can be distributed to or for the settlor's benefit (in this case, the full value of the Trust). The court declined to consider the merits of Tara's assertion because this presents a distinct issue that was not preserved below. Tara's assertion regarding the potential applicability of Utah Code section 75-7-505(2)(a) presents an entirely distinct legal theory that needed to be preserved below. Tara advances a series of arguments based on language from the Trust Agreement, Utah caselaw, Nevada trust law, and even federal property law. From this, she argues that John never validly renounced his rights to assets within the Trust and that she remains his creditor. This is a fairly intricate theory, and it turns on a combination of statutes and cases and contractual language that involves several distinct analytical frameworks. This theory presents an issue, not an argument, and it therefore needed to be preserved below. This issue was not preserved. It's true that the district court grappled with the overarching question of whether or not the corpus of the Trust was marital property. Tara's arguments at the summary judgment stage focused on two particular theories: first, that the Trust was not "validly created" because marital assets were placed into the Trust "without [Tara's] knowledge or consent"; and second, that, even if the Trust was validly created, Tara's "entitlement to her fair share of the marital assets" and John's "inequitable conduct" provided the court with sufficient justification to reform the Trust in such a way that she should receive a share of the stock options that were now owned by the Trust. At no place in Tara's pleadings or in the court's analysis did anyone invoked Utah Code section 75-7-505(2)(a), which provides the analytical foundation for the issue Tara is presenting on appeal. Although formal citation to a particular statute might not always be required to preserve an issue, it would be the usual and presumptive starting place if an assertion is predicated on a particular statute. Without such a citation, Tara would have at least been required to present this distinct legal theory to the district court in such a way that the court had an opportunity to rule on it.

(b) Tara next asserted that the Trust is void as being against public policy. Tara again presents a distinct issue that needed to be preserved, as opposed to an argument that didn't. Tara didn't present such a theory below. When Tara asked the court to invalidate the Trust during the litigation regarding the Investment Trustee's summary judgment motion, she did not identify any law that expressly forbade the transfer of marital assets to an irrevocable trust, nor did she assert that the Trust Agreement harmed the public as a whole. Indeed, the district court itself pointed this out in its order granting summary judgment, noting that Tara had not made a claim that public policy would override the Utah Uniform Trust Code if the Trust is deemed valid and irrevocable.

(c) Tara asked the court to adopt something of a new common law rule under which assets that are placed by a spouse into a trust during a marriage can be equitably distributed in a subsequent divorce if the transfer was effectuated "in contemplation of divorce or with the intent of impairing marital rights." There is some reason to think that this issue was preserved. In her opposition to the motion for summary judgment, Tara argued that "one spouse is not entitled to shield marital assets from another spouse by use of a trust," and she further complained that John acted "without [her] knowledge or consent and with the clear intent to deprive her of her interest in marital property."

(d) Tara's proposed rule turns on the spouse's reasons or intent for transferring the marital property. But the determination of intent is a question of fact, which will only be reversed if the district court's finding is clearly erroneous. In its posttrial findings of fact, the court observed that the "CPA for the couple while they were married . . . testified that such trusts are very common because they create estate tax savings—in essence, the formation of the trust removes any appreciation of the trust proceeds from the estate/death tax." The court further observed that Tara had "testified at the [t]rial that she understood that one of the benefits of the trust was to avoid tax consequences." The court reiterated and relied on this testimony by Tara and the CPA later in its dissipation analysis, finding that it was "undisputed that the Trust was formed to avoid tax consequences when the beneficiaries withdrew funds from the Trust."

(e) Tara has not directly challenged this finding in her brief, much less carried her burden of establishing that it was clearly erroneous. In any event, to satisfy that burden of persuasion on this point, Tara would need to marshal the evidence, and we see nowhere in her brief where she has done so. And this finding directly undermines Tara's proposed resolution of this issue. After all, if the purpose of the Trust was to avoid tax consequences, then Tara would not be entitled to relief even under her proposed rule. As a result, Tara is not entitled to the requested relief.

(f) Utah courts consider several factors in determining if dissipation of marital assets has occurred, including: (1) how the money was spent, including whether funds were used to pay legitimate marital expenses or individual expenses; (2) the parties' historical practices; (3) the magnitude of any depletion; (4) the timing of the challenged actions in relation to the separation and divorce; and (5) any obstructive efforts that hinder the valuation of the assets. There is no error with respect to the court's analysis of the first, second, and fourth factors, but there is legal error in the court's analysis of the third and fifth factors.

(g) The purpose of the Trust was to avoid certain tax consequences. The court then echoed this finding in its analysis of the first dissipation factor, finding that it was "undisputed that the Trust was formed to avoid tax consequences when the beneficiaries withdrew funds from the Trust." These findings do indeed suggest that the assets were spent for legitimate marital purposes. Because the Trust was formed to avoid tax consequences, the first factor did not support a dissipation determination.

(h) The district court first noted that John and Tara "had not created a trust prior" to this one, although it also noted that they did create a different trust a short time later. The district court also found that John and Tara had done "what they could do to avoid tax consequences related to the income that [John] brought into the marriage," that John and Tara had taken "other actions to avoid tax consequences (such as prepaying taxes, paying taxes quarterly, etc.)," and that they "appear[ed] to always be concerned with tax consequences regarding [John's] income." In light of these additional findings, the "historical practices" in question could include the couple's broader historical practice of trying to minimize their tax obligations. Because the court's additional findings confirm that the Trust was created for that very purpose, there was no abuse of discretion in the court's conclusion that the second factor weighed against dissipation.

(i) The district court found that while "the marital assets that formed the corpus of the Trust are not available to Tara and, therefore, for her, are 100% depleted," they otherwise "still exist." From this, the court concluded that this factor did not weigh "for or against" dissipation. Here, the district court viewed the "asset" as being just the stocks themselves. But dissipation occurs when a spouse "seriously depleted the marital estate." And it makes sense that this factor should focus on any depletion of value to the marital estate (as opposed to just looking to any depletion in value of a particular item). For example, suppose that, in contemplation of a potential divorce, a spouse surreptitiously transferred all of the funds from the couple's joint bank account into an account that only that spouse controlled. In such a situation, no one would seriously dispute that this transfer weighed in favor of a dissipation determination, even if the money itself still existed within the other, non-marital account. The district court thus erred by looking to whether the stock options (or their value) still exist in the abstract. Rather, in considering this factor, the court should have considered the magnitude of any depletion to the marital estate.

(j) The record indicates that the parties were having marital difficulties at the time that the Trust was created. After all, one of the two reasons that John went to see Attorney was to seek assistance "with the negotiation of a postnuptial agreement," and John apparently did so because of the parties' ongoing marital difficulties. Given that John created the Trust a short time later and then transferred the stock options into it, the timing of the transfer might suggest that it was at least in contemplation of a potential separation or divorce, thus supporting a dissipation determination. The district court concluded that while it appears that some marital problems existed at the time of the creation of the Trust, those issues apparently resolved because the parties' separation did not occur until approximately five years later. The court thus concluded that this factor weighed against a finding of dissipation. The district court could have concluded that the timing factor supported a dissipation determination, given that the parties were experiencing marital difficulties when the transfer occurred. But the court was not required to do so, given that the parties stayed married for several more years and, also, the court's additional findings that there was an independent, tax-related purpose for the creation of the Trust and the transfer in question. In light of the discretion afforded to the district court, there is no basis for reversing its conclusion that the fourth factor did not support a dissipation determination.

(k) The fifth factor looks to whether there were "any obstructive efforts that hinder the valuation of the assets. The district court concluded that this factor "weighs heavily in favor of [John]" because "the evidence shows that, while [Tara] did not know every detail pertaining to the Trust, that was because she did not take affirmative action to learn those details and, furthermore, there is no evidence that those details were hid from [her]." The court incorrectly suggested that it believed this factor requires some affirmative obstructive action by the allegedly concealing party. It's true that "obstruction" often involves an affirmative action that's intended to conceal or hide something. But context of course matters. And here, the court is not interpreting a particular statute (such as a criminal obstruction of justice statute), wherein the term "obstruction" might have a defined meaning that may or may not require an affirmative act. Rather, the court is interpreting the phrase "obstructive efforts" as it has been used in a common law test that applies to a divorce action. Viewed through the particular prism of how marriages sometimes or even often operate—both in terms of trust expectations and agreed-upon divisions of labor—we believe that it sometimes might be possible for a spouse to impede or hinder the other spouse's awareness of something (even something important) through half-truths or targeted omissions alone. If supported by the facts and evidence, it thus might be possible for a court to determine that half-truths or omissions qualify as "obstructive efforts" for purposes of a dissipation analysis. Here, the record does show that Tara was included in some meetings in which John and Attorney discussed the formation of the Trust with her, and it likewise shows that she could have accessed and read the Trust Agreement or other documents related to the Trust if she had made the effort. But the record also indicates that Tara "was not provided any draft documents to review . . . prior to this divorce case." And of more importance, it shows that she was told by John that the Trust was to be "a family trust" for the purpose of "avoid[ing] tax consequences" and that she was told that she was a beneficiary. It also shows that, while John was apparently taking the lead on the creation of the Trust and even making representations to her about it, Tara was not told that her status as the "spouse" and beneficiary of what had been described to her as a "family trust" would be nullified if the parties ever divorced.

(l) This factor involves a case-specific inquiry that's best determined by the district court in the first instance. The court erred in its apparent conclusion that this factor can be satisfied only through affirmative misstatements, as opposed to omissions that could have been regarded as material—either in light of the couple's past practices generally or the particular circumstances of how they were approaching the creation of the Trust. On remand, the district court must assess this factor anew in light of the principles set forth above.

d. ***Roberts v. Roberts,* 6 N.W.3d 730 (Supreme Court of Iowa 2024).** Postmarital amendment to a premarital agreement relating to inchoate dower interests in property is not enforceable.

(1) David and Elizabeth Roberts were married on April 1, 1993, in Iowa. They had met in 1991. At the time of their marriage, David was fifty-four years old, and Elizabeth was fifty-one years old. David sold insurance, provided investment advice, and owned real estate and cattle. Elizabeth had a high school education and had done a variety of jobs, most recently as an interior designer. Both David and Elizabeth had offspring from prior marriages.

(2) About two weeks before their marriage, at David's request, the couple executed an "antenuptial agreement," otherwise known as a "prenuptial agreement" or a "premarital agreement." No party contests the validity of this agreement.

(3) The agreement provided in paragraphs one and two that David and Elizabeth would each retain their own premarital property, including "all interest, rents and profits which may in time accrue or result in any manner from increase in value, or be collected for the use of the same in any way."

(4) In addition, paragraph four of the agreement provided that upon the death of either one, "the survivor shall have and make no claims of any kind against the estate of the other for any reason or by way of any right as the surviving spouse of such decedent for dower, statutory right, election, right of support, right of inheritance and homestead rights . . . except as specifically provided in paragraph 8." Paragraph eight in turn stated that the surviving spouse would be "awarded and receive the housing facility occupied by the Parties at the time of such death regardless of ownership thereof" and "one-third of ALL (net equity in) real property of the deceased." The one-third interest would "include any real estate either party leaves to the other at death by will" but exclude any personal property. Paragraph ten added that David intended to acquire additional real estate and that Elizabeth would receive at least a ten percent share in that real estate—or more if she contributed capital toward the acquisition.

(5) During the marriage, Elizabeth took part in the renovation and repair of the residential rental properties owned by David. She also "handled most of [the] mail and bills." Elizabeth further described herself as "the chief cook and bottle washer."

(6) In 2002, David executed a will. The will left the entire estate to a revocable trust. At that time, there were various beneficiaries of the trust, including Elizabeth, David's son Eric, David's daughter Diana, and grandchildren of David and Elizabeth. However, in 2011, David amended the trust. The amended trust made Eric the trustee and, practically speaking, Eric became the sole beneficiary of the trust upon David's death.

(7) In 2016, David was making arrangements with his attorney to have a warranty deed prepared so that certain real property could be transferred from Elizabeth and himself to the revocable trust. At that time, his attorney advised him privately that Iowa law had changed such that a spouse's elective share was no longer effective against property held in a revocable trust under certain circumstances. The attorney explained that in their case, though, Elizabeth would still be entitled to a one-third share of the real property in the revocable trust because of the antenuptial agreement.

(8) About eight months later, in May 2017, Elizabeth prepared a note that stated in part, "After much discussion, months of anxiety, and guilt trips, and desperation, I have come to the conclusion that the situation in our home is not going to improve. David's animosity toward my grandsons and other members of my family leaves me in the middle of a[n] unpleasant situation. I can honestly say he has good reason to feel as he does. However I am 76 years old and I would like to live in peace. I have several health problems. . . . I would like to enjoy the time I have left. In order to eliminate the debt I have a[c]quired and to protect David's int[e]rest, I will waive my dower rights to all properties, investments, and holdings. . . . David and I have disc[u]ssed the amount I will need to eliminate the debts. The amount is $62,500.00. If David wishes to consider this a pre-divorce agreement, I would like to have the $800 a month household allowance until we can come sign this agreement. [It is] imper[a]tive that this is taken care of quickly, as I plan to travel to Texas in June."

(9) David provided this note to his attorney, asking, "Is this workable [and] decent for me?"

(10) That December, David and Elizabeth executed a "Partial Revocation of Antenuptial Agreement" prepared by David's attorney. The agreement specifically revoked paragraph eight of the antenuptial agreement, explaining that it was "inconsistent with the desires of Dave and Elizabeth" and "inconsistent with their conduct as separate waivers of dower interests have been previously executed and recorded [with respect to individual properties]." The agreement also specifically revoked a portion of paragraph ten as "inconsistent with the desires of David and Elizabeth." In addition, the agreement stated that paragraph ten "has never been followed since the execution of the antenuptial agreement." The agreement added a recital to the effect that it had been prepared by David's attorney, that this attorney did not represent Elizabeth, and that Elizabeth "has had the opportunity to consult an attorney before signing this agreement."

(11) The parties signed a second agreement at the same time as the partial revocation. The second agreement reiterated that the parties were executing "a partial revocation of their antenuptial agreement to make clear that neither party will claim a marital share interest in property of the other or claim any other interest in property owned by the other." This agreement stated that David would pay approximately $50,000 to cover debts owed by Elizabeth or her grandchildren, would deliver a check in the amount of $14,700 to Elizabeth, and would thereafter pay Elizabeth $800 a month for household expenses while they remained married.

(12) According to Elizabeth, David presented her with the partial revocation, and "[t]he entire interaction" with respect to the revocation took less than five minutes.

(13) In 2019, David executed a new will. The second paragraph thereof stated, "I am specifically not making any devise or bequest to my spouse under this will." The will named Eric as executor and provided that the entire estate would go into David's revocable trust, of which Eric would be both the trustee and the sole beneficiary.

(14) In 2020 and 2021, David conveyed certain property interests to Elizabeth worth approximately $900,000 in total. Based on what his father told him, Eric argues that these transactions were related to the partial revocation, although the partial revocation itself does not mention them.

(15) David passed away on April 2, 2022, at the age of eighty-three. Eric—acting as executor and trustee—filed a petition in the Shelby County District Court asking it to enter David's will to probate and to appoint him as the executor. According to the later-filed report and inventory, David's wealth at the time of death consisted primarily of real estate in Shelby, Harrison, and Pottawattamie Counties. Collectively, that real estate was worth approximately $15 million and was almost entirely held by the revocable trust.

(16) Elizabeth filed a motion and later a petition requesting enforcement of the couple's premarital agreement, or if the district court found the agreement unenforceable, opting "to

take the elective share and spousal allowance" of David's estate. In response, Eric raised the 2019 partial revocation agreement and asked the court to dismiss Elizabeth's petition. Elizabeth filed a motion for summary judgment The district court found that the partial revocation was valid and enforceable and "consistent with common law principles of contract law." It overruled and denied Elizabeth's first motion for summary judgment and ruled that her second summary judgment motion on the counterclaims was moot.

(17) Elizabeth appealed, and the Iowa Supreme Court reversed and remanded on the following grounds:

(a) Although David's attorney used the terminology "partial revocation" in drafting the 2017 agreement, it is really an amendment. It doesn't eliminate all provisions of the 1993 antenuptial agreement but swaps out some obligations for other obligations. Essentially, Elizabeth received cash (and, according to Eric, some real property) in return for giving up her rights to one-third of David's real property on his death. The wording used by David's lawyer does not bind the court.

(b) In 1983, the National Conference of Commissioners on Uniform State Laws propounded the Uniform Premarital Agreement Act ("UPAA"). Iowa adopted its own version of the UPAA—the Iowa Uniform Premarital Agreement Act ("IUPAA")—in 1991.

(c) Section 596.7 states: "After marriage, a premarital agreement may be revoked only as follows: (1) by a written agreement signed by both spouses. The revocation is enforceable without consideration; (2) to revoke a premarital agreement without the consent of the other spouse, the person seeking revocation must prove one or more of the following: (a) the person did not execute the agreement voluntarily; (b) the agreement was unconscionable when it was executed; (c) before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and (d) the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse."

(d) Notably, the UPAA—on which Iowa's uniform act was modeled—provides, "After marriage, a premarital agreement may be amended or revoked only by a written agreement signed and acknowledged by the parties." Thus, Iowa did not adopt the portion of the uniform law relating to amendment. The IUPAA provides greater protection for vulnerable parties in some contexts than the UPAA.

(e) Even before the enactment of the IUPAA, and continuing to the present day, Iowa has allowed parties to enter into premarital agreements waiving their elective share.

(f) Iowa law does not give married persons who previously entered into a premarital agreement the authority to enter into a new agreement during their marriage relating to inchoate dower interests in each other's property. The parties may revoke their antenuptial agreement as provided in section 596.7, but they may not make a new agreement.

(g) The legislature chose only the word "revoked" and did not include the word "amended" that appeared in the UPAA. The implication is that parties can revoke, but not amend, once they are married. Yet in 2017, these parties entered into an amendment rather than a revocation.

(h) Furthermore, section 597.2 serves as a backstop. Historically, section 597.2 has been read as a prohibition on married parties contracting with respect to their inchoate rights—specifically, the elective share. Additionally, the distinction between revocation and amendment is not an academic one. One risk of postmarital agreements is that the spouse with economic leverage (or some other type of leverage) may be able to take advantage of the other spouse. It is difficult to conceive of this being the case, though, where the postmarital agreement simply revokes the premarital agreement. In that event, the parties are being restored to the position they would otherwise have had under Iowa law but for the premarital agreement.

(i) We note also that the court of appeals—which sees many more family law cases than the Supreme Court—concluded in a lengthy unpublished opinion in 2018 that "a premarital agreement executed after January 1, 1992, may not be amended after marriage, although it may be revoked, abandoned, or the rights thereunder waived."

(j) Unlike a revocation, an amendment to a premarital agreement may leave a spouse with less than they bargained for before the marriage and less than Iowa law would otherwise afford. Indeed, Elizabeth contends that this is what happened here. In the premarital agreement, she exchanged her elective share for a one-third interest in David's net real estate. But following the partial revocation, Elizabeth continued to waive her elective share, while also relinquishing the one-third interest in David's real estate. In return she received a cash benefit of approximately $65,000 (mostly used to cover various debts, including debt owed by Elizabeth's grandsons to David) and a modest monthly allowance of $800 while married. Postmarital amendments to premarital agreements affecting elective shares are generally not enforceable.

(k) The partial revocation—or really amendment—of the premarital agreement that the parties executed in 2017 was invalid and unenforceable.

e. ***Tremblay v. Bald,* 2024 N.H. 6 (Supreme Court of New Hampshire 2024).** Continued cohabitation with romantic partner is valid consideration for contract to pass property at death.

(1) Plaintiff, Gail C. Tremblay, and the decedent, Donald D. Bald, were in a romantic relationship and lived together for more than ten years beginning in November 2009. They became engaged on December 31, 2009, but never married. They remained engaged and continued to live with each other until the decedent died intestate on July 26, 2020. At the time they met, the plaintiff was living at 19 Spruce Street and the decedent was living at 16 Spruce Street, in Gorham. As the relationship progressed, the plaintiff moved in with the decedent at 16 Spruce Street. In December 2009, the decedent purchased the plaintiff's property at 19 Spruce Street. On January 1, 2012, they executed a notarized agreement superseding a prior agreement from December 2009. The January 2012 agreement provides, in pertinent part: "In the event that [the decedent] passes away and we are living together, [the plaintiff] will choose to keep, free and clear of any encumbrance, either the 16 Spruce St. property or the 19 Spruce St. property, including the contents of her choice; and the choice of two vehicles. This does not include [the decedent's] gun collection."

(2) They subsequently executed two more notarized agreements, each dated March 30, 2015. One of these agreements provides, in relevant part: "I, [the decedent], in the event of my death, leave to [the plaintiff] the 2014 Ford Mustang …; as long as we are still living together as an engaged couple." The other agreement provides, in relevant part: "I, [the decedent], in the event of my death, leave to [the plaintiff] free and clear of any encumbrances, the property at 1 Marois Ave, Gorham, NH (including a garage and park model home); as long as we are still living together in the same household. This sheet being the third of three that we, as fiancees, have thus far completed. There is no Will at this time."

(3) Approximately six months after the decedent's death, the plaintiff brought this action asserting that: (1) the agreements signed by her and the decedent are enforceable contracts entitling her to the property described in the agreements; (2) in the alternative, she is entitled to the property under theories of promissory estoppel, implied-in-fact contract, or, as to one particular vehicle, jointly purchased property; and (3) Allan Bald, both in his individual capacity and as Administrator of the Estate, is liable for certain rents and profits received from the property. The defendants counterclaimed, seeking unpaid rent from the plaintiff.

(4) The plaintiff moved for summary judgment and the defendants cross-moved for summary judgment. The trial court denied the plaintiff's motion, finding the agreements lacked adequate consideration. The trial court granted summary judgment in favor of the defendants. The trial court subsequently granted the plaintiff's motion for interlocutory appeal. On appeal, the New Hampshire Supreme Court reversed and remanded on the following grounds:

(a) A valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds. The defendants do not dispute that the written agreements here reflect offer, acceptance, and a meeting of the minds. The parties disagree, however, on whether the agreements are supported by consideration. The plaintiff's continued cohabitation with the decedent is the consideration for the agreements.

(b) Here, the parties clearly recited the exchange: certain property would transfer provided the plaintiff and the decedent were still living together at the time of the decedent's death. By their plain language, the agreements in this case were solely founded upon the plaintiff's continued cohabitation with the decedent. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

(c) Consideration is present if there is either a benefit to the promisor or a detriment to the promisee. The law does not undertake to measure the adequacy of the consideration for a contract or agreement. The slightest benefit conferred upon the one party, or the slightest loss or inconvenience sustained by the other, is sufficient.

(d) The agreements meet this test. The plaintiff's continued cohabitation amounted to a benefit to the decedent, as promisor. It served as a benefit to the decedent because, as the agreements plainly reflect, he desired that the plaintiff continue to live with him. Thus, the agreements reflect a bargained-for exchange: that the decedent would leave certain property to the plaintiff if she continued to live with him until his death.

(e) Here, the decedent's performance was not optional so long as the contracting parties lived together at the time of his death. That either party could defeat the condition of the agreements by ending the relationship prior to the decedent's death has no bearing on whether, if the condition were satisfied, the decedent was required to perform. Accordingly, the "words of promise" in the agreements did not make the decedent's performance optional such that he made no promise.

(f) The agreements do not expressly recite any consideration. However, New Hampshire law does not require consideration to be recited for it to exist. In this case, the consideration supporting the agreements, although not specifically labeled, is nonetheless readily determined from the text of the agreements. The agreements are enforceable as a matter of law.

f. ***Reich v. Reich,* 105 Cal. App. 5th 1282 (Court of Appeal of California, Second Appellate District 2024).** Decedent's estate, for the purpose of calculating the omitted spouse's share, does not include the proceeds of an individual retirement account when the IRA's beneficiaries are two separate trusts that were created by the decedent's testamentary trust.

(1) In September 2003, Thomas Reich created a revocable trust to provide for the distribution of some of his assets upon his death. The operative trust document is the Third Amendment and Restatement of the Thomas M. Reich Revocable Trust (the "Trust"), dated May 19, 2016. The Trust specifies that (1) Thomas's ex-wife, his brother, and his nephew are to receive a total of $1.5 million in specific, cash gifts; and (2) Thomas's daughter Shannon Reich—or, if Shannon dies before Thomas, Thomas's granddaughter Leah Tesi—is to receive any residue of the Trust's assets in "separate trusts" created by the Trust for the recipients' benefit.

(2) Thomas maintained an IRA at PNC Bank. Thomas completed a form designating Shannon's and Leah's separate trusts as each receiving one-half of the IRA's proceeds upon his death. Thomas thereafter married his longtime close acquaintance, Pamela K. Reich. They married on November 20, 2020, and Thomas died on July 2, 2021. At no point during their seven-and-one-half-month marriage did Thomas update the Trust to provide for Pamela.

(3) At the time of Thomas's death, the IRA's balance was around $1.5 million. The IRA is Thomas's separate property. Pamela filed a petition that sought, among other things, an omitted spouse's share of Thomas's estate. The trial court ruled that an IRA's proceeds can sometimes be included in a decedent's estate and that the IRA proceeds in this case would pass to "sub-Trust[s]" of the Trust and thus "essentially … be paid" "into the actual Trust."

(4) In August 2022, Pamela and the Trust's beneficiaries reached a partial settlement. Because there were insufficient assets to fully satisfy the specific gifts delineated in the Trust, the settling parties each agreed to take proportionally reduced amounts to accommodate Pamela's omitted spouse's share. Under the settlement, Pamela received $188,483.57 in cash as well as stock and half of the proceeds of Thomas's life insurance policy. The IRA proceeds were explicitly "excluded" "from [the] settlement," leaving the dispute over Pamela's share of those proceeds to be resolved in future litigation.

(5) Pamela subsequently filed two identical petitions—one as to Shannon's separate trust and another as to Leah's separate trust—regarding her entitlement to a share of the IRA proceeds as part of her "omitted spouse's share." The probate court dismissed Pamela's petitions with prejudice. Pamela appealed and the court of appeals affirmed on the following grounds:

   (a) An omitted spouse—except in four statutorily enumerated circumstances not present here—is entitled to a "share in the decedent's estate" consisting of (1) "one-half" of the decedent's community and quasi-community property, and (2) "[a] share of the [decedent's] separate property" "equal in value" to what the omitted spouse "would have received" had the decedent died intestate. The omitted spouse's share is to be drawn "first" from any portion of the decedent's estate "not disposed of by will or trust"; if that is "not sufficient," then the omitted spouse's share is to be "taken from all beneficiaries of [the] decedent's testamentary instruments" "proportion[ately]."

   (b) An omitted spouse's share is to be drawn solely from the decedent's "estate." For this purpose, the "estate" includes (1) the "decedent's probate estate" and (2) "all property held in" or "passing by" "any revocable trust that becomes irrevocable on the death of the decedent." An omitted spouse's share is not to be drawn from (1) property that passes outside the decedent's "probate estate" and (2) property that does not pass through a revocable trust that becomes irrevocable upon the decedent's death.

   (c) The trial court correctly declined to include the proceeds from Thomas's IRA in Pamela's omitted spouse share because those proceeds are not part of Thomas's "estate."

   (d) IRA proceeds are not part of a decedent's "probate estate." The Probate Code provides a nonexclusive list of several types of "transfers" of property upon a person's "death" that are "nonprobate transfers." These nonprobate transfers need not "comply with the requirements for execution of a will," and more to the point, they effectuate the transfer of property, not under the law of probate, but instead under "[t]he terms of the instrument under which the nonprobate transfer is made." IRAs are explicitly listed as one of these nonprobate transfers and California law has long treated them as such.

   (e) Although IRA proceeds can sometimes pass through a "trust that becomes irrevocable" upon death, such as when the designated beneficiary of the IRA is the decedent's trust, the IRA proceeds in this case never became part of the Trust for purposes of calculating Pamela's omitted spouse's share. It is undisputed that the IRA was held by Thomas in his individual capacity and not by the Trust; indeed, federal law governing IRAs prohibits trusts from holding an IRA. It is also undisputed that Thomas designated the separate trusts for Shannon and Leah as the beneficiaries of the IRA's proceeds rather than the Trust itself. Thus, the IRA proceeds in this case at no point ever passed through the Trust.

(f) Pamela's characterization of the trusts created for Shannon and Leah as "sub-trusts" is misleadingly inaccurate; the Trust itself labels them "separate trust[s]." If Thomas had created those separate trusts in documents independent of the Trust, there is no question that the IRA proceeds would pass directly from the IRA into those independently created separate trusts, and thus completely outside of the Trust (and hence completely outside of Thomas's "estate"). There is no reason why Thomas's decision to kill two birds with one stone by creating the separate trusts in the Trust document itself should lead to a different result when the IRA proceeds are still passing directly from the IRA to those separate trusts—and, importantly, not through the Trust. Nor does it matter that the beneficiaries are the separate trusts for Shannon and Leah rather than Shannon and Leah as individuals; in either event, the proceeds are not passing through the Trust.

(g) The whole purpose of probate law is to effectuate the decedent's intent: Here, Thomas's intent to designate the separate trusts for Shannon and Leah as the beneficiaries of his IRA is crystal clear. Although the separate trusts ostensibly came into being and thus become irrevocable upon Thomas's death and although the IRA proceeds undoubtedly are held in those separate trusts, the IRA proceeds never pass through the Trust itself. Because only the decedent's testamentary instruments are subject to the omitted spouse's share, and because only the Trust is Thomas's testamentary instrument, whether or not the separate trusts became irrevocable upon Thomas's death is irrelevant.

(h) The Trust contains instructions for distributing IRAs and some of those instructions are located in the provisions describing the two separate trusts, but those instructions deal with how the trustees of those separate trusts are to distribute the proceeds for tax purposes; they do not deal with the Trust at all.

g. ***In re Marriage of Smith,* 2024 COA 95 (Court of Appeals of Colorado 2024).** Wife's father's power of appointment over trust rendered wife's trust interest revocable and excluded from property division upon divorce.

(1) Sarah Bland Smith ("wife") and James F. Butterworth ("husband") married in 2007, and wife initiated the marital dissolution proceeding about thirteen years later.

(2) Early in the proceedings, husband requested that wife disclose information about an irrevocable family trust created by her stepmother that named wife as a beneficiary. Wife filed a motion for determination of a question of law, arguing that any interest she had in the family trust did not constitute property and was not an economic circumstance relevant to the dissolution proceeding. She attested that she had not received any distributions from the trust and argued that the trustee, who was her father, had sole discretion over the distributions. She further argued that her father, as the primary beneficiary, had a power of appointment over the trust property, which he could use to revoke her trust interest. The district court granted wife's motion and did not further consider her trust interest when dissolving the marriage.

(3) Husband appealed and the court of appeals affirmed on the following grounds:

(a) When a spouse has a present, fixed right to a benefit, even if that benefit will not occur until sometime in the future, that constitutes a property interest. However, interests that are speculative are mere expectancies and do not constitute property.

(b) Wife only has a discretionary interest in the family trust. Wife, her sisters, and her father are eligible beneficiaries of the family trust. The trust directs the following distributions: "My Trustees shall pay or apply all or any part of the net income [and principal] to or for the benefit of any one or more of the Eligible Beneficiaries, in such proportions, equal or unequal or all to one person that my Trustees in their discretion consider advisable for any such Eligible Beneficiary's maintenance in health and reasonable comfort, complete education . . . or support in such Eligible Beneficiary's accustomed manner of living."

(c) Upon wife's father's death, any remaining trust property not effectively appointed through her father's power of appointment would be placed in separate lifetime trusts for wife and her sisters. Wife's lifetime trust is to be created under terms substantially similar to that of the family trust, and it has the same terms for distributions to wife and her descendants. After wife's death, the property in her lifetime trust would be given to her descendants, also in trust.

(d) Distributions of income and principal from the trust — and likewise her later lifetime trust — are totally within the discretion of the trustee. Where the trust permits the trustees to distribute to a beneficiary or beneficiaries so much, if any, of the income and principal as they in their discretion see fit to distribute, a beneficiary has no property interest or rights in the undistributed funds. Even if the trust directs that a trustee, within their discretion, shall pay a beneficiary income and principal, the settlor's intent to bestow discretion over that distribution can render the beneficiary's interest a mere expectancy. Although the family trust indicates that the trustee "shall pay" the income and principal to the eligible beneficiaries, the plain language of the trust grants the trustee the "discretion" to determine any distribution to any one or more of the beneficiaries that the trustee considered "advisable." It further provides that the trustee can make "unequal" distributions, including to only one of the eligible beneficiaries. This broad discretionary authority includes the trustee's power to withhold distributions from wife.

(e) The trustee's discretion over wife's interest is further demonstrated elsewhere in the family trust. It directs that when making a discretionary distribution, the trustee is required to give primary consideration to wife's father's needs, has no obligation to consider wife's needs, and cannot distribute anything to wife unless the trustee expects to have enough trust property to adequately provide for wife's father throughout his lifetime. Together, these provisions demonstrate that wife's stepmother intended to grant the trustee complete discretion over distributions, if any, to wife.

(f) Wife's father's power of appointment rendered wife's trust interest revocable and precluded it from the court's consideration. The family trust granted wife's father a power of appointment over the trust property upon his death. Her father could appoint the trust property outright or through a newly created trust, within his discretion. Any beneficial interest wife had in the trust was subject to this power of appointment. The court determined that it gave wife's father the power to dispose of the family trust property, which would in turn revoke wife's trust interest. The court then concluded that any interest wife had in the family trust was revocable. The term "revocable" in section 14-10-113(7)(b) applies to "any interest" or "any donative third party instrument." A plain reading of the statute does not provide a clear answer. As written, the term "revocable" in the phrase "any interest under any donative third party instrument which is . . . revocable" could reasonably be read to modify either "any interest" or "any donative third party instrument." The legislature was concerned not just with revocable instruments, but any interest that is revocable, and intended "revocable" to modify "any interest." The court is precluded from considering any interest in a donative third party instrument as an economic circumstance or property if that interest is capable of being canceled or withdrawn.

(g) Nothing within the language of the Uniform Dissolution of Marriage Act ("UDMA") demonstrates any legislative intent to import the Uniform Trust Code's definition of "revocable." Had the legislature intended to adopt the CUTC's definition, it knew how to do so, but it did not. Thus, applying the ordinary and natural meaning of a revocable interest, wife's father's power of appointment fell within the scope of this subsection. Her father could use the power of appointment upon his death to dispose of the family trust property without regard to wife's trust interest. Wife's father's power of appointment rendered wife's trust interest revocable.

(h) The district court did not err by excluding wife's discretionary and revocable interest in the family trust from its consideration as a property interest or economic circumstance.

h. ***McDonald v. McDonald (In re Est. of McDonald),* 2024 IL App (2d) 230195 (Appellate Court of Illinois 2024).** Putative-spouse claim is a claim and cause of action under the Probate Act and is time-barred if not filed within 2 years of decedent's death.

(1) On May 30, 2017, the circuit court entered an order declaring John W. McDonald III ("John") a disabled person in need of guardianship. The court appointed John's brother, Shawn McDonald ("Shawn"), as the plenary guardian of John's person and estate. Following Shawn's appointment, John moved to vacate the guardianship order. The court denied John's motion, but appointed independent counsel (Anthony Scifo) to assist John in seeking the termination of the guardianship.

(2) On July 11, 2017, John and Ellizzette McDonald ("Ellizzette") participated in a marriage ceremony. Scifo testified that Ellizzette never told him that she and John had married. The first indication Scifo had of John's and Ellizzette's wedding ceremony was when he received a marriage certificate from Ellizzette's attorney in October or November 2017. Scifo further testified that in July or August 2017, prior to learning of the purported marriage, he discussed the validity of a marriage with John and Ellizzette over the phone. Scifo testified, "I believe I said to them that they shouldn't get married because there was a guardianship action that had been imposed and the marriage could be voided by Shawn McDonald because he was the plenary guardian of John." Asked what Ellizzette's response was to his statement, Scifo testified that Ellizzette said: "In Australia there is common law marriages that happen all the time, that she was part of the State Department, and according to some international law, the two of them could get married and this wouldn't be an issue, and various other representations of law in other jurisdictions, to which I merely stated 'I am licensed in the State of Illinois and only know the law here.'"

(3) Scifo testified that he also told Ellizzette that common law marriages were not valid in Illinois.

(4) Scifo testified that, in response to Ellizzette's questions to him about marriage, he advised against marriage because Shawn would probably have the ability to void the marriage as the plenary guardian. Scifo also testified that, in conversations with John, he would reiterate the same points. Ellizzette stated in deposition testimony that she became aware that John was a ward of the court sometime in 2017. She later learned that Shawn had been appointed as the guardian. Ellizzette also stated in her deposition testimony that she knew Scifo represented John and that Scifo had "cautioned" John, prior to their wedding ceremony, "that they may try to invalidate the marriage."

(5) John died intestate on December 11, 2017. Shawn filed a petition for letters of administration and an affidavit of heirship. In the affidavit, Shawn averred that John's only heirs were his parents (John W. McDonald Jr. and Brenda K. McDonald) and his three siblings (Shawn, Heather Ladue, and Brett McDonald). Shawn acknowledged that John participated in a wedding ceremony with Ellizzette Duvall Minnicelli, but he claimed that the marriage was void. The trial court entered orders appointing Shawn administrator and declaring John's heirs to be his parents and three siblings.

(6) Shawn filed a petition for declaration of invalidity of marriage. Ellizzette moved to vacate the court's orders appointing Shawn administrator of John's estate and declaring heirship. Shawn voluntarily withdrew his petition for declaration of invalidity of marriage. On the same day, Shawn filed his response to Ellizzette's motion to vacate his appointment as administrator, asserting that, although Ellizzette may have participated in a marriage ceremony, John lacked the capacity to enter into a legally valid marriage contract because he was a ward subject to plenary guardianship. The trial court denied Ellizzette's motion to vacate the order appointing Shawn administrator but granted her leave to file a petition for letters of administration and an affidavit of heirship based on her assertion that she was John's surviving spouse and sole heir. Ellizzette filed that petition. The trial court denied Ellizzette's motion for judgment on the pleadings as "premature." The trial court entered an order granting Shawn's motion in limine and barring Ellizzette from testifying at trial regarding her putative marriage to John or regarding John's heirship.

(7) A bench trial on Ellizzette's claim of heirship was held and Ellizzette represented herself at the trial. At the close of Ellizzette's case, Shawn's attorney moved for a directed finding. The trial court granted Shawn's motion for a directed finding. In so ruling, the court stated that the minimum relevant evidence necessary to establish a prima facie case of a valid marriage was "a valid application for a marriage license, a ceremony performed in Edgar County and witnessed by two witnesses." The court then concluded that, as a matter of law, Ellizzette did not present a prima facie case of a valid marriage. Specifically, the court held that the marriage was neither properly witnessed nor licensed, that Ellizzette did not present a prima facie case of a valid marriage ceremony, and that no best-interest determination was made by the probate court. The court entered an order granting a directed finding in Shawn's favor.

(8) Ellizzette appealed, and the court of appeals reversed the trial court's ruling on Shawn's motion in limine that barred Ellizzette from testifying. The court of appeals concluded that the trial court erred in finding that there was no evidence that the purported marriage was properly licensed or that a valid marriage ceremony was performed in Edgar County. The court of appeals also determined that Illinois law does not have a statutory provision requiring the presence of witnesses for a marriage to be valid. The court also determined that state law does not require prior approval by the court before a ward can marry.

(9) Shawn filed a petition for leave to appeal, which the Illinois Supreme Court granted. The supreme court, in a 4-3 decision, affirmed the judgment of the trial court, concluding that Ellizzette failed to present a prima facie case that her marriage to John was valid, because the lack of a judicial determination that the marriage was in John's best interest rendered the marriage void. After the Illinois Supreme Court denied Ellizzette's petition for rehearing, Ellizzette filed a petition for a writ of certiorari with the United States Supreme Court. The United States Supreme Court denied Ellizzette's petition.

(10) While the parties' appeals were pending, Shawn filed a proposed distribution plan that he later amended. Under the amended proposed distribution plan, John's father and three siblings would each receive 25% of the net sum distributable to the estate. Ellizzette filed an objection to the amended proposed distribution plan. After the Illinois Supreme Court denied Ellizzette's petition for rehearing, Ellizzette filed a "Motion for Leave to File Amended Objections to Amended Proposed Distribution Plan of Shawn McDonald" (motion to amend objections).

(11) Ellizzette then asserted that putative-spouse status confers upon her "all rights Illinois confers on legal spouses, until the time she obtained knowledge that she was not legally married." Ellizzette contended that she had a good-faith belief that she was legally married to John because she participated in a marriage ceremony with John, she cohabited with John until the time of his death in the good-faith belief that she was married to him, and she did not obtain knowledge that she was not legally married under Illinois law until the Illinois Supreme Court denied her petition for rehearing. Ellizzette argued that, because Shawn's

amended proposed plan of distribution conflicts with her status as John's putative spouse, the trial court should grant her leave to file her amended objections, a copy of which was attached to the motion to amend objections. The trial court, without hearing evidence or entertaining argument, denied Ellizzette's motions. The trial court concluded that Ellizzette did not have a good-faith belief she was married to John and that her putative-spouse claim was untimely.

(12) Ellizzette appealed and the court of appeals affirmed on the following grounds:

(a) Ellizzette's putative-spouse claim is barred by the limitations provision in the Probate Act, which states that "[u]nless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent."

(b) Article 18 of the Probate Act (755 ILCS 5/art. XVIII (West 2022)) is titled "Claims Against Estates." Relevant here, section 18-12(a) imposes an initial period within which a claim may be filed against an estate but, in any event, section 18-12(b) bars all claims after two years from the decedent's death. Thus, a claim that is not filed within section 18-12(b)'s limitations period is barred.

(c) [*P35] The Probate Act broadly defines a "claim" as "any cause of action." Therefore, the two-year limitations provision applies to any claim regardless of its legal basis. This strict time frame was enacted by the legislature to facilitate the early settlement of estates.

(d) Ellizzette's putative-spouse claim, although raised in a motion, qualifies as a "cause of action" under the Probate Act because it constitutes a factual situation seeking to entitle Ellizzette to a remedy in court. In turn, it constitutes a "claim" within the meaning of the Probate Act. Ellizzette's putative-spouse claim is one "against the estate." Since John died on December 11, 2017, all claims, regardless of their legal basis, were required to be filed within two years after that date, or by December 11, 2019. Ellizzette first raised her putative-spouse claim on November 2, 2022, when she filed her motion to amend objections. Thus, Ellizzette missed the time within which to assert her putative-spouse claim against the estate. As such, the trial court properly determined that Ellizzette's motions, in which she sought to be awarded the entirety of John's estate as his putative spouse, were barred.

(e) Nothing in the plain language of section 18-10 supports Ellizzette's twisted reading of the statute. Ellizzette's contention that claims under article XVIII of the Probate Act involve payment of money by the estate to a person or entity, not a distribution of the estate to an heir, is belied by the language of the statute itself, which expressly refers to an award of a surviving spouse or child of the decedent. Moreover, Ellizzette's motions seek to distribute John's entire estate to her as his sole heir. Thus, as Shawn correctly observes, if successful, Ellizzette's claim will reduce the value of the estate.

(f) Ellizzette raised her putative-spouse claim more than two years after John's death. Accordingly, the trial court properly determined that Ellizzette's motions, in which she sought to be awarded the entirety of John's estate as his putative spouse, were time barred.

(g) Even if Ellizzette's putative-spouse claim had been timely, the trial court did not err in determining that she did not have a good-faith belief that she was lawfully married to John.

(h) The Illinois putative-spouse statute—section 305 of the Marriage Act—provides in relevant part as follows: "Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good-faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited, or declared invalid."

(i) Thus, the rights of a putative spouse are conferred upon anyone who has gone through a marriage ceremony and cohabited with another in the good-faith belief that he or she was married to the other individual. Ellizzette did not have a good-faith belief that she was married to John. Ellizzette disputes this finding. Regardless how the Illinois Supreme Court characterized her deposition testimony and the deposition testimony of Scifo, those deposition transcripts establish the following. Ellizzette knew, prior to the marriage, that John had been declared a ward of the court. Ellizzette knew that a guardian (Shawn) had been appointed for John. Ellizzette knew that an attorney (Scifo) had been appointed to represent John in the guardianship proceedings. Scifo provided both John and Ellizzette with information that a potential impediment to a marriage existed. Notably, Scifo stated that he discussed the validity of a marriage with John and Ellizzette, telling them "they shouldn't get married because there was a guardianship action that had been imposed" and "the marriage could be voided by Shawn McDonald because he was the plenary guardian of John." Scifo further testified that, in response to Ellizzette's questions to him about marriage, "[his] statements were always [that John] was under [a] guardianship and [he (Scifo)] advised against [marriage] because Shawn would probably have the ability to void the marriage *** as the plenary guardian." Although Scifo testified that these conversations took place after the date of the marriage (but before he knew of the marriage), Ellizzette acknowledged in her deposition testimony that Scifo had "cautioned" John, prior to their wedding ceremony, "that they may try to invalidate the marriage." This deposition testimony establishes that Ellizzette possessed "authoritative knowledge of some legal impediment" to the marriage, i.e., that the marriage might be invalid due to John's status as a ward. That Scifo did not represent Ellizzette is of no consequence. Scifo was an attorney appointed to represent John in his guardianship proceedings and Ellizzette questioned Scifo about marriage.

i. ***Glassie v. Doucette,* 316 A.3d 1152 (Supreme Court of Rhode Island 2024).** Claims for breach of divorce settlement agreement against decedent's estate barred due to seven-year delay in filing.

(1) Donelson C. Glassie ("testator") and Marcia Sallum Glassie ("plaintiff") were married in 1986, had three children, and were divorced in 1993. According to their property-settlement agreement ("PSA"), the testator was to execute a will that would not only treat his obligations under the PSA as "a claim against any assets in [his] [e]state" but also "specifically bequest to [plaintiff] an amount equal to said obligations." The PSA further provided that "[t]he obligation of [the testator] to maintain said assets and to bequest said sum to [plaintiff] shall be subject to modification by the Family Court from time-to-time as the obligations of [the testator] diminish under [the PSA]."

(2) A dispute soon unfolded over what the PSA required of the testator's will. In 1997, a Family Court justice determined that plaintiff was "entitled under the language of the [PSA] to the bequest of a sum certain equal to [the testator's] obligations." That sum was a "fixed figure," the hearing justice explained, and one that would "continue unless" the testator petitioned the Family Court for modifications consistent with any changes to his obligations. Following the decision of the Family Court, the testator executed a will that he soon amended with a codicil, which provided, in relevant part, that he would "give, devise and bequeath to [plaintiff] the sum of $2,000,000.00, or such other amount as shall be then required to fully satisfy all of [his] remaining obligations and responsibilities" under the PSA. According to a stipulation filed in Family Court, plaintiff found this language "to be in full compliance with the" relevant

provision of the PSA, and, in 1999, the testator executed a new will incorporating the language of the codicil in full.

(3) Not once before his death on February 3, 2011, did the testator return to Family Court and seek modifications to the bequest in his will. On May 3, 2012, plaintiff filed a $2,000,000 claim against the testator's estate in the Newport Probate Court, which the Executor ("defendant") disallowed the following week. The dispute then made its way to Superior Court, and, in 2015, plaintiff was awarded $2,000,000, less the proceeds of a life insurance policy that she received upon the testator's death, as well as attorneys' fees. The Rhode Island Supreme Court vacated the Superior Court judgment and determined that the disputed provision in the will is ambiguous because it does not clearly specify under what circumstances plaintiff is to receive the sum of $2,000,000 or the circumstances under which she is to receive such other amount necessary to satisfy all of the testator's remaining obligations.

(4) On remand, the Superior Court denied plaintiff's motion to amend her complaint to add a claim for breach of contract. The plaintiff filed a petition for leave to file a claim out of time and, after the court denied her petition, she appealed that denial to the Superior Court.

(5) The Superior Court held a bench trial on plaintiff's appeal from the denial of her petition to file a late claim for breach of contract. The trial justice affirmed the probate court and denied plaintiff's petition to bring a claim for breach of contract. Plaintiff appealed and the Rhode Island Supreme Court affirmed on the following grounds:

   (a) The trial justice determined, based on defense counsel's cross-examination of plaintiff, that plaintiff knew in 2012 that she and defendant held conflicting interpretations of the disputed will provision. Even if plaintiff arguably did not concede at trial she knew in 2012 that defendant read the will provision differently than she did, or even if she did concede and thereafter retracted her concession, neither view of the evidence will supersede that of the trial justice unless the latter is not supported by competent evidence. Plaintiff does not challenge this finding on appeal, and she appears to concede in her brief that she learned that defendant held a different reading of the provision when her claim was disallowed in 2012.

   (b) The possibility that a factfinder would construe the provision in a manner inconsistent with the testator's contractual obligations under the PSA, arose in 2012, when defendant disallowed plaintiff's $2,000,000 claim against the estate based—as she concedes then to have known—on his conflicting interpretation of the will provision. As soon as this happened, plaintiff reasonably should have known there was a possibility, however remote in her view, that a factfinder would construe the provision against what she asserts to be the testator's obligations under the PSA. The plaintiff, however, waited another seven years before filing her claim for breach of contract, and the trial justice found that it was not excusable neglect for her to do so.

   (c) Section 33-11-5(b) creates an exception to § 33-11-5(a), which bars claims against a decedent's estate that are not "presented within six (6) months from the first publication" of the estate. If a creditor "fail[s] to present a claim" within that six-month period "by reason of accident, mistake, excusable neglect or lack of adequate notice of decedent's estate," § 33-11-5(b) permits the creditor, "before distribution of the estate," to petition "for leave to present a claim out of time."

   (d) The defendant may have denied plaintiff's $2,000,000 claim against the estate more than six months after first publication, but that does not mean that § 33-11-5 is inapposite to her contract claim. Had plaintiff sought to file the latter claim as soon as the former was denied, perhaps there would have been a finding of excusable neglect. The question before the trial justice, however, was whether it was excusable neglect for plaintiff to file her claim, not in 2012, but in 2019. On this question, the trial justice determined that plaintiff "knew in 2012" that defendant disallowed her $2,000,000 claim against the estate based on defendant's conflicting interpretation of the will provision at issue, which should have alerted her to a potential claim for breach of contract. Because a reasonably prudent person under similar circumstances would not have waited another seven years before seeking to bring such a claim, he next found that plaintiff's delay was not the result of excusable neglect.

(e) There is no reason to disturb these factual findings of the trial justice. The plaintiff concedes that she knew in 2012 that the defendant disallowed her $2,000,000 claim against the estate because he read the will provision at issue differently than she did. If that is true, then the plaintiff was aware in 2012 of the facts that underlie her breach-of-contract claim. That claim alleges that the testator, the plaintiff's former husband, violated his obligations under the PSA because the language of his will falls short of what, in the plaintiff's view, the terms of the PSA require. Although the plaintiff should have been aware of her potential claim in 2012, she did not seek to amend her complaint until 2019. This was some four years after the parties litigated a dispute, in Superior Court, over the meaning of the will provision, not to mention almost two years after this Court issued the decision that, according to the plaintiff, first provided notice of her claim. The plaintiff's failure to timely present her claim for breach of contract was not due to excusable neglect and, therefore, her claim must be denied.

j. ***In re Est. of Bozeman,*** **2024 N.C. App. LEXIS 1050 (Court of Appeals of North Carolina 2024).** A victim of domestic violence does not commit abandonment that bars inheritance when refusing to live with her assailant.

(1) Johnathan Matthew Bozeman died intestate in 2022. He was survived by his mother, Petitioner Pamela Tompkins Boyd ("Mother"), and his wife, Respondent Sage C. Huddleston ("Wife"). Mother filed a motion for an order declaring that Wife be barred from inheriting from her husband's Estate, alleging that Wife had abandoned him prior to his death.

(2) Wife lived in Florida and was the "estranged wife" of Mr. Bozeman (up to his death). Mr. Bozeman, at all times relevant to our analysis, lived in North Carolina.

(3) From 1999 to 2000, almost two decades prior to their marriage, Wife and Mr. Bozeman had cohabited in a romantic relationship. At that time, Wife became aware of Mr. Bozeman's substance abuse problem, which included periods of sobriety and periods of relapse.

(4) In 2018, they married and honeymooned for approximately one month in Europe. Upon their return to the United States, Mr. Bozeman continued to live in North Carolina, and Wife continued to live in Florida, "at least in part so that she could care for her nephew." She "visited" Mr. Bozeman on some weekends. Mr. Bozeman, however, never visited Wife in Florida, as he had no valid driver's license. Wife had a job which did not prevent her from living in North Carolina, as she could and did work remotely in her job. They never established a marital home.

(5) During the marriage, Mr. Bozeman continued to struggle with substance abuse, experiencing periods of relapse, of which Wife was aware.

(6) In July 2019, Wife stopped visiting Mr. Bozeman; and Mother became aware that the marriage between Mr. Bozeman and Wife was ending based on conversations Mother had with each of them. They never saw each other again. In any event, that same month (July 2019), Mr. Bozeman began sending Wife angry emails. However, in April 2020, he sent her an email apologizing for his conduct, though acknowledging that their marriage was coming to an end. His April 2020 email to Wife stated: "I really am sorry things ended up this way. More importantly I'm sorry for all the mean things that I said to you in the past. I realize now that I was hurting real bad and I was only trying to make you hurt as well. Things are really slow for me right now but I would like you to know that I intend to pay you back for Europe. I hope you find some form of happiness and I'm sorry for any sadness that I've caused you."

(7) Wife and Mr. Bozeman never divorced. They remained husband and wife for the remainder of Mr. Bozeman's life. Mr. Bozeman died in January 2022. There was evidence from both Wife and Mother that Wife and Mr. Bozeman continued to communicate. Mother testified that she was aware that Wife and Mr. Bozeman spoke on at least four occasions after July 2019. Wife testified that she and Mr. Bozeman spoke on several occasions up through the latter part of 2021, including making plans to meet up in Las Vegas in late 2021, but that Mr. Bozeman never showed and then died a few months later from an overdose.

(8) After Mr. Bozeman's death, Wife had lengthy conversations with a cousin of Mr. Bozeman in which she acknowledged that she had no contact with Mr. Bozeman, that the marital relationship had ended, and that she was living with someone else. Based on those conversations, Mother believed that Wife was in a romantic relationship with someone else. Wife admitted to Mother that she was in a romantic relationship with someone else after July 2019, and testified that she had roommates during this period but no live-in paramour.

(9) After a hearing on the matter, the trial court entered an order barring Wife from inheriting from the Estate of her deceased husband. Wife appealed and the court of appeals reversed and remanded on the following grounds:

 (a) N.C.G.S. § 31A-1(a)(3) provides that a surviving spouse loses her rights of intestate succession in her deceased spouse's estate if two things are shown; namely, that she "willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death."

 (b) Wife conceded that she and Mr. Bozeman were living apart at the time of Mr. Bozeman's death.

 (c) The trial court never actually found that Wife was, indeed, in a romantic relationship with someone else prior to Mr. Bozeman's death.

 (d) The trial court made no findings regarding Mr. Bozeman's condition in 2020. Rather, the trial court found that Mr. Bozeman had a housemate in 2020 and that this housemate stated that he never observed any drug use, or psychotic or violent behavior by Mr. Bozeman while he was living there and that this roommate never observed anything to indicate that it would not be safe for Wife to live with Mr. Bozeman. Again, however, the trial court failed to make a finding on the key factual issue: It never found whether it actually would have been safe for Wife to live with Mr. Bozeman during this time.

 (e) Marital abandonment is when a spouse "brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." Whether the surviving spouse had the intent to abandon her spouse is a finding of fact. The elements of abandonment must be based on the conditions as they existed at the time of Mr. Bozeman's death. Further, the burden is on the party asserting that an abandonment has occurred to prove each and every element of abandonment.

 (f) Wife argued that it is impossible for abandonment to occur where she never actually lived with Mr. Bozeman, contending that she could not have brought her cohabitation with Mr. Bozeman "to an end" if they never actually cohabitated in the first place. "Cohabitation" as the "dwelling together continuously and habitually" and the "voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people." It is true that Wife and Mr. Bozeman never "dwelled" in the same marital home. But the evidence and findings of the trial court do show that they spent a month together in Europe and then, for a period, had an arrangement where they spent many weekends together at Mr. Bozeman's North Carolina home. The trial court also found that Wife registered to vote and registered her vehicle in North Carolina for a period of time during the marriage.

(g) However, even assuming that Wife never "cohabited" with Mr. Bozeman, there is no requirement that spouses have previously established a marital home as part of showing that one spouse has abandoned the other spouse. The courts have never held that a spouse who has never actually moved in with her spouse cannot abandon that spouse for purposes of being disqualified from inheriting.

(h) To be sure, there are marriages where the spouses choose to live in separate residences but, otherwise, enjoy the benefits and assume the duties of a marriage. And there may be instances where a person cuts off communication with her spouse as they return from their honeymoon before establishing a marital home. In such situations, if one spouse chooses to end contact with the other spouse without the consent of the other spouse, without any justification, and without any intent on renewing the relationship, and if the abandoned spouse then dies, it would not be error for a trial court to order that the abandoning spouse be disqualified from inheriting from her abandoned spouse.

(i) The trial court's order is deficient in determining whether the paucity of contact between her and Mr. Bozeman after July 2019 was without Mr. Bozeman's consent. The trial court found that Wife never visited Mr. Bozeman in North Carolina. However, there was evidence that she was willing to have him visit and even live with her in Florida if he became sober. And there was evidence that they had planned to see each other in Las Vegas shortly before his death but that it was him that did not show, due to a relapse.

(j) It may be that Wife refused to live with Mr. Bozeman in North Carolina, but the trial court never made any finding regarding Mr. Bozeman's role in not traveling to see Wife in Florida or to remain sober and move to Florida. Further, the trial court never made any finding regarding Mr. Bozeman's statement in his April 2020 statement that he believed the marriage had ended.

(k) And, here, there is no finding that, just prior to Mr. Bozeman's death, they were living apart without Mr. Bozeman's consent. Rather, their last contact mentioned by the trial court was Mr. Bozeman's April 2020 email in which he apologized for hurting her. This email shows his consent for them to live apart as they sought to end their marriage. However, the marriage did not end before Mr. Bozeman died.

(l) The trial court's order is deficient regarding the "intent not to renew" element of abandonment. Here, there is no finding that at the time of Mr. Bozeman's death Wife had "no intent" to continue seeking reconciliation in the marriage. The Court found that Mr. Bozeman stated in his April 2020 email that he believed the marriage to be ending. However, there was evidence that Mr. Bozeman sent this email during a period of sobriety and that, thereafter, they reopened communications in which they each indicated a desire to reconcile. Also, neither ever filed for divorce.

(m) The trial court's order is deficient in determining whether she ended contact with Mr. Bozeman or otherwise did so without justification. Mother failed to meet her burden of producing evidence that Wife's decision to stop visiting Mr. Bozeman in North Carolina after July 2019 was without justification.

(n) Presuming that Wife unilaterally decided to separate from Mr. Bozeman, it is not Wife's burden to show as a defense that she was justified in doing so. Rather, "without justification" is an affirmative element of abandonment. Accordingly, it is Mother's burden to show, not only that Wife left Mr. Bozeman but that she did so without justification.

(o) Wife contends that she was justified in living apart from Mr. Bozeman, contending that he treated her cruelly due to his drug addiction. When the husband, by cruel treatment, renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, not hers. Again, though, it is not incumbent on Wife to show that Mr. Bozeman abandoned her. Rather, the only issue here is whether she abandoned Mr. Bozeman. And it may be that no abandonment occurred.

(p) Mother contended that Wife was not justified because Wife knew of Mr. Bozeman's on-again, off-again drug use when she married him and that her "plan of leaving him when he was using drugs and, purportedly, returning when he was sober" did not justify her "abandonment."

(q) However, the only evidence presented at the hearing showing the reason Wife and Mr. Bozeman stopped seeing each other in July 2019 was from Wife, that the separation was due to Mr. Bozeman's cruel behavior towards her during his relapses. For instance, she testified that she was subjected to physical abuse when Mr. Bozeman would mix Xanax and alcohol which, if true, would exacerbate the impact of Mr. Bozeman's substance abuse and addiction. A victim of domestic violence does not commit abandonment when refusing to live with his or her assailant. Acquiescence and attempts to improve the conditions throughout the marriage do not constitute consent to future abuse and would not make her later decision to leave or her refusal to rejoin the marriage unjustified. Her testimony about Mr. Bozeman's threatening behavior was bolstered by some of Mr. Bozeman's post-July 2019 emails to her in which he threatened her, as described below.

(r) Mother offered no evidence to show that the July 2019 separation was the unilateral choice of Wife, done "without justification." She offered no evidence showing that Mr. Bozeman had not been threatening up to July 2019. Rather, in her testimony, Mother testified that she did not know why Wife and Mr. Bozeman stopped seeing each other as of July 2019. She testified that she spoke with both Wife and Mr. Bozeman around the time of the separation but that she never asked them what exactly happened. Again, it is not necessary for Wife to prevail that the trial court believe that Mr. Bozeman was a threat to her up to July 2019. Rather, it is sufficient if Mother failed to present any evidence showing that Mr. Bozeman's bad conduct was not the reason for the separation.

(s) There was evidence that Wife, at some later point, was in a romantic relationship with someone else (which she denies). But there is no evidence that she was in such a relationship during the marriage in or prior to July 2019. Rather, Mother testified that she believed the relationship did not start until "after" July 2019, and probably not until 2020 or 2021. In sum, the only evidence as to the reasons for the July 2019 separation came from Wife, that the separation was due to Mr. Bozeman's relapse and ill treatment of Wife.

(t) Evidence shows that in the months following July 2019, Mr. Bozeman sent a series of cruel emails to Wife, sometimes followed by apologetic emails, before his final apology in his April 2020 email. In some of the emails, he physically threatened Wife, stating in one email that "when you see me next[,] it will be your last" and, in another, that "[y]ou might get what you're after! Burning down the house." The evidence further demonstrated Mr. Bozeman's ups and downs during this time as he struggled with his addiction in 2019. For example, on 2 October 2019, he sent a series of cruel emails to Wife. But three days later, on 5 October 2019, he sent an email stating that he loved her, thought she was smart, and would have loved her for the rest of their lives. He admitted in his April 2020 email that he had sent the prior cruel/threatening emails "to make [her] hurt as well." There was no evidence offered at the hearing that after April 2020 Mr. Bozeman ever sought to reconcile with Wife which was rebuffed by Wife.

(u) Assuming the separation of Wife and Mr. Bozeman was unilaterally Wife's decision, there was no evidence showing that the separation was without justification. There is no evidence showing that Wife engaged in an abandonment of Mr. Bozeman after April 2020. There is no evidence that he ever sought to go see Wife or that he was rebuffed in efforts to get back with her. Accordingly, Wife was entitled to a ruling declaring her eligible to take under her deceased husband's estate, as Mother failed to present evidence showing all the elements of abandonment.

k. ***In re Estate of Pelton,* 2024 N.H. LEXIS 271 (Supreme Court of New Hampshire 2024).** Husband's consent to wife's "marrying" and living with another man and agreement with her life choices vitiates a claim of abandonment that bars wife's inheritance.

(1) In October 2010, Roger Lee Pelton and Tina Burnham were married in Maine. The two decided to keep their marriage a secret. They lived together from 2008 to 2013. In September 2013, Tina purportedly married Lincoln Burnham at Pelton's home. After the purported marriage to Lincoln, the respondent moved out of Pelton's home and moved in with Lincoln. Pelton died intestate on December 13, 2022.

(2) After Pelton's death, the administrator, one of Pelton's three daughters, submitted his estate for probate. Believing that she was entitled to a portion of his estate, Tina entered the case as a "Surviving Spouse." The administrator filed a motion to estop the respondent from inheriting from the estate as a surviving spouse. Following a hearing, the circuit court denied the administrator's motion. The administrator unsuccessfully sought reconsideration.

(3) The administrator appealed and the New Hampshire Supreme Court affirmed in part, vacated in part, and remanded on the following grounds:

(a) RSA 560:18 provides: "If a husband has willingly abandoned his wife and has absented himself from her, or has willfully neglected to support her, or has not been heard from, in consequence of his own neglect, for the term of three years next preceding her death, he shall not be entitled to any interest or portion in her estate, real or personal, except such as she may have given to him in her will." Another statute provides that gender-specific terms relating to the marital relationship are to be construed to be gender-neutral for all purposes throughout New Hampshire law.

(b) The trial court found that the evidence supports the reasonable inference that, for whatever reason, the decedent tacitly consented and otherwise agreed with Respondent's subsequent life choices. The record supports this finding. Thus, the trial court determined that such an arrangement vitiates a claim of abandonment as it is defined in New Hampshire law. The trial court's conclusion is correct.

(c) The abandonment statute has remained unchanged since at least 1891. An agreement between a husband and wife to live apart did not constitute statutory abandonment. Merely cohabitating with another woman does not as a matter of law make out a case of abandonment. Therefore, consent of the other spouse defeats a claim of abandonment.

(d) RSA 560:19 provides: "If, at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for divorce, such guilty survivor shall not be entitled to any interest or portion in the real or personal estate of said decedent, except such as may be given to such survivor by the will of the deceased."

(e) Adultery is conduct that constitutes cause for divorce; bigamy is not. The trial court drew "the reasonable inference" that the respondent engaged in adultery. However, the court found that the evidence supported that the decedent "impliedly consented to the Respondent's lifestyle choices." The trial court also concluded that because the decedent had not commenced an action for divorce, it did not need to decide whether sufficient grounds existed for the Decedent to seek a divorce for cause.

(f) By its plain language, the statute requires, in relevant part, a finding that the decedent was justifiably living apart from the surviving spouse because such survivor was or had been guilty of conduct which constitutes cause for divorce. The trial court made no finding with respect to the first condition. On remand, it should. With respect to the second condition, the evidence supports the trial court's conclusion that the respondent engaged in adultery. The trial court may then consider whether there is "conclusive" evidence of an affirmative defense to adultery.

24. WILLS, PROBATE, & ESTATE ADMINISTRATION

a. ***In re Est. of Dahlstrom,* 2024 Wash. App. LEXIS 1514 (2024).** Attorney testimony of customary office practices not adequate to support probate of unsigned copy of lost will.

(1) Carol Dahlstrom completed a Puget Sound "Legacy Confirmation Form" and sent it to the University of Puget Sound ("UPS" or the "university"). On the form, Dahlstrom noted an intent to include UPS in her estate plan and requested more information about deferring gifts. Carol then met with Kurt Graupensperger, an employee of the UPS Office of University Relations. During the meeting, she declared that she wanted to leave her entire estate to UPS and that she had met with her attorney to begin the process of preparing a will to accomplish her wishes. Dahlstrom also mentioned a desire to endow scholarships for UPS students majoring in education. During the meeting, Graupensperger provided Dahlstrom language options for her and her attorney to consider when inserting a bequest to the university in her will.

(2) Carol Dahlstrom visited with UPS Dean of the School of Education Chris Kline. The two discussed the education program at the university and Dahlstrom's intended scholarship to be established through an estate bequest. Dahlstrom also mentioned a wish to extend a $50,000 bequest toward athletics in honor of her brother, a graduate at the university.

(3) Carol Dahlstrom then visited her attorney at his office to discuss estate planning. Dahlstrom brought the paper that contained language pertaining to gifts to University of Puget Sound. Counsel reviewed the proposed language in the paper, which became articles in a draft will. Counsel included the language in a will he drafted for Dahlstrom. Counsel mailed the will draft to Carol Dahlstrom for her review. Dahlstrom asked for no changes to the draft. According to counsel, Carol Dahlstrom signed the will on February 25, 2009. Nevertheless, counsel lacked any memory of Dahlstrom appearing at his office on February 25 or of her signing the will. He lacks any memory of witnesses signing the will. He does not know the identity of any witness.

(4) Despite no memory of the signing and witnessing of Carol Dahlstrom's will, counsel testified with confidence that Dahlstrom visited his law office and signed the will. He based this confidence on other circumstances. He personally typed the date, February 25, 2009, on the will using his manual Smith Corona typewriter, a typewriter different from the one used to type the will. He customarily typed the date with the manual typewriter when a client signed the will. He stamped "COPY" on the signature line on his copy of the will. According to counsel, this stamp shows the original to have been signed by Dahlstrom. The bottom left of counsel's copy of the will shows counsel's notary stamp. According to counsel, his notary stamp would not be present unless Dahlstrom signed the will. The notary seal and the "COPY" stamp does not, however, necessarily mean that witnesses were present. Nevertheless, counsel cannot identify the employees who witnessed Carol Dahlstrom's signing. He has no recollection of any witnesses signing the will. Under his standard practice, however, counsel did not direct clients to sign a will without witnesses present. Counsel does not know what Carol Dahlstrom did with the original will document. Counsel retired before the death of Dahlstrom. He kept no copy of the signed will. He does not know whether Dahlstrom executed a new will or revoked the 2009 will.

(5) Counsel confirmed that the unsigned copy of the will discovered in Carol Dahlstrom's residence after her 2019 death contained the same contents as the will he prepared in 2009. The will found in Dahlstrom's home has the stamp "COPY," which, according to counsel,

evidences it is a copy of the will Dahlstrom signed. The copy also showed the notary seal of counsel.

(6) Carol Dahlstrom telephoned Kurt Graupensperger, of the UPS Office of University Relations, to cancel an appointment wherein Graupensperger would have reviewed and received a copy of Dahlstrom's will. During the call, Dahlstrom informed Graupensperger that her estate planning documents were complete and that her attorney incorporated much of the language that Graupensperger recommended for a bequest to UPS. Graupensperger never saw a copy of a will. Graupensperger does not know if Carol Dahlstrom ever revoked a will after signing it in 2008 or 2009.

(7) In 2015, George Mills, Associate Vice-President of UPS University Relations, telephoned Carol Dahlstrom to discuss her estate bequests. During the call, Dahlstrom commented that she had recently revised the two sections in her will that distributed her estate to UPS. According to Dahlstrom, one section distributed $50,000 to athletics in her brother's honor. Dahlstrom agreed, at Mills' request, to provide a copy of the pertinent sections of the will. Carol Dahlstrom sent a copy of her will's bequest sections to George Mills via a letter. Dahlstrom did not forward to Mills the pages of her will that included the testator's signature line or the witnesses' signature lines. While living, Dahlstrom never provided the University of Puget Sound, despite its requests, with a copy of any executed or unexecuted will.

(8) In 2019, Carol Dahlstrom died at her home in Lakewood. At the time of her death, her closest living relatives were her two nieces, Hailey Dahlstrom and Kate Mata, and her nephew, Sean Dahlstrom. After her death, emergency responders found, at her residence, an unattested and unsigned copy of the will purportedly prepared by counsel. George Mills died in February 2020.

(9) Carol Dahlstrom's niece, Kate Mata, filed a petition for an order appointing her as the administrator of Dahlstrom's estate. She claimed that Dahlstrom died intestate. The superior court signed an order appointing Mata and issuing letters of administration. University of Puget Sound filed a petition to probate the purported lost will. Kate Mata filed a summary judgment motion to dismiss UPS' petition. UPS filed an affidavit of counsel that avowed that counsel watched her sign her Will and he notarized it on February 25, 2009. Mata thereafter deposed counsel, who at that time could not recall sitting down with Carol Dahlstrom on February 25, 2009 and watching her execute the Will, and could not recall witnesses signing the Will. The superior court granted Kate Mata's summary judgment motion, thereby declaring that Carol Dahlstrom died intestate.

(10) UPS appealed and the court of appeals affirmed on the following grounds:

(a) Counsel's notary stamp and the "COPY" stamp on the copy of the will, in accordance with his standard practice, show that Dahlstrom signed the Will. The stamps, however, do not demonstrate that subscribing witnesses signed.

(b) Although the relevant statute only demands that the proponent establish the contents of a lost will by clear, cogent, and convincing evidence, the Washington Supreme Court has imposed this same burden of proof as to the execution of the will. The copy of the will submitted to the court by UPS lacks a signature of Carol Dahlstrom. The copy also lacks the signatures of two attesting witnesses. Assuming any witness witnessed the signing, we do not know the identity of that witness or witnesses.

(c) The testator and the two subscribing witnesses must be competent. Counsel never testified to the competency of Carol Dahlstrom or the will witnesses. In the event a will is lost, the court may take proof of the execution and validity of the will. A lost will must have the same requirements as all other wills. A court deems a lost will properly executed if the will is (1) in writing, (2) signed by either the testator or another person under the testator's direction in the testator's presence, and (3) attested to by two witnesses in the presence of the testator and at the testator's request. The witness proffered to prove the execution of a lost will must be able to testify to his or her own personal knowledge regarding both the testator and the subscribing witnesses signing the will.

(d) Counsel fails to meet the definition of witness for purposes of the lost will statute and his testimony fails to provide clear, cogent, and convincing evidence that Carol Dahlstrom or two attesting witnesses signed the will.

(e) Counsel did not state that he had a memory of or personal knowledge of watching her sign the will. One might argue that the language "I watched her sign" necessarily means he remembers watching. Nevertheless, his detailed deposition testimony contradicted such a reading of the affidavit. Counsel unequivocally testified, during the deposition, that he lacked any memory of either Dahlstrom or the witnesses signing. Generally, when a party gives clear answers to unambiguous questions in a deposition that negate the existence of any question of material fact, that party cannot thereafter create an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. Counsel explained, in his deposition, that his affidavit testimony of having seen Carol Dahlstrom signing the will was based on his normal business practice not his personal knowledge.

b. ***In re Estate of Brown,*** **2024 Tex. LEXIS 684 (Texas Supreme Court 2024).** Unsworn testimony by decedent's legal guardian is admissible to meet burden of proving lost will.

(1) In August 2009, Myrtle Dell Brown signed a will naming her cousin, Annabelle Powell, executor and sole distributee of her estate. Brown and Powell subsequently had a falling out because Powell fired one of Brown's caretakers and allegedly stole from Brown. One of Brown's caretakers told Beverly June Eriks about the situation, and Eriks decided to help Brown after notifying the State Bar.

(2) On October 1, 2009, Brown allegedly made the new attested will at issue here, which was drafted by attorney John Yow. The October 2009 will revoked all prior wills, named the Humane Society of the United States sole distributee of her estate, and named Eriks independent executor. The original October 2009 will was in Brown's possession after signing.

(3) Shortly after the October 2009 will's signing, David Easterling, a former attorney of Brown, wrote a letter to the trial court suggesting the need for guardianship. The trial court opened a guardianship proceeding and appointed attorney Catherine Wylie as Brown's guardian on October 19, 2009. Wylie concluded that Brown's caretakers were stealing from her. According to the trial court, Brown also told guardian Wylie that Eriks was stealing from her, but there are no details underlying this allegation. Within a few months, Brown moved to an assisted living center, where she passed away in June 2018.

(4) In August 2018, Eriks filed an unopposed application to probate a copy of Brown's October 2009 will, in which she states that the original will could not be located and that she believed it had been accidentally disposed of during the guardianship. At the trial court's direction, Wylie then filed an Application for Determination and Declaration of Heirship in December 2018. That same month, Eriks moved the court to reconsider and objected to an heirship determination, and the Society filed its own application for probate, which was unopposed. The Society also filed a jury demand, requesting a trial by jury of any contested matter.

(5) At trial, Wylie gave possibly unsworn testimony that Brown's caretakers were stealing from Brown, that Brown's papers and belongings were disordered and had clearly been gone through before Wylie searched for the original will, and that Brown was very easily exploited. Wylie also observed that several people had access to and frequently entered and left Brown's quarters at the assisted living center. Although Brown had a "history of hiding" valuables such as cash, Wylie explained that her search for Brown's original October 2009 will was so thorough that she "cleared the whole house" and "if there was an original it was

not in her home or in the safe deposit box." The trial court stated that it "want[s] the Humane Society to get their money too," but it ultimately refused to probate a copy of the October 2009 will, rejecting the proponents' insistence that "[t]hey probate copies [of wills] every day in every court." Despite the case's uncontested nature, the trial court denied the application for probate.

(6) The Society appealed and the court of appeals affirmed. The Society further appealed and the Texas Supreme Court reversed and remanded on the following grounds:

(a) All applications to probate a will must meet certain requirements, which include establishing that an original will was not subsequently revoked. Two additional requirements apply when an original will is not produced in court. First, the applicant must prove the cause of nonproduction. Second, if the will was last seen in the testator's possession or in a place to which she had ready access, the applicant must overcome a rebuttable presumption that the testator revoked the will.

(b) To prove the cause of nonproduction of the will, an applicant must present evidence sufficient to satisfy the court that the will cannot by any reasonable diligence be produced. Although applicants are not required to prove exactly how the original will was lost, they must demonstrate the will could not be found after a reasonably diligent search. There is no single correct method to conduct a reasonably diligent search for a will; courts have held that searches broad enough to include safe-deposit boxes and other places where the will would likely be found are sufficient.

(c) When an original will cannot be located and was last seen in the testator's possession, a presumption arises that the testator destroyed the will with the intent of revoking it. But overcoming the presumption of revocation is a low hurdle because it may be rebutted with circumstantial evidence contrary to the presumption. The presumption may also be rebutted with a plausible explanation for the will's disappearance, such as through natural disaster or fraudulent destruction.

(d) The court of appeals erred by not viewing Wylie's unsworn testimony as evidence and concluding the Society failed to carry its burden on this requirement.

(e) As guardian of Brown's person and estate, Wylie is an officer of the court. When, during an evidentiary hearing, counsel makes unsworn factual statements as an officer of the court, on the record and without objection from opposing counsel, such statements are properly considered as evidence. Here, Wylie made her statements in her capacity as an officer of the court. As an officer of the court, Wylie's testimony is properly considered evidence.

(f) All parties and the trial court were aware of Wylie's role at the probate hearing, yet no one objected to her not being sworn on the record. There is also no doubt Wylie's statements were tendered based on her personal knowledge because she conducted the search of Brown's home herself. Because Wylie put all relevant parties—and the trial court itself—on notice that she was attempting to explain the cause of the original will's nonproduction, there is not a bar to consideration of her testimony.

(g) The court did not make a ruling at the hearing that Wylie's testimony was inadmissible. Thus, the Society did not have an opportunity to cure any deficiency. Under these circumstances, Wylie's testimony should be considered evidence.

(h) When Wylie's testimony is considered, the Society established the cause of nonproduction as a matter of law. Wylie's search of Brown's home and Yow's search of his office were on par with searches held to be reasonably diligent in other cases. No evidence refutes Wylie's or Yow's testimony, and the trial court itself found that a diligent search of Brown's home and safe deposit box occurred. The trial court's legal conclusion—that the evidence of the cause of the will's nonproduction was insufficient—therefore conflicts with its own factual finding. Accordingly, even assuming the cause of nonproduction must be proved by a preponderance of the evidence in an uncontested proceeding, the Society carried its burden on this requirement.

(i) The court of appeals therefore should have proceeded to consider whether the Society rebutted the presumption of revocation. Because the court did not address that issue, we remand for it to do so in the first instance.

c. ***In re Est. of Beck,*** **2024 MT 249 (Supreme Court of Montana 2024).** Video recording not admitted to probate as a will.

(1) Jesse Beck ("Jesse") crashed his motorcycle. While Jesse was receiving help on the side of a road from another driver, a Carbon County Sheriff's Office deputy, who was responding to the report of Jesse's accident, tragically struck and killed both Jesse and the other driver. Jesse was survived by his only child, Alexia Beck ("Alexia").

(2) Four days prior to his death, Jesse had sent Jason Beck ("Jason") a phone video recording of himself, in which Jesse stated: "I, Jesse Beck, give all my possessions, if anything happens to me whatsoever, I give all my possessions, everything, to Jason Beck, my brother. Christina Fontineau does not get one thing, not one thing."

(3) Limited detail about the circumstances surrounding the video, other than its delivery to Jason's cellphone, is set forth in the record. No witnesses appear or are apparent in the recording, and Jesse's words were not reduced to written form and signed by Jesse. Christina Fontineau was a nonrelative who would not be entitled to take from Jesse's Estate (the "Estate") under the laws of intestacy.

(4) Following Jesse's death, Alexia filed a petition for informal appointment as personal representative in intestacy to administer the Estate, which was ordered. She also initiated a wrongful death action in connection with the accident in which Jesse was struck and killed. Jason filed a complaint seeking intervention in the wrongful death action, a petition for formal proceedings to probate Jesse's video recording as an enforceable will, which he argued would make him the sole devisee, and for appointment as personal representative of the Estate and removal of Alexia as personal representative. Alexia filed an objection, arguing the video did not qualify as a will under statute. The District Court ordered additional briefing on the question of whether the video could constitute a will.

(5) After briefing, the District Court held that a video recording of a decedent, even if it records him or her expressing testamentary intent, does not qualify as a "document or writing upon a document" and denied Jason's petition to probate Jesse's video recording. Jason appealed and the Montana Supreme Court affirmed on the following grounds:

(a) Section 72-2-522, MCA, provides as follows: "Writings intended as wills. Although a document or writing added upon a document was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will."

(b) The expansion of electronic media applications has resulted in proposed legislation to provide for and regulate their uses in commercial and legal affairs, but this has not extended to approval of a nonwritten, video will. In 2001, the Legislature enacted the Uniform Electronic Transactions Act ("UETA") to facilitate electronic transactions consistent with other applicable law by allowing the use of electronic signatures. However, the Legislature limited the UETA, in the context here, by specifically excluding from its scope laws governing the creation and execution of wills, codicils, or testamentary trusts. In recent years, the Uniform Laws Commission (ULC) has produced the Uniform Electronic Wills Act ("UEWA"), for the purpose of bringing estate planning into the digital age by allowing the online execution of wills while preserving the legal safeguards to ensure a will's authenticity. The Montana Legislature has not adopted the UEWA, but even so, the Act as proposed by the ULC still requires a testator to make a will that is readable as text at the time the testator electronically signs the document, and the testator's signature must be witnessed by two witnesses who add their own electronic signatures. There has not been, in any state, legislative authorization of nonwritten, video wills, nor approval of such a will by any court applying the UPC.

(c) An unsigned electronic note on the decedent's phone that the decedent had referenced in a separate handwritten note and described as his "farewell," and which included his instructions about where to find his will, as was at issue in In re Estate of Horton, is different than this case.

(d) The statute's plain language and its structure and context clearly imply that a "document," as used in § 72-2-523, MCA, is a physical paper or possibly digital file on which words are produced, and which would be capable of being signed and witnessed, thus not extending to a video or audio recording. There is no language to suggest that the Legislature contemplated audio or video recordings. There is no indication that the stated statutory purpose—of relaxing formal execution requirements for written documents that "harmlessly" failed to satisfy all of the requirements—was intended to authorize entirely new forms of testamentary disposition not previously contemplated by the UPC. Jesse's video, while undoubtedly expressing testamentary intent, comports with none of the § 72-2-522, MCA, requirements, nor attempts to. Even under the yet-to-be adopted UEWA, the video satisfies none of its legal standards to ensure a will's authenticity. It was neither written, signed, or witnessed by anyone, nor accompanied by documentation attempting to do those things. Thus, to the extent that the video can be considered an attempted will, the errors are not harmless or de minimis. Such an expansive interpretation of the harmless error exception could render nearly all will formality obsolete and would likely invalidate both § 72-2-522 and § 72-2-523, the exception swallowing the rules.

(e) The court is required to "liberally construe" the UPC to promote its underlying purposes and policies, but this does not give the Court license to override express statutory language. The language of § 72-2-523, MCA, a UPC provision, requires a will to be a "document," and there is no clear basis that would permit broad extensions of that term to entirely new forms of intended wills, here a video recording lacking any form of statutory authentication, even under a liberal construction of the provision.

d. ***In re Frabbiele,* 2024 La. LEXIS 1921 (Supreme Court of Louisiana 2024).** A testator's failure to sign his name on each page of the notarial testament is a material deviation rendering the will invalid.

(1) In 2008, John Wallace Frabbiele executed a three-page document purporting to be his last will and testament. In the testament, John bequeathed the disposable portion of his estate to his third wife, Barbara Ann Nash Frabbiele, and the forced portion to his son Anthony subject to Barbara's usufruct. The instrument was executed before two witnesses and a notary public.

(2) John died in 2021. Barbara opened his succession by filing the original will with a petition, seeking an ex parte order probating the testament and appointing her executrix of John's estate. Acting on the petition, the trial court signed an ex parte order recognizing the will as John's "Notarial Last Will and Testament," ordering it to be executed, and declaring "this Order shall have the effect of Probate."

(3) On the same day, an opposition to the petition to probate was filed by John's seven adult children, all from his first marriage: Lisa Beth Frabbiele, Janine F. DeSoto, Michele F. Beck, Patty Rene Frabbiele, Teresa F. Lawson, Rebecca F. Perry, and Anthony Frabbiele. The opposition alleged the will was defective because the first and second pages only bear what appears to be the initials of Decedent. The matter proceeded to a contradictory hearing where the only evidence presented was the will. No witnesses testified, and no other documents were introduced. Ruling from the bench, the trial court found the will substantially complied with the requirements for a notarial will, and ordered it probated. A writ application to the court of appeal was denied, with one judge dissenting.

(4) The Louisiana Supreme Court granted a writ of certiorari, to determine if the testator's initials on "each other separate page" rather than his signature satisfy the mandatory language of Article 1577(1) when the testator's signed name appears only on the last page of the testament, after the attestation clause. On appeal, the Supreme Court, over one dissent, reversed the trial court on the following grounds:

(a) The testator's initials, rather than his signed name, are a material deviation from the Article. The testator's signature after the attestation clause cannot cure this material defect; thus, the will is invalid. The testator placed his initials on the first two pages of his three-page testament; he signed his name, however, only on the last page after the attestation clause. The testator's initials alone, on each other separate page, contravene and fail to satisfy the Article 1577(1) signing requirements. A testator's failure to sign his name on each page of the notarial testament is a material deviation rendering the will invalid.

(b) There was a clear distinction between the testator's initials and his full signature. The notarial will is the successor of the statutory will. Its minimal formal requirements provide a simplified means for a testator to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will. It is well-settled the primary motivation for enacting the codal requirements for notarial wills was the prevention of fraud. However, evidence of fraud is not required to render a notarial will invalid for noncompliance with the mandatory requirements. The fact that there is no fraud, or even suggestion or intimation of it, will not justify the courts in departing from the statutory requirements, even to bring about justice in the particular instance, since any material relaxation of the statutory or codal rule will open up a fruitful field for fraud, substitution, and imposition.

(c) The requirements of form to execute a valid notarial will are: "The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then: (1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page. (2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this day of , ."

(d) The statute provides that the formalities prescribed for the execution of a testament must be observed or the testament is absolutely null. The statute does not specify any exceptions to this standard.

(e) The mandatory provisions of Article 1577, as written, are clear and unambiguous. Subsection (1) expressly requires a testator to sign his name at the end and on each separate page of a notarial will. There can be no dispute these provisions are mandatory;

thus, any departure from these mandatory requirements constitutes a material deviation rendering a notarial will invalid.

(f) A testator's mere initialing, in print, instead of his signed name on each page "falls short" of the formalities required. In this matter, the testator's cursive initials do not comply with the statutory requirements. Compelling observance of these mandatory provisions has long been recognized in our jurisprudence, despite its harshness.

(g) Some lower courts have misapplied Article 1577(1)'s requirement that a testator "shall sign his name" on each page of the testament. In particular, some courts have found any "substantial compliance" with the requirements of Article 1577 sufficiently validates a notarial will. However, the failure to comply with the statutory requirements of Article 1577(1) is a material deviation which invalidates a notarial will.

(h) In this matter, we find the trial court adopted an overly broad application of "shall sign his name." The trial court erred as a matter of law and the court of appeal further erred in concluding the notarial will substantially complied with La. C.C. art. 1577. Substantial compliance with Article 1577(1) is insufficient. Article 1577(1) is a mandatory requirement, stated simply: "shall sign his name," not his initials.

(i) It is undisputed the testator in this matter did not sign his name on each page of the testament. Initials and a name are not interchangeable for purposes of Article 1577(1). The testator did not comply with the requirements of Article 1577(1). Accordingly, the testator's notarial will is invalid for his failure to sign his name on each other separate page pursuant to the mandatory requirements. Ruling otherwise and validating the will constitutes a clear departure from the plain language of Article 1577 and renders the statutory requirements of Article 1577(1) meaningless.

(j) One dissenting justice overserved that the majority effectively interpreted "sign his name" in Article 1577 to mean "write his name," rendering wills vulnerable to attacks based on signature style and penmanship.

25. Issue, Beneficiaries, Paternity, & Adoption

a. ***In re 1979 Inter Vivos Trust of Alfred,* 2024 N.J. Super. Unpub. LEXIS 1411 (Superior Court of New Jersey, Appellate Division 2024).** Stranger to the adoption doctrine applied a presumption against an adult adoptee's inclusion in a class gift in trust, and adoptee could not overcome the presumption with evidence of probable intent on the settlors' part to include adoptee as trust beneficiary.

(1) Alfred founded a successful real estate business, Alfred Sanzari Enterprises ("ASE"), in 1945. Alfred and his wife, Mary wanted the business to be carried on by their family. Alfred and Mary had three children: "Freddie," Ben, and David. Alfred and Mary began estate planning as early as 1976, when Alfred first met with attorneys to discuss placing ASE's properties into an inter vivos trust. They executed the first trust (the "1979 Trust") on June 1, 1979. Alfred and Mary continued to revise their estate plan over the years, resulting in the 1992 Last Will and Testament of Mary A. Sanzari, the 1992 Last Will and Testament of Alfred Sanzari, and a second trust (the "1994 Trust"), which also held ASE assets. Only Alfred, not Mary, was the grantor of the 1994 Trust.

(2) The 1979 and 1994 Trusts provide a residuary class gift to each child of Ben and to each grandchild of Ben as a secondary beneficiary. The 1994 Trust provided: "As used herein, wherever this context requires or permits . . . the words 'children' and 'issue' shall include adopted children as though they were Settlor's natural born children and/or issue." The 1979 Trust provided: "All references herein to "issue," "child" or "children" shall be deemed to refer only to issue, child or children born of lawful wedlock or legally adopted." The trusts did not expressly address whether they included adopted adults. At the time the 1979 Trust was

executed, Ben was thirty-two years-old and had three young children with his then-wife Barbara. By 1994, Ben was forty-seven years-old and had a fourth child with Barbara.

(3) The trusts were created to keep ASE in the family. Ben conceded at trial that his father would not provide any interest in his business to someone who was not sufficiently connected with the Sanzari family. Additionally, Alfred's firstborn, Freddie, who had his own businesses with his wife, was not given any interest in the trusts, and neither was Freddie's wife or daughter. Notes from Alfred and Mary's estate planning admitted at trial indicate Alfred intended that control of the properties should always be kept away from the wives of Ben and David. And although Ben's three daughters were given interests in ASE, Ben testified Alfred insisted that one of David's sons, or Ben's youngest biological son, Alfred Louis, be the successor trustee who would be involved in managing the business assets.

(4) The trusts were also intended to ensure that Ben, who is legally blind and was born deaf, would remain financially secure notwithstanding his physical limitations. Huttle and David were appointed trustees to carry out those tasks.

(5) From 2002 until mid-2005, Carl's mother Karina worked as a nurse's assistant for Alfred and Mary. Before Alfred's death on December 11, 2005, Alfred interacted with the minor Carl approximately five times and knew him only as his nursing assistant's son. Ben did not meet Carl until two years after Alfred's death.

(6) Karina began working as an aide and housekeeper for Ben in 2007. That same year, Ben's first wife Barbara filed for divorce. The divorce was finalized on December 6, 2007. Ben and Karina married six months later, and Carl moved in with the couple. Prior to the wedding, Karina and Ben entered into a prenuptial agreement pursuant to which Karina waived any interest in the trusts or trust-owned property. The agreement states Ben has four children, Karina has one child, and provides the parties mutually intend that each shall be free to provide for his or her children from Separate Property as each deems fit, both during the parties' lives and in their estate plans, freely and without consideration of interests or claims of the other spouse.

(7) Carl spent time with his step-grandmother, Mary, prior to her death. Mary treated Carl as she did her other grandchildren, including making a monetary Christmas gift to Carl in 2009 from the 1979 Trust. Ben admitted the $20,000 gift to Carl was made at his own suggestion and decision, and David — not Mary — as trustee of the trust, accepted his suggestion and signed the check. 2009 was the first time Carl received one of the Christmas checks. Mary, who had suffered several serious health problems for years — including vision problems necessitating multiple eye surgeries and a liver transplant — became "very sick" by the end of 2009 with heart and lung problems. Mary died on February 23, 2010.

(8) Ben alleged for the first time at trial that shortly before Mary's death, in December of 2009, he told Mary he wanted Carl to become a "part of the trust," and she agreed. He claimed the only person he ever spoke to around that time about adopting Carl or including him in the trust was Mary.

(9) Ben testified Alfred and Mary created trusts for each of Ben's children, and either Alfred and Mary together, or Mary alone after Alfred passed, created trusts for the benefit of each of Ben's grandchildren within a couple months of their births. However, in the twenty-one-month span between Ben's marriage to Karina and Mary's death, Mary did not create a trust for Carl. Nor did she amend her will to bequeath anything to Carl.

(10) On October 13, 2017, Ben, at age seventy, adopted Carl, then eighteen years-old. Plaintiffs filed two verified complaints, one for each of the trusts, seeking declaratory relief.

(11) The trial court rejected defendants' argument that the trusts were clear on their faces, Carl automatically qualified as a beneficiary because of the "adopted child" language, and there

was no need for the court to consider the doctrine of probable intent. On appeal, the appellate division affirmed on the following grounds:

(a) The plain language of both trusts refers only to adopted "children." The plain language of both trusts provides that a child adopted by Ben would constitute a "child" or "issue" within the meaning of the trusts. Ben testified there was only one adoption known in the family prior to his adoption of Carl as an adult, which occurred when Alfred's brother Gene and his wife adopted an infant after they were unable to conceive. Defendants offered no evidence regarding Alfred's or Mary's purpose in including the term "adopted children" in the trusts.

(b) The stranger to the adoption doctrine is a well-established, judicially created doctrine. Historically, New Jersey courts acknowledged a presumption that an adopted child could not take property under an instrument created by someone other than the adoptive parent unless the instrument itself indicated a specific intent that the adopted child should take. In 1953, the Legislature eliminated the stranger to the adoption doctrine as it related to minors, but not as it relates to the adult adoption statute.

(c) The adult adoption statute, provides, in relevant part: "All rights, privileges and obligations due from the parents by adoption to the person adopted and from the person adopted to them and all relations between such person and them shall be the same as if the person adopted had been born to them in lawful wedlock, including the right to take and inherit intestate personal and real property from and through each other. Except, however, that the person adopted shall not be capable of taking property expressly limited by a will or any other instrument to the heirs of the body of the adopting parent or parents, nor property coming on intestacy from the collateral kindred of the adopting parent or parents by right of representation.

(d) Although the latter provision provides that an adopted adult cannot take if the trust is limited to "heirs of the body," the judicial doctrine is broader than the statute and includes situations in which an instrument executed by a stranger to the adoption does not make specific provision for a specific adoptee.

(e) The adoption of children and the adoption of adults involve quite different considerations and different factors of policy and require and receive different treatment. The basic purpose of child adoption is to provide and protect the welfare of children, to provide homes and families and security for homeless children, and to provide children for couples who desire to have children to love and raise and maintain. A substantial factor here is the duty and obligation of support and maintenance. In an adult adoption the relation between the parties is different, the motivation can be quite varied, and such adoptions are treated differently in the statutes. Adoption of adults is ordinarily quite simple and almost in the nature of a civil contract. The complete severing of the relation to natural parents is not accomplished in an adult adoption; the relation remains in New Jersey as to inheritance in case of intestacy of the natural parents.

(f) It is one thing to ascribe to a testator a contemplation of the possibility of that which has come to be relatively commonplace, namely, the adoption of a child at some time in the future by a member of the family or other relative, or any other prospective beneficiary under a will. Frequently, in such cases, the child is acquired in infancy, although the child may be older where a spouse adopts a stepchild. In both instances, however, the child is reared as one's own by the adopting parent and is recognized as such among the family and friends. But it is quite another matter where the adopted person is an adult. One would be hard-pressed to ascribe to a testator, in the absence of any expression thereon or of clarifying attendant circumstances, a probable intent to include an adopted adult among the children or issue of a testamentary beneficiary. It is extremely unlikely that a testator would foresee the likelihood that his or her child, or any other prospective beneficiary, might at some time in the future adopt an adult. It is equally improbable that an adopted adult would be embraced in the bosom of the family members other than the adopting parent, as would an adopted child.

(g) Whether a trust specifically uses the term "heirs of the body" is not the controlling language. The "stranger to the adoption" doctrine is judicially created and is broader than the statute. The presumption is not limited to cases where the trust explicitly uses the term "heirs of the body."

(h) A question of first impression is whether the "stranger to the adoption" doctrine applies to adult adoptees in cases where "child," "issue," and the like expressly includes child adoptees, but neither the trust itself nor the surrounding circumstances suggest the settlor contemplated adult adoption.

(i) When applying New Jersey law adult and child adoption are two different processes, with different purposes, requirements, and consequences. New Jersey's statutes expressly presume a lack of intent to include adult adoptees because of the legal and social differences between adult and child adoptions. The trust language regarding adopted children cannot on its face be read as an expression of intent to include adult adoptees. Nothing else in the language of either trust or the surrounding circumstances suggests adult adoptees were meant to be included in the class.

(j) The court had shifted the burden of proof to defendants to demonstrate Carl, an adult adoptee, was an intended secondary beneficiary to the trusts. The court concluded defendants did not meet that burden, noting Ben and Carl were not able to provide any testimony as to the meaning of the term "adopted children" as set forth in the trusts. Alfred knew Carl only as his nurse's assistant's son, when Karina was employed to care for him and Mary; defendants' assertion that Mary treated Carl as a grandson was based largely on a single monetary Christmas gift from Mary to Carl in 2009, which Ben acknowledged was actually made by David at Ben's request; Mary's will made specific bequests to all of her grandchildren but not to Carl, even though he was known to her; and Mary created trusts for each of her biological grandchildren but not for Carl.

(k) The court also found defendants' testimony about the loving and genuine relationship between Ben and Carl not relevant, ruling that "such love and affection is not attributable to Alfred and Mary and does not support defendants' contentions regarding the probable intention of Alfred and Mary." Finally, the court rejected Ben's testimony that he told Mary in 2009 he intended to adopt Carl and wanted him to be included as a secondary beneficiary, finding it inconsistent with Ben's testimony that he never reviewed the trusts prior to Mary's death, and as legally insufficient, "self-serving" testimony pursuant to the Dead Man's Act. Thus, the court concluded defendants "failed to present evidence as to the probable intent of Alfred and/or Mary sufficient to overcome the presumption of the 'stranger to the adoption' doctrine."

(l) Defendants are entitled to the benefit of only reasonable inferences. It is not reasonable to infer from their interactions any intent by Alfred to specifically include Carl as a class beneficiary when Alfred knew Carl only as his employee's son. It likewise is not reasonable to infer Mary treated Carl like Ben's other children, when the undisputed evidence demonstrates Mary did not create a trust for Carl or bequeath anything to Carl in her will, as she did for Ben's other children. And not all Sanzari family members were included in the two trusts: Freddy, his wife, and children were specifically excluded. Even if Mary treated Carl as a member of the Sanzari family, that fact is insufficient to support an inference that she intended Carl to become a secondary beneficiary.

(m) A genuine, loving basis for an adult adoption alone is insufficient to overcome the presumption against adult adoptees.

b. ***Steele v. Comm'r of Soc. Sec.,*** **385 So. 3d 587 (Supreme Court of Florida 2024); Steele v. Comm'r of Soc. Sec., 94 F.4th 1263 (United States Court of Appeals for the Eleventh Circuit 2024).** A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or pre-embryos to a woman's body can only take from a decedent's estate if the will must give something to the child as contemplated by the decedent when the will was made.

(1) Philip and Kathleen Steele married in 1997. During their marriage, they had a son—conceived through in vitro fertilization. Following his son's birth, Mr. Steele submitted additional sperm samples to a fertility clinic.

(2) Thereafter, with the assistance of a lawyer, Mr. Steele prepared a will. At the outset, Mr. Steele defined his family to encompass his spouse, his living children, and any later-born or adopted children. Elsewhere in the will, Mr. Steele addressed the disposition of his property. He devised to his wife all tangible personal property, the homestead property, and the residue of his estate. If, however, his wife died before him, his children "then living" would inherit his tangible personal property.

(3) Mr. Steele died roughly a year and a half after executing the will. Following Mr. Steele's death, P.S.S. was conceived by in vitro fertilization using Mr. Steele's deposited sperm samples. After P.S.S. was born, Ms. Steele sought survivor benefits from the Social Security Administration ("SSA"), contending that P.S.S. was entitled to such benefits as a child of Mr. Steele. The SSA denied Ms. Steele's application. In its view, P.S.S. did not qualify as Mr. Steele's child under the controlling federal statutes.

(4) Disagreeing with that determination, Ms. Steele asked for administrative review. However, an administrative law judge ("ALJ") rejected Ms. Steele's position, agreeing with the SSA's determination that P.S.S. was not Mr. Steele's child under the applicable federal statutes. Since Mr. Steele died while domiciled in Florida, the ALJ considered whether P.S.S. could take from Mr. Steele's estate under Florida's intestacy statutes. Such statutes, often located in Florida's probate code, establish default rules for distributing a decedent's property absent a valid will. Finding no controlling statute in the probate code, the ALJ held that a posthumously conceived child, like P.S.S., could only inherit through a will. Thus, according to the ALJ, such a child could not take under Florida's intestacy statutes.

(5) Ultimately, Ms. Steele sued the SSA in federal district court. The district court, however, ruled in the SSA's favor, agreeing with the ALJ's conclusion and statutory interpretation. Following that unfavorable ruling, Ms. Steele appealed to the Eleventh Circuit. The Eleventh Circuit noted that the issue in this case—whether a "posthumously conceived" child could take under Florida intestacy law—was one of first impression. The court certified two questions of Florida law, asking: (1) Under Florida law, is P.S.S. "provided for" in the decedent's will within the meaning of Fla. Stat. § 742.17(4); and (2) if the answer is yes, does Florida law authorize a posthumously conceived child who is provided for in the decedent's will to inherit intestate the decedent's property?

(6) The Florida Supreme Court answered only the first certified question in the negative on the following grounds:

(a) The Supreme Court answered only the first certified question because its interpretation of the phrase "provided for" in section 742.17(4) was dispositive. The statute provides as follows: "A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."

(b) Consistent with these definitions, case law in a related context underscores a necessary component of the term "provided for." In the context of section 742.17, contemplation of the post-death conception of a child would be necessary in order for that child to be provided for in the will. "Provided for" in section 742.17(4) means that the testator actually left something to the posthumously conceived child through the will. Or, put another way, the child must have some inheritance right under the will. As part of this requirement, the will must show that the testator contemplated the possibility of a child being conceived following his or her death.

(c) Mr. Steele's will does not "provide for" P.S.S. No part of the will acknowledges the possibility of children being conceived after Mr. Steele's death. To be sure, the will references afterborn or adopted children. But that mention of later-born children, as we read Mr. Steele's will, refers most naturally to children born after his will was drafted but conceived before his death, i.e., when the dispositional portions of the will create vested rights. Thus, this reference to later-born children would not cover P.S.S., who was conceived after Mr. Steele's death.

(d) But, even if the court found that post-death conception was in some generic sense contemplated by Mr. Steele, P.S.S. could not have received anything under the will. Mr. Steele's will conveyed all relevant property to Ms. Steele. In the event that Ms. Steele had died before Mr. Steele, the tangible personal property would have been distributed to his "then living children." By its terms, this fallback provision only applied to children living at the time Mr. Steele died and necessarily excluded any posthumously conceived children, like P.S.S. Therefore, as it was impossible for P.S.S. to inherit anything from the will, it is clear that Mr. Steele did not provide for P.S.S. as contemplated by section 742.17(4).

(7) On remand, the federal district court held that the administrative law judge did not err in denying Katherine Steele's claim for child's insurance benefits ("CIB") for P.S.S., and affirmed the district court's order upholding the administrative law judge's decision on the following grounds:

(a) Under the Social Security Act, an applicant qualifies for CIB if he "meets the Act's definition of 'child,' is unmarried, is below specified age limits (18 or 19) or is under a disability which began prior to age 22, and was dependent on the insured at the time of the insured's death." The Social Security Act defined "child," in relevant part, as "(1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions]." Additionally, a subsequential definition provision provides that "[i]n determining whether an applicant is the child or parent of [an] individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]."

(b) Whether posthumously conceived children can inherit through intestacy under Florida law was a question of first impression. The Florida Supreme Court determined that Mr. Steele's will did not "provide for" P.S.S. because "[n]o part of the will acknowledges the possibility of children being conceived after Mr. Steele's death."

(c) For the reasons stated in the Florida Supreme Court's decision, P.S.S., who was conceived after Mr. Steele's death, was not "provided for" in Mr. Steele's will, as contemplated by section 742.17(4). Therefore, under the intestacy law of Florida, P.S.S. is not "eligible for a claim against the decedent's estate" under section 742.17(4) and cannot inherit Mr. Steele's personal property through intestacy, which means that P.S.S. is not considered a "child" of Mr. Steele for purposes of qualifying for CIB under the Social Security Act. Accordingly, the administrative law judge did not err in denying Ms. Steele's claim for CIB on behalf of P.S.S., and we affirm the district court's order upholding the administrative law judge's decision.

c. ***McCormick v. Roberts (In re Estate of Brent L. McCormick),* 317 Neb. 960 (Supreme Court of Nebraska 2024).** A biological child is allowed to inherit from decedent when parental rights of decedent have been terminated.

(1) Brent L. McCormick died intestate. Brent's domicile at the time was in Arlington, Nebraska. Brent's sister-in-law, Tracy, filed in the county court a petition for formal probate, in which she, inter alia, requested to be appointed as personal representative. In the petition, Tracy listed Brent's father, mother, and brother as the only known heirs and interested parties. Beth Roberts ("Beth") filed a demand for notice of all filings in the probate case, and she alleged that she was the natural daughter and lawful heir of Brent. Beth later filed an objection to Tracy's petition on the basis that it failed to list Beth as a child or heir. Beth alleged in the objection that she was the only child and sole heir of Brent.

(2) Beth was the biological daughter of Brent, and Brent's paternity was established during his lifetime by the district court for Washington County on August 7, 1991. The district court terminated Brent's parental rights on July 10, 1992. Beth spent a "very minimal" amount of time with Brent after his parental rights were terminated. Beth was not adopted by anyone after Brent's parental rights were terminated. Brent was not married and had no other children when he died intestate.

(3) The county court determined that Beth was permitted to inherit from Brent. The county court determined that a biological child is allowed to inherit when parental rights are terminated.

(4) Tracy appealed and the Nebraska Supreme Court affirmed on the following grounds:

(a) The issue in this appeal involves a matter of statutory interpretation: whether a biological child may inherit under the intestate statutes from a parent whose parental rights have been terminated.

(b) It is undisputed that Brent died intestate. It is also undisputed that Brent was not married at the time of his death and that therefore, there is no surviving spouse. Brent's intestate estate therefore passes first to the issue of the decedent. It is undisputed that Brent had no children other than Beth.

(c) Neb. Rev. Stat. § 30-2209(23) defines "[i]ssue of a person" to include "all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Nebraska Probate Code." Within the Nebraska Probate Code, § 30-2309 defines the relationship of parent and child for the specific purpose of intestate succession. Section 30-2309 provides in relevant part: "If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, a person born out of wedlock is a child of the mother. That person is also a child of the father, if the paternity is established by an adjudication before the death of the father or is established thereafter by strict, clear and convincing proof. The open cohabitation of the mother and alleged father during the period of conception shall be admissible as evidence of paternity. The paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child."

(d) It is undisputed in this case that Beth is the biological daughter of Brent and that Brent's paternity was established by an adjudication in the district court in 1991. Therefore, a relationship of parent and child between Brent and Beth was established for purposes of intestate succession, and under the definition of "[i]ssue" set forth in § 30-2209(23), a relationship of parent and child between Brent and Beth was established pursuant to the relevant statute contained in the Nebraska Probate Code.

(e) While it is therefore clear that after the paternity adjudication in 1991, a relationship of parent and child had been established between Brent and Beth, it is also undisputed in this case that Brent's parental rights to Beth were terminated in 1992. As the county court noted, § 30-2309 makes no mention of what effect a termination of parental rights has with respect to the relationship of parent and child established thereunder. Section 30-2309(2)(ii) specifies that the establishment of a relationship of parent and child thereunder "is ineffective to qualify the father . . . to inherit from or through the child" unless the father meets certain requirements, and it appears that a father whose parental rights have been terminated would ordinarily not meet such requirements. Section 30-2309, however, imposes no additional requirements for a child to be qualified to inherit from or through the father.

(f) The Legislature specifically addressed termination of parental rights in § 30-2312.02, which provides: "(a) A parent is barred from inheriting from or through a child of the parent if the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished. (b) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child."

(g) Like § 30-2309(2)(ii), which imposes additional requirements for a father to inherit but does not impose additional requirements for a child to inherit, § 30-2312.02 specifies the effect of a termination of parental rights on the parent's right to inherit from or through the child, but it does not specify the effect of such termination on the child's right to inherit from the parent whose parental rights have been terminated.

(h) The probate statutes reflect a clear intent to limit or extinguish the right of a parent to inherit from a child under the circumstances set forth but do not reflect an intent to limit or extinguish the right of a child to inherit from the parent under the same circumstances. This treatment aligns with statutes outside the Nebraska Probate Code.

(i) Because § 43-293 specifically provides that the parent shall have no rights of inheritance with respect to the juvenile, the statute does not include rights of inheritance within the "legal rights, privileges, duties, and obligations" of which both the parent and juvenile are divested. To give effect to all parts of a statute, a court will attempt to reconcile different provisions so they are consistent, harmonious, and sensible and will avoid rejecting as superfluous or meaningless any word, clause, or sentence. It would be superfluous to separately address inheritance rights of parents if inheritance rights were included in the rights addressed in the first part of the same sentence regarding both parents and juveniles. § 43-293 does not divest the juvenile, or child, of the right to inherit from a parent whose parental rights have been terminated.

(j) § 30-2309(1) provides that "an adopted person is the child of an adopting parent and not of the natural parents." The Legislature expressed an intent that adoption is an event that ends the adopted child's status as the child of a natural parent for purposes of intestate succession. Unlike adoption, the Legislature does not appear to have expressed an intent that termination of a natural parent's parental rights is an event that ends the child's status as "issue" of that parent for purposes of taking under intestate succession. Regarding the present case, it is undisputed that Beth was not adopted after Brent's paternity was established or after his parental rights were terminated and, obviously, that she is not barred from inheriting under § 30-2309(1).

(k) Although probate statutes and other statutes specifically provide that termination of parental rights divests a parent of inheritance rights with respect to a child, no statute specifically provides that termination of a parent's parental rights extinguishes the inheritance rights of the child as to that parent. Reading these statutes together, under the Nebraska Probate Code, as applied to the undisputed facts of this case, Beth was "issue" of Brent and therefore eligible to inherit from him pursuant to the statutes governing intestate succession.

d. ***Matter of McGuire,* 2024 N.Y. Misc. LEXIS 752 (Surrogate's Court of New York, Erie County 2024).** Privacy rights are outweighed by illegitimate child's interests in determining conclusively whether decedent was her biological father for inheritance purposes.

(1) Decedent died at age 92 on July 7, 2020. His Will, dated June 12, 2017 (with Codicil dated November 28, 2018), was admitted to probate without objection on March 24, 2021, and full letters were issued to the nominated co-executors Thomas C. D'Agostino, Esq. and Michael J. McGuire.

(2) Decedent's distributees were listed as his surviving spouse, Donna M. McGuire, and seven children: Michael J. McGuire, Kathleen McGuire, Jeanne Marie McGuire, F. James McGuire, Jacquelyn McGuire Gurney, Charlene McGuire Patterson (f/k/a Charlene McGuire Ruiz) and Kelly McGuire. Article THIRD of decedent's Will provides that decedent's children are those seven individuals just listed, as well as any children born after execution of the Will.

(3) Jordan A. Tripi ("Jordan"), filed a notice of claim, asserting that she was a biological child of decedent's and, therefore, one of his distributees. Thereafter, Jordan filed an application seeking an order requiring a known biological child of decedent's to submit to a DNA test in order to confirm that decedent is Jordan's biological father. As stated in her supporting affidavit, Jordan was born in 1991, and for most of her life knew her mother to be Carolyn Tripi ("Carolyn") and her father to be John Tripi, Jr. ("John"). In 2021, Jordan submitted a DNA sample to a testing service and received results indicating Irish lineage but no Italian lineage, which was unexpected because John was Italian. Significantly, the results also indicated that Jordan is likely related as a cousin to decedent's nephews John McGuire (who submitted an affidavit in support of Jordan's application) and Bryan McGuire.

(4) Jordan's mother Carolyn also submitted an affidavit in support of Jordan's motion. Carolyn states that she had had an extra-marital sexual relationship with decedent in the summer and fall of 1990, ending when Carolyn informed decedent that she was pregnant with the child who is Jordan. While initially denying to Jordan any knowledge that would explain the unexpected DNA test results, Carolyn finally admitted her relationship with decedent to Jordan following John's death in 2022; and Carolyn now states her belief that decedent is Jordan's biological father.

(5) Jordan argued that the production of a DNA sample of a party is permitted without any showing that a decedent openly and notoriously acknowledged that person as his child. Jordan also urged that DNA testing of a family member should be ordered where no DNA of decedent's is readily available, and that such testing is minimally invasive and reliable. The executors and all but two of the seven named children of decedent's ("respondents") opposed Jordan's application.

(6) The surrogate ordered DNA testing of one of decedent's seven known biological children on the following grounds:

(a) EPTL 4-1.2(a)(2)(C), while contained in EPTL Article 4 ("Descent and Distribution of an Intestate Estate"), provides guidance to the determination of whether a nonmarital child is entitled to be considered a distributee in a testate estate. The statute itself applies EPTL 4-1.2 in testate matters. EPTL 2-1.3 construes a disposition of property to persons described in an instrument as issue, children, descendants, and the like, as inclusive of nonmarital children of a decedent-father if the children would be entitled to inherit from such father under EPTL 4-1.2.

(b) DNA testing may be ordered in a testate estate pursuant to EPTL 4-1.2(a)(2)(C).

(c) It has long been recognized that the state of technology for DNA testing has advanced to the point that it can determine paternity to a 99-100% scientifically acceptable certainty. Ordering DNA testing of one of decedent's children is appropriate and not unduly burdensome. Here, Jordan proposes testing using a saliva swab, a procedure far less "invasive" than blood testing.

(d) Respondents suggested that their privacy rights outweigh Jordan's interests here. Specifically, it has been asserted that "all cases such as this one" could result in the revelation of "information that could tarnish a child's memory of his or her parents and split family members apart." That same affidavit recites decedent's three marriages. Here, the affidavit of John McGuire, Esq., decedent's nephew through decedent's younger brother, Gerald McGuire, has already revealed Jordan's DNA connection to him [John McGuire] and to this McGuire family. That, coupled with the affidavit of Jordan's mother recounting her pregnancy with Jordan as a result of her extra-marital relationship with decedent, has already lifted any veil of privacy about McGuire family members. And, John McGuire also makes the point that a conclusive determination of whether decedent is Jordan's biological father is also warranted in the interest of fairness to the decedent.

(e) Any such privacy rights as have been asserted here are outweighed by Jordan's interests in determining conclusively whether decedent was her biological father. If DNA testing establishes Jordan's status as decedent's biological child, whatever hurdles Jordan might thereafter face in seeking to challenge decedent's Will is a matter about which speculation is wholly inappropriate. Such a challenge would be a matter for another day and cannot bear on the DNA testing issues.

26. Construction & Conditions

a. ***Koski v. Campbell,* 2024 Cal. App. Unpub. LEXIS 4641 (Court of Appeal of California, Sixth Appellate District 2024).** A directive in a trust amendment for the trustee to defend against contests remains in effect until the trust amendment is judicially invalidated or otherwise terminated; trustee's obligation to comply with the express directive to defend takes precedence over general duty to deal impartially with the beneficiaries.

(1) In 2006, Kiomars Fiazi created a revocable trust, and in 2015, he restated the trust ("Restatement"). The Restatement, in Article Eight, provided specific monetary gifts totaling $300,000 to two beneficiaries, with the remainder of the trust estate to be distributed to four beneficiaries, including Manijeh Sheila Koski and two other sisters of Fiazi. Schuyler Campbell was entitled to a distribution only if one of those other sisters predeceased him. Article Nine of the Restatement identifies Fiazi as the trustee and his sister Koski as the successor trustee.

(2) Article Ten of the Restatement gives the trustee the general power to defend litigation as follows: "The trustee may, in the trustee's discretion, initiate or defend, at the expense of the trust, any litigation that the trustees [sic] considers advisable relating to the trust or any property of the trust estate."

(3) Article Thirteen contains a no contest clause. Article Thirteen also gives the trustee the "authori[ty] to defend at the expense of the trust estate any contest, attack or proceeding brought by anyone seeking to void, nullify or set aside any provision of this Trust instrument, or the grantor's will, including any amendments or codicils made hereof."

(4) Fiazi executed an amendment to the trust in October 2017 ("First Amendment"). The amendment changed a portion of Article Eight to provide that after distribution of the specific monetary gifts ($300,000) to two beneficiaries, the remainder of the trust estate would be distributed as follows: "To GRETA HERNANDEZ, forty percent (40%); To MANIJEH ('SHEILA') KOSKI, thirty percent (30%); To DAMIAN & SCHUYLER CAMPBELL, ten percent (10%); To PARVIN HOSSEINIAN, twenty percent (20%)."

(5) Greta Hernandez was a friend of Fiazi. Koski and Parvin Hosseinian are Fiazi's sisters. Damian and Schuyler Campbell are Fiazi's nephews.

(6) Fiazi executed another amendment to the trust ("Second Amendment") in September 2020. This amendment changed the entirety of Article Eight regarding the distribution of the trust estate upon his death. Among other things, the amendment omitted the specific monetary gifts to two beneficiaries, omitted Campbell as a beneficiary, added Dinora Figueroa as beneficiary, and changed the percentages that each beneficiary would receive. Specifically, Fiazi stated in the Second Amendment to Article Eight that the trust estate would be distributed as follows: "To my friend GRETA HERNANDEZ, twenty-three percent (23%); To my sister MANIJEH ('SHEILA') KOSKI, twenty-two percent (22%); To my sister PARVIN HOSSEINIAN, ten percent (10%); To my dear friend DINORA FIGUEROA, thirty percent (30%); To my dear friends ROGELIO SABORIT and YELENA STASEYVEA, fifteen percent (15%)."

(7) Fiazi acknowledged in Article Eight of the Second Amendment that questions would arise regarding the amendment. He stated in Article Eight, "The grantor is aware that certain family members and friends question his actions managing his assets and amending his trust with respect to the persons he has designated as beneficiaries. Nonetheless, the grantor has included these persons as beneficiaries, despite their efforts to interfere. Grantor intends to exercise his right to dispose of his assets as he so chooses without interference from anyone who disagrees. Grantor instructs the successor trustee of the trust to carry out his wishes as stated herein and to take all necessary steps to prevent the circumvention of his wishes."

(8) In addition, although Article Thirteen (of the Restatement) already contained a no contest clause, and although Articles Ten and Thirteen already authorized the trustee to defend the trust, the Second Amendment added to Article Eight the following no contest clause and a directive to the trustee to defend the trust: "If, without probable cause (as defined in California Probate Code §21311(b) or any successor statute), any beneficiary of any trust created by this document, singly or in conjunction with any other person or persons, files a direct contest (as defined in California Probate Code §21310 or any successor statute), that alleges the invalidity of this document or any one or more of its terms or that alleges the invalidity of any will of the grantor or any one or more of its terms, which is in existence on the date this document is executed, then the right of that person to take any interest given to him or her by this document shall be determined as it would have been determined had the person predeceased the execution of this declaration of trust without surviving issue. The successor trustee is directed to and authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions. All costs and attorney's fees shall be charged against the share of the contesting beneficiary."

(9) Kiomars Fiazi died in October 2022. In February 2023, Campbell filed a petition challenging the validity of the Second Amendment. Campbell alleged, among other things, that (1) Fiazi lacked sufficient mental capacity at the time he executed the Second Amendment, and (2) the amendment was the result of undue influence by Figueroa, who Campbell alleged was Fiazi's "caretaker." Figueroa, represented by counsel, filed a demurrer to the petition.

(10) Koski, the trustee of Fiazi's trust, filed a petition for instructions and sought to remain "neutral" in the dispute and not use trust resources. The court instructed Koski as trustee to remain neutral in the litigation and file no responsive pleading to Campbell's petition challenging the validity of the Second Amendment. Figueroa appealed and the court of appeals reversed on the following grounds:

  (a) A trustee has a duty to administer the trust according to the trust instrument. Included in this duty is the requirement that the trustee has a duty to defend against any action that would diminish the funds to be distributed to the decedent's intended beneficiaries.

(b) A trustee also has the duty to administer the trust instrument according to the Probate Code except to the extent the trust instrument provides otherwise. The Probate Code further provides that if a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries. Hence, when a dispute arises as to who is the rightful beneficiary under a trust, involving no attack upon the validity or assets of the trust itself, the trustee ordinarily must remain impartial, and may not use trust assets to defend the claim of one party against the other.

(c) A trustee may defend against a contest by a beneficiary, even if the beneficiary's contest will have no other effect on the trust except for modifying the dispositive provisions for the trust estate, when the authority granted by the trust document directs the trustee to defend against any contest brought by a beneficiary.

(d) A trust instrument containing a directive for the trustee to defend against contests remains in effect until the trust, or as in this case the trust amendment, is judicially invalidated or otherwise terminated. If the rule was otherwise, that is, if the directive to the trustee to defend the challenge could be enforced only after it was determined that the underlying challenge lacked merit and was brought without probable cause, then the trustee would have no means of knowing whether the instruction should be observed prior to resolution of the merits of the underlying controversy. The trustee would be unable to comply with the directive until after the litigation had been concluded, rendering the directive meaningless.

(e) A party contesting a trust containing a defense directive is not without recourse in appropriate circumstances. Upon a sufficient showing, the party contesting the validity of a trust instrument may seek a preliminary injunction, which is within the probate court's discretion to grant. Such an application would allow the court to weigh the equities and enjoin the use of trust assets to defend a challenge upon a proper showing of the likelihood of success.

(f) The probate court erred in ordering trustee Koski to remain neutral with respect to Campbell's litigation and to not file a responsive pleading to his petition.

(g) First, the Second Amendment to the trust contains an express directive to the successor trustee to defend against any attack on the trust, which would include Campbell's petition attacking the validity of the Second Amendment.

(h) Second, the primary duty of a court in construing a trust is to give effect to the settlor's intentions. Here, interpreting the language as a directive to defend, rather than merely authorizing the trustee to defend, furthers Fiazi's clear intent that the Second Amendment be defended against attack when he knew that the new distribution set forth in the Second Amendment had generated "question" by family and friends and "efforts to interfere." Fiazi in the Second Amendment expressly "instruct[ed] the successor trustee of the trust to carry out his wishes as stated herein and to take all necessary steps to prevent the circumvention of his wishes."

(i) Third, the fact that the defense directive was contained in the Second Amendment, which Campbell has challenged the validity of, is not a basis by itself for Koski, as trustee, to avoid abiding by the defense directive. A directive in a trust amendment for the trustee to defend against contests remains in effect until the trust amendment is judicially invalidated or otherwise terminated. Thus, the defense directive contained in the Second Amendment remains in effect unless and until the probate court determines that the Second Amendment is invalid.

(j) Koski in her petition for instructions made no explicit request for preliminary relief either in her petition for instructions or in her reply in support of the petition. She also did not provide any evidence on which the court might have invoked such equitable considerations. There was no evidence before the court establishing that a challenge to the validity of the Second Amendment was "likely" to succeed or that the balance of equities favored denying Koski as trustee the authority to defend against Campbell's petition at the expense of the trust. Further, although Figueroa is currently represented by counsel, there was no showing that she or the other beneficiaries under the Second Amendment have the resources to continue to defend against Campbell's petition if the trustee may not do so at trust expense.

(k) Koski was not required to remain neutral in relation to Campbell's petition to avoid an accusation of breaching her fiduciary obligations to the Trust beneficiaries. A trustee of a trust having two or more beneficiaries generally has a duty to "deal impartially" with beneficiaries except to the extent the trust instrument provides otherwise. Consequently, a trustee may defend against a contest by a beneficiary, even if the beneficiary's contest will have no other effect on the trust except for modifying the dispositive provisions for the trust estate, when as here the authority granted by the trust document directs the trustee to defend against any contest brought by a beneficiary. Koski's obligation to comply with the express directive to defend that is contained in the Second Amendment takes precedence in this particular circumstance over her general duty to deal impartially with the beneficiaries.

(l) There is no support for the argument that the defense directive in the Second Amendment should automatically be invalidated and unenforceable based on a public policy concern about beneficiaries who fraudulently induced a settlor to amend a trust and who also induced the settlor to include a no-contest provision directing and authorizing the trustee to defend any contest to insulate the beneficiaries from having to expend personal funds to defend their actions. To the extent there is a "sufficient showing" that establishes Campbell is likely to prevail in his challenges to the validity of the trust amendment or that the balance of equities favors denying the trustee the authority to defend against Campbell's petition at the expense of the trust, a request for preliminary relief regarding the defense directive may be presented to the probate court in the first instance.

(m) The Second Amendment in this case expressly directs the trustee to defend against any attack on the trust at the expense of the trust estate. Koski's general duty to treat beneficiaries impartially does not provide a legal basis for refusing to comply with the directive to defend. Koski's status as a beneficiary under the trust does not necessitate that she, as the trustee, remain neutral in relation to his petition challenging the validity of the Second Amendment. Koski has a personal interest in having the Second Amendment declared invalid in order to receive "a larger share" of the trust estate under the First Amendment. Although the percentages for Koski decreased from the First Amendment to the Second Amendment, it is not clear that Koski will actually receive a smaller amount under the Second Amendment. The First Amendment provided for specific monetary gifts totaling $300,000 to be distributed, with Koski to receive 30 percent of the remainder of the trust estate. Under the Second Amendment, the monetary gifts were omitted and Koski is to receive 22 percent of the trust estate. It is possible that the 30% remainder interest in the First Amendment could actually turn out to be equal to or less than her 22% interest in the entire trust contained in the Second Amendment. Even assuming Koski would receive a larger amount under the First Amendment, Koski specifically stated in her reply brief in support of her petition for instructions that she is aware of her fiduciary obligations and places those obligations in front of any personal financial responsibilities that she may have.

(n) Article Ten's grant of discretion to defend "any litigation . . . relating to" the trust is a more general power than Article Eight's directive to defend "any contest or other attack" on the trust. When a trust provides a general grant of discretion and a clause specifically directs the trustee to act, the particular expressions qualify those which are general.

Article Eight's specific instructions to the trustee, regarding defending the trust against attack, control over Article Ten's more general grant of discretion to defend. Moreover, Article Ten's broad grant of discretionary power is, by its own terms, limited by the trust's other, more specific provisions. In this regard, Article Ten states at the outset that the powers listed in Article 10 are "subject to any limitations stated elsewhere in this trust," which necessarily includes the directive to defend in Article Eight.

(o) In the absence of Koski defending against Campbell's petition, Figueroa has been and will continue to be required to defend against the petition herself. Koski does not provide authority suggesting that the fact that Figueroa, if successful, may presumably seek reimbursement from the Trust precludes a determination of prejudice in this circumstance. Koski also does not point to anything in the record demonstrating that a defense by the trustee would be completely unnecessary due to the defense already being provided by Figueroa. Undoubtedly, as Figueroa observes, a more complete and more effective defense can be mounted with the support of the Trustee and Trust ***resources.***

b. ***In re Max,*** **2024 Iowa App. LEXIS 86 (Court of Appeals of Iowa 2024).** Phrase "if any of these bequests lapses, the other bequests will increase proportionately" in will precludes application of anti-lapse statute.

(1) In his 1995 will, Max Lauser set up three possible paths for the distribution of most of his estate after his death. First, if his wife died before him, he named twelve beneficiaries to receive eleven equal shares of the residue of his estate, and provided that "if any of these bequests lapses, the other bequests will increase proportionately." Except for a church, all the named beneficiaries were family members of Lauser and his wife. The Lausers had no children.

(2) If Lauser's wife survived him, the entire estate passed directly to her. But if she disclaimed all or some of the bequest, the disclaimed estate passed to a trust. The trust would provide for her for her lifetime, and at her death the assets would pass to the twelve beneficiaries, again providing that "if any of these bequests lapses, the other bequests will increase proportionately."

(3) Two years after executing the will, Lauser died. His wife was still alive. She disclaimed the estate in favor of creating the Max and Nelda Lauser Trust under the will. In accordance with the will, a local bank was appointed trustee, and the trust supported Lauser's wife for her life. All twelve of the other beneficiaries were still alive (or in existence, in the case of the church) at the time of Lauser's death.

(4) Twenty-four years later, Lauser's wife died. During those intervening years, eight of the twelve named beneficiaries also died. Six of those eight were survived by children and, in some cases, grandchildren (their issue); two died without any issue. And only four named beneficiaries were still alive (or in existence): Appellant Barbara Zellmer, Gregory and Paul Lauser (splitting a single share), and the United Methodist Church in Wilton.

(5) The trustee requested a declaratory ruling as to who should receive the remainder of the trust assets. The district court ruled that the trust estate must be divided into nine equal shares. (Two of the named beneficiaries died without having any children, and all the parties agreed that their shares should be distributed by proportionally increasing the other shares.) And the court decided that the shares of the deceased named beneficiaries must be distributed to their issue. Around the time of the court's ruling, the trust estate was valued at about $1.5 million.

(6) Zellmer appealed and the court of appeals reversed on the following grounds:

(a) The will provided that: "After my wife's death, the trustee shall divide the trust estate into eleven equal shares to be distributed according to the provisions of Sections 3.02(b) and 3.04." Section 3.02(b) kicks off with a condition that it applies "If my wife does not survive me." And of course, she did. Indeed, section 4.03's instruction to look to section 3.02(b) would only ever be applied if Lauser's wife did survive him and chose to let his estate fund the trust. But the court must give effect to section 4.03 and its instruction to use the provisions of section 3.02 to distribute the trust estate if at all possible. The court can do so without much difficulty by recognizing that Lauser wrote section 3.02(b) to apply in the context of disposing of the residue of his estate at the time of his death if his wife had died first. But section 4.03 requires its application in a different context—disposing of the remaining trust assets after it has completed supporting her throughout her life. So to best reflect Lauser's intent expressed in section 4.03, the court must translate the substantive distribution instructions of section 3.02 from the language used in the residuary context to the trust-distribution context in which it must now be applied. The court must strive to give meaning to as many of the substantive instructions—Lauser's intent—expressed in section 3.02 as we can.

(b) Section 3.02 directs an initial division into eleven shares, just as section 4.03 does. The will directs that "[i]f any of these bequests lapses, the other bequests will increase proportionately." The sentence has two parts: a condition and an operative clause that takes effect if the condition is met. And there is no real dispute about the operative clause; if it takes effect, the applicable share is alternatively given to all the remaining beneficiaries, increasing their shares proportionally. The most common way a lapse occurs is when a person dies before becoming entitled to the gift. This type of lapse comes from a fundamental principle of the common law: you cannot give property to a person or entity that does not exist.

(c) Like a quarterback attempting a pass to a wide receiver who is out of bounds, the attempted transfer fails as incomplete. It lapses. If the transfer occurs before the death, it is still good. No lapse. And with the pass complete, we do not care whether the receiver then runs out of bounds. Even if the recipient later dies, the property has transferred and can be passed on through a will or the laws of intestacy. Longstanding common law tells us that the transfer happens at the death of the testator making the bequest unless vesting is postponed further by the will's terms.

(d) This common-law rule was viewed by many, including our legislature, as too harsh to be the default governing rule. So we have had an antilapse statute modifying this rule on the books since the earliest days of the Iowa Territory. The current version of that statute, which has been in effect since a few months before the execution of Lauser's will, provides that surviving issue still inherit property given in a will to a named beneficiary who dies before the testator "unless from the terms of the will, the intent is clear and explicit to the contrary."

(e) Because this antilapse statute only applies absent contrary intent clear and explicit from the terms of the will, the statute would not affect the operation of Lauser's will. The final sentence of section 3.02 with its directive to "increase proportionately" the other bequests "[i]f any of these bequests lapses" falls squarely within the sort of will terms previously found to express such a contrary intent.

(f) Thus, in section 3.02(b)'s original context of distributing the residue of Lauser's estate, one of Lauser's bequests would lapse if the named beneficiary dies (or ceases to exist, in the case of the church) before Lauser died. The pass would not have been completed. And those lapsed shares would instead be given proportionally to the other named beneficiaries.

(g) What's more, we can infer that Lauser intended to ensure that only the named beneficiaries would receive the bequest. Without Lauser's added sentence, the antilapse statute would have provided that the shares would pass to the issue of any named beneficiary who had died. But with the sentence, they would not. And indeed, the court can conceive of no other meaning for the sentence than to provide for an alternative method of distributing the shares of named beneficiaries who were not alive to receive them. Lauser's decision to include the sentence in section 3.02(b) thus expresses a clear intent to distribute his estate to only those named beneficiaries who are alive to receive the shares.

(h) Now that we understand how this last sentence of section 3.02(b) would have applied to distribute the residue of Lauser's estate if his wife had predeceased him, the court can return to consider how it applies at the end of the path Lauser's assets actually traveled. The clean alignment between the openings of both sections 4.03 and 3.02(b) show that the distribution is to function the same, just in two different contexts: the division of the residue of Lauser's estate and the division of the trust estate. Both start with dividing into eleven shares. And both should continue with applying the rest of "the provisions of section 3.02(b)"—because that is what the text of section 4.03 requires.

(i) Lauser chose to use this general term "lapse" in the last sentence of section 3.02(b), rather than a more specific and narrow condition that the beneficiaries need only survive him. So there is no reason not to consider the sentence's application in the context of distributing the trust. All the more so when the inclusion of that sentence shows only one clear intent: to limit the distribution to the twelve beneficiaries expressly named in the will.

(j) Rather than being effective at Lauser's death, the transfer is not effective until his wife's death. Under the Iowa Trust Code, "[u]nless otherwise specifically stated by the terms of the trust, the interest of each beneficiary is contingent on the beneficiary surviving until the date on which the beneficiary becomes entitled to possession or enjoyment of the beneficiary's interest in the trust." The Iowa Trust Code completely reverses the common law preference for vested interests and deems all interests contingent upon survival to the time of possession unless specifically stated otherwise. Lauser's wife was the sole beneficiary of the trust so long as she was living. The beneficiaries named in section 3.02(b) had no right to possession or enjoyment of any interest in the trust at least until she died. And no terms of the will specifically give any earlier vested right to the beneficiaries. Under the Trust Code, their interests were thus contingent—and not effective to transfer any rights to them—until Lauser's wife's death.

(k) And so, just as in section 3.02's original context, if any named beneficiaries die before the transfer occurs—on Lauser's wife's death—their shares lapse. And the other shares must be proportionally increased. Because the timing of the transfer differs, the relevant death—Lauser's wife's rather than his own—also differs. But we are still giving the sentence the same meaning in either context.

(l) Even if lapse is not a term usually applied in the context of an interest granted in a trust, we think its concept translates easily. And the fundamental common law principles remain the same. A dead person cannot inherit, whether receiving from the residue of Lauser's estate or an interest from a trust.

(m) This interpretation is supported as well by the broader distribution scheme. To be sure, Lauser gave not just to his and his wife's siblings; he also gave to the children of two of the siblings who died before he executed the will. And if that were the entire scheme, it might suggest Lauser would want the other shares to pass to the named beneficiaries' issue too or at least be neutral to the analysis. But Lauser also included Zellmer—the only one of many nieces and nephews with their parents still living to receive an independent equal share of her own—despite her mother also being named as a beneficiary. While we do not know what motivated this special purpose, we must assume Lauser had one. And it would be disturbed by passing on all the other shares to the deceased beneficiaries' issue rather than limiting the distribution to only those beneficiaries named by Lauser.

(n) True, the Trust Code contains a default savings provision—much like our antilapse statute—that gives the interest of a beneficiary who "dies prior to becoming entitled to possession or enjoyment of" the interest to the beneficiary's "issue who are living on the date the interest becomes possessory." But that provision applies only if "no alternate beneficiary is named in the trust." And only if the interest is not "subject to an express condition of survivorship imposed by the terms of the trust." And like all the Trust Code, only if there is not a contrary trust term. Sections 4.03 and 3.02(b), and especially the last sentence directing that "[i]f any of these bequests lapses, the other bequests will increase proportionately," are contrary trust terms that prevent application of the default savings provision of the Trust Code under any of these three exceptions.

(o) To distribute the trust estate in compliance with the trust terms in the will, the trustee must first "divide the trust estate into eleven equal shares." Then, to "distribute[]" those shares "according to the provisions of Sections 3.02(b) and 3.04," the trustee must proportionally increase the shares of the beneficiaries named in section 3.02(b) who are still alive or in existence with the lapsed shares of those beneficiaries who have died.

(p) Only four named beneficiaries are still alive. And two of those are directed by section 3.02(b) to split a single share. So the trustee must distribute the remaining assets of the Max and Nelda Lauser Trust in three equal shares: one to Barbara Zellmer, one split between Gregory and Paul Lauser, and one to the United Methodist Church in Wilton, Iowa.

c. ***Gibney v. Hossack,* 493 Mass. 767 (Supreme Judicial Court of Massachusetts 2024).** Testator's use, in a devise, of the words "if she survives me," together with the other terms of the will, demonstrated testator's intent to avoid application of the anti-lapse statute.

(1) In March 2019, Heather W. Hossack ("Heather" or "decedent") died. She was forty-eight years old. Heather was single and had been in a long-term relationship with her partner, Donald Etchison; Thomas Gibney was her neighbor and friend of many years. Gibney was Heather's primary health care proxy. Heather did not have children. She was predeceased by her parents, but survived by her brother, John.

(2) In March 2016, three years prior to her death and shortly after her father died, Heather executed her will, setting forth her desired distribution of her cash assets, her personal and real property, and the remainder of her estate. Heather devised cash assets held in "Baird accounts and U.S. Trust accounts" to her mother, Ethel Wyman, "if she survives me." At the time of the will's execution, Wyman was eighty-five years old. In addition, Heather devised cash assets held in "Fidelity accounts" to John, the only other living member of her immediate family. His devise also was conditioned "if he survives me." The will specified the meaning of "surviving" the decedent, providing: "Requirement of Survival. No beneficiary shall be considered to have survived me and to be entitled to any of my estate unless such beneficiary survives me for at least NINETY (90) days."

(3) Heather left all her tangible personal property and her real property to Etchison. Unlike the devises to Wyman and John, Etchison's devises were "per stirpes." Heather named Gibney the devisee of the residuary estate. This residuary devise, like Etchison's devise, was "per stirpes."

(4) The will was drafted by a Connecticut attorney, who was, at the time, an associate in a Connecticut-based law firm not admitted to practice in Massachusetts. To convey to the attorney her desired disposition of her assets, Heather filled out a questionnaire. The attorney prepared a draft and reviewed it with Heather by telephone, making certain changes thereafter. At his deposition, the attorney could not recollect many of the details of his conversations with Heather. However, he testified that because he knew that Wyman was elderly, he had explained to Heather that if Wyman predeceased her, the Baird and U.S. Trust account assets would lapse to the residuary estate and be distributed to Gibney, the devisee

of the residuary estate. The attorney could not recall which Massachusetts statutes, if any, he had consulted in connection with his advice to Heather.

(5) Following Heather's death, Gibney was appointed the personal representative of her estate, in accordance with the will. Heather's will was admitted to probate. Counsel for the estate informed John that, because Wyman did not survive Heather, the devise to Wyman lapsed, and that the U.S. Trust accounts would fall to the residuary estate. John challenged this interpretation of the will, contending that the anti-lapse statute required that the failed devise fall to him.

(6) Gibney, the named beneficiary of the residuary estate, filed a complaint, seeking a declaration and instructions that the decedent's use of the words "if she survives me" in her devise to Wyman evinced the decedent's intent to avoid application of the anti-lapse statute. The judge allowed summary judgment in favor of Gibney.

(7) John appealed, and the Massachusetts Supreme Court transferred the case to itself on its own motion and affirmed on the following grounds:

 (a) The legal system long has used default rules of construction to resolve estate litigation over the terms of a will; these rules purport to reflect a testator's presumed intent in the absence of contrary evidence. One such default rule is the anti-lapse statute of the Massachusetts Uniform Probate Code ("MUPC"). It generally provides that where a devisee falls within a class of specific familial relatives of the testator and where the devisee predeceases the testator, the devise does not lapse; instead, the devise falls to the living issue of the predeceased devisee. The rule is based on a judgment about the typical testator's probable intent to preserve the devise for the predeceased devisee's lineal descendants, thereby keeping the devise in the family. A testator can avoid the default presumption by indicating "a contrary intention shown by the terms of the will."

 (b) A testator's choice to make a devise to an individual "if she survives me," demonstrates a contrary intention to avoid application of the anti-lapse statute. The phrase "if she survives me," which is a condition precedent of the devise to Wyman, together with the other terms of the will, demonstrate, as a matter of law, a "contrary intention shown by the terms of the will" to defeat application of the anti-lapse statute.

 (c) The anti-lapse statute is grounded in the judgment that the typical testator probably did not intend to disinherit a line of descent. When a will imposes no survivorship condition or alternate disposition on a devise if the devisee predeceases the testator, there is no indication in the terms of the will that the testator contemplated the possibility that the devisee might predecease her. As such, the anti-lapse statute fills in the testator's missing intent with a presumption against disinheritance of certain lineal descendants, allowing the devisee's living issue to take in the devisee's stead.

 (d) The language "if she survives me" evinces that Heather had the foresight to consider that the devisee — Wyman, her eighty-five year old mother — might predecease her and, upon such consideration, conditioned the devise upon the devisee's survival. There is no need to substitute a judgment (in the form of the rule of construction embodied in the anti-lapse statute) as to what the testator might have done if she had considered the issue; Heather contemplated the eventuality and provided for it expressly in the will. In these circumstances, the anti-lapse statute's presumed intention must cede to the expressed intention of the testator: that the devise fail, or lapse, if the survivorship condition is not met.

 (e) This conclusion is informed by the Legislature's rejection of Uniform Probate Code ("UPC") § 2-603(b)(3) — a proposed subsection of the anti-lapse statute that set forth a rule of construction suggested here by John. Specifically, UPC § 2-603(b)(3), provided, in relevant part: "words of survivorship, such as in a devise to an individual 'if he [or she] survives me,' … are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of [the anti-lapse statute]." Under the proposed subsection, the testator would have had to make an explicit statement of disinheritance or to identify an alternative devisee to avoid the anti-lapse statute. The court regards the Legislature's rejection of this proposal as purposeful.

(f) The devise is to Wyman, who was in her mid-eighties when Heather executed the will, "if she survives me." Absent language in the will to the contrary, this language sufficed to show Heather's intent to avoid the anti-lapse statute. Rather than calling into question this conclusion, the will as a whole supports it. In particular, the will specifies that a devisee is only considered to have "survived" Heather if the devisee survives her for at least ninety days, further evincing that the circumstance of a predeceased devisee was contemplated and specifically considered. In addition, the devises to Wyman and John are conditioned "if [he or she] survives me," while the devises to Gibney and Etchison are made "per stirpes"; in other words, where Heather intended that a devise should fall to a deceased devisee's issue, she did so expressly. The absence of similar language for Wyman and John bolsters our conclusion that Heather intended for Wyman and John to receive their devises only if they survived her; otherwise, these devises would lapse and fall to the residuary estate.

d. ***Moe v. Almer (In re Est. of Almer),* 2024 ND 102 (Supreme Court of North Dakota 2024).** Trust terms superseded default tax apportionment provisions and Principal and Income Act.

(1) Merle Almer died in 2016 at the age of 89. Among other endeavors during his life, he owned and operated a construction business and a farm totaling roughly 2,800 acres. He owned all of his assets individually and operated a sole proprietorship throughout his life. His wife predeceased him. Linda Moe is one of his children. Casey Almer is one of his grandchildren. Moe is Casey Almer's aunt.

(2) Merle Almer's will named Moe his personal representative. The will contains bequests to various individuals. Some are cash, but the will nonetheless refers to them as "specific devises." Other bequests are particular property but are not referred to as specific devises. The bulk of Merle Almer's wealth is distributed in three categories: the construction business, the farm and farming assets, and oil and gas interests. The construction business is devised 52% to Moe with the rest to others who were involved in the business. The will devises a life estate in the farm and farming assets to Casey Almer. The will sets out a testamentary trust for the oil and gas interests. Moe is named the trustee. She, Casey Almer, and others are beneficiaries.

(3) The will directs the personal representative to use "harvested and unharvested grain" to pay costs of administration and taxes for the estate. The will contains contingent instructions in the event the grain is insufficient to cover the estate's liabilities. At the time of Merle Almer's death in February 2016, he had no crop in the ground. The grain discovered in his grain bins was less than expected, and the proceeds from selling it were anticipated to be short of the predicted estate tax liability. These circumstances resulted in a dispute between the personal representative and Casey Almer that ultimately led to a separate lawsuit. The personal representative sued Almer for conversion of grain and other farm assets, and Almer brought conversion and breach of fiduciary duty counterclaims. Almer's counterclaims were dismissed, and a jury found he did not convert property.

(4) During the course of administration, the personal representative paid the estate tax, which was roughly $2 million more than the proceeds of grain harvested before the decedent's death. After the personal representative paid the estate tax and distributed the farm assets, Almer filed a petition for surcharge alleging the personal representative breached her fiduciary duties. The personal representative filed a response and a cross-motion requesting an order approving an inventory and appraisement, final report and accounting, and approval of final distribution. The district court heard testimony and took evidence over five days.

(5) The district court issued a lengthy order with findings of fact and conclusions of law. The court held abatement provisions in the will were ambiguous due to the will's non-standard use of the term "specific devise." The court made findings concerning the testator's intent based on testimony from the attorney who prepared the will. The court found the testator intended for an abatement procedure that prioritized construction business assets over most other assets. The court also found the personal representative did not breach her fiduciary duties while administering the estate. The court denied Almer's application for surcharge and granted the personal representative's motion to approve final distribution. The court denied about $35,000 in attorney's fees and approved approximately $760,000 in attorney's fees. The court entered judgment staying its orders pending appeal.

(6) Almer appealed, and the North Dakota Supreme Court temporarily remanded the case for the limited purpose of considering costs and disbursements. The district court entered an order denying costs and disbursements and the parties filed amended briefs. On appeal, Almer challenged the court's interpretation of the will, the court's findings concerning the personal representative's conduct during administration, and the court's approval of attorney's fees. The Supreme Court affirmed on the following grounds:

(a) Abatement, in the context of a will, means the reduction of a legacy, general or specific, as a result of the estate's being insufficient to pay all debts and legacies. The Uniform Probate Code, as adopted in North Dakota, provides default abatement provisions. Under these rules, property not disposed of by a will is the first to abate, followed by residuary devises, then general devises, and then specific devises. A general devise is "a specific amount of money or quantity of property, that is payable from the estate's general assets." A specific devise is a "devise that passes a particular piece of property." The statutory abatement provisions do not apply if a will provides its own abatement procedure. If a will sets out its own procedure, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(b) Merle Almer provided an abatement procedure that differs from the statutory default. His will requires taxes, debts, and expenses to be paid "out of the residue of my estate, without apportionment." In the next sentence, the will states: "Upon my death, all of the harvested and unharvested grain which I may own at the time of my death . . . shall be sold in the ordinary course of business, and the proceeds therefrom shall be used to pay such taxes and expenses of administration . . ." The will then provides contingent instructions if "the proceeds from the grain are insufficient." In such case, "my liquid assets shall be used to pay them." The will references certain bank accounts as "liquid assets" and gives the personal representative "absolute discretion" to use funds from those accounts "and/or from any other liquid assets in my Estate." The next instruction is at the center of the dispute and provides: "If the liquid assets are insufficient to pay the taxes, debts, expenses of administration and specific devises, then my Personal Representative shall have the absolute discretion to sell any assets of my estate as may be necessary to pay them."

(c) Extrinsic evidence is appropriate to resolve ambiguities in the will concerning payment of taxes. Based on extrinsic evidence, the district court found the "will expresses an order of abatement, and that those devises denominated in [the] will as 'specific devises' are the preferred devises with the highest priority that would be the very last to abate." The court's finding is based on testimony from Kathleen Imes, the attorney who prepared the will. The court found "Imes worked with Merle Almer on his estate planning for many years, had discussions with him about his intent for the disposition of his estate assets, and drafted this particular will based on those discussions." The court considered credible Imes' testimony "that the term 'specific devise' in the will was used intentionally by Merle Almer to signify the preferred devises with the very highest priority, and was one of the most important parts of his will." The court found Merle Almer considered his construction business, which he labeled a "specific devise," to be "his legacy" and that he "wanted it to survive after his death." The court found Merle Almer intended that bequests labeled "specific devise" could be "funded" by the sale of other assets, including "the Almer farm assets, and the Almer Minerals Trust." The court's findings regarding the testator's intent are supported by the evidence and not clearly erroneous. The district court did not err when it interpreted the will.

(d) Almer argued the personal representative breached fiduciary duties by retaining estate assets and failing to distribute income derived from them.

(e) Almer has not identified evidence showing the personal representative took actions that would constitute a farming or oil and gas business or venture. The personal representative hired a custom combiner to take possession of grain Casey Almer planted on the farmland in 2016, entered into a lease with another farmer for 2017, sold grain to raise funds for estate administration, and leased or continued to lease minerals the decedent owned. These transactions are expressly authorized by N.D.C.C. § 30.1-18-15, which states the personal representative may "[r]etain assets owned by the decedent pending distribution or liquidation," may "dispose of an asset . . . for cash," may enter "for any purpose into a lease as lessor or lessee" and may enter "into a lease or arrangement for exploration and removal of minerals or other natural resources."

(f) Almer also argued the personal representative violated the Uniform Principal and Income Act (1997) by not distributing minerals to a testamentary mineral trust or making distributions of royalty income. He notes section 59-04.2-06 states an "income beneficiary is entitled to net income from the date on which the income interest begins," which is "the date of a testator's death . . . even if there is an intervening period of administration of the testator's estate." However, N.D.C.C. ch. 59-04 plainly does not apply when a will or trust provides conflicting provisions, in which case the trust or estate "shall" be administered "in accordance with the terms of the trust or the will." The will in this case differs from the statute by allowing the personal representative, in her "absolute discretion" to use "any" of the "liquid assets in my Estate" to pay "my debts and taxes."

(g) The costs of administering this estate, including taxes and litigation expenses, have been substantial and ongoing. It would have been imprudent and unreasonable for the personal representative to immediately distribute all of the estate assets or fail to maintain a financial reserve in the estate, until such time as the estate was actually drawing to a close. The personal representative acted reasonably when she retained and utilized estate assets.

(h) Almer argued the personal representative had no basis to believe he stole grain, and she wasted estate assets by pursuing litigation against him that ultimately failed. The district court found several individuals made statements to the personal representative that gave her reason to believe the decedent's grain bins were full at the time of his death. The court found Almer had access to the grain bins before and after the decedent's death and was generally uncooperative with the personal representative. The court found that a forensic accountant provided the personal representative with a report indicating grain was missing and that Almer sold more grain than he produced on his own property. The court found the personal representative's accusations and decision to bring the lawsuit against Almer were reasonable given the information she had at the time. The court also found the protracted and expensive nature of the litigation with Almer was due in part to counterclaims pursued by Almer.

(i) Almer argued the personal representative failed to distribute equipment that was devised to him. He asserts some farm equipment was improperly characterized as construction equipment. The district court found "more than two hundred pieces of equipment" existed during the decedent's life, the equipment "went back and forth" between farming and construction operations, and the decedent never created a list characterizing the equipment. The court found the personal representative's distribution of the equipment, which was based on advice by "those who were familiar with the equipment and its day-to-day uses," was reasonable and did not constitute a breach of fiduciary duty.

(j) Almer argued the personal representative failed to properly maintain farm equipment and distributed some equipment in a damaged state. The district court found Almer failed to prove this claim. The court noted Almer only provided his opinion as to damages, which the court did not find credible. The court explained Almer "claims he paid to repair a few of these things, but presented no receipts showing the cost. He alleges $100,000.00 in repair costs for a sprayer and another $100,000.00 for a tractor, but then admitted at trial that he does not know what is wrong with these items, has never had them looked at by a dealer or repair shop, and does not know what it would actually cost to repair them."

e. ***Haverstick v. Haverstick (In re Est. of Haverstick),* 683 S.W.3d 167 (Supreme Court of Arkansas 2024).** Will provisions controlled disposition of annuity proceeds over beneficiary designation forms.

(1) In 1992, John Haverstick Sr. obtained an annuity from Southern Farm Bureau. When the policy was obtained, John Sr. named the following beneficiaries: "One third to Frances P. Garner friend, one third to John A. Haverstick son and one third to Jerry Haverstick son." The annuity policy stated that the owner may change the beneficiary during the annuitant's lifetime by filing written notice to Southern Farm Bureau.

(2) In 2000, John Sr. changed the beneficiary to the following: "The Executors or Administrators of the Estate John H. Haverstick." In 2004, John Sr. changed the beneficiaries as follows: "In equal shares to John A. Haverstick, son, Jerry Haverstick, son, & Frances Garner, friend who survive the insured, except that if Jerry Haverstick shall Predecease the Insured leaving issue, then the share of such deceased child to his issue, per stirpes." In 2005, John Sr. made another change to the beneficiaries: "In equal shares to John A. Haverstick, son, Jerry Haverstick, son, & Frances Haverstick, wife who survive the insured, except that if Jerry Haverstick shall Predecease the Insured leaving issue, then the share of such deceased child to his issue, per stirpes." This is the last written beneficiary change-request form filed.

(3) On October 20, 2015, John Sr. executed his will at the office of his attorney, Thomas "Bay" Fitzhugh. The will stated in pertinent part: "I have an annuity or policy with Farm Bureau and I have made my estate the beneficiary of the proceeds from that policy. The value of the policy at the present time is approximately $400,000.00. I leave to both of my sons $10,000.00 a piece to be paid out of the proceeds from that policy upon my death. The remainder of my property real, personal and mixed I give to my wife Frances should she survive me. In the event that my wife Frances should predecease me I leave all of my property to my children share and share alike. In the event that my son Jerry should predecease me I leave his portion to his son Jeremy."

(4) John Sr. died on May 2, 2018. Neither John Jr. nor Jerry was aware of the 2015 revised will until after John Sr.'s death. After John Sr.'s death, Frances filed a petition to probate the will and appoint Frances as personal representative. Attorney Fitzhugh also filed an order probating the will and appointing Frances as personal representative. John Jr. and Jerry filed a motion to contest the will and set aside the order probating the will and appointing Frances as personal representative. Later, in an amended motion, John Jr. and Jerry argued that Frances exercised undue influence over John Sr.; isolated him from his family; and engaged in a game of secrecy and deception that she thought would result in a financial windfall for herself.

(5) The circuit court found the will was valid and that there was neither a confidential relationship nor undue influence. John Jr. and Jerry timely appealed, and the court of appeals affirmed. John Jr. and Jerry filed a petition for review, and the Arkansas Supreme Court affirmed the circuit court. Frances, as personal representative, filed a petition for delivery of deposited funds. John Jr. and Jerry denied that the clerk should be ordered to transfer the funds and interest to Frances.

(6) John Jr. and Jerry filed a petition to declare the annuity beneficiary form valid and controlling. The circuit court denied John Jr. and Jerry's petition to declare the annuity beneficiary form valid and controlling and dismissed the petition.

(7) John Jr. and Jerry appealed and the Arkansas Supreme Court, over one dissent, affirmed on the following grounds:

(a) The will at issue here specifically identified the Farm Bureau annuity valued at $400,000. The will further set forth John Sr.'s intent to leave each of his sons $10,000 to be paid from the annuity. Thus, John Sr.'s will clearly identified the $400,000 Farm Bureau annuity and his intent to change the distribution amount that each son would receive by stating that they would each receive $10,000 from that annuity. As to whether John Sr. intended to change the names of the beneficiaries and make his estate the beneficiary of the proceeds from the annuity, the circuit court correctly found that while the Will doesn't change the names of the beneficiaries, it is clear that the intent of the testator was to change how the proceeds from the Farm Bureau annuity policy would be paid upon his death. John Sr. clearly identified the annuity policy and his intent to change how the proceeds from the annuity would be distributed upon his death.

(b) The Arkansas policy of allowing the testator to modify a beneficiary designation to life insurance policies also applies to the will at issue here, which changed how the proceeds from the annuity would be distributed upon John Sr.'s death. The will is John Sr.'s last expression on the subject, and it ought to control.

(c) John Jr. and Jerry argued that under Act 925 of 2021, attempts to modify annuity beneficiaries by will are ineffective. John Jr. and Jerry acknowledge that the Act was not in effect when John Sr. executed his 2015 will. However, they assert that because this Act is procedural or remedial, it should apply retroactively and the court should hold that the Act mandates that an attempt to change annuity beneficiaries by a will is ineffective and that the 2005 beneficiary form controls. As an additional basis to apply the Act retroactively, they argue that this Act's purpose is to clarify rather than change the law.

(d) Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. Any interpretation of an act must be aimed at determining whether retroactive effect is stated or implied so clearly and unequivocally as to eliminate any doubt. In determining legislative intent, the court has observed a strict rule of construction against retroactive operation and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. However, this rule does not ordinarily apply to procedural or remedial legislation. The strict rule of construction does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation.

(e) Act 925 of 2021, codified at Ark. Code Ann. §§ 23-81-137 and 28-25-111, states that this is "an act to prohibit a change to a designated or named beneficiary of a life insurance policy or annuity contract through a will; to clarify that only a change to a life insurance policy or annuity contract can change the designated or named beneficiary of a life insurance policy or annuity contract."

(f) Arkansas Code Annotated section 23-81-137, titled "Requirements to change designated or named beneficiary of life insurance policy or annuity contract—Prohibition," states that a designated or named beneficiary of a life insurance policy or annuity contract (1) can be changed according to the terms of the life insurance policy or annuity contract; and (2) cannot be changed in a will.

(g) Arkansas Code Annotated section 28-25-111, titled "Life Insurance policy or annuity contract—Proceeds," provides that a testamentary change to a designated or named beneficiary of a life insurance policy or annuity contract is ineffective if the change is not made according to the terms of the life insurance policy or annuity contract.

(h) The Act does not expressly state that it is to be applied retroactively. The legislature could have included language in the Act stating that it should be applied retroactively, but it did not. Frances had a vested interest in the proceeds of the annuity when John Sr. died, which was well before the enactment of the Act. Because the Act is not merely remedial or procedural, the Act does not apply retroactively.

(8) One dissenting justice would hold that the owner of an individual retirement annuity must change the beneficiary under the annuity.

f. ***In re Est. of Bentley,* 2024 Alas. LEXIS 98 (Supreme Court of Alaska 2024).** Alaska law permitted Washington testator to choose Alaska law to govern the rights of a surviving spouse who married the testator after the will was executed.

(1) Paul Bentley and Eleanor Haynes first married in 1989 in Washington and divorced a few years later. They did not have children together. After their divorce, they remained in contact. Haynes later remarried, but Bentley did not. After Haynes divorced her second spouse, she and Bentley became close again. At that time Haynes lived in Washington and Bentley lived in Seward. They began flying to visit each other and vacationed together in Mexico and Hawaii.

(2) Bentley received a kidney transplant, which compromised his immune system and eventually led to skin cancer and other health complications. In May 2017, Bentley and Haynes met with an attorney in Anchorage about drawing up a will for Bentley. Bentley signed the will in August. The will devised some property to Haynes, some property to his brother, and the residuary of the estate to the National Kidney Foundation ("NKF"). The will nominated Haynes as personal representative and directed the personal representative "to administer [Bentley's] estate in accordance with the provisions of the Uniform Probate Code, as codified and amended by the Alaska statutes."

(3) In October 2017, Bentley developed kidney failure. That month Bentley flew to Washington to stay with Haynes while he received treatment. After some complications Bentley was hospitalized in November. Bentley spent three days in the hospital on dialysis, then elected to stop treatment on November 17. That same day Bentley asked Haynes what she wanted "for Christmas." She responded that she wanted to marry him. The two obtained a marriage license, waited the legally required 48 hours, and then were married by a hospice chaplain on November 20. Bentley died the next day.

(4) Haynes was appointed as personal representative of Bentley's estate in January 2018. Haynes hired one attorney to represent her in her role as personal representative and another attorney to represent her personally as the surviving spouse and beneficiary. Haynes filed an inventory showing that the total value of Bentley's estate was $1,822,867.

(5) Haynes then filed a notice claiming three statutory allowances and a demand for the elective share payable to a surviving spouse. Haynes also took the position that as an after-married spouse, she was entitled to Bentley's entire estate. NKF, the residuary beneficiary of Bentley's estate, opposed Haynes's petition, arguing that Haynes was not entitled to inherit as an after-married spouse because she did not meet the statutory criteria.

(6) Haynes moved for partial summary judgment and NKF cross-moved for summary judgment. The superior court ruled that Bentley was domiciled in Washington at death, and that Alaska law would govern the "intrinsic validity" of the will and Washington law would govern the "formal validity," citing the choice-of-law provision in Alaska's probate code. NKF then filed a motion arguing that Haynes was not entitled to inherit as an after-married spouse under Washington law. Haynes opposed. The superior court agreed with NKF that Washington law controlled, and therefore Haynes could not inherit as an after-married spouse under Alaska law. The superior court ruled that Haynes was entitled to $125,000 as a statutory spousal allowance under Washington law, but was not entitled to inherit as an after-married spouse under Washington law. Haynes and NKF both moved for attorney's fees. The superior court granted NKF's motion, awarding $100,757 in fees against Haynes in her individual capacity. It denied Haynes's motion for fees.

(7) Haynes appealed and the Alaska Supreme Court reversed and remanded on the following grounds:

(a) Alaska probate code's choice-of-law statute allows testators domiciled in other states to choose Alaska law to govern the "effect" and "interpretation" of the will's disposition of property located in Alaska. Bentley so chose. Because Alaska's after-married spouse statute controls the effect and interpretation of a will when the testator later gets married, Haynes's rights to Bentley's Alaska property are governed by AS 13.12.301 — not by the comparable provision in Washington law.

(b) Alaska's probate code contains a detailed choice-of-law statute. Two of the statute's provisions are key to this case. Subsection (b) lays out the general rule: "Subject to the other provisions of this section, the intrinsic validity, effect, revocation, or alteration of a testamentary disposition of personal property and the manner in which the property devolves at death when not disposed of by will are determined by the law of the jurisdiction in which the decedent was domiciled at death."

(c) Subsection (i) provides an exception. It allows the testator some ability to choose Alaska law to govern the disposition of property located in Alaska even if the testator is not domiciled in Alaska at the time of death: "When a testator, who is not domiciled in this state at the time of death, provides in the testator's will that the testator elects to have the disposition of the testator's property situated in this state governed by the local law of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation, or alteration of the provision, is determined by the local law of this state. The formal validity of the will is determined under (b) of this section."

(d) The parties' focus on the meaning of "intrinsic validity" is misplaced. This framing ignores the probate code's instruction that testators may choose Alaska law to govern "the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation, or alteration of the provision." In other words, "intrinsic validity" — which includes a testator's capacity to execute the will — is only one of several issues that a testator may choose to have governed by Alaska law. "Interpretation" is defined as "the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the testator if the testator's intention is not otherwise ascertainable." "Effect" is defined as "the legal consequences attributed under the local law of a jurisdiction to a valid testamentary disposition." A testator can choose Alaska law to govern the interpretation and effect of a will provision disposing of personal property located in Alaska.

(e) Alaska's after-married spouse statute pertains to the interpretation and effect of a will when the testator subsequently marries. The statute creates a default rule that a surviving spouse is entitled to an intestate share, but then allows the testator to override this rule by making his or her intent clear. In other words, the statute determines the effect of the will's express provisions. It also informs the court's interpretation of the testator's chosen language because it directs courts to consider whether the will was made in contemplation of marriage or was intended to be effective notwithstanding a subsequent marriage.

(f) The underlying policy is to allow testators to choose whether to have Alaska law govern the interpretation and effect of their wills. It therefore seems likely the legislature intended to allow testators to choose Alaska law to determine how to carry out their wills if they later marry.

(g) The statutory reference to "the manner in which the property devolves at death when not disposed of by will" seems meant to govern property that is disposed of by means other than a will, like joint bank accounts and retirement accounts subject to transfer-on-death provisions, or property of someone who dies intestate. The use of the term "intestate share" to describe an after-married spouse's share of property devised by will does not mean that this property is "not disposed of by will." Rather, there is a rule for interpreting the will's disposition of property when the testator later marries. The statute does not take the testator's property entirely outside the will. In some cases, such as when the will was made in contemplation of an impending marriage, applying the statute means the testator's property is distributed exactly as the testator devised. This reading of the statute creates a logical distinction between matters of "interpretation" and "effect" of the will, which the testator can choose, and laws governing "the manner in which the property devolves at death when not disposed of by will," which the testator cannot choose because this property is not controlled by the will.

(h) New York's probate choice-of-law statute is very similar to Alaska's. Both provide that the law of the testator's domicile at death generally controls disposition of personal property. The statutes also use similar language to describe when the testators can select a different jurisdiction's law. The New York statute was enacted in 1966, over three decades before Alaska's version was enacted. This interpretation of the Alaska statute is similar to the interpretation adopted by New York's highest court. Given the striking similarity between New York and Alaska law, New York case law is a persuasive guide to the legislature's intent.

(i) A testator may choose Alaska law to govern the effect and interpretation of the will with regard to property located in Alaska. Alaska's after-married spouse statute determines the interpretation and effect of a will when the testator subsequently marries. When Bentley chose to have his will administered under Alaska law, he chose Alaska law to govern his will in the event he later married. Accordingly, we reverse the superior court's decision to apply Washington law to this issue and remand for it to apply Alaska law.

g. ***Johnson v. Dennis,* 2024 Iowa App. LEXIS 299 (Court of Appeals of Iowa 2024).** Trust interest contingent on surviving date of distribution of trust assets.

(1) In 1992, husband and wife, Charles and Josephine Dennis executed the Dennis Family Trust. They were both the settlors and trustees. The trust provided for Charles and Josephine during their lives and for distribution to their children after their deaths. Charles and Josephine had four children, Michael, Greg, George, and Mardelle. Charles died in 2006, and Josephine died in 2013.

(2) Michael and Mardelle became trustees after their mother's death. The trust dictated that: "Upon the death of the surviving Trustor, unless stated otherwise, the Trustee shall apply and distribute the net income and principal of each of the shares of the resulting Trust Estate . . . set aside for the benefit of the Trustor's named beneficiaries as follows: Michael E. Dennis ¼; George L. Dennis ¼; Greg A. Dennis ¼; Mardelle M. Doud ¼.

(3) At the time of Josephine's death, the trustees attempted to sell the house owned by the trust, but they could not come to an agreement on a sale price. No distribution occurred.

(4) Mardelle passed away in 2019. At the time of her death, the assets remaining in the trust were the house, its contents, and money in a trust bank account. After Mardelle's death, Michael became the sole trustee. Mardelle's daughter had been living in the home and agreed to buy it. After the sale of the house closed, Michael made the first distribution of the trust to himself, George, and Greg, but not to Mardelle's issue.

(5) To justify the lack of distribution to Mardelle's issue, Michael alleges that before Mardelle's death, she wrote herself checks out of the trust account to cover "hot checks" from gambling debt. He also asserts that he provided money directly to Mardelle to cover gambling debt. Michael contends the funds should be distributed to Mardelle's estate once opened because her interest was vested when Josephine died. Michael also has an interest in her debt to him being paid out of the estate. Mardelle's children and husband filed this action seeking the distribution of Mardelle's share, contending they were entitled to it under the trust, citing section 4.4(d): "If any beneficiary for whom a share of the trust estate has been set aside should fail to survive the above distribution, then the Trustee shall distribute one hundred percent (100%) of the balance of such deceased beneficiary's share of the Trust Estate, in equal shares, to the issue of the deceased beneficiary."

(6) The district court agreed and ruled that the plaintiffs were entitled to Mardelle's share of the trust. The court also removed Michael as a trustee, citing a conflict of interest. Michael moved to reconsider, which the court denied. Michael appealed and the court of appeals affirmed on the following grounds:

  (a) The Trust terms required that the distribution be made to Mardelle's issue as Mardelle had failed to survive the distribution. There is no ambiguity in this language. And this language shows Mardelle's interest was contingent on surviving the distribution.

  (b) Michael's arguments are defeated by the plain language of the trust. The language of the trust requires that if a beneficiary predeceases the distribution of the trust estate, that beneficiary's share is to go to their issue. Because a beneficiary's interest was contingent on surviving the distribution, Mardelle's share should be distributed to her issue.

h. ***Marine-Adams v. Tenerowicz (In re Boutet),* 2024 Mich. App. LEXIS 643 (Court of Appeals of Michigan 2024).** Failure to satisfy trust condition that required beneficiary to inform her son of his biological father's identity caused beneficiary to forfeit share of trust.

(1) On November 18, 2005, Bernard Boutet, as settlor, established the Bernard R. Boutet Revocable Living Trust (the "Trust"). The Trust was drafted by attorney M. Ted Kiriazis. Bernard and his wife, Marilyn Boutet, were the original co-trustees. A First Amendment to the Trust was also executed on November 18, 2005. Marilyn died on December 1, 2009. The original beneficiaries of the Trust, following Bernard and Marilyn, were their three children: Darrell Boutet, Dale Boutet, and Diane. Dale died on April 29, 2014. A Second Amendment to the Trust and a Third Amendment to the Trust were executed on June 14, 2019.

(2) In relevant part, the Second Amendment to the Trust allocated the distributions of trust assets upon Bernard's death and further stated that Kiriazis was appointed to become the successor trustee upon Bernard's death.

(3) At issue in this appeal is the language of the Third Amendment to the Trust, which was signed by Bernard and stated in relevant part as follows: "Except as otherwise provided below, Twenty-Five percent (25%) to Settlor's daughter, DIANE TENEROWICZ. Notwithstanding any provision of this Agreement or Applicable Law to the contrary, if DIANE TENEROWICZ does not take the Required Action (as defined below), then all beneficial interests, powers and rights of every kind and nature which she otherwise has under this Agreement shall be forfeited, including the allocation herein provided. If the allocation is forfeited in accordance with the above, then the percentages in Section 7.2 shall be revised as follows: (1) Zero percent (0%) to Settlor's daughter, DIANE TENEROWICZ; (2) Forty

percent (40%) to Settlor's son, DARRELL BOUTET; (3) Twenty-Five percent (25%) to Settlor's grandson, RYAN BOUTET; (4) Ten percent (10%) to Settlor's grandson, KEITH BOUTET; (5) Ten percent (10%) to Settlor's granddaughter, KATIE TENEROWICZ; (6) Five percent (5%) to Settlor's step-granddaughter, STACEY CARR (the daughter of the spouse of Settlor's son, DARRELL BOUTET); (7) Ten percent (10%) to Settlor's good friend, CHRISTINE N. HUGHES. If DIANE TENEROWICZ is not surviving, then these assets shall be allocated to her surviving descendants, per stirpes. If no descendants are surviving, then this allocation shall lapse and the assets shall be allocated to the other individuals (or their descendants, if applicable) named in this Section 7.2, then surviving, in the same proportions as provided herein. For purposes of this Agreement, "Required Action" means: (1) informing her son, KEITH BOUTET, as to whom his biological father was, within sixty (60) days after the death of Settlor; and (2) taking all actions reasonably necessary to provide scientific evidence (including DNA) of the biological fatherhood, including the taking of any medical examinations or testing. DIANE TENEROWICZ shall waive all provisions of law relating to disclosure of confidential medical information insofar as such disclosure would be pertinent to the determinations required under this Section. All expenses incurred in connection with such examinations and testing shall be charged to the trust share of DIANE TENEROWICZ."

(4) On December 15, 2019, approximately six months after executing the Third Amendment to the Trust, Bernard died.

(5) Shortly after Bernard's death, Diane met with Kiriazis at his office. Kiriazis discussed the Third Amendment with her. Diane understood that the amendment required her to disclose to Keith the identity of his biological father within 60 days of Bernard's death and to take all actions reasonably necessary to provide scientific evidence of paternity within the same time period. She admitted that she understood that she would forfeit her share under the Trust if she failed to fulfill these requirements.

(6) However, Diane did not know the identity of Keith's biological father; she only knew that Keith's father could be one of two potential men. Moreover, Keith was an adult by this point and he and Diane were apparently estranged and did not communicate with each other. Diane did not give Keith any information regarding his paternity.

(7) Kiriazis, as successor trustee of the Trust, filed a petition that sought to vacate the Third Amendment. He did not notify the other beneficiaries of the Trust. The probate court denied the petition. Subsequently, an attorney representing Keith, Darrell, and Hughes (collectively, the "beneficiaries") entered an appearance on their behalf and filed a petition for trust supervision, removal of Kiriazis as the successor trustee, forfeiture of Diane's share under the Trust, determination that a conflict of interest exists, and payment of attorney fees and costs. The probate court granted the petition for full supervision of the Trust, removed Kiriazis as trustee, and appointed Lynn Marine-Adams as successor trustee. The court granted the petition to forfeit Diane's share of the Trust and denied the petition alleging that Kiriazis breached his fiduciary duty.

(8) Diane appealed and the court of appeals affirmed on the following grounds:

  (a) The Third Amendment unambiguously requires Diane to perform at least the first action—informing Keith of his biological father's identity—within 60 days of Bernard's death. There is no dispute that Diane did not provide any information about Keith's biological father to Keith within 60 days of Bernard's death. She did not even communicate to him within that timeframe that she knew that his father was one of two potential individuals.

  (b) Because the language of the Third Amendment is clear and unambiguous, the language reflects Bernard's intent as a matter of law. Diane failed to satisfy the terms of the Third Amendment and thereby forfeited her share of the Trust.

(c) To the extent Diane seems to claim that she was somehow excused from timely performing the required condition because there was allegedly a question as to the enforceability of the provision in the Third Amendment, Diane has not provided any cogent and legally supported basis on which the amendment could actually have been found unenforceable. In fact, such conditions on a testamentary gift are generally enforceable. Public interests are not in any manner prejudiced or the fundamental rights of any individual citizen in any manner violated by upholding a gift or bequest made upon condition that he observe some specified line of personal conduct not in violation of law, or contrary to good morals. The donee is under no compulsion to accept the gift. He is free to elect. The question he has to decide is the ordinary one which arises in nearly every business transaction—whether the thing offered him is worth the price demanded. The owner of property may give or refrain from giving. He may attach to his offer such lawful conditions as his reason, caprice, or malice may dictate, but he is dealing with his own, and the donee, who claims the benefit of the gift, must take it, if at all, upon the terms offered.

(d) Moreover, Diane never challenged the enforceability of the Required Action within the 60-day period, which would seem to have been the proper action to take to protect her entitlement to the gift under the trust if she thought it was not possible to comply with the condition due to circumstances of which Bernard was not aware when he executed the Third Amendment. The fact that she did not know which individual was actually Keith's biological father when she first learned of the Third Amendment does not mean that it would have been impossible for her to take the steps that she subsequently took to attempt to figure out the answer. Diane mischaracterizes the factual record by claiming that her lack of definitive knowledge on the issue of Keith's paternity, coupled with her total failure to take any action regarding the matter within 60 days of Bernard's death is a result of "impossibility." Difficult is not the same as "impossible."

(e) Testator was not under any legal obligation to provide anything for his daughter and he had a right to attach to a gift in his will any lawful terms or conditions he saw fit. Courts do not make wills by substituting their judgment for that of the testator. It is not the province of the court of jury to substitute its judgment for that of the testator, or to correct a seeming injustice. So long as the testator was of sound mind and expressed her own desires in the instrument, she was at liberty to make whatever disposition she chose.

(f) Diane's mere assertion that the condition is of questionable enforceability does not make it so. Diane never took any action to assert this theory until well after the 60-day period had expired. On a related note and contrary to Diane's argument on appeal, the probate court's ruling that it was reasonable for Kiriazis to petition the court for instructions because the Third Amendment provision was "questionably invalid" does not conflict with the probate court's ruling that Diane forfeited her share. Diane theoretically could have petitioned the probate court to construe the Third Amendment within 60 days of Bernard's death. However, she did nothing within 60 days of Bernard's death, and that is the reason she forfeited her share.

(9) One concurring justice would hold unenforceable the conditions in the Bernard R. Boutet Trust as contrary to public policy, based on the rights of privacy of Diane and the biological father. Tenerowicz's son is an adult, so there is not child support at issue. Tenerowicz's compliance with the trust's conditions would require the putative fathers to submit to DNA testing. They have every right to refuse such a request. Publicly identifying them, even without requesting that they submit to DNA testing, destroys their rights to keep secret highly personal information—their long-ago love affairs with Tenerowicz. A public policy argument was not raised in the trial court, however, and would likely have been unsuccessful even had it been pursued because the Supreme Court's precedent seems to foreclose any public policy challenges to testamentary bequests beyond those that are unlawful. One of

the "purposes" of the trust provision involving Tenerowicz compelled her to disclose intensely personal information, violating her privacy and that of the possible fathers of her son. A public policy analysis should have been undertaken to explore whether Boutet's conditional, "deadhand" bequest should be enforced. The application of "public policy" to trust conditions should be reconsidered by our Supreme Court in view of the adoption of the Uniform Trust Code.

i. ***Ryan v. Ryan Found. (In re Ryan*), 316 Neb. 524 (Supreme Court of Nebraska 2024).** Assets received from GRATs reduced to zero gifts to children at termination of marital trust.

(1) On October 19, 2007, Eileen A. Ryan executed the "Third Amended and Restated Trust Agreement" ("Trust Agreement") that created the Eileen Ryan Revocable Trust. The Trust Agreement used a marital and family trust arrangement such that if Eileen predeceased her husband, Wayne L. Ryan, her assets would be divided into "marital" and "family" shares. The marital and family shares would then be further divided into subtrusts. The assets would be held in subtrusts for the remainder of Wayne's lifetime, with provisions for distribution of income or principal under certain circumstances.

(2) Eileen died in 2013, at which point the Eileen Ryan Revocable Trust was created and funded. This proceeding concerns a portion of the Trust Agreement governing the Eileen Ryan Marital Trust ("Marital Trust") that bequeathed $5 million in Countable Assets to each of Eileen's children. Eileen and Wayne had five children: Constance M. Ryan, Timothy Ryan, Stacy Ryan, Carol Ryan, and Steven Ryan (collectively the "children"). Only the Countable Assets provision in the Marital Trust is specifically at issue in this case.

(3) After Wayne died in 2017, the children began disputing the Countable Assets bequest, some asserting that the $5 million bequest had already been satisfied by amounts each child previously received from "Grantor Retained Annuity Trusts" ("GRATs") established by Eileen and Wayne prior to Eileen's death.

(4) The Trust Agreement provided that the amount distributed to a particular child of the settlor would be "[the] amount, if any, as needed at the time of the death of the survivor of Settlor and Settlor's husband to give [$5 million] in Countable Assets (as defined below) to each of Settlor's children." Section 9(e)(i) explained that "[t]o the extent that the Wayne L. Ryan Revocable Trust Agreement contains a similar bequest, the total of such bequests per child shall be [$5 million] and, to the extent assets are available within the Wayne L. Ryan Revocable Trust, shall be satisfied first pursuant to the Wayne L. Ryan Revocable Trust Agreement." "Countable Assets" were defined in section 9(e)(i)(1) as follows: "Countable Assets" for purposes of computing this [$5 million] shall include any amount(s) currently distributable to a child pursuant to other provisions of the Eileen Ryan Revocable Trust or the Wayne L. Ryan Revocable Trust, any amount passing to Settlor's children pursuant to any Irrevocable Trust which either Settlor and/or Settlor's husband have established during their lifetimes, and any amounts passing automatically to any of Settlor's children by reason of either of the deaths of Settlor and/or Settlor's husband by virtue of beneficiary designation, survivorship, payable on death transfer or joint title (or joint ownership). Countable Assets shall also include any assets, at their current values, from any of the above sources even if not currently distributable to such child if the only reason such amounts are not currently distributable is because the beneficiary has not reached a required age for distribution. Any debt owing to Settlor by a child, as evidenced by a promissory note or other loan documentation, shall be extinguished and the amount of remaining unpaid principal and accrued interest, if any, otherwise due and owing to Settlor shall count toward such [$5 million] for such child.

(5) The Trust Agreement was written and updated several times. The final and controlling version was made on October 19, 2007, and the Countable Assets provision contained in the Marital Trust remained substantially the same as it was in a 2004 version of the Trust

Agreement. In the 2007 Trust Agreement, the residuary from the bequest of Countable Assets would be split one-half to the Ryan children and one-half to the Ryan Foundation.

(6) In July 2007, Eileen and Wayne each implemented GRATs funded by Streck, Inc., shares. Each of the children had received 2,665,346 shares of Streck from the GRATs of Eileen and Wayne. At that time, the court valued the shares of each child at $7,383,008. Constance petitioned the county court to interpret the trust instrument and declare rights or to reform the trust and alleged that a dispute existed as to the interpretation of the provisions of section 9 regarding the Countable Assets bequest because other beneficiaries had asserted that the bequest had been satisfied by distributions that the children received in 2009 from the GRATs. Constance filed a motion for summary judgment. Steven, acting as personal representative of Wayne's estate ("Personal Representative"), filed a motion for partial summary judgment. Through counsel, the Ryan Foundation and Timothy, Carol, and Steven, acting individually, filed joinders to the motion filed by the Personal Representative.

(7) The county court determined that the Trust Agreement was not ambiguous and determined that the amounts the children received from the GRATs were Countable Assets because they satisfied the trust language as "any amount passing to Settlor's children pursuant to any Irrevocable Trust which either Settlor and/or Settlor's husband have established during their lifetimes." The county court found that assets received from the GRATs satisfied the distributions of $5 million to Constance and the other children. The court found that Constance was not entitled to additional assets under equalizing provisions in the Trust Agreement. The Personal Representative's motion for partial summary judgment was treated as a motion for full summary judgment and was granted, and all issues raised in Constance's petition for declaratory relief and for reformation were decided unfavorably against her. The court denied Constance's motion in limine and found that the Personal Representative's administration of Wayne's estate and its obligation for estate and inheritance taxes owed by Eileen's estate are intertwined matters. Steven was permitted to introduce evidence of valuations of assets and the process by which tax filings on behalf of Wayne's estate were prepared pursuant to court order in collaboration with the FNBO-Trustee and the Attorney General. As part of this tax filing, Countable Assets were valued, calculated, and accepted by an Internal Revenue Service determination, the Attorney General, the trustee for federal estate tax purposes, the Douglas County Attorney, and the county court for inheritance tax purposes.

(8) Constance appealed and the Nebraska Supreme Court affirmed on the following grounds:

   (a) This is an appeal from Constance's request to declare rights under the Trust Agreement. When declaratory relief is sought, it is a statutory requirement that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." A party is "indispensable" when the party has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest. The county court could not make a final determination concerning the controversy without affecting the interest of the Personal Representative. In this case, the Personal Representative was not taking an appeal or challenging an order of distribution but was participating in an action to declare rights. He had been part of the proceedings and participated for several years prior to this matter. Although Steven was not a beneficiary in his capacity as the Personal Representative, he was indispensable because the proceedings affected his interests, which, in the instant case, were to dutifully administer and settle Wayne's estate. Eileen's Marital Trust assets were subject to estate taxes under Wayne's estate under the structure of the estate plan. Because Eileen's trust was included in Wayne's estate for various tax purposes, including a marital deduction, the size of Eileen's trust impacted Wayne's estate. There are other impacts on Wayne's estate not repeated here. The county court had recognized the interconnectedness of the two estates for Nebraska inheritance tax calculations for Wayne's estate, and the Personal Representative had been discharged from personal liability by the Internal Revenue Service after a determination of the tax paid. A recalculation of the Countable Assets would affect the Personal Representative's duties. Thus, Steven was an indispensable party in this case and properly participated in the proceedings.

(b) There is no genuine issue of material fact that the children received more than $5 million in Countable Assets from, inter alia, distributions from irrevocable trusts such as the GRATs. The Trust Agreement's definition of Countable Assets is not ambiguous, as the county court correctly determined.

(c) The Trust Agreement provides that the amount distributed from the Marital Trust on behalf of a particular child of the settlor would be "[the] amount, if any, as needed at the time of the death of the survivor of Settlor and Settlor's husband to give $5 million in Countable Assets (as defined below) to each of Settlor's children."

(d) The clauses are not uncertain, and reading the Trust Agreement as a whole does not make these terms ambiguous. For purposes of computing the $5 million, the definition of Countable Assets, as printed in italics and quoted above, includes "any amount passing to Settlor's children pursuant to any Irrevocable Trust, which either Settlor and/or Settlor's husband have established during their lifetimes." "Any amount . . . pursuant to any Irrevocable Trust" includes the amount the children received from the irrevocable GRATs, and such distributions were therefore Countable Assets. Eileen was a sophisticated businesswoman and an experienced creator of trusts, and the Trust Agreement was executed after consulting privately with counsel. She was capable of excluding inter vivos gifts from the "Irrevocable Trusts" provision included in the Countable Assets, as illustrated by the previous clause that targeted amounts "currently distributable" at the time of Wayne's death. When considering the complete provision, the reasonable interpretation is to include distributions from the GRATs as Countable Assets.

(e) Because in earlier proceedings the county court had valued the shares of Streck that each child received at $7,383,008, the county court found that Constance had received more than $5 million from the GRATs distributions. The fact that the shares were valued at more than $5 million is not contested. Because these distributions were Countable Assets, there is no question that Constance was not entitled to additional assets to satisfy the $5 million bequest under the provisions in section 9.

(f) Parol evidence can be used in actions seeking reformation of trust instruments, and a court may rely on such extrinsic evidence. Here, Constance's central argument is that a settlor's subsequent acts are of significance in construing an ambiguous trust instrument. However, the Trust Agreement was not ambiguous, and Constance's speculation regarding construction is not productive in this case.

(g) The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

(h) A "post-execution change of mind" would not afford a basis for reformation of a trust. Constance has identified no evidence in the record other than speculation that shows or infers that both the intent and the terms of the Trust Agreement were affected by a mistake of fact or law. Constance's conjectures regarding Eileen's understandings are thin. After viewing the pleadings and evidence in the light most favorable to Constance and giving her the benefit of all reasonable inferences deductible from the evidence, evidence on the reformation issue did not present a genuine issue of material fact as to whether both Eileen's intent and the terms of the Countable Assets provision were affected by a mistake of fact or law. The county court did not err when it granted summary judgment on the reformation issue and denied and dismissed Constance's petition. Constance's assignment of error regarding reformation is without merit.

j. ***Kosmann v. Brown,* 81 Va. App. 322 (Court of Appeals of Virginia 2024).** Trust amendment made by attorney-in-fact constituted such a general power of appointment that violated the restrictions in the trust agreement.

(1) In May 2015, Brown created the Brown Living Trust, a revocable, grantor trust, appointing herself and her daughter, Monroe, as initial trustees, and Brown's niece, Nadine Seamans, as successor trustee. The Trust Agreement, among other things, specified that Brown, while alive, "may at any time or times amend any provision of [her] Trust Agreement or revoke [her] Trust in whole or in part," and required that "[a]ny amendment or revocation of [her] Trust Agreement made during [Brown's] life shall be by a written instrument signed by [her] and delivered to [her] Trustee."

(2) In addition, Article 4, Section 4 of the Trust Agreement provided: "Any right or power, other than (i) an amendment by Will, or (ii) any right or power that would constitute a general power of appointment if held by [Brown's] Attorney-in-Fact, may be exercised for and on [Brown's] behalf by any Attorney-in-Fact who, at the time of the exercise, is duly appointed and acting for [Brown] under a valid and enforceable Power of Attorney executed by [Brown]. Only if no such Attorney-in-Fact is then available may a legal representative appointed by a court of competent jurisdiction exercise such right or power."

(3) Upon Brown's death, the remainder of her property was to be divided into separate and equal shares, with one share for Monroe, then living, and one share for Seamans should Monroe predecease Brown." In addition, the Trust Agreement provided that if at any time there is no beneficiary entitled to receive all or any part of Brown's Trust Estate then her remaining Trust Estate shall be distributed to the Fairfax County Society for the Prevention of Cruelty to Animals.

(4) Brown also executed a Property Power of Attorney ("POA") at about the same time that she created the Trust Agreement, which appointed as agents Monroe and Seamans. The document, in relevant part, gave to Brown's agents the power to amend, revoke and/or exercise any and all other powers Brown could exercise under the terms of any trust of which she is Trustor."

(5) In March 2019, Monroe, acting as attorney-in-fact for Brown, amended the Trust to make the Trust irrevocable, name Monroe and Kosmann as trustees, and to change the distributions at Brown's death to add: $50,000 to Nadine Seamans, or her descendants, per stirpes; $5,000 to 4Paws Rescue Team, Inc., and distribution of the residue to Monroe. At the same time, Monroe, acting as Brown's attorney-in-fact, also resigned Brown as Trustee of the Trust, thereby leaving Monroe the sole Initial Trustee.

(6) Almost a year later, in July 2020, Kosmann's counsel sent a letter to Sarah Darnell, the Business Office Manager for Discovery Village at the Forum in Fort Myers, Florida, where Brown was a resident in the memory care unit. In the letter, Kosmann's counsel stated that, "In the past, Ms. Brown's bills for Discovery Village have been paid by the Trust," and asked that Discovery Village "discontinue automatically drafting, or otherwise paying Ms. Brown's Discovery Village bills" from the previously established bank account. The letter directed Discovery Village to contact Seamans for payment.

(7) Seamans, acting as Brown's attorney-in-fact, petitioned for declaratory judgment that the Amendment and Resignation were invalid and unenforceable. Brown moved for summary judgment. Kosmann, in response, moved for partial summary judgment. The circuit court declared the amendment to the Trust invalid and unenforceable due to Monroe's exercise of a general power of appointment.

(8) Kosmann appealed and the court of appeals affirmed on the following grounds:

(a) The Amendment signed by Monroe as Brown's attorney-in-fact constituted a general power of appointment within the meaning of the Trust Agreement.

(b) Neither the definition of "power of appointment" in Code § 64.2-701, nor the definition of "presently exercisable general power of appointment" in Code § 64.2-1600, contains a categorical exclusion that forbids agents from exercising powers of appointment. Instead, what the statutes make clear is that both terms—"power of appointment" and "presently exercisable general power of appointment"—are not coextensive with the powers of a fiduciary or an attorney-in-fact.

(c) The plain text of the Uniform Trust Code does not support Kosmann's contention that attorneys-in-fact are prohibited from exercising powers of appointment. Instead, the limitation contained in Code § 64.2-701 specifying that a "'[p]ower of appointment' does not include a power of attorney" means what it says: that a power of appointment does not contain a power of attorney. That is, a power of appointment is not a power of attorney. Yet, this distinction imposes no absolute bar that would preclude someone holding a power of attorney from also holding a power of appointment. Indeed, this is a possibility contemplated by other related chapters of the Virginia Code, including the Uniform Power of Attorney Act and the Uniform Disclaimer of Property Interests Act.

(d) Rather, Code § 64.2-701 specifies that when exercising a power of appointment, the powerholder is acting in a nonfiduciary capacity. It follows that a power of appointment does not "include" a power of attorney because someone acting under a power of attorney is an agent, and, thus, a fiduciary.

(e) Code § 64.2-701 contains no prohibition preventing an attorney-in-fact from being authorized to exercise a power of appointment. Although a somewhat paradoxical result, it is conceivable that, under Virginia law, someone operating with a power of attorney could exercise a power of appointment. However, in exercising a power of appointment, an attorney-in-fact would still be bound to exercise the power consistent with its terms—a constraint that governs all such powerholders.

(f) Similarly, although a presently exercisable general power of appointment under the Uniform Power of Attorney Act does not include a power exercisable in a fiduciary capacity, an attorney-in-fact may nevertheless, under the Act, hold a presently exercisable general power of appointment, so long as the power of attorney does not provide otherwise, and there is language in the power of attorney granting general authority with respect to estates, trusts, and other beneficial interests. Although a presently exercisable general power of appointment does not include a power exercisable in a fiduciary capacity, an attorney-in-fact may nevertheless, if authorized, hold such a power.

(g) It is merely the case that a power of attorney does not inhere in a power of appointment or a presently exercisable general power of appointment. Someone acting under a power of attorney may not, by default, exercise a power of appointment.

(h) The plain text of the Trust Agreement precluded Monroe, as Brown's attorney-in-fact, from exercising any right or power that would constitute a general power of appointment. Brown intended, through her Trust Agreement, to prohibit her attorney-in-fact from exercising such a power, and it is Brown's intent, not the statutory definitions that controls here.

(i) The Trust Agreement expressly contemplates a conceptual possibility foreclosed by Kosmann's argument: an attorney-in-fact exercising a right or power that would constitute a general power of appointment. The Trust Agreement expressly proscribes such an exercise of power, stating that any right or power may be exercised by an attorney-in-fact unless it would constitute a general power of appointment.

(j) The Trust Agreement clearly evinces Brown's intent to guard general powers of appointment closely and carefully. The Agreement, therefore, bespeaks no intent to permit her attorney-in-fact to exercise the kind of broad, far-reaching power that imbues in the holder of a general power of appointment.

(k) In amending the Trust, Monroe violated this requirement, taking actions that, in substance, constituted an exercise of a general power of appointment, i.e., were the exercise of right or power in favor of a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(l) Monroe's Amendment named Monroe and Kosmann as initial trustees and removed Brown as an initial trustee and Seamans as a successor trustee, while requiring that any "remaining trust property [be distributed] to Kimberly P. Monroe outright, free of trust," and providing that if "Monroe is deceased," the "Trustee shall distribute" any "remaining trust property to the then-acting Trustee of the Monroe Living Trust." The Amendment also made the Trust, and thus Monroe's revisions, irrevocable.

(m) While it is true that Monroe stood to inherit the remainder of the Trust, Monroe's Amendment rewired the Trust, as to lock in an arrangement redounding to the favor of Monroe and, in particular, Monroe's estate. Hence, because the changes Monroe made to the Trust were undisputedly in Monroe's favor, and Monroe signed the Amendment as Brown's attorney-in-fact, the Amendment is invalid and so unenforceable, since it conflicts with Article 4, Section 4 of the Trust Agreement.

k. ***In re Est. of Bebout,*** **2024 Pa. Super. Unpub. LEXIS 17 (Superior Court of Pennsylvania 2024).** Language in will disinheriting child is effective to eliminate child's interest under intestacy where will did not include a residuary clause.

(1) George Bebout ("Bebout") died on June 16, 2021. Prior to his death, Bebout drafted a last will and testament ("the Will"), in which he made specific bequests to his wife Angelita V. Acoba ("Acoba") and Megan Bebout ("Appellant"). Appellant was born from a previous marriage and is Bebout's only child. In the Will, Bebout specifically bequeathed to Acoba "all of my tangible personal property." In reference to Appellant, the Will read: "I give and bequeath the sum of FIVE ($5.00) DOLLARS to my daughter, Megan Bebout. It is my desire that this is all she is to receive from me, for reasons known to me." There is no residuary clause, disposing of the remainder of Bebout's estate.

(2) On September 8, 2022, Acoba filed a petition for construction of the Will. Acoba asserted that the absence of a residuary clause in the Will was "a scrivener's error." Acoba contended that the only possible way to construe the Will is that the remainder of Bebout's property be distributed to Acoba in light of the express limitation of the inheritance of Appellant to the sum of Five Dollars ($5.00) and no comparable limitation on the inheritance of Acoba. In the alternative, Acoba asserted that if there is a partial intestacy due to the lack of a residual clause, Acoba would still be entitled to the entire residual estate by operation of law, due to Bebout's express disinheritance of Appellant from receiving anything more than five dollars from his estate.

(3) Appellant and the Estate and Acoba filed cross-motions for judgment on the pleadings. After a hearing, the orphans' court entered an order in favor of the Estate and Acoba. On appeal, the court of appeals affirmed on the following grounds:

(a) The Probate, Estates and Fiduciaries Code provides that a testator may disinherit an heir from receiving a share of an intestate estate by and through a will: "A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which the individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his intestate share."

(b) The language used here specifically excludes Appellant from the entirety of Bebout's estate, not only the part of his estate which passes under the Will. The language establishes a clear intent to disinherit a child from an entire estate.

(c) Bebout was permitted to exclude or limit Appellant from receiving her share of intestate property. He did just that by clearly stating "this is all she is to receive from me." This broader phrase encompassed not only specific property passing through the will, but also any other property that Appellant could share in. Since there is a clear intent to exclude Appellant from the distribution of the estate, the trial court did not err in granting judgment on the pleadings in favor of Acoba.

l. ***Elmer v. Poynor,* 389 So. 3d 931 (Court of Appeal of Louisiana, Fifth Circuit 2024).** Inter vivos trust with a clause for shifting principal interests that would only be operative while settlor remained alive is not an invalid substitution under Louisiana law.

(1) On June 30, 2017, Jeanne Watson ("the Settlor") created the Watson Family Irrevocable Trust (the "Trust"). The trust named Ms. Watson the income beneficiary for the remainder of her lifetime. Ms. Watson's daughters are Deborah Poynor and Karen Elmer. They were both designated as initial principal beneficiaries, entitled to the remainder of the principal in the trust upon Ms. Watson's death. One term of the Trust was that Ms. Watson reserved "the right to modify ownership interest in principal, including the right to eliminate entirely the principal interest of a principal beneficiary."

(2) The Trust consisted of two categories: (1) assets related to a condominium in Wisconsin; and (2) all other property owned by Ms. Watson. For the condominium assets, the Trust provided that if Ms. Poynor or Ms. Elmer predeceased Ms. Watson and had children at the time of death, then that principal beneficiary's interest would pass to those children (Ms. Watson's grandchildren). However, if Ms. Poynor or Ms. Elmer predeceased Ms. Watson and did not have children of their own at the time of death, then the interest in the condominium would pass to the other principal beneficiary. As to all other assets, the trust provided that "if a principal beneficiary predeceases a Settlor, the principal beneficiary's interest shall vest in the surviving principal beneficiary, or if there is no surviving principal beneficiary, in the surviving descendants of Settlor."

(3) Ms. Elmer died before Ms. Watson in 2020; Ms. Watson passed away later that same year. Appellants Kristen and Lauren Elmer are Ms. Elmer's daughters and survived her. Upon the death of Ms. Watson, the appellants received Ms. Elmer's interest in the condominium assets contained in the Trust. On April 18, 2022, the appellants filed a Petition for Declaratory Judgment at the Twenty-Fourth Judicial District Court, which named Ms. Poynor as a defendant. The petition alleged that the portion of the trust that gave Ms. Poynor full ownership of all remaining non-condominium assets after the deaths of Ms. Elmer and Ms. Watson is invalid under La. R.S. 9:1973(A) of the Louisiana Trust Code. The petition further sought to compel Ms. Poynor to fully account for trust assets to the appellants.

(4) Ms. Poynor and the appellants filed cross-motions for summary judgment, and the trial court denied the appellants' motion and granted Ms. Poynor's motion for summary judgment. On appeal, the court of appeals affirmed on the following grounds:

(a) Section 1.3 of the Trust purports to shift the non-condo interest in the trust principal to a surviving principal beneficiary in case of a principal beneficiary's death. This clause is valid and enforceable as written. The legal question of whether the clause in Section 1.3 of the trust contains a prohibited substitution and is, therefore, null and void or provides a substitution permissible under Louisiana law.

(b) Prohibited substitutions have long been anathema in Louisiana. As articulated by the Louisiana Supreme Court more than a hundred years ago: "The prohibited substitution is an attempt on the part of a donor or testator to vest title in his donee or legatee without the right of alienation or testamentary disposition or the capacity to transmit it to his heirs. The objection to the substitution is that, during the lifetime of the donee or legatee, neither he nor the person designated to acquire the title at the death of the donee or legatee could alienate the property; and the law prohibits keeping property out of commerce indefinitely and complicating the simple tenures by which alone its ownership is permitted."

(c) The Civil Code still forbids prohibited substitutions. A disposition by which a thing is donated in full ownership to a first donee, called the institute, with a charge to preserve the thing and deliver it to a second donee, called the substitute, at the death of the institute, is null concerning both the institute and the substitute. This rule, which has been part of the Civil Code since its inception, impeded the development of trusts in Louisiana until the adoption of the Louisiana Trust Code in 1964. At that time, amendments allowed some substitutions in trust that would otherwise be prohibited.

(d) The Trust Code expressly provides for dispositions that are otherwise prohibited. A disposition authorized by the Trust Code may be made in trust, although it would contain a prohibited substitution if made free of a trust. A settlor may dispose of the property in trust to the same extent that he may dispose of that property free of trust and to any other extent authorized by the Code and that a trust containing a substitution authorized by the Code is valid.

(e) The trust instrument states: "As to the remainder of the Trust principal, if a principal beneficiary predeceases a Settlor, the principal beneficiary's interest shall vest in the surviving principal beneficiary, or if there is no surviving principal beneficiary, in the surviving descendants of Settlor." On its face, this provision contains a substitution. Ms. Watson gives property in trust to her daughters, Karen and Deborah, but then dictates what happens to that property at the beneficiary's death rather than allow the beneficiary themselves to determine to whom the property should go when they die.

(f) In the case before us, the settlor, Ms. Watson, created an inter vivos trust with a clause for shifting principal interests that would only be operative while she remained alive. Under the Watson Trust, the settlor, Ms. Watson, remained the trust's income beneficiary during her lifetime. Ms. Watson was the income beneficiary of the Watson Trust when Karen's principal beneficiary interest shifted to Deborah. As such, the Watson Trust did not provide for a donation of "full ownership" of the property to the principal beneficiaries as is required to meet the definition of a prohibited substitution.

(g) Property may be donated in trust to the same extent she may dispose of property free of trust. Ms. Watson's inter vivos donation conditioned upon the beneficiary surviving her is permissible, not a prohibited substitution, and the trust instrument is valid and enforceable as written.

m. ***Est. of Rick,* 384 So. 3d 945 (Court of Appeal of Louisiana, Fourth Circuit 2024).** Phrase "if I don't make it through this open heart surgery" in will is a suspension condition that voids gift to spouse.

(1) Roderick Anderson Rick, Sr. (the "decedent") died on October 24, 2016. At the time of his death, he was married to Tresea Sandifer Rick ("Appellee") and had one son, Roderick Anderson Rick, Jr., from a previous marriage. On April 6, 2017, the decedent's son filed a petition to the open the decedent's succession, alleging that his father had died intestate. However, Appellee filed a Petition to Probate Olographic Testament. The testament, which was half-typed and half-handwritten, was executed on June 29, 2015. In it, the decedent left everything to his wife, Appellee. After a trial on the merits, the court denied Appellee's

Petition to Probate Olographic Testament, finding that the instrument failed to conform with the requirements of Louisiana Civil Code.

(2) Thereafter, Appellee filed another Petition to Probate, File, and Execute Olographic Testament. This time, the instrument was a completely handwritten document that was executed on August 18, 2014. The document reads as follows: "8-18-14 If I don't make it through this open heat [sic] surgery I would like my wife Tresea have [sic] all my money in the bank [sic] this second open heart surgery that she had to see me go through by herself [sic] I want her to know how much I appreciate all the love I have for her being there for me [sic] she don't know her car was a gift. I want her to have the house to finish raising our grandchildren in it [sic] I love my wife Tresea Sleates Roderick A. Rick Sr."

(3) The decedent wrote this document the night before he was to undergo an open-heart surgery. Pamyla C. Rick ("Appellant") filed a Petition for Partial Judgment of Possession, again alleging that the decedent had died intestate. Appellant argued that the August 2014 testament contained a suspensive condition that did not occur. Namely, the sentence "If I don't make it through this open hea[r]t surgery" is a suspensive condition and, because the decedent did survive the surgery, the testament is invalid.

(4) The district court found that the August 2014 testament did not contain a suspensive condition and denied the Petition for Partial Possession. On appeal, the court of appeals, one dissenting opinion, reversed and remanded on the following grounds:

(a) The parties do not dispute the validity of the form of the August 2014 olographic will. The sole question in this case is whether the first portion of the testament constituted a suspensive condition, and the parties ***disagree as to the interpretation of this provision.***

(b) The intent of the testator as expressed within the four corners of his testament controls the disposition of his estate. The decedent's will starts with the phrase, "If I don't make it through this open hea[r]t surgery. ..." This is a qualifying phrase that clarifies everything written after it and establishes a suspensive condition.

(c) The district court erred in finding that it did not contain a suspensive condition. The language of the decedent's olographic will is clear—if the decedent did not survive his 2014 open-heart surgery, then his wife was to inherit. Contrary to the arguments presented on this appeal, there can be no other interpretation of that statement. This is a case wherein the district court disregarded the plain language of the testament under the pretext of pursuing its spirit.

(d) The decedent's testament is not ambiguous as to the disposition of his estate. He states, in plain words, that his wife would inherit his property if he did not survive the open-heart surgery. There is nothing complicated or technical about the phrase such that the decedent, or any layperson, could not comprehend the meaning of the words written. Notably, the decedent mentions the impending surgery twice in his one paragraph testament, giving further insight into his state of mind and concern about the procedure.

(e) This case involves an instance wherein the decedent wrote a will on the eve of a major surgery leaving all to his wife should he not survive that surgery. Appellee is requesting that the Court strike out the plain language used by the decedent, which goes against this state's long-standing rules of interpretation. No court should re-write the decedent's will or presume that the decedent did not understand what he wrote when the language used is explicit and clear. The court's job is to uphold the terms of the testament as written.

(5) The dissenting justice would conclude that the decedent created a valid, enforceable will, where the law is indulgent when interpreting a will written by a testator without the

assistance of counsel, and a will should be read, if possible, to lead to testacy, rather than intestacy.

27. Capacity, Undue Influence, & Contests

a. ***Scott v. Deborah Young,* 2024 Fla. App. LEXIS 7847 (Court of Appeal of Florida, Fifth District 2024).** Determination of incapacity in guardianship proceedings one month before execution of will is not determinative of capacity at time of will signing.

(1) The petition included the following: a codicil executed on September 20, 2018, which removed the brother Thomas Scott as the personal representative and appointed Young to that position; and an August 14, 2018 order from a guardianship court issued in a separate proceeding finding the decedent to have testamentary capacity. Scott also filed both a petition for administration and an objection to Young's petition. In the objection, Scott affirmatively pled that the decedent lacked testamentary capacity to sign the codicil or was unduly influenced. He noted that the decedent had been previously declared totally incapacitated and questioned how a guardianship order entered on August 14, 2018, which relied on medical evaluations conducted in April of 2018, could show that the decedent had testamentary capacity at the time she allegedly signed the codicil on September 20, 2018.

(2) Young filed a motion for judgment on the pleadings which the trial court granted. Scott appealed and the court of appeals reversed and remanded on the following grounds:

(a) Scott sufficiently pleaded a basis to believe that the decedent did not have testamentary capacity at the time she allegedly executed the codicil, which the trial court had to accept as true. By the same token, the trial court was obligated to take as unproved Young's claim that the decedent did have testamentary capacity at the time of execution. Accordingly, the matter should have proceeded allowing both parties to present their cases. Instead, the trial court appeared to labor under a misconception that further proceedings were not needed because the guardianship order was dispositive on the question of the decedent's capacity at the time of execution. That conclusion was incorrect.

(b) Under well-established Florida law, a testator must possess testamentary capacity at the time of executing a will or codicil, which, in this case, allegedly occurred over a month after the guardianship court entered its order. That does not mean the guardianship court's order is irrelevant, however. Testamentary capacity at the time of execution may be established by inferences from proof of the testator's mental condition leading up to and following the execution of the will when such proof is properly related and connected. The guardianship court's order is certainly some proof of the decedent's mental capacity leading up to the time she allegedly executed the codicil. Nevertheless, it is insufficient to entitle Young to a judgment on the pleadings, as the trial court was obligated to take Scott's sufficiently pleaded allegations as true when considering the motion.

b. ***Robinson v. Gutierrez,* 98 Cal. App. 5th 278 (Court of Appeal of California 2023).** For purposes of the fraud or undue influence presumption for a donative transfer to a care custodian, a "care custodian" does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult, but free room and board in exchange for care services are remuneration.

(1) In 2015, the decedent, Gwyneth A. Robinson, expressed to an acquaintance her desire to have a housemate to assist her on an as-needed basis. The acquaintance arranged for the decedent to meet the acquaintance's sister, defendant Gutierrez. As a result of this meeting, Gutierrez moved into the decedent's residence in 2015 and received free room and board in exchange for performing household duties of cleaning and laundry, and driving the decedent as needed. When Gutierrez moved in, the decedent was able to maintain her personal needs,

pay her bills and expenses, purchase her own food, prepare her meals, and administer her medications. Gutierrez provided companionship, which the decedent needed. This relationship lasted for nearly three years. There was no evidence Gutierrez received remuneration for her services other than free room and board.

(2) In September 2018, the decedent executed a joint tenancy deed naming Gutierrez as a joint tenant on the title to her residence. In October 2018 and while a patient in a hospital, the decedent directed an attorney to prepare her estate plan. She wanted her entire estate to go to Gutierrez and to have Gutierrez be the trustee of her trust.

(3) The attorney prepared a trust instrument, a will, and an individual grant deed. In the revokable inter vivos trust agreement, the decedent named Gutierrez as the trustee of the trust, and she transferred her property into the trust. Decedent transferred her residence by grant deed to Gutierrez as trustee of the trust. The trust and the will declared that upon the decedent's death, all of decedent's property passed to Gutierrez free of trust. The decedent executed the estate instruments at her home on October 18, 2018. She died 10 days later.

(4) The surviving children of the decedent's brother, who predeceased her, sued to determine the validity of the trust and the will. They also alleged causes of action for elder financial abuse and undue influence. They sought a constructive trust and other forms of relief. The trial court denied plaintiffs' petition and entered judgment in favor of Gutierrez. On appeal, the court of appeals reversed and remanded on the following grounds:

(a) Plaintiffs did not submit a reporter's transcript of the trial as part of the record. As a result, and because no factual error is apparent on the face of the record, plaintiffs are barred from challenging the sufficiency of the evidence. The court conclusively presumes the evidence supports the judgment. This includes conclusively presuming that sufficient facts support the trial court's determination that Gutierrez and the decedent had the prior personal relationship required for Gutierrez not to be a "care custodian." Also, the briefs filed by both sides do not comply with the California Rules of Court. The California rules require briefs to support any reference to a matter in the record with a citation to a place in the record where the matter appears. Each of the briefs filed in this appeal omit citations to the record in support of factual assertions and arguments. The court deem arguments not supported by citations to the record to have been waived.

(b) The meaning of the word "remuneration" as it is used in section 21362 is a question of law that the court reviews de novo. "Remuneration" has been defined as "payment; compensation, especially for a service that someone has performed."

(c) In turn, "payment" can mean the "performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation," or "the money or other valuable thing so delivered in satisfaction of an obligation." "Pay" as a noun refers to "compensation for services performed; salary, wages, stipend, or other remuneration given for work done." And "compensation" means "remuneration and other benefits received in return for services rendered; especially salary or wages." These definitions show that the terms "remuneration," "pay," and "compensation" can be interchangeable. As used in section 21362, "remuneration" refers to a form of compensation given in exchange for the provision of care services. The dictionary sources indicate that "remuneration" refers to compensation in the form of money or some other thing of equivalent value. Thus, on its face, the term includes compensation in the form of room and board or other noncash benefits in exchange for the provision of care services.

(d) The Legislature expressly excluded certain payments from being considered to be remuneration for purposes of section 21362. The statute states that as used in the definition of a care custodian, "'remuneration' does not include the donative transfer at issue under this chapter or the reimbursement of expenses." Where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. Had the Legislature intended to exclude room and board from being considered as remuneration for purposes of section 21362, it would likely have listed them in the quoted sentence as additional types of payment or compensation that do not constitute remuneration. Its silence implies it did not intend to exclude room and board as remuneration for purposes of determining whether a person is being remunerated or compensated for rendering care services.

(e) But because "remuneration" as used in section 21362 can reasonably be read to encompass money, other types of benefits, or both, the court turns to the statute's legislative history and purposes to discern legislative intent. The Legislature in this instance intended that remuneration would include room and board given in exchange for care and social services. The history indicates that the Legislature's primary concern was to protect dependent adults from unethical caregivers as much as reasonably possible. It concluded that a dependent adult's personal friends who rendered care for a substantial time without compensation would be least likely to take advantage of the adult. The Legislature decided that an objective way for determining whether a caregiver was such a friend was if he or she rendered services voluntarily without expectation or agreement of any remuneration. Interpreting "remuneration" to mean any form of compensation or pay best furthers the Legislature's intent to declare that all donative transfers by dependent adults to care providers are presumptively the result of fraud or undue influence except those transfers made to true, personal friends, as best as such friends can be objectively determined. The Legislature implicitly agreed with Chief Justice George that "the likelihood is less that a personal friend gratuitously providing substantial, ongoing health care services over a lengthy term is motivated by the prospect of obtaining undue economic benefit by coercing a testamentary modification."

(f) This interpretation of "remuneration" is consistent with interpretations of the term in other employment-related cases. Courts have defined "compensation" and "remuneration" in employment and workers' compensation contexts as including noncash benefits in exchange for services.

(g) In similar fashion, the Labor Code defines "wages" for its purposes as "all amounts for labor performed by employees of every description." Courts have interpreted "wages" to include benefits to which an employee is entitled as part of his or her compensation, including room and board.

(h) These cases indicate that appellate courts and the Legislature, at least in the context of employment and workers' compensation, have interpreted the terms compensation and remuneration interchangeably, and that remuneration includes noncash benefits including room and board where it is economically quantifiable and given in exchange for services rendered. They also show that when the Legislature adopted Labor Code section 3352 as discussed in Barragan, the Legislature considered room and board to be types of remuneration. For purposes of that statute, they were insufficient forms of remuneration by themselves to qualify a volunteer at a private, nonprofit organization for workers' compensation benefits.

(i) The term "remuneration" is also interpreted broadly in employment discrimination law. Compensation is an essential condition to establish an employer-employee relationship, but "remuneration" for that purpose is interpreted to be more than just cash compensation.

(j) The California Fair Employment and Housing Act ("FEHA") similarly protects employees. An individual cannot be deemed an employee for purposes of FEHA "absent the existence of remuneration." To qualify as remuneration, the benefit need not be monetary, but it "must be of a quantifiable, financial nature that is significant and not merely incidental to the work activities performed." There are no cases determining whether room and board qualify as remuneration under FEHA, but the cases illustrate that remuneration and compensation can include more than just cash payments. Interpreting "remuneration" in section 21362 to include room and board is not inconsistent with how the term has been interpreted in other employment contexts.

(k) The trial court relied on federal tax law to define remuneration for purposes of section 21362 as taxable income. In general, "taxable income" means gross income or adjusted gross income less allowable deductions. By definition, "taxable income" does not necessarily include all remuneration, or even all cash remuneration, an employee receives as compensation. Care providers could be compensated and, if they have enough in deductions, reduce their taxable income to zero. Narrowing the definition of remuneration to taxable income would thus thwart the Legislature's ability to protect dependent adults from unethical caregivers who are compensated for their services. It would also thwart the Legislature's intent to exclude from the presumption of undue influence only donative transfers made to close, personal friends who most likely would render care services voluntarily and without any compensation over a significant amount of time. There is no indication the Legislature intended remuneration as used in section 21362 to be limited to taxable income.

(l) The Legislature intended the term "remuneration" as used in section 21362 to include free room and board. Because Gutierrez received remuneration in exchange for her care services, she qualifies as a care custodian, and the decedent's donative gift to her is subject to the presumption of fraud or undue influence under section 21380.

(m) While the trial court concluded there was no undue influence, it made that determination based on the preponderance of the evidence. That standard of proof does not apply when the transfer was made to a care custodian and the presumption of fraud or undue influence arises. Because the donative transfer is presumed to be the result of fraud or undue influence under section 21380, the presumption may be rebutted by Gutierrez proving "by clear and convincing evidence" that the transfer was not the product of fraud or undue influence. The trial court expressly did not apply that burden of proof or make that determination when it resolved plaintiffs' claims. It will be obligated to apply that burden of proof on remand.

c. ***In re Helene Eicoff Barrington Living Trust U/A/D June 29, 2015,* 2024 Del. Ch. LEXIS 381 (Court of Chancery of Delaware 2024).** There is no statutory exception to the enforcement of a no-contest clause for a legal action that has not even been initiated.

(1) Helene Eicoff's estate plan included a will, various life insurance policies, and several trusts, including: (1) the Helene Eicoff Revocable Trust U/A/D June 5, 1991, as amended (the "Living Trust"); (2) the Alvin Eicoff and Helene Eicoff Joint Irrevocable Trust U/A/D April 8, 1991, as amended (the "Irrevocable Trust"); and (3) the Helene Eicoff Barrington Living Trust U/A/D June 29, 2015, as amended (the "Barrington Trust").

(2) On December 11, 2019, Helene executed her last will and testimony (the "Will") with the assistance of her attorney. Helene also amended and restated the Barrington Trust and designated her attorney as co-trustee. Helene died on May 6, 2020, in Florida. Helene was survived by her two granddaughters, Leanne Eicoff and Amber Eicoff. Following Helene's death, the Barrington Trust became irrevocable, and The Northern Trust Company of Delaware ("NTCD") was designated to serve as successor co-trustee, together with the attorney (the "Trustees"). The Trustees are the petitioners in this action.

(3) The Barrington Trust agreement (the "Barrington Trust Agreement") provides that certain trusts will be created for the benefit of Leanne and Amber if they survive Helene. Section 3.2 provides: "If either the Grantor's granddaughter, Leanne, or any descendant of Leanne,

survives the Grantor by thirty (30) days, the Trustee shall set aside and allocate such cash, securities and other assets with a fair market value on the date of distribution of Two Million Dollars ($2,000,000) ('Leanne's Distribution')," and "the Trustee shall retain Leanne's Distribution in further trust . . . to be held, administered, and distributed under the terms and conditions of Article V." Article V provides that Leanne's trust "shall be administered for the benefit of Leanne and any descendant of hers living from time to time[.]" Section 5.2 further provides that the Trustee "may distribute the net income and principal" of Leanne's trust "to or for any beneficiary of [the trust], at any time and from time to time, as the Trustee deems necessary or advisable for the beneficiary's best interests," until the termination date of the trust.

(4) The Barrington Trust Agreement contained a broad no-contest clause (the "No-Contest Clause") that would be triggered by contests to the Will of the Grantor, the Living Trust Agreement, or the Barrington Trust Agreement or, in any manner, attacks or seeks to impair or invalidate any of their provisions, and also by attacks on life insurance, IRA, and other beneficiary designations, or any trust that the Grantor created or may create during the Grantor's lifetime.

(5) The Barrington Trust Agreement defines "beneficiary" as "a person to whom the Trustee of a separate trust is then directed or authorized to distribute net income or principal, or both, from the trust estate of such trust," unless otherwise expressly identified in the Barrington Trust Agreement. The Barrington Trust Agreement is governed by Delaware law and designates the Delaware court as the exclusive forum to resolve any disputes.

(6) On May 29, 2020, shortly after Helene's death, Leanne sued to be appointed as the personal representative over an intestate administration of Helene's estate (the "Estate Action"). Northern Trust Company, an affiliate of NTCD, filed a counter-petition to be the estate's representative and disclosed the Will for the first time. In response, Leanne challenged the validity of the Will, alleging that it was procured by fraud, duress, mistake, or undue influence by the attorney.

(7) On August 25, 2020, Leanne filed another lawsuit in Florida state court regarding the Irrevocable Trust (the "Irrevocable Trust Action"). In the Irrevocable Trust Action, Leanne challenged a determination made by the trustee of the Irrevocable Trust concerning the named beneficiaries of the Irrevocable Trust.

(8) On September 15, 2020, the Trustees filed the Verified Petition for Instruction in this action (the "Instruction Action"). The Trustees alleged that Leanne violated the No-Contest Clause by filing the Estate Action and the Irrevocable Trust Action, and by interfering with the distribution of one of Helene's life insurance policies by directing the insurer, AXA Life Insurance Company, "to freeze all accounts" pending a court order permitting distributions. The Trustees sought an instruction that Leanne's conduct violated the No-Contest Clause, that Leanne is no longer a beneficiary of the Barrington Trust, and that the Trustees should treat Leanne as having predeceased Helene under the terms of the No-Contest Clause.

(9) Three weeks after the Trustees filed the Instruction Action, Leanne filed a lawsuit in Florida state court challenging the validity of the Living Trust (the "Florida Living Trust Action"). On October 14, 2020, four days after filing the Florida Living Trust Action, Leanne filed a duplicative action in Delaware (the "Delaware Living Trust Action"). That same day, Leanne moved to dismiss or stay the Instruction Action.

(10) On October 27, 2020, Leanne filed another lawsuit in Florida state court, challenging the instruments governing the Barrington Trust (the "Florida Barrington Trust Action"). Leanne filed a duplicative action in Delaware two days later to preserve her statutory rights under 12 Del. C. § 3546 (the "Delaware Barrington Trust Action"). On January 7, 2021, Leanne filed a motion to dismiss or stay the Delaware Barrington Trust Action and the Delaware Living Trust Action. On November 16, 2021, the court stayed the Delaware Barrington Trust Action, the

Delaware Living Trust Action, and the Instruction Action in favor of the actions in Florida (the "Stay Order").

(11) On February 23, 2024, Leanne voluntarily dismissed the Florida Barrington Trust Action without prejudice. In response, the Trustees filed a motion to lift the stay in the Delaware Barrington Trust Action and the Instruction Action on June 6, 2024. On August 2, 2024, the court granted the Trustees' motion and lifted the stay in the Delaware Barrington Trust Action and the Instruction Action as of August 30, 2024, at 5:00 p.m.

(12) On September 11, 2024, Leanne filed a motion to stay the Delaware Barrington Trust Action and the Instruction Action through November 6, 2024, in anticipation of a global mediation of the Delaware and Florida disputes. On September 17, 2024, the Trustees filed a motion for summary judgment (the "Motion"). The parties filed a stipulated briefing schedule on September 30, 2024, which the court entered the next day (the "Scheduling Order"). On October 7, 2024, the court entered an order staying fact discovery in the Delaware Barrington Trust Action and the Instruction Action, but allowed briefing on the Motion to proceed in accordance with the Scheduling Order. The Motion was fully submitted on November 1, 2024.

(13) The court granted the Trustees' motion for summary judgment on the following grounds:

(a) Leanne is a beneficiary of the Barrington Trust under the plain language of the Barrington Trust Agreement. The Barrington Trust Agreement defines beneficiary as "a person to whom the Trustee of a separate trust is then directed or authorized to distribute net income or principal, or both, from the trust estate of such trust." The Barrington Trust Agreement provides for the creation and funding of a $2 million trust for the benefit of Leanne, and that the trust will be "administered for the benefit of Leanne and any descendant of hers living from time to time." Further, the Trustees are authorized to distribute the net income and principal of the trust to Leanne and her beneficiaries. Accordingly, Leanne is a beneficiary of the Barrington Trust.

(b) Leanne's challenges to the validity of the Barrington Trust, the Living Trust, and the Will triggered the No-Contest Clause. The plain language of the No-Contest Clause provides that any beneficiary who challenges the validity of the Barrington Trust, the Living Trust, or the Will forfeits his or her rights as a beneficiary of the Barrington Trust. The undisputed record establishes that Leanne's conduct falls within the scope of the No-Contest Clause. For example, in the Florida Barrington Trust Action, Leanne sought to have the Barrington Trust Agreement declared void on the grounds of undue influence by Helene's attorney. The complaint in the Florida Barrington Trust Action alleged that the attorney "was in a close, confidential relationship with Helene and used undue influence, artful and/or fraudulent contrivances, persuasion over persuasion, pressure, duress, coercion, or force to unduly influence Helene and to destroy her free agency and her own will and influence her into executing the [Barrington] Trust." In the Estate Action and the Florida Living Trust Action, Leanne contests the validity of the Will and the Living Trust, respectively, on similar grounds of undue influence. These actions seek to impair or invalidate the provisions of the Barrington Trust, the Living Trust, and the Will. Accordingly, Leanne engaged in conduct that triggered the express terms of the No-Contest Clause.

(c) Leanne argued that there is a genuine issue of material fact regarding the enforceability of the No-Contest Clause. Specifically, Leanne argued that she may reassert her claims challenging the validity of the Barrington Trust in Florida, and therefore, she could still substantially prevail on those claims, which would render the No-Contest Clause unenforceable under 12 Del. C. § 3329(b)(2).

(d) Delaware law generally enforces no-contest clauses absent certain exceptions. This general rule is codified in 12 Del. C. § 3329. Section 3329(a) provides: "A provision of a will or trust that if given effect would reduce or eliminate the interest of any beneficiary of such will or trust who initiates or participates in an action to contest the validity of such will or trust or to set aside or vary the terms of such will or trust shall be enforceable."

(e) Section 3329(b) carves out certain types of actions from the validating effect of Section (a). There are five exceptions enumerated in Section 3329(b). Under subsection (b)(2), a no-contest clause is not enforceable as to "any action in which the beneficiary is determined by the court to have prevailed substantially." Section 3329(a) plainly states that a provision of a trust instrument that, if given effect, would eliminate the interest of a beneficiary who initiates an action to contest the validity of the trust or to set aside or vary the terms of the trust is enforceable. The No-Contest Clause provides that a beneficiary forfeits her interest in the Barrington Trust if she contests the validity of the Barrington Trust Agreement or any provision thereof. Leanne undisputably triggered the No-Contest Clause by challenging the validity of the Barrington Trust Agreement in the Florida Barrington Trust Action. Accordingly, under the plain language of Section 3329(a), the No-Contest Clause is enforceable, unless one of the exceptions in Section 3329(b) applies.

(f) Section 3329(b)(2), the exception at issue here, states that a no-contest clause is unenforceable as to "[a]ny action where the beneficiary is determined by the court to have prevailed substantially." In the Florida Barrington Trust Action, Leanne has voluntarily dismissed her claims. At this point in time, the Florida Barrington Trust Action has reached a conclusion. Leanne obtained none of the relief she sought, and the Florida court made no findings regarding the validity of the Barrington Trust. Under the plain language of Section 3329(b)(2), Leanne has not prevailed substantially in the Florida Barrington Trust Action. As such, the exception is inapplicable, and the No-Contest Clause is enforceable under Section 3329.

(g) The fact that Leanne may reassert her challenge to the Barrington Trust in Florida does not alter the statutory analysis. Section 3329(b)(2) carves out any actions where the beneficiary has substantially prevailed. The statute does not, as Leanne argues, provide an exception for a beneficiary substantially prevailing in a wholly separate action, let alone an action that has not even been initiated. Such a construction runs afoul with the plain language of the statute, and the court rejects this unreasonable construction.

(h) Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that a court was persuaded to accept as the basis for its ruling. Leanne has previously represented to the court that she filed the Delaware Barrington Trust Action out of an abundance of caution to preserve her statutory rights. The court relied on these representations when issuing the Stay Order. Leanne, therefore, is judicially estopped to argue that the Delaware Barrington Trust Action is an avenue for which she can substantially prevail after dismissing her claims in the Florida Barrington Trust Action.

28. Amendment, Revocation, Reformation, & Termination Of Non-Charitable Trusts

a. ***Haggerty v. Thornton,* 2021 Cal. App. LEXIS 763 (2021); 2021 Cal. LEXIS 8899 (2022); 15 Cal. 5th 729 (California Supreme Court 2024).** Amendment that does not comply with trust terms requiring amendments to be acknowledged is valid, where trust instrument merely specifies a method of modification without limiting settlors to the use of that method.

(1) Jeane created a trust in 2015. The trust provides that Jeane could amend or revoke the trust "by an acknowledged instrument in writing." Jeane amended the trust in 2016 to make her niece, Briana, successor trustee after her death and to name her as a beneficiary. The 2016 amendment was signed and notarized. Jeane signed a 2018 trust amendment that excluded Briana as a beneficiary. The 2018 amendment was not notarized, but above her signature

Jeane wrote: "I herewith instruct [my former estate planning attorney] to place this document with her copy of the trust. She can verify my handwriting." Jeane died later in 2018. The trustee under the original trust agreement petitioned to confirm her appointment as trustee and took the position that the 2018 amendment had revoked the 2016 amendment. Briana filed a competing petition to invalidate the 2018 amendment for lack of notarization or another acknowledgement.

(2) The probate court found that the 2018 amendment was valid, and Briana appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) By statute: (i) unless the trust provides otherwise, a revocable trust may be amended by the same procedure as for revocation of the trust; and (ii) a trust may be revoked by either complying with the procedure in the trust terms, or by a writing delivered to the trustee, unless the trust instrument explicitly makes the method of revocation in the trust instrument the exclusive method of revocation.

(b) The statutes changed the prior rule requiring that the method in the trust terms must be used, regardless whether it was explicitly or implicitly exclusive. A power of revocation implies the power of modification and the method of modification is the same as the method of revocation, unless the trust instrument distinguished between the two.

(c) The trust does not distinguish between revocation and modification, and therefore does not "provide otherwise" than the general rule under the statutes that a trust may be modified by any valid method of revocation. The settlor did not bind herself to the specific method in the trust instrument to the exclusion of other permissible methods. Because the method in the trust was not explicitly exclusive, the statutory method of revocation was available. Jeane complied with the statutory method by signing the amendment and delivering it to herself as trustee, and the 2018 amendment was therefore valid.

(3) The California Supreme Court granted the petition for review of the decision of the court of appeals, and affirmed on the following grounds:

(a) Two separate statutory provisions have governed trust revocation and modification. Section 15401 governs the procedures for revocation. Under this provision, a revocable trust "may be revoked in whole or in part by any of the following methods: (1) by compliance with any method of revocation provided in the trust instrument; or (2) by a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation (the "statutory method"). Section 15401 further provides: "If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to the statutory method."

(b) Section 15402 governs the procedures for modification. It provides: "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." Thus, if the trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either via the statutory method or via the revocation method provided in the trust instrument. But a revocable trust may not be modified "by the procedure for revocation" where the trust instrument "provides otherwise."

(c) The phrase "unless the trust instrument provides otherwise" qualifies the provision that follows it, i.e., that the settlor of a revocable trust "may modify the trust by the procedure for revocation." The most natural reading of this sentence is that the settlor may modify the trust using any procedure for revocation unless the trust instrument says that the settlor may not (i.e., "provides otherwise"). This is supported by the plain meaning of the term "otherwise." A trust term would be contrary to the authorization provided in section 15402 if it were to preclude the use of any of the section 15401 revocation procedures for modification. It could do so by specifying an exclusive method of modification in the trust instrument or by otherwise precluding modification via the revocation procedures provided in section 15401. But a trust instrument that merely specifies a method of modification without limiting settlors to the use of that method does not preclude the use of the revocation procedures and therefore does not "provide otherwise" from the general rule.

(d) The Legislature intended section 15402 to codify the preexisting rule that the power of revocation implies the power of modification and to expand the availability of the statutory method for both revocation and modification. It is also relevant that the goal was to make the statutory method more readily available for modification and revocation.

(e) The mere fact that a trust instrument distinguishes between modification and revocation by authorizing certain procedures for revocation and other procedures for modification does not suffice to preclude the use of revocation procedures for modification. The legislative history supports the view that the settlor may modify the trust using any procedure for revocation unless the trust instrument says the settlor may not. If a trust were to provide that it "may only be modified by an acknowledged instrument in writing," then the trust would preclude modification via any different method of revocation, including the statutory method, regardless of whether the trust distinguishes between revocation and modification. But if a trust were to simply provide that it "may be modified by an acknowledged instrument in writing," then the trust would not preclude modification via any method of revocation, again regardless of whether the trust treats modification and revocation differently.

(f) The statutory method is available for modification unless the trust instrument "provides otherwise" by expressly precluding it or by explicitly making a different procedure exclusive. Alternative policy arguments regarding whether modifications should be treated more restrictively than revocations are best directed to the Legislature, which may amend the trust laws if it chooses. Under the statute, the procedures for revocation can be used for modification unless the trust instrument provides a method of modification and makes it exclusive, or otherwise expressly precludes the use of revocation procedures for modification.

b. ***Balistreri v. Balistreri,* 75 Cal. App. 5th 511 (California Court of Appeals 2022); 2022 Cal. LEXIS 2627 (California Supreme Court 2022); 2024 Cal. App. Unpub. LEXIS 3667 (Court of Appeal of California, First Appellate District 2024).** Trust amendment not notarized as required under trust terms is still valid.

(1) Mary and Sal were married and had a daughter, Julia. Sal also had children from prior marriages, including Sal and Christina.

(2) In 2006, Mary and Sal created a trust, which they restated by a notarized document in 2008. In 2017, Mary and Sal amended the trust a second time again with a notarized document. On September 6, 2017, Mary and Sal revoked the trust by a notarized document. On that same date, Mary and Sal created the trust at issue. They named themselves trustors and trustees and placed community property located on 23rd Street in San Francisco in the trust. The trust provided that upon Sal's death the property would be distributed equally among Julia, son Sal, and Christina. The trust provided that it could be revoked or terminated by either of Mary or Sal as to their separate property and as to any of their community property. The trust also provided that during their joint lifetimes the trust could be modified or amended by either acting alone as to their separate property or by both of them acting jointly as to community property. The trust mandated that any amendment, revocation, or termination be

made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee.

(3) In February 2020, Mary and Sal signed a trust amendment that removed the distribution to the children and retained the assets in trust at Sal's death, but the amendment was not notarized. Sal died the next day. Mary petitioned to validate the amendment. The son petitioned to invalidate the amendment for improper execution, lack of capacity, and undue influence by Mary. The probate court voided the amendment due to lack of notarization. On appeal, the court of appeals affirmed on the following grounds:

(4) When a trust specifies a method of amendment—regardless of whether the method of amendment is exclusive or permissive, and regardless of whether the trust provides for identical or different methods of amendment and revocation—there is no basis for validating an amendment that was not executed in compliance with that method.

(5) The Probate Code provides for revocation of a trust either (1) by compliance with any method of revocation provided in the trust instrument or (2) by a writing, other than a will, signed by the settlor and delivered to the trustee during the lifetime of the settlor. But, if the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, that method must be used. To do so, the trust must contain an explicit statement that the trust's revocation method is exclusive.

(6) By contrast, the Probate Code provides with respect to trust modification that, [u]nless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation. When the trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. When the trust instrument specifies how the trust is to be modified, however, that method must be used to amend the trust. The trustor may bind himself or herself to a specific method of amendment of a trust by including that specific method in the trust agreement. Thus, when a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid.

(7) Here, the trust requires an amendment to be notarized. By including that specific method of amendment in the trust, Mary and Sal expressed an intent to bind themselves to that method—indeed, a method they had repeatedly utilized in amending and revoking prior trusts—and they were not entitled to cast aside that procedure and amend the Trust using the revocation procedure set forth in the Probate Code.

(8) The court acknowledged that *Haggerty v. Thornton*—which was decided while this appeal was pending—reached a different result. The California Supreme Court granted the petition for review and deferred further action pending consideration and disposition of Haggerty v. Thornton. It then transferred the matter back to the court of appeals to vacate its decision and reconsider the cause in light of Haggerty v. Thornton ("Haggerty"). The court of appeals then reversed and remanded the trial court on the following grounds:

   (a) The Probate Code governs revocation and modification of a trust. Section 15401, subdivision (a) sets out two alternative methods for revocation: a trust may be revoked by "compliance with any method of revocation provided in the trust instrument"; alternatively, revocation can occur by "a writing, other than a will, signed by the settlor . . . and delivered to the trustee during the lifetime of the settlor" unless "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation."

   (b) As set forth in Haggerty, under section 15402 a trust may be modified via the section 15401 procedures for revocation, including the statutory method, unless the trust instrument provides a method of modification and explicitly makes it exclusive, or otherwise expressly precludes the use of revocation procedures for modification. A trust instrument that merely specifies a method of modification without limiting settlors to the use of that method does not preclude the use of the revocation procedures and therefore does not "provide otherwise" from the general rule.

(c) The Trust does not explicitly make its specified method of modification exclusive, nor does it expressly preclude the use of revocation procedures for modification. It provides "[a]ny amendment, revocation, or termination . . . shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee." Use of the word "shall" is insufficient to meet the standard established by Haggerty. While courts ordinarily construe the word "shall" as mandatory, there may be indications that use of the word is suggestive, rather than dispositive or conclusive. Haggerty noted that the California Law Commission, which recommended enactment of section 15402, proposed to make the statutory method more readily available for modification and revocation. Reviewing section 5.2.4, "shall" did not explicitly make the specified method of amendment exclusive or expressly precludes the use of the revocation procedures.

c. ***Grassfield v. Grassfield,* 381 So. 3d 628 (Court of Appeal of Florida, Second District 2023).** Compliance with some—but not all—requirements of a settlor's stated method to amend his trust is not "substantial compliance" and trust amendments are invalid.

(1) In 2003, Bruce Grassfield created a revocable trust and selected two trustees to manage it—himself and his financial advisor. They remained the trustees until 2016 when Bruce amended the trust by naming himself and his son Paul Grassfield as trustees and by removing the financial advisor as a trustee. The 2016 amendment also adopted and left untouched a provision of the trust that reserved Bruce's power as the donor to revoke or amend the trust as follows: "The Donor reserves the power, at any time, or from time to time, to alter, amend, restate, terminate or revoke, in whole or in part, the terms and provisions of this Trust, and the Trust hereby created, by an instrument, in writing, signed by the Donor, acknowledged before a Notary Public, and delivered to the Trustee during the Donor's lifetime."

(2) In August 2018, Bruce executed a "Restatement of the Bruce A. Grassfield 2003 Revocable Trust." The 2018 restatement purported to remove Paul as co-trustee, leaving Bruce as the sole trustee. It also purported to make Violetta Lashauri-Wofsey—whom the trust identified as "the Grantor's friend"—the primary beneficiary of the trust. Bruce then married Violetta in October 2018, and she became Violetta Grassfield. Next, in January and May 2019, Bruce executed two more trust documents—a "First Amendment to the Restatement of the Bruce A. Grassfield 2003 Revocable Trust" and a "Second Amendment to the Restatement of the Bruce A. Grassfield 2003 Revocable Trust." The first amendment purported to transfer additional assets to Violetta upon Bruce's death, and the second amendment purported to name Violetta a successor trustee after Bruce. The second amendment also changed how the trust assets would be handled upon Bruce's death; they were to pour back into his estate and be distributed pursuant to a last will and testament that Bruce also created in May 2019, in which he named Violetta the sole beneficiary of his estate.

(3) Bruce passed away in August 2019 at the age of ninety-two. Violetta filed a probate action, which Paul opposed. Paul also filed a separate civil action seeking to invalidate the 2018 restatement and 2019 amendments to the trust. Paul alleged that he was a trustee when Bruce attempted to amend the trust through these instruments, that the trust required delivery of such instruments to the trustee, and that no delivery to Paul was made or even attempted during Bruce's lifetime. Violetta did not dispute these facts. But she argued that section 736.0602(3)(a) only requires "substantial compliance" with a trust's amendment method and that the 2018 restatement and 2019 amendments substantially complied despite the lack of delivery to Paul.

(4) Paul moved for summary judgment and the trial court ruled in his favor. It entered a final judgment finding the 2018 restatement and 2019 amendments to the trust invalid. Violetta appealed and the court of appeals affirmed on the following grounds:

(a) The Florida Trust Code provides that a "settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust." The code does not define "substantial compliance," nor has any appellate court defined it.

(b) The Uniform Trust Code ("UTC") provides guidance. The UTC comments to Section 602 suggest that substantial compliance may exist where a "technical" aspect of the settlor's method is skipped. But the comments also emphasize that the settlor's prescribed method "should be followed whenever possible," and suggest that signing and delivering a written instrument to the trustee is an ordinary and reliable method to amend or revoke a trust.

(c) Here, the method that Bruce prescribed plainly required these things. More specifically, Bruce reserved the power to amend or revoke the trust "by an instrument, in writing, signed by Bruce, acknowledged before a Notary Public, and delivered to the Trustee during Bruce's lifetime." The parties don't dispute that the 2018 restatement and 2019 amendments satisfied the first three requirements; they were written instruments that Bruce signed and a notary acknowledged. But there also is no dispute that the remaining requirements—delivery to "the Trustee" during Bruce's lifetime—required delivery to both trustees and that the 2018 and 2019 instruments were not delivered to Paul during Bruce's lifetime.

(d) The trust provided that "there shall always be at least two Trustees," and it required a "unanimous act" of two trustees for "all decisions, actions and discretion" they made or exercised under the trust. Clearly Bruce regarded having two trustees as indispensable, and nothing could be accomplished without the involvement of both. And while the trust also reserved Bruce's right to remove a trustee, he could do so only "by notifying such Trustee . . . by written instrument signed and acknowledged by the Donor." Paul was never provided written notice of his purported removal as trustee, nor was there ever an attempt to deliver the 2018 and 2019 instruments to him.

(e) Even more, Bruce expressed his method for amendment in the conjunctive. His method required a written, signed, notarized instrument "and" delivery to the trustee during Bruce's lifetime. Bruce's intent shows that delivery to the trustee was not optional.

(f) Section 736.0602(3)(a) requires "substantial" (not "strict") compliance with the method a settlor prescribes for amendment of her or his trust. But given the emphasis Bruce's trust instrument placed on having two trustees, delivery to only one of them did not substantially comply with the method Bruce prescribed for amendment of his trust.

(g) A trustee, unlike a notary, is not an outside observer whose involvement in amending or revoking a trust could be viewed as merely technical. The trustees here had certain rights and responsibilities, had to act by unanimous consent, and any instrument purporting to alter or revoke the trust had to be delivered to both of them during Bruce's lifetime. Because delivery of the purported amendatory instruments to Paul was never made or even attempted, substantial compliance with the method Bruce prescribed is lacking.

d. ***Connary v. Shea,* 2024 ME 57 (Supreme Judicial Court of Maine 2024).** The court cannot reform a trust to conform to the intent of one settlor when doing so is or may be contrary to the intent of the other settlor as expressed in the instrument; reformation is available only when necessary to give effect to the intent of all settlors.

(1) In July 2003, William and Patricia Shea established the Shea Family Living Trust; they funded it, in part, with stock in a private, New-Hampshire-based bank and stock in General Electric.

The Trust's distribution plan included a provision that, upon the death of the survivor of William and Patricia, a successor trustee was to "take charge of the assets then remaining in" the Trust, pay the debts of the survivor and of the Trust, distribute the bank and General Electric stock to the Connary heirs (Patricia's nieces and nephews), and distribute all of the remaining "net proceeds of the trust" to the Shea brothers (William's children).

(2) William died in 2006. That same year, the bank recalled and redeemed its stock, and the Trust received approximately $460,000. During the twelve years that followed, these funds were commingled with other funds in the Trust's investment accounts. After Patricia died in 2018, the successor trustee determined that the bank stock was no longer part of the Trust and informed Connary that he could not distribute any money to Connary in lieu of the bank stock.

(3) In October 2019, Connary sued Shea and the Trust. Connary requested a declaratory judgment stating that the Trust unambiguously provided to him the proceeds from the involuntary redemption and sale of the bank stock or, if the Trust was ambiguous, that Patricia intended to gift any proceeds from the redemption of the bank stock to him. Connary also asked the court to reform the Trust to conform to Patricia's intentions that the proceeds were to be distributed to him.

(4) The parties filed cross-motions for summary judgment. The court agreed with Shea and granted his motion for summary judgment. Although the parties had not addressed Connary's claim for reformation, the court "denied and dismissed" that claim, later stating that it had entered summary judgment as a whole based on its conclusion that the Trust's distribution plan plainly provided for a specific devise of the bank stock.

(5) Connary appealed, and the Maine Supreme Court affirmed and agreed with the trial court that the Trust language reflected a plain and clear intent by William and Patricia to create a specific gift of the bank stock to Connary and that the stock had adeemed because no shares remained in the Trust at the time of Patricia's death. The Supreme Court observed that this interpretation of the Trust document did not necessarily preclude a viable claim for reformation, and vacated that portion of the judgment and remanded the matter for further proceedings on the reformation claim.

(6) On remand, Shea moved for summary judgment on the reformation claim. Connary opposed the motion and filed a statement of additional material facts that he contended raised a disputed issue for trial. That filing included (1) statements that Patricia had, in 2016 and 2018, indicated to various family members that she intended for Connary to receive "Uncle Pete's money," an apparent reference to the bank and General Electric stock; and (2) statements that the attorney who drafted the Trust document for Patricia and William did not question Patricia about her intent in the event that the bank stock no longer existed in the Trust at the time of her death. Shea objected to and qualified many of these statements, arguing that the evidence cited was inadmissible and, in any event, did not support the statements. The trial court granted Shea's motion and concluded that it could not consider the evidence of Patricia's statements of intent and that Connary had not presented any other evidence generating a genuine dispute of fact material to his reformation claim.

(7) Connary appealed and the Maine Supreme Court affirmed on the following grounds:

   (a) Under the Maine Uniform Trust Code, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

   (b) The Uniform Comment to section 415 explains: "Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required."

(c) Even if the evidence concerning Patricia's prior statements of intent is admissible, Shea is entitled to judgment as a matter of law on the reformation claim. Reformation is available "to conform the terms to the settlor's intention" only if it is proven that "both the settlor's intent and the terms of the trust were affected by a mistake." The statute refers to the "settlor" in the singular, but in this case two settlors, Patricia and William, created the Trust together.

(d) Although this appears to be an issue of first impression in Maine, reformation is appropriate only if necessary to conform to the terms of both settlors' intention. Connary must prove that both Patricia and William were mistaken about what would occur in the event of the stock recall in order to prevail on a reformation claim. The cardinal rule is to give effect to the intention of the settlor[s] gathered from the language of the trust, bearing in mind that such intention must be related to the time the trust was executed. The court cannot reform a trust to conform to the intent of one settlor when doing so is or may be contrary to the intent of the other settlor as expressed in the instrument. Reformation is available only when necessary to give effect to the intent of all settlors.

(e) The record contains scant evidence of William's intent generally and no evidence that could support a finding that William mistakenly believed the Trust provided for Connary to receive proceeds from any future recall of the bank stock. Even if the court were to consider Patricia's extrinsic statements of intent, Shea is still entitled to summary judgment in his favor.

(f) Reformation is a rule governing mistakes in the content of a donative document, in a case in which the donative document does not say what the transferor meant it to say. Accordingly, reformation is not available to modify a document in order to give effect to the donor's post-execution change of mind or to compensate for other changes in circumstances. Based on this principle, courts have declined to allow reformation where the claimed mistake involved a failure to predict future changes in circumstances that might affect the donor's wishes.

(g) Evidence that Patricia and William would have intended for Connary to receive money had they known that the bank would recall and redeem its stock before the distribution provision took effect is evidence of a mistake that does not relate to facts that existed when the Trust was executed. This evidence does not support a reformation remedy.

(h) Reformation is unavailable in this case because its only purpose would be to compensate for a change in circumstances that occurred after the Trust was formed, when the bank recalled and redeemed the stock at issue. To survive summary judgment, Connary needed to point to admissible evidence in the record sufficient to raise a genuine dispute of fact about whether, in 2003, Patricia and William intended to include a Trust provision that would preserve proceeds for Connary in the event of a stock recall but mistakenly left that provision out of the Trust. Connary's proffered evidence, even if admissible, does not raise a fact issue concerning Patricia's and William's intent in 2003. Because Connary cannot point to evidence sufficient to raise a genuine dispute of fact material to the reformation claim, Shea is entitled to judgment as a matter of law on that claim.

e. ***In re Est. of Giguere,* 2024 ME 41 (Supreme Judicial Court of Maine 2024).** Omission of residuary clause where spouse predeceases was not a scrivener's error that justified reformation of will to avoid intestacy.

(1) Linda Giguere died on September 22, 2021. Linda's Last Will and Testament, dated January 16, 2013, nominated William Giguere, her husband, to serve as personal representative. Article Six of the 2013 will established a trust for the benefit of William in the event that Linda

predeceased him. The 2013 will contained no provision addressing the disposition of Linda's residuary estate in the event that William predeceased her.

(2) William died on March 7, 2015, predeceasing Linda. Linda did not execute a new will after William's death. Linda's daughter, Hilary Barlow, filed an application for the informal appointment of a personal representative of her mother's estate. The application stated that Hilary was "unaware of any unrevoked testamentary instrument relating to property having situs" in Maine. The Register of Probate appointed Hilary as personal representative.

(3) Attorney Jeremy W. Dean, acting as Linda's attorney and the person in possession of Linda's will, filed a petition for formal probate of the 2013 will and appointment of personal representative, requesting the removal of Hilary as personal representative and petitioning for the formal appointment of an individual named Teri McRae to serve as personal representative. The petition stated that the person named as personal representative in the 2013 will, William Giguere, was deceased and that the successor personal representative named in the will, Attorney Susan Hunter, had renounced her right to be appointed. The petition identified William's sons, Eric P. Giguere and Mark S. Giguere, as devisees.

(4) Eric filed a petition for the formal probate of the will and appointment of a personal representative. Among other things, the petition requested that Eric be appointed as personal representative of the estate because he is both a beneficiary of the trust and a residual devisee of the 2013 will, and Teri McCrae "has no priority for appointment." Eric filed another petition requesting the appointment of Attorney Justin D. LeBlanc as personal representative. Subsequently, the court entered an order removing Hilary as personal representative and appointing Attorney LeBlanc as successor personal representative.

(5) Attorney LeBlanc filed a petition for instructions. In January 2013, Linda contacted counsel and said that she wanted to omit Hilary from her will. Counsel made the requested change. When counsel asked how Linda wanted to dispose of the remainder of her estate in the event William predeceased her, Linda said that "she wasn't ready to make a decision and so she said we'll deal with that later." Counsel did not recall having a discussion with Linda about the consequences of failing to designate a residuary devisee in the will or how intestate succession operated under Maine law. Counsel was certain, though, that it was Linda's intention at the time not to include a provision in the 2013 will disposing of her residuary estate in the event that she survived William, and that the absence of such provision was not a scrivener's error.

(6) The Probate Court rejected the request to reform the 2013 will to name Eric and Mark as residuary devisees and determined that since the 2013 will did not fully dispose of Linda's estate, the residuary estate passed by intestate succession to Hilary. Eric and Mark timely appealed and the Maine Supreme Court affirmed on the following grounds:

    (a) A court may reform a will to conform the terms to the testator's intention if it is proved by clear and convincing evidence what the testator's intention was and that the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. The purpose of reformation is to give effect to a testator's clear intent, not to rewrite a will for the testator in the guise of interpreting it. Eric and Mark, as the parties petitioning to reform the 2013 will, had the burden of proving by clear and convincing evidence that Linda intended that they be the residuary devisees of her estate if William predeceased Linda.

    (b) The 2013 will does not provide for the disposition of Linda's residuary estate in the event that she outlived William. The plain language of the will makes that evident. In this case there is no ambiguity. There is simply no beneficiary at all for the residuary in the event that William predeceased her. Since William died before Linda, the trust described in Article Six never came into existence.

(c) When executing the 2013 will, Linda did not intend for Eric and Mark to be residuary devisees in the event that she survived their father. The unrebutted deposition testimony of counsel established that Linda was aware that the 2013 will did not provide for the disposition of her residuary estate if William predeceased her. Linda acknowledged that she "wasn't ready to make that decision" and preferred to "deal with that later."

(d) Not only did Eric and Mark fail to meet their burden of proving by clear and convincing evidence the very premise of their reformation request—that the omission of a residuary clause in the 2013 will was a scrivener's error—but the record squarely contradicts that assertion. Counsel who prepared the 2013 will, testified unequivocally that the omission was not a scrivener's error. It was purposeful because Linda was not prepared at that time to name a devisee. This is further supported by the fact that Linda's 2012 will did name a residuary devisee in the event that Linda survived William, indicating that she was likely aware of the need for, and function of, such a provision.

(e) Because the 2013 will was silent about the disposition of Linda's residuary estate in the event she survived William, those assets passed by way of intestate succession to her only child, Hilary. The 2013 will does not have a provision disposing of the residuary estate in the event Linda survived William. As the record makes clear, Linda was aware of this and "wasn't ready" to address this eventuality at the time the will was executed.

f. ***In re Est. of Termination of the Ira Yohalem Irrevocable Trust,* 2024 NYLJ LEXIS 2076 (Surrogate's Court of New York, New York County 2024).** Court rejects early termination of trust, despite lack of opposition, where the contention that the trust is uneconomical is based solely upon the challenges to the trust's administration arising from alleged ongoing disputes among family members.

(1) In this uncontested proceeding, petitioner, a co-trustee of The Ira Yohalem Irrevocable Trust a/k/a The Ira Yohalem Insurance Trust Two, dated June 24, 2002 ("Trust"), sought (1) to terminate the Trust as uneconomical, (2) to distribute a portion of the principal to one of two presumptive remainder beneficiaries and the remaining assets of the Trust to the income beneficiary, and (3) to dispense with the appointment of a guardian ad litem for unborn issue by means of virtual representation. The settlor of the Trust is deceased. He was survived by his wife, who is the other co-trustee, two adult children, and two grandchildren, one of whom is a minor. The value of the Trust is approximately $930,000.

(2) Upon the settlor's death, the Trust terms allocated a portion of the trust estate to a marital trust and the remaining trust assets to a residuary trust. The terms of both the marital and residuary trusts are the same: Settlor's wife receives the net income in set installments for life. Upon her request she also receives a portion of the principal, provided such withdrawals do not exceed five percent (5 percent) of the total value of the principal for the respective calendar year. At such request, the trustee must pay to the wife so much of the principal as they deem necessary for her maintenance, support, and health. Upon the wife's death, any remaining balance of the Trust is to be paid outright in equal shares to the settlor's two children. If either child predeceases the wife, any balance is to be paid outright in equal shares among the surviving child and the then living descendants of such predeceased child.

(3) The surrogate denied the petition on the following grounds:

(a) Virtual representation applied where there is similarity of economic interest between the representor and representee, no conflict of interest, and adequacy of representation. Settlor was survived by a son and a daughter, the presumptive remainder beneficiaries. His son has no children, and his daughter is the parent of both grandchildren, the contingent remainder beneficiaries. The petition alleges that the grandchildren are virtually represented by their mother, and that the interests of any unborn issue are virtually represented by both of the settlor's children. The interests of the grandchildren and unborn issue are genuinely represented in this proceeding and the request for virtual representation was granted.

(b) Early termination of a trust on the grounds of economic unfeasibility if a court finds that continuation of the trust is economically impracticable, the express terms of the trust do not prohibit its early termination, early termination would not defeat the specified purpose of the trust, and such termination serves the best interests of the beneficiaries. A petitioner must prove each of the four factors to prevail. Failure to do so will result in early termination being denied, despite having consents from all interested parties.

(c) The continued administration of a trust has been found to be economically impracticable when its annual administration expenses either approach or exceed the trust's annual income or when the trust funds are insufficient to generate meaningful income to an income beneficiary. Therefore, early termination has most often been permitted for modest-sized trusts. In contrast, such applications have been denied where trust assets are not deemed so minimal.

(d) Here, the petitioner has not sufficiently demonstrated that the continued expense of administering the Trust would be uneconomical. The Trust's funds, valued at $930,000, are not minimal. No calculations have been offered to show the Trust's annual income or the expenses of its administration, much less how such expenses are so great as to render insufficient income payments to the wife as the lifetime income beneficiary. Indeed, petitioner's contention that the Trust is uneconomical is based solely upon the challenges to the Trust's administration arising from alleged ongoing disputes among family members. Although the court does not question the legitimacy of the family's relational circumstances, this basis simply does not satisfy the statutory requirement.

(e) Although early termination is not expressly prohibited by the terms of the Trust, it appears such termination would contravene the Trust's specified purpose of providing for the wife for her lifetime. Courts have found that where, as here, a trust's language limits a trustee's power to invade principal for a lifetime income beneficiary to a "support and comfort standard," as opposed to granting a trustee unlimited discretion to invade same, the limitation demonstrates the settlor's concern with keeping funds available for such beneficiary.

(f) Petitioner's proposed redistribution upon the Trust's early termination would give a lump sum outright to one of the settlor's two children, and the remaining funds outright to his wife. This is a significant departure of the Trust's specified purpose as the responsibility of maintaining available funds for the lifetime of the income beneficiary would not be preserved. That the settlor's children would not receive any distributions outright until after the wife's death, should any balance remain, is a situation clearly contemplated in the Trust's terms. The court may not order early termination where the purpose for which a trust is created has not been accomplished, or has not become impossible of accomplishment, or if continuance of the trust is necessary to carry out its purpose.

(g) Lastly, petitioner's argument that early termination of the Trust is in the best interests of all beneficiaries is unconvincing. The instrument's primary purpose is for the wife to have funds available for her well-being until her death. The petition acknowledges all funds could be spent during her lifetime, leaving nothing for the children or potentially, the grandchildren to inherit. But the Trust's terms do not negate this possibility. Moreover, the settlor provided for his children and grandchildren via independent estate planning measures. The proposed redistributions compromise the protections established for the wife in the Trust.

g. ***In re Trusts,* 2024 U.S. Dist. LEXIS 49268 (United States District Court for the Eastern District of Arkansas, Northern Division 2024).** Court refuses to modify trust to prevent share for beneficiary that died after testatrix, but before estate distribution, from passing to beneficiary's estate.

(1) Mary Stiny left her daughter, Rena Wood (then Powell), a 35% share of her amended survivor's trust. But there was a condition—Rena had to survive her mother. If she died before Mrs. Stiny, her 35% share would then go to her living issue by right of representation. Here are the trust's words: "Thirty-five percent (35%) to trustor's daughter, RENA POWELL, and in the event she predeceases trustor, then to the living issue of RENA POWELL by right of representation."

(2) Mrs. Stiny died in June 2019. The current round of litigation about the Stiny trust followed. Mid-case, in January 2021, Rena was killed in a hit-and-run accident. She died without a will and left three daughters: Chatel Oldenburg Singh, Carissa Oldenburg, and Summer Oldenburg. She also left a widower, Jason Wood, the husband from whom she was apparently separated. Her untimely death created a new tangle about should Rena's share of the trust be distributed when she survived her mother but died before receiving her share.

(3) Chatel Oldenburg Singh and Carissa Oldenburg asked the court to modify the survivor's trust. Christopher Beauchamp, the personal representative of Rena's estate, opposed modification and argued that Rena's entire 35% share belongs to her estate and must be distributed according to Tennessee's law of intestate succession. Under that law, the Oldenburg daughters will inherit two thirds of their mother's estate. Jason Wood will receive the other third.

(4) The federal district court ruled in favor of Beauchamp on the following grounds:

(a) Rena's share did not lapse because she satisfied the trust's only condition precedent—she survived Mrs. Stiny. Her beneficial interest vested. And her pre-distribution passing doesn't defeat the transfer. Rena's share will flow to her estate unless modification of Mrs. Stiny's survivor's trust is appropriate.

(b) California law gives the Court, sitting in equity, both statutory and common law power to modify a trust's terms. Under the California Probate Code, the Court may modify the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the trust's purposes. Under the common law, the Court may modify the trust if "peculiar" or "exceptional" circumstances make modification necessary to accomplish Mrs. Stiny's purpose; and if there was some expression of Mrs. Stiny's purpose in the trust instrument.

(c) All material circumstances considered, modification is not warranted. First, Mrs. Stiny's intention "as expressed in the instrument controls the legal effect of the dispositions made in the instrument." And there is no ambiguity, patent or latent, in Mrs. Stiny's words. The Oldenburg daughters mostly agree with all this. They don't argue patent or latent ambiguity; they argue ambiguity as applied in the now-existing circumstances.

(d) In the face of the trust's clear words, the Oldenburg daughters offered extrinsic evidence of Mrs. Stiny's intentions. The Court may consider extrinsic evidence regarding the circumstances under which the trust was made, in order to interpret the trust instrument, but not to give it a meaning to which it is not reasonably susceptible. Before Mrs. Stiny became the surviving spouse, in her survivor's trust she left separate bequests to Rena and the Oldenburg daughters: 10% for Rena and 8% for each daughter (collectively, 34%). Mrs. Stiny first amended her survivor's trust in February 2011. That amendment "reallocate[d]" the daughters' bequests to Rena and bumped Rena's share up to 35%. Mrs. Stiny did not "eliminate" the Oldenburg daughters' interests, as she had done for a different grandchild, Corbyn Martin.

(e) By all accounts, Mrs. Stiny intended this reallocation to function as a workaround to the generation skipping tax. Before Rena died, she testified in the Centennial Bank trial in December 2018: "My amount went up because the attorney suggested so that my three daughters wouldn't have to pay the second generation tax, to wrap their 8 percent, which totaled 24 percent, into mine. And then mine was 11 percent."

(f) Before the amendment, Mrs. Stiny had been concerned about how the generation skipping tax might affect her grandchildren. Her counsel believed Mrs. Stiny would have decided to leave the Oldenburg daughters' shares to Rena so that Rena could set up a trust for them after Mrs. Stiny died. He could not say, however, whether Mrs. Stiny's motivation "was strictly tax planning or more."

(g) Carissa Oldenburg recalled a conversation she had with Mrs. Stiny shortly after the amendment was done. During that conversation, Mrs. Stiny told Carissa that each daughter's 8% share had been reallocated to Rena's share to give the daughters a tax benefit. Mrs. Stiny also told her that Rena would give each daughter her 8% share once the 35% share was distributed to Rena.

(h) This tracks Chatel Oldenburg Singh's testimony. Chatel said that Rena called her while Rena was in the office with Mrs. Stiny and Smith. On that call, Rena told her that the amendment's purpose was to shield the Oldenburg daughters from the generation skipping tax. In a later conversation, Rena told Chatel that Mrs. Stiny had been advised to put the Oldenburg daughters' 8% shares under Rena's share to lessen their tax burden.

(i) The extrinsic evidence does not supply any other reasonable meaning to Mrs. Stiny's chosen words. Rena was to get the money as an initial matter. The second step was hers to take. Again, the Oldenburg daughters don't argue latent ambiguity as to what Mrs. Stiny intended in the specific bequest she actually made to Rena. Instead, they urge that the extrinsic evidence bears only on how Mrs. Stiny "would have wanted Rena's share to be distributed under the present circumstances." The Court, however, may not use extrinsic evidence in this way. A court cannot invoke extrinsic evidence to write a new or different instrument.

(j) Last, the circumstances here are neither peculiar nor exceptional. Marriage, marital problems, untimely death, litigation, and intestacy are all common human experiences. It is foreseeable that a beneficiary may get married, as Rena later did to Jason Wood. It is foreseeable that a marriage might be troubled at times, as theirs seemingly was. It is also foreseeable that a beneficiary might survive a testator or settlor but die before distribution. That circumstance is familiar to California law. Of course, Mrs. Stiny sought to discourage trust contests and protracted litigation. Implicit in the trust's no-contest clause, though, is Mrs. Stiny's recognition that litigation might occur. Last, intestacy is all too common. Rena could have eliminated the questions presented with a will or a trust. As will likely be true for most of us, she passed away having left some important things not yet done.

(k) The law presumes that Mrs. Stiny knew the relevant statutory and case law. Whether she did or not, she had the benefit of experienced counsel when she chose how to amend her survivor's trust in February 2011. She made no change to the applicable provision when she amended her survivor's trust again in May 2013. The trust as a whole embodies a clear purpose, as the Oldenburg daughters press, to benefit blood family rather than marital relatives. The clear and specific provision about Rena's share, however, applies and controls over this general intention. Mrs. Stiny could have hedged as to her Oldenburg granddaughters by requiring that Rena survive until the distribution date. She did not. Rena's daughters' claim on the trust's assets has undeniable equity, which creates hydraulic pressure in their favor. But, California and Tennessee law are clear on how Rena's share must be distributed, albeit unexpectedly, in the constellation of circumstances presented. On the record as a whole, not enough exceptional facts are presented to modify Mrs. Stiny's counseled and unambiguous directions in her chosen words.

h. ***Neal v. Gruber (In re Revocable Living Trust of Jeanne M. Winn),* 2024 Iowa App. LEXIS 267 (Court of Appeals of Iowa 2024).** Tax costs of IRA assets in trust, and trustee fees, are not grounds to terminate a trust where continuation of trust accomplishes material trust purposes.

(1) Jeanne Winn created the Revocable Living Trust of Jeanne M. Winn in 2015, naming herself as trustee while living and her brother James Gruber as trustee upon her death. Jeanne was the sole beneficiary while living, and the beneficiaries upon her death were her daughter Jennifer Neal and her granddaughters Cassie Short and Karah Smith (f/k/a Karah Short). Jeanne died in 2020, with more than one million dollars in trust assets—a large portion of which are held in an individual retirement account ("IRA"). Upon her death, the trust became irrevocable.

(2) The trust provided a trust (the "Trust") that paid 3% of the Trust assets annually to Jennifer Neal. The Trust also provided for discretionary principal to Jennifer for her health, maintenance and education, and to Cassie Short and Karah Short for their health and education. In addition, if either granddaughter completed a four-year postsecondary education, the granddaughter would be paid $50,000.00 from the Trust principal. After 20 years, the Trust would terminate and distribute 50% to Jennifer Neal, 25% to Cassie Short, and 25% to Karah Short. When Jeanne created the trust, Jennifer was in her mid-40s and Cassie and Karah were college age.

(3) The beneficiaries jointly petitioned to terminate the trust. Jennifer, age 54, wanted to terminate the trust because the net value the beneficiaries would receive over twenty years would be greater now than if the trust continued its full duration—partially because of tax consequences. Karah, age 26, similarly wanted to terminate the trust because she would receive more money that way; Karah had already received trust money for her education, including a $50,000 graduation payment for completing her four-year degree. Cassie, age 29, did not oppose terminating the trust but testified it was her mother Jennifer's idea to do so. Cassie attended college without graduating and received trust money for student-loan payments but not the $50,000 graduation payment. She also had no immediate plans to complete her degree and was "on the fence" about doing so regardless of the graduation payment.

(4) The beneficiaries presented expert testimony and a spreadsheet explaining what they described as significant tax disadvantages associated with the trust enduring for twenty years. The crux of the testimony was that the Setting Every Community Up for Retirement Enhance Act of 2019 ("SECURE Act") changed tax treatment of inherited IRAs, and the beneficiaries of this trust would realize less money if the trust continued over its full term compared to terminating it today. The expert's calculations did not account for any distributions for health, education, or maintenance, or any tax decisions made by the beneficiaries upon receipt of monies if the trust terminated.

(5) James and his sister Jeanne had a "rocky relationship" for much of their lives but grew close after Jeanne's husband died. James described conversations with Jeanne where she shared concerns about Jennifer's spending habits. According to James, Jeanne was worried Jennifer would "blow" the money if she received it in a lump sum without restrictions, and Jeanne wanted the money "to last for a long time so the beneficiaries wouldn't spend it right away." James opposed termination of the trust because he believed it would undermine or conflict with Jeanne's wishes, and he promised her he would abide by the trust terms. In managing the trust, James has not denied any request for a distribution, consistent with the trust's terms. The trust pays James a 1.5% trustee fee annually.

(6) James and Jeanne's sister Julie Vollmer similarly described Jeanne's goals of providing for her grandchildren's education and welfare and ensuring Jennifer did not receive a large lump sum upon Jeanne's death. Julie also testified Jeanne intended for the trust to last a long time and had rejected shorter-term suggestions. And she relayed that Jeanne had specific concerns about Jennifer making "dumb ass" decisions with money she should have saved for retirement. (Julie told the probate court Jeanne "liked to swear.")

(7) Jeanne's financial advisor, who now advises the trust, explained Jeanne was not concerned about tax consequences but was concerned about making sure that the money in the trust lasted. The financial advisor specifically warned Jeanne that the IRA going to a trust was not tax-efficient, but Jeanne still "wanted everything to go to the trust."

(8) The probate court denied the petition to terminate the trust, finding continuing the trust was potentially necessary to carry out the goal of incentivizing Cassie's and Karah's education and was necessary to carry out the asset-protection intent to restrict Jennifer's access to a lump sum. The beneficiaries appealed and the court of appeals affirmed on the following grounds:

(a) Courts are generally prohibited from dissolving a trust before expiration of the term for which they were created, save in exceptional cases. One of those exceptional circumstances, set forth by statute, allows a trust to be terminated with court approval and with the consent of all the beneficiaries if continuance of the trust on the same or different terms is not necessary to carry out a material purpose.

(b) The beneficiaries and the trustee agree on two material purposes of the trust: (1) to incentivize Cassie's and Karah's education; (2) and to ensure there are assets left in the trust for Cassie and Karah to receive.

(c) Iowa Code section 633A.2203(5) recognizes that asset protection can be evidenced not only with magic clauses like a "spendthrift provision"—which provides certain protections from creditors and limits the beneficiary's ability to transfer their interest—but also by a second, distinct option of "a provision giving the trustee discretion to distribute income or principal to a beneficiary or among beneficiaries." And that's exactly what this trust does, with its language granting "sole discretion" to the trustee to make payments to Jennifer for her "health, maintenance and education" and to Cassie and Karah for their "health and education." And while the trust's language does not restrict the beneficiaries' ability to pledge or assign their future benefits under the trust, that does not change the discretion granted to the trustee reflecting asset-protection intent. Following the statutory presumption that granting discretion over distributing income or principal reflects an asset-protection goal "presumed to constitute a material purpose of the trust," guaranteeing a continuing income—instead of a large sum of money to Jennifer before retirement—was a material purpose.

(d) The three material purposes of the trust are to incentivize Cassie's and Karah's education, to ensure there are assets left for them to receive, and asset protection as relates to at least Jennifer. First, as to Cassie's and Karah's education, the trust still serves a necessary purpose in motivating Cassie to finish her four-year degree, even if she is "on the fence" about more school right now. Had Jeanne intended for Cassie to receive more money despite not completing her education, Jeanne could have included such a provision, and its absence suggests maintaining the $50,000 carrot carries out Jeanne's wishes. The trust provides generally for "education" and is not limited to a four-year degree, so trust funds could be distributed to Cassie or Karah (or Jennifer if she so desires) for additional credentials or degrees in any field, again consistent with Jeanne's expressed desires. Second, as to asset protection, continuing the trust is necessary to carry out Jeanne's intent that the money "last" and Jennifer not receive a large lump sum of money until retirement, as Jeanne feared Jennifer could not prudently manage a large sum. These material purposes each independently support continuing the trust.

(e) The significant tax consequences argued by the beneficiaries may—and perhaps will, barring more changes to the tax code—reduce the total amount of real money they receive from the trust. Assuming without deciding the math offered by the beneficiaries' expert and in the briefing is correct, the total tax drag (and trustee costs) may be hundreds of thousands of dollars. But as the probate court recognized, the purpose of the trust was not to maximize the tax ramifications of the payout to the beneficiaries. This rationale is supported by evidence that Jeanne was warned about tax consequences relating to IRAs by her financial advisor and offered alternatives before she died. And she both declined to tinker with the trust and reiterated she was not concerned with taxes. It is not the court's place to second-guess Jeanne's intent in forming the trust, and that the court or the beneficiaries might make different financial decisions based on tax consequences is not a legal basis for termination.

i. ***Rutland v. Regions Bank,* 2024 Miss. App. LEXIS 17 (Court of Appeals of Mississippi 2024).** Divorce proceedings are not implicitly modification and termination of an irrevocable life insurance trust by consent under the Uniform Trust Code.

(1) In 1991, William Hunter Rutland established an "Irrevocable Trust" for the benefit of four people: his wife at the time, Joanne, and their three children, Melanie, William Jr., and Lady (the "Trust"). William was defined as "the Creator" and Joanne as "the Creator's wife." In making distributions of income and principal after the death of the Creator, the Trust set out that the Trustee shall consider the Creator's wife as the primary beneficiary and consider her needs above those of the other beneficiaries. A bank was named as trustee.

(2) The Trust was very detailed and included a defined series of terms as to how it was to be administered, what it covered, and what it didn't. It set out that "during the lifetime of the Creator, no principal shall be distributed to or for the benefit of the Creator or the Creator's wife." In other words, it was only upon William's death that any contents would be paid. After William and Joanne died, the Trust was to be divided "into equal and separate shares" for each child if they had reached 25 years old.

(3) The Trust forbade by its own terms the "enabl[ing] [of] the Creator to borrow all or any part of the principal or income of the trust, directly or indirectly." And while the principal of the Trust could not be diminished, the trustee could "[m]ake loans to the Executor or Administrator of the estate of the Creator or the Creator's wife" in order "to facilitate payment of administrative expenses, debts, estate, inheritance or other death taxes[.]"

(4) The Trust was funded by a life insurance policy on Mr. Rutland's life. In 2010, after decades of marriage, William and Joanne divorced. Three years later, she passed away. After his divorce, William married the former Bernice McWhorter, whom he was married to until his death in 2019. After he passed, pursuant to a life insurance policy, the insurer issued a death benefit check for $495,120.26 to the "William Hunter Rutland Family Trust Dated 04/12/1991."

(5) Bernice called the trustee and alleged she was assured that the final estate expenses would be paid from the Trust. At some point, the Trust reversed course and declined to pay for William's funeral. The trustee later filed a petition for declaratory judgment, naming Bernice and the three beneficiaries as defendants. It requested: a judgment that the Trust would not have to pay for the administration of William's estate; a ruling that the 2010 divorce between William and Joanne did not impact the Trust; and that the Trust should be allowed to pay the beneficiaries the proceeds of William's life insurance policy "less the expense of the administration of the Trust."

(6) Bernice argued her belief the Trust should pay her late husband's funeral expenses, because the Trust, which was bought with marital property, was divided in the divorce settlement between William and Joanne, and the proceeds should be paid into their separate estates.

Bernice was the executor of William's estate, and claimed she should recover from the insurance instead of it funding the Trust.

(7) The trustee moved for summary judgment and summary judgment was granted in favor of the trustee. Bernice sought reconsideration which the trial court denied. Bernice appealed and the court of appeals affirmed on the following grounds:

(a) Bernice does not take issue with the trial court's substantive finding that the Trust was irrevocable and could not have been dissolved by the divorce. Instead, she claimed that the trial court forbade discovery which cut off the appellant from information which would have amplified her case.

(b) Ordinarily even a court of equity has no authority to authorize the trustee to depart therefrom and will do all within its power to see that the trust is executed in accordance with its terms. The interests of the beneficiaries are paramount, and nothing should be done that would diminish their rights under the terms of the agreement and granted by law. The Trust in this case is governed by the Mississippi Uniform Trust Code. While it was created prior to the UTC's implementation in 2014, the law applies to all judicial proceedings concerning trusts commenced on or after July 1, 2014.

(c) The very terms of the Trust declare it to be irrevocable—indeed, the title of the document is "IRREVOCABLE TRUST AGREEMENT." It also meets the terms under state law to be a "noncharitable irrevocable trust," as it did not generate a charitable deduction for William and was not for the benefit of a charity. The express purposes of the Trust were to provide for the listed beneficiaries and to avoid taxes on William's estate.

(d) A noncharitable irrevocable trust may only be modified or terminated in certain defined ways. During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. This method does not require the approval of a court, even though the trustee may seek court approval of a modification or termination.

(e) This subsection cannot apply, as all the beneficiaries did not consent to the Trust's modification or termination. Even taking Bernice's position that both William and Joanne intended for the Trust to be modified or terminated upon their divorce, there is nothing in the record to suggest the other beneficiaries, their three children, agreed in any way. Therefore the Trust was not modified or dissolved pursuant to subsection (a).

(f) The statute also allows modification or dissolution when a partial number of the beneficiaries seek this remedy. In contrast to subsection (a), which can be done without court approval, subsection (d) expressly requires a trial court's authorization and oversight. Even assuming William and Joanne intended for the Trust to be modified or dissolved upon their divorce, the issue was not placed before a trial court for its approval. Therefore the Trust could not have been modified or dissolved pursuant to subsection (d).

(g) There was no competent evidence presented to the trial court that the beneficiaries or the trustee sought to modify or dissolve the Trust. There was no sworn evidence presented to the trial court that any of the beneficiaries or the trustee wanted to modify or dissolve the Trust either. And Bernice did not point to any evidence that was lacking on this point that would have precluded the grant of summary judgment. Bernice does not claim that she could have obtained any information that would have triggered the applicable statutes governing modification or termination.

(h) The purpose of Bernice's core argument is clear. If the trial court had accepted her position, the Trust would have been defunded; she expressly asked then for the trustee to tender "half of the proceeds to the estates of William Hunter Rutland, Sr.," of which she was executor, and half to his ex-wife, "after first paying the lawful expenses of the estate of William[.]" Yet the whole point of the Trust in the first place was to avoid just such a scenario. Once created by William, the Trust would survive beyond his control and his death in order to provide for beneficiaries. Bernice asks the court system to reject the express terms set in place by William in 1991 that he meant to benefit his children. There is no authority upon which to do so.

(i) It is not "inequitable" to follow the terms of the Trust, especially as there are no statutory or common law grounds for its termination or modification. Bernice's argument heavily rests upon something that did not happen. She insists that the divorce between William and Joanne split the insurance policy which was designated to fund the Trust. But upon William's death, the uncontested proof was that the applicable insurance policy did indeed pay out and fund the Trust. Bernice focuses nearly her entire argument on why that should not have happened given her strained interpretation of the meaning of her late husband's divorce, but upon William's death, the insurance company promptly wrote a check payable to the Trust. It was deposited, and the Trust was funded with the proceeds from the insurance policy.

(j) On appeal, Bernice does not show how the testimony of any witness would have impacted the trial court's interpretation of the Trust or state law. And Bernice did not show how any additional discovery would have impacted the trustee's request for summary judgment. The determination of whether the divorce impacted the Trust was a legal determination, one which the trial court analyzed at length before holding that this irrevocable trust was not impacted by a divorce. This was the crux of the trial court's ruling on summary judgment.

(k) It was Bernice herself who continued to argue that the various documents and letters surrounding William and Joanne's divorce warranted modification or termination of the Trust. She cannot now complain the trial court committed error by reviewing the docket of the divorce to see if it impacted the claims in this case. The divorce was filed in Coahoma County Chancery Court, and it is well-settled that a trial court may take judicial notice of available evidence in its own court files.

j. ***Terteling v. Terteling (In re Terteling Trust No. 6),* 2024 Ida. LEXIS 118 (Supreme Court of Idaho 2024).** Trust reformed to eliminate gender-specific restrictions on distributions.

(1) Terteling Trust No. 6 (the "Trust") is an irrevocable trust created by a trust agreement on June 30, 1970, by six trustors: Joseph L. Terteling ("Joseph"), his former wife Carolyn E. Terteling, N.L. Terteling ("Nixon"), Angela B. Terteling, N. Kendal Terteling ("Kendal"), and J.A. Terteling & Sons (collectively, "the Trustors"). Nixon and Angela, husband and wife, were Joseph's uncle and aunt and are now both deceased; Kendal is their son. J.A. Terteling & Sons was an Idaho general partnership in which Joseph, Nixon, and Kendal were general partners. The partnership conveyed all of its assets to the family corporation, J.A. Terteling & Sons, Inc. Subsequently, all of the capital stock in J.A. Terteling & Sons, Inc. was vested in the Trust. The capital stock was Joseph's sole and separate property, which he had inherited from his parents. In exchange for the shares of stock, J.A. Terteling & Sons, Inc. received a promissory note from the Trust for the value of the stock; the note has since been satisfied and discharged.

(2) At its formation, the Trust had three Co-Trustees: Joseph, Nixon, and Kendal. The purpose of the Trust was not to benefit the Trustors or Co-Trustees, but to benefit the Co-Trustees' heirs. Article III of the Trust contained language restricting the class of beneficiaries to male children named Terteling: "CO-TRUSTEES shall pay the net INCOME of the CORPUS annually in equal [*4] shares to, or for the benefit of, each then living male child whose name

is TERTELING, and who is the child of one of the CO-TRUSTEES, but is not one of the original CO-TRUSTEES; provided however, that if any said child named TERTELING of one of the CO-TRUSTEES shall have died leaving one or more male children of his own named TERTELING, then said surviving child or children of such deceased child shall be entitled, per stirpes, to the share which such deceased child would have taken if living."

(3) At the time the Trust was created, Joseph was the father of four young boys: Joseph N. Terteling, Andrew J. Terteling ("Andrew"), Steven L. Terteling ("Steven"), and Thomas E. Terteling. Joseph did not have any additional children after the Trust was created, and the other Co-Trustees did not have any other children. Even though Kendal is the son of Nixon and Angela, he was not a beneficiary because he was one of the original Co-Trustees. Nixon hired the attorney who drafted the Trust and was the driving force regarding the formation of the Trust. Neither Joseph nor Carolyn discussed the language of the Trust with the attorney who drafted it. None of the parties to this appeal have been able to identify the attorney who drafted the original trust agreement.

(4) In 1978, eight years after the Trust was created, Joseph and his sister, Ann Terteling Sparks, filed a lawsuit against Nixon and Kendal for control of the Trust and J.A. Terteling & Sons, Inc. This lawsuit was resolved through a court-approved settlement. As part of that settlement, both Nixon and Kendal resigned as Co-Trustees of the Trust, the partnership, J.A. Terteling & Sons, was dissolved, and the family corporation, J.A. Terteling & Sons, Inc., was restructured and renamed "The Terteling Company, Inc." The Terteling Company owns all of the shares of Western States Equipment Co., Inc., and the Trust owns all of the shares in The Terteling Company. The 1978 settlement included a provision that Seattle First National Bank (subsequently, Seafirst National Bank, and now Bank of America) ("the Bank") would replace both Nixon and Kendal as Co-Trustees of the Trust; however, Kendal reserved the right to appoint a corporate successor co-trustee from a list of approved financial institutions in the event the Bank resigned or was removed as a corporate co-trustee.

(5) At the time this settlement was reached, the Trust was indebted to Nixon, Angela, Ann Terteling Sparks, Kendal, and Joseph. The settlement provided that these creditors would be "cashed out" as soon as possible, and at any rate, no later than five years past the date of judgment in that case, with interest. The appointment of a corporate trustee provided assurance to the creditors that the Trust would satisfy its debts as required by the settlement. All creditors were later paid and the Trust's debts were fully discharged as provided in the 1978 Judgment. Within five years of the 1978 Judgment, none of the Trustors were creditors of the Trust.

(6) As part of the Bank's acceptance of its co-trusteeship, it required all of the Trustors to sign an affidavit clarifying their original intent and purpose in establishing the Trust to alleviate concerns regarding diversification of the Trust's assets. All of the Trustors executed an affidavit, including Nixon, Angela, Kendal, Joseph, Carolyn, and J.A. Terteling & Sons Co. (successor in interest to J.A. Terteling & Sons). Nixon signed on behalf of J.A. Terteling & Sons Co., as General Partner. The affidavit stated that the purpose of the Trust was to benefit successive generations of the Terteling family.

(7) Twenty-five years after the Trust was created, and after Nixon and Angela had died, the first female heir of Joseph and Carolyn was born, Brooke J. Terteling. At that time, Joseph realized that the male-restrictive language of the Trust prevented Brooke from being a contingent residual beneficiary, and he discussed this impact with his then wife, Flinda Terteling. They had a similar discussion three years later in 1998, after triplet grandchildren were born: Alyssa, Darcy, and Thomas J. The male restriction would impact all three granddaughters, but not their brother. Joseph sought legal counsel in the late 1990s "to see" if the language in the Trust "could be corrected to provide for the benefit of successive generations of the Terteling family as he intended," but was told that the Trust could not be reformed judicially.

(8) In 2013, the interested parties—including Joseph and the Bank of America as Co-Trustees, the Trust's beneficiaries, and the virtual representatives of the minor contingent beneficiaries of the Trust—executed a non-judicial binding agreement, pursuant to the Trust and Estate Dispute Resolution Act ("TEDRA"), modifying the Trust to reflect the intentions expressed in the 1978 Affidavit regarding the Trust's purpose. The 2013 TEDRA Agreement explained that the original intent of the Trustors was "retention and management of all the shares of the family corporation ... within [the Trust] for the benefit of successive generations of the family." The agreement modified Article I of the Trust and provided that the Trust's purpose is to benefit successive generations of the Terteling family.

(9) In 2016, Joseph resigned as Co-Trustee pursuant to the terms of the Trust and the 1978 Judgment, and Thomas E. Terteling was appointed as his successor.

(10) In 2020, Kendal, then around 75 years old, filed a petition to adopt Richard Tinsley, age 66, as part of a scheme to defraud the Trust. An order of adoption was entered on December 31, 2020. Although he is Nixon's male-child, Kendal, as an original co-trustee, could not benefit from the Trust because the Trust specifically excludes him as a beneficiary. After the adoption was final, Richard Tinsley changed his surname to Terteling, then applied to the Bank to be added as a beneficiary for distribution of trust benefits. The Bank informed Trustee Thomas E. Terteling of the demand, who then intervened in the adoption proceeding and obtained a judgment vacating the Order of Adoption nunc pro tunc.

(11) During the process of vacating the adoption order, the interested parties learned that a friend of Kendal had rented an apartment in Boise for Kendal so he could claim he was an Idaho resident when in fact he was not. Kendal was a resident of California and had not resided in Idaho for some time; however, he swore under oath in the adoption proceeding that he had been an Idaho resident for six months prior to filing the petition for adoption. Likewise, both Kendal and Richard Tinsley swore under oath in the adoption hearing that Kendal had a parental relationship with Richard Tinsley for one year prior to filing the petition, but this was not true. On June 11, 2021, the adoption court vacated the Order of Adoption upon learning of the parties' perjury. Criminal charges were subsequently filed against the friend, Kendal, and Richard Tinsley for the crimes of preparing false evidence and attempted grand theft. Both Kendal and Richard Tinsley were also charged with the crime of perjury.

(12) Around the same time as Kendal's fraudulent adoption attempt, the Trust became aware that its co-trusteeship arrangement placed its construction equipment business, Western States Equipment Company, Inc. ("Western States"), out of compliance with the dealership agreement it had with the Caterpillar company. The dealership agreement required a single individual, named the "Dealer Principal," to maintain exclusive voting control over Western States; accordingly, the Bank sought to resign as Co-Trustee of the Trust, such that Thomas E. Terteling would be the sole trustee with exclusive voting control pursuant to the dealership agreement.

(13) On May 4, 2021, the Trust obtained a judgment striking the portion of the 1978 Judgment referring to Kendal's right to appoint a successor corporate co-trustee upon the Bank's resignation, thereby removing Kendal's remaining rights or interests in the Trust. Kendal opposed this action, but the Ada County Magistrate Court, which entered the judgment, specifically found that Kendal had "no legitimate reason to oppose the deletion" because he was no longer a creditor or a co-trustee, was not a beneficiary or contingent beneficiary of the Trust, and had not been in contact with the family for several decades. Following this judgment, the interested parties of the Trust—including all living Trustors, the Trustee, all beneficiaries and virtual representatives of the contingent beneficiaries, contingent beneficiary the Terteling Foundation, Inc., and contingent beneficiary Thomas J.—executed a non-judicial binding agreement to designate a single trustee who would be the Dealer Principal, and to accept the resignation of the Bank as Co-Trustee. The 2021 TEDRA agreement provided that "[t]he original intent of the Trustors was retention and management

of all the shares of the family corporation known as J.A. Terteling & Sons, Inc., an Idaho corporation or its successor, within [the Trust] for the benefit of successive generations of the Terteling family." The 2021 TEDRA agreement also modified Article VI of the Trust to state, "There shall be a sole Trustee, who may be male, female, or gender neutral."

(14) On February 21, 2022, Joseph, Carolyn, and their granddaughters Brooke, Alyssa, and Darcy filed a verified petition to reform the Trust, and sought to remove the male-only restrictions contained in the Trust and replace them with gender-neutral language as allegedly intended by the Trustors. None of the current beneficiaries objected to the petition; however, Thomas J., a contingent beneficiary and brother of the three granddaughter petitioners, filed an objection.

(15) The magistrate court granted the verified petition.

(16) Thomas J. appealed the magistrate court's decision to the district court. The district court affirmed the magistrate court's decision. Thomas J. appealed to the Idaho Supreme Court, which affirmed on the following grounds:

(a) Although this Court had not specifically addressed reformation of a trust, it had long recognized that reformation of an instrument is a proper equitable remedy when the evidence demonstrates that the instrument does not reflect the parties' intentions. Generally, reformation of an instrument requires a finding of a mutual mistake, or a unilateral mistake combined with evidence that the other party had knowledge of the mistake. However, trusts differ from many other written instruments because trustors typically do not receive consideration for the creation of a trust. Accordingly, a unilateral mistake on the part of the settlor is ordinarily sufficient to warrant reformation.

(b) Reformation is a matter of trust construction in which the trustor's intent at the time of the trust's creation is of utmost importance. When a trust is reformed, it is reworded to correct a mistake made by the settlor or a scrivener so that the trust reflects the settlor's actual intent at the time the trust was drafted. Inter vivos trusts, like deeds, life insurance contracts, and other donative documents, can be reformed if it is established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's or trustor's intention was.

(c) Reformation of a trust "to conform the terms to the settlor's intention" is also recognized under the Uniform Trust Code, even when the terms of the trust are unambiguous. Unlike trust interpretation to resolve ambiguity, which involves the interpretation of language already in the instrument, reformation may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Accordingly, reliance on extrinsic evidence is essential.

(d) Reformation of a trust does not depend upon ambiguity within the trust document. Trusts may be reformed even when unambiguous. Most trust instruments are drafted by counsel, and the language in the instrument is the testator's only by adoption. The testator informs counsel what she wants to accomplish and relies on counsel to carry out her wishes. If counsel makes a mistake in drafting and fails in this effort, then the testator's intent has not been realized. If counsel wrote a mistake into the trust document, the trustor's intent would not be realized no matter how many times that same mistake appears in the trust instrument.

(e) The contract principle that a party cannot avoid enforceability of a contract by alleging a failure to fully understand the impact of the contract signed is not applicable to trust reformation. Moreover, failure to read an instrument or notice that it contained a mistake can be a basis for reformation, even when the instrument at issue is a contract. The unambiguous language in Article III restricting beneficiaries to male children only and the usage of "male child" at multiple points in the document do not preclude reformation of the Trust.

(f) The stipulated facts demonstrate clear and convincing evidence that a mistake occurred in the drafting of Article III of the Trust Agreement. The Trustors did not intend to restrict the beneficiaries of the Trust to male members of the Terteling family but rather to provide that beneficiaries may be gender neutral so long as they are the children of or descendants of Joseph L. Terteling.

(g) There is no evidence beyond the face of the trust that it was the intent of the trustors to restrict beneficiaries to males. There is substantial, competent evidence to support reformation of the trust. The trust corpus derives from Joseph's sole and separate property. He states that the intent was to give the property to all generations of the family, regardless of gender, and the male-only designation was an error. There were no female heirs at that time or for many more years. Joseph attempted to change the trust after the first female granddaughter was born, realizing that she would not benefit under the language of the trust. Carolyn would not have agreed to the restriction had she known it was in the trust. The 1978 affidavit and TEDRA agreements support the claim that males and females were intended to be included as beneficiaries of the trust. No reason for a male-only restriction has been shown. There is clear and convincing evidence that the restriction was a mistake and that Article III of Terteling Trust No. 6 should be reformed to eliminate the male-only restriction.

(h) The magistrate court's findings derived from Joseph's and Carolyn's declarations and the 1978 Affidavit support the magistrate court's decision to reform the Trust.

(i) First, Joseph's and Carolyn's declarations both state that the male-only designation in the Trust Agreement was a drafting error that did not reflect their true intentions at the time the Trust was created. No evidence was presented to contradict Joseph's and Carolyn's testimony regarding their intent at the time of the Trust's formation. Joseph's declaration also demonstrates that he attempted to correct the mistake soon after it became apparent, when the granddaughters were born in the 1990s. A reasonable trier of fact could conclude that Joseph's and Carolyn's testimonies regarding the Trustors' intent at the time of the Trust's creation are credible because they attempted to correct the mistake as soon as it was realized. The magistrate court's findings are further supported by Joseph's testimony that he has dyslexia and does not recall reading the entire Trust Agreement at the time of signing and Carolyn's testimony that she did not speak to the attorney who drafted the Trust Agreement, and the "technical language of the Trust" was never explained to her. Thus, a reasonable trier of fact could conclude that the evidence does not demonstrate a new or changed intent since the time of the Trust's creation; rather, Joseph's and Carolyn's intent to benefit successive generations of the family extends back to the date of the Trust's creation.

(j) Second, the 1978 Affidavit, by itself, but particularly when combined with Joseph's and Carolyn's affidavits, is substantial and competent evidence that all Trustors intended all subsequent generations of the family, regardless of gender, to be included as beneficiaries of the Trust. The phrase "for the benefit of successive generations of the family" is, on its face, gender neutral. The gender of family members in "successive generations" is unknown because "successive generations" is an open class of un-ascertainable heirs. Thus, by 1978, just eight years after the Trust was created and when all ascertainable heirs were male, all Trustors, including Nixon and Angela, declared that their original intent in 1970 was to benefit successive generations of the family. A reasonable trier of fact could conclude that, had the male restriction actually been intended, the clarification of intent in the 1978 Affidavit would have kept the same language as Article III.

(k) Substantial and competent evidence supports the magistrate court's findings that a mistake occurred in the drafting of Article III of the Trust Agreement and the Trustors did not intend to restrict the beneficiaries of the Trust to male members of the Terteling family but rather to provide that beneficiaries may be gender neutral so long as they are the children of or descendants of Joseph.

k. ***In re Omega Trust,* 2024 N.H. LEXIS 281 (Supreme Court of New Hampshire 2024).** Series of emails with estate planning attorney are not a valid trust amendment.

(1) The trust at issue was one of several trusts that the settlor created as part of a complex estate plan. The trust contained the following relevant terms regarding its amendment: "The settlor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the settlor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent. … This trust agreement, and any amendments hereto, shall be effective when executed by the settlor, notwithstanding that the signature of the Trustee is provided for, the Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only. This trust agreement may be executed in any number of counterparts with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together and shall constitute one agreement."

(2) David J. Apostoloff sought to establish that a series of emails between the settlor and his estate planning attorney shortly before the settlor's death reflected an enforceable amendment to the trust pursuant to RSA 564-B:6-602(c), which provides: "The settlor may revoke or amend a revocable trust: (1) by substantial compliance with a method provided in the terms of the trust; or (2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the terms of the trust."

(3) The New Hampshire Supreme Court previously reversed the trial court's dismissal of the petition for failure to state a claim, concluding that the petitioner had adequately pleaded an alternative method of amending the trust, namely, "an expression of intent to amend the trust by email." The court remanded the matter for the circuit court to determine the settlor's intent in the first instance, but not address whether the petitioner had pleaded sufficient facts to establish that the settlor had substantially complied with the method for amending the trust set forth within it.

(4) On remand, the trial court denied the petition. The trial court noted that the settlor's attorney understood, based upon the email exchange, that he had been directed to draft documents in accordance with the email exchange, and that testimony from multiple witnesses who knew the settlor well, including his attorneys, established that the settlor likely would have engaged in multiple rounds of edits to the documents, including substantive edits, had he not died before the attorney could prepare the documents. The trial court further noted: (1) the email exchange contained no definitive language indicating that the changes were the settlor's final plan; (2) the settlor had no phone conversation with his estate planning attorney regarding the changes; (3) on the evening prior to his death, the settlor demonstrated his understanding that further action would be required before changes reflected in the email exchange would be effectuated; and (4) there was no evidence establishing that the settlor did anything to manifest an intent to adopt the email exchange as an amendment to the trust, such as signing a printed copy of it or forwarding it to the trustee.

(5) Although the trial court noted that the settlor was clearly in the process of trying to amend his estate plan when he died, it determined that the petitioner had failed to prove, by clear

and convincing evidence, that the settlor's manifestation of intent was complete, given his life-long prior practice of editing and revising documents. Likewise, the trial court determined that the settlor had not substantially complied with a method for modifying the trust as established by its terms.

(6) On appeal, the New Hampshire Supreme Court affirmed on the following grounds:

(a) Whether the email exchange reflected a manifestation of the settlor's intent to amend the trust is a question of fact to be determined by competent evidence and not by rules of law. Clear and convincing evidence means evidence indicating that the thing to be proved is highly probable or reasonably certain. Substantial compliance generally encompasses minor deviations or technical violation from required procedures.

(b) It was the petitioner's burden, as the appealing party, to demonstrate reversible error. Here, the trial court found that, although the settlor was in the process of amending his estate plan when he died, the email exchange did not reflect the final or complete manifestation of his intent to amend his estate plan, including the trust at issue. Thus, there was no amendment to which the settlor had manifested intent, or of which the settlor could have provided notice to the trustee in substantial compliance with the amendment provisions of the trust. The petitioner did not establish that the trial court's decision was unsupported by the evidence or plainly erroneous as a matter of law.

29. Creation, Validity, & Funding

a. ***In re Estate of Semanek,* 2024 Tenn. App. LEXIS 237 (2024).** In order to execute a valid will in Tennessee, a testator must sign their will prior to the two attesting witnesses.

(1) Peggy Jean Semanek ("Decedent") died on December 1, 2019, and was survived by two children, appellant Edward Semanek, Jr., and appellee Lottie R. Turner. Decedent's last will and testament ("the Will"), dated October 9, 2019, was subsequently filed by Ms. Turner in the Giles County Chancery Court ("the trial court"), and she was appointed by the trial court as the personal representative of Decedent's estate. The Will bore the signatures of Decedent and two witnesses, Cody Jones and Travis Wrightington. Thereafter, Mr. Semanek filed a complaint to contest the Will, alleging in pertinent part that the Will was invalid because Decedent failed to sign the Will in accordance with Tennessee Code Annotated section 32-1-104, which sets forth the manner in which a will may be validly executed.

(2) In response to Mr. Semanek's first set of interrogatories and request for production of documents, Ms. Turner responded: "Cody Jones and Travis Wrightington were the two witnesses to the Last Will & Testament. They are both family friends. The Decedent asked me to call a couple of people she knew to see if they would come and witness her signing her Will. I called them over in the evening. In their presence, I read the Will to my Mother. After the Will was read to my Mother, Cody Jones signed it and passed it to Travis Wrightington, who gave it to my Mother to sign. Once my Mother signed, Travis Wrightington signed the Will as a witness."

(3) Mr. Semanek moved for summary judgment alleging that the Will was invalid because Mr. Jones signed the Will prior to Decedent signing it. The trial court denied Mr. Semanek's motion for summary judgment, reasoning that Tenn. Code Ann., Section 32-1-104, does not mandate a sequence for the due execution of a will. Ms. Turner moved for summary judgment which the trial court granted.

(4) Mr. Semanek appealed and the court of appeals reversed on the following grounds:

(a) In order to execute a valid will in Tennessee, a testator must sign their will prior to the two attesting witnesses. Tennessee Code Annotated section 32-1-104 mandates that a testator sign their will prior to the attesting witnesses subscribing their own signatures.

(b) Tennessee Code Annotated section 32-1-104 outlines the manner in which a will shall be validly executed: "The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two witnesses as follows: (1) The testator shall signify to the attesting witnesses that the instrument is the testator's will and either: (A) The testator sign; (B) Acknowledge the testator's signature already made; or (C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and (D) In any of the above cases the act must be done in the presence of two or more attesting witnesses; (2) The attesting witnesses must sign: (A) In the presence of the testator; and (B) In the presence of each other."

(c) It is undisputed that the Will at issue is neither holographic nor nuncupative. The structure of the statute implies that the signature of the testator must precede the signatures of the attesting witnesses. As the description "attesting witnesses" suggests, the purpose of these witnesses is to attest to the fact that the testator either signed in their presence, has already signed and acknowledged to the witnesses that the signature is, in fact, their signature, or another has signed for the testator at their request. In the absence of the testator's signature, it is unclear what a potential witness would attest to, other than the existence of an unsigned will.

(d) While the language of the statute does not expressly state that such a sequence must be followed, case law is explicit on the matter. The Tennessee Supreme Court has previously stated that since it is the signature of the testator that subscribing witnesses are to attest, there can be no valid attestation or subscription unless it be a fact that the testator has actually signed his name, or caused it to be signed, before they subscribed their names. There is no will to witness until it has been signed by the testator. More recently, the Tennessee Supreme Court observed that the testator's signature is essential to the creation of a will. In light of the critical function underlying the testator's signature, we conclude that a testator must sign, or have another sign on their behalf, prior to any attesting witness subscribing their signature upon the will.

(e) Mr. Jones subscribed his signature prematurely. In view of the undisputed facts, the trial court erred in granting Ms. Turner's motion for summary judgment and in denying Mr. Semanek's motion for summary judgment.

b. ***In re Estate of Patterson,* 2024 Vt. Unpub. LEXIS 100 (Supreme Court of Vermont 2024).** Will rejected where signature not genuine, document had conflicting dates as to its execution, and there was delay in its presentation to the probate court.

(1) Clifford Patterson died in December 2021. At the time of his death, decedent owned a home and land in Swanton, Vermont, where he lived with Paullette Cameron. In July 2022, decedent's son petitioned the probate division to open an intestate estate and appoint son as administrator. The probate division granted son's motion for a license to sell the Swanton property in October 2022. In May 2023, Cameron filed a motion to allow a handwritten document that she claimed was decedent's last will and testament.

(2) The document stated: "I Clifford Patterson leave my home and property to Paullette Cameron until the day she passes or moves off the property." Below this were written two dates, "June 10 2021" and "5/10/21," followed by the names of decedent, Cameron, and two witnesses.

(3) Son objected to Cameron's motion, arguing that the will was not valid and had not been timely delivered to the probate division. After a hearing, the probate division denied Cameron's motion to allow the will. Cameron appealed to the civil division, which held a de novo hearing on the motion. Cameron presented testimony from the two witnesses whose names appeared on the will and testified on her own behalf. The first witness, Sara Levick, testified that the document was dictated to Cameron's late daughter, Katrina Westerling, because decedent did not have good handwriting. The document was then signed by

decedent, Cameron, herself, and the other witness, Chantal Riendeau. Levick testified that the signing took place in June 2021 and that the May 2021 date was not on the document when she signed it. Riendeau similarly testified that the document was prepared by Westerling at decedent's direction and that he signed it. She could not recall when it was signed but believed it was in May.

(4) Cameron testified that the document was signed in June. She testified that she, decedent, Westerling, Levick, Riendeau, and two other people were present when the document was signed. She stated that her daughter, Westerling, prepared the document because decedent had poor spelling and penmanship. Cameron testified that the June date was in Westerling's handwriting and the May date was written by Cameron. When asked why she added the May 2021 date, she stated, "We had made an appointment to go up to have this document notarized, and I wrote it on the paper by mistake. And we never kept the appointment because Clifford went fishing." She further testified that "[t]hat was just a brain thing with me. It's just a misconception. I don't know why I did it." Copies of decedent's driver's license, police department identification card, and the deed to his house, each of which had been signed by decedent, were also admitted into evidence.

(5) At the conclusion of the hearing, the civil division found that the document was not decedent's will and affirmed the probate division's decision. Cameron appealed and the Vermont Supreme Court affirmed on the following grounds:

(a) Like any other will, a handwritten will must strictly adhere to statutory requirements, and its proponent bears the burden to prove that it was duly executed. A will must be: (1) in writing; (2) signed in the presence of two or more credible witnesses by the testator or in the testator's name by some other person in the testator's presence and by the testator's express direction; and (3) attested and subscribed by the witnesses in the presence of the testator and each other.

(b) The trial court found that the will was not signed by the testator. The court's finding is not clearly erroneous. The witnesses all testified that the document was prepared by Cameron's late daughter, Katrina Westerling. The witnesses also testified that the document was signed by decedent. However, the court found that the signature looked more like the "Clifford Patterson" that appeared in the first line of the document than the signatures on decedent's driver's license, police department identification card, or the deed to the house, each of which was admitted into evidence. It therefore concluded that the same person who wrote the document also signed decedent's name. The genuineness of the signature was a question of fact for the court to decide, and the court was free to accept or reject the witnesses' testimony on this point. The court did not credit Cameron's explanation for the conflicting dates on the document. These factors, coupled with the belated presentation of the will to the probate division, led the court to conclude that it was not authentic. The court's findings were adequate to explain its decision and were supported by the record below.

(c) The law permits a will to be signed in the testator's name by another person in the testator's presence and at their express direction. However, Cameron did not claim that occurred here and there was no evidence to support such a finding. The trial court's finding that decedent did not sign the document was therefore fatal to the document's validity under the statute.

c. ***In re Serio,* 2024 La. App. LEXIS 1661 (Court of Appeal of Louisiana 2024).** Testamentary intent must exist when the instrument is executed and must apply to the particular instrument produced as a will. A paper note is not established as a person's will merely by proving that he intended to make a disposition of his property similar to or even identically the same as that contained in the paper; it must satisfactorily appear that he intended the very paper to be his will.

(1) Salvadore "Sal" John Serio, Jr. filed a petition to probate and execute an olographic testament executed by his brother, Anthony "Tony" Neil Serio, who died January 31, 2023. At the time of his death, Tony was divorced with no children and his estate consisted entirely of his separate property. According to the sworn detailed descriptive list, Tony's estate consisted of only his retirement benefits ($5,500), the inheritance he was to receive as part of his father's succession ($101,782), and some legal fees owed in connection with the succession (-$5,500). Sal attached a copy of the purported olographic testament to his petition. The handwritten note states in its entirety: "Note: Make Sal my Beneficiary to get my stuff. 11-9-22 - Tony Serio." There is also a signature of Sal Serio dated 11-22-22. Sal included with this petition an affidavit of proof of olographic testament wherein Sal Serio and his mother Cassandra Gail Serio attested that the olographic testament was entirely written, dated, and signed in the handwriting of Tony Serio.

(2) The trial court issued judgment declaring the purported olographic testament invalid and absolutely null, denying further relief requested, and ordering Sal Serio to amend his pleadings and proceed via intestacy. Sal Serio filed a motion for a new trial from this ruling. Shortly thereafter, a "Petition to Intervene, To Open Succession under Regular Administration, To Be Appointed Executor, To Compel Return of All Succession Assets, and Memorandum in Opposition to Motion for New Trial" was filed by Tony Serio's half-siblings, Jane Marie Brun and Elizabeth Harte, as intestate heirs of decedent. Jane Brun represented that she was also administering the estate of their deceased father, Salvadore J. Serio, Sr., who died on May 23, 2021. The court denied the motion for a new trial.

(3) Sal Serio appealed, and the court of appeals affirmed on the following grounds:

   (a) An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. The document itself must establish testamentary intent. Extrinsic or parol evidence cannot be used to establish testamentary intent. In the absence of testamentary intent, there is no will. The olographic testament must be proved by the testimony of two credible witnesses that the testament was entirely written, dated, and signed in the testator's handwriting.

   (b) Reading the document as a whole, the document fails to establish the necessary testamentary intent. The handwritten note is captioned as a note. The writing fails to convey that it is a last will and testament in any way. There is no clear intent that Decedent was disposing of his assets when he dies. The document uses the word "beneficiary." There is no clear intent that Decedent was disposing of his assets when he dies. The document uses the word "stuff."

   (c) Decedent's use of the word "beneficiary" does not indicate a clear intent for his brother to be the one to benefit from his stuff after death. The use of the word "beneficiary" in this instance provides no indication that decedent intended his brother to be the beneficiary of all of his "stuff" (or property) at his death.

   (d) While the date and signature are evidence that certain mandatory requirements of form for an olographic testament may have been met, the date and signature are not evidence of testamentary intent. People sign and date many documents that are not intended to have legal effect (e.g., letters, birthday cards). What decedent intended by signing and dating this "note" is not clear on its face.

   (e) Appellant argued that a reasonable person rarely attempts to give away all of his "stuff" prior to his death, and that a reasonable person generally understands that all of his possessions must go to someone after he passes away. Appellant's argument makes use of language that is not in the testament, which states only "my stuff" not "all of my stuff." The word "stuff" itself is unclear. Decedent's "stuff" consisted only of a Domino's pizza retirement benefit and the inheritance he was to receive from his father's estate. It is unclear from the record whether decedent was in possession of his inheritance at the time this note was drafted or whether he meant to include that inheritance with his use of the phrase "my stuff."

(f) Testamentary intent must exist when the instrument is executed and must apply to the particular instrument produced as a will. A paper is not established as a person's will merely by proving that he intended to make a disposition of his property similar to or even identically the same as that contained in the paper; it must satisfactorily appear that he intended the very paper to be his will. There is not clear intent by the testator that he intended this "note" to be his will.

d. ***Padilla v. Est. of Larmett,* 2024 N.Y. App. Div. LEXIS 5107 (Supreme Court of New York, Appellate Division 2024).** Signed Legal Shield will questionnaires do not create an enforceable promise to make a will.

(1) Jose Rafael Padilla ("plaintiff") claimed that James Clayton Larmett ("decedent") promised to change his will to benefit him. Decedent died on February 15, 2021 and his February 19, 2016 will was admitted to probate by this court on April 27, 2021 ("will"). Plaintiff is not a named beneficiary under the will. Plaintiff filed a claim against decedent's estate for one-third of the estate, basing his claim on alleged oral promises made to him by decedent and two "will questionnaires" allegedly signed by decedent. The executor rejected plaintiff's claim. Plaintiff filed a summons and complaint seeking to enforce his claim against decedent's estate (hereinafter, "defendant").

(2) Plaintiff's only written evidence of decedent's alleged promise are the April 5, 2020 and January 29, 2021 will questionnaires. Defendant is not contesting that decedent signed both will questionnaires. However, as plaintiff conceded, neither questionnaire can be probated as a will and the decedent never executed a will to reflect the information in either questionnaire. In the April 5, 2020 will questionnaire, decedent indicates that he wanted to leave plaintiff one-fourth of his estate, while the January 29, 2021 will questionnaire, created seventeen days prior to decedent's death, indicates that decedent wanted plaintiff to receive one-third of his estate. Plaintiff testified that after January 29, 2021, decedent told him he wanted to make further changes to his testamentary dispositions. Finally, neither will questionnaire includes any suggestion, let alone a clear and unambiguous manifestation, that decedent in any way intended to renounce his future power of testamentary disposition.

(3) The surrogate granted the defendant's motion for summary judgment. On appeal, the appellate division affirmed on the following grounds:

(a) The only written evidence that plaintiff presented to the court of decedent's alleged promise to make a testamentary disposition consisted of the April 5, 2020, and January 29, 2021 "will questionnaires" that decedent allegedly completed on a form provided by a prepaid membership legal service called "Legal Shield." Plaintiff claims that he sent the second of these to Legal Shield by fax in or about late January 2021. Decedent died on February 15, 2021. There is no claim that any will based on either questionnaire was ever prepared, and the only will in evidence was decedent's February 19, 2016 will, which makes no provision for plaintiff.

(b) An individual may agree in writing to make an enforceable testamentary bequest provided that it indisputably demonstrates decedent's intent to renounce her right to freely execute a subsequent will during her lifetime. This requirement is necessary because a will is ambulatory in nature and is ordinarily revocable during the life of the testator, even after due execution of a will, testators also retain unfettered authority to dispose of all property during their lifetimes. Individuals may by agreement validly surrender their power of revocation, but the law strictly scrutinizes the renunciation of the right to revoke a will and requires a threshold showing of clear and unambiguous evidence to give effect to this surrender of rights.

(c) Petitioner failed to present indisputable evidence of a contract to make a testamentary bequest to plaintiff. The questionnaires fail to satisfy the statute of frauds. Neither questionnaire clearly evidences all of the material terms of a binding contract. Neither unequivocally renounces decedent's right to execute a will making no provision for petitioner and neither sets forth any consideration for the alleged promise.

(d) Because the questionnaires do not clearly evidence a promise to make a bequest to plaintiff, neither this Court nor the motion court may consider parol evidence to clarify decedent's intent. Even if the court could do so, the record demonstrates in several ways that decedent had not made a final decision about a bequest to plaintiff and other aspects of his will. First, the size of the bequest to plaintiff and the charities listed as beneficiaries were different in each of the questionnaires. Second, the record reflects that, other than allegedly having plaintiff fax the second questionnaire to Legal Shield, decedent took no further steps to make a new will. In addition, plaintiff testified at his deposition that, after decedent allegedly promised to leave a portion of his estate to plaintiff, decedent also considered appointing his nephew as executor and making a cash bequest to his nephew. Decedent's nephew's affidavit states that his uncle had asked him in 2020 if he was willing to be the executor in place of the executor named in his 2016 will, and he replied that he was. That affidavit makes no mention that decedent had any intention to make a bequest to plaintiff. Furthermore, while the January 29, 2021 questionnaire lists decedent's nephew as an "alternate" "executor/representative," it is silent as to a bequest to the nephew. While none of these changes was effectuated, the contradictory evidence in the record about them demonstrates that decedent did not view the bequests or other specific items noted in the questionnaires as final and unalterable.

e. ***Venezia v. Greenbaum,* 226 A.D.3d 948 (Supreme Court of New York, Appellate Division 2024).** Validity of gifts to irrevocable trusts cannot be resolved on summary judgment.

(1) In April 2017, the defendant Adam Sandler created an irrevocable trust for the benefit of his two daughters, who are the plaintiffs in this action. The defendant Pamela Greenbaum was named as trustee. In October 2019, the plaintiffs commenced this action, inter alia, to impose a constructive trust against, among others, Sandler and Greenbaum, alleging that Greenbaum violated the trust by disbursing its funds to Sandler and others for Sandler's benefit. Sandler and Greenbaum separately moved for summary judgment dismissing the complaint insofar as asserted against each of them and declaring that the trust was void ab initio on the ground that they misunderstood the trust documents and did not intend to make an inter vivos gift to the plaintiffs. By order entered March 30, 2021, the Supreme Court, among other things, granted both motions. The plaintiffs appeal.

(2) On appeal, the appellate division reversed on the following grounds:

(a) An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will. An irrevocable trust may not be cancelled except upon proof of the settlor's misunderstanding of the nature of the instrument.

(b) Here, Sandler and Greenbaum established their prima facie entitlement to judgment as a matter of law by submitting their affidavits explaining that they misunderstood the trust documents and that Sandler did not intend to confer an inter vivos gift upon the trust or the plaintiffs.

(c) However, the plaintiffs raised a triable issue of fact in opposition by submitting the trust instrument, signed by Sandler, which stated in plain language that the trust was solely for the benefit of the plaintiffs and that Sandler understood that he would no longer have any entitlement to funds deposited into the trust. The affidavit of the plaintiff Marissa

Sandler Frank also raised a triable issue of fact as to Sandler's intent when creating the irrevocable trust.

(d) The Supreme Court should have denied the separate motions of Sandler and Greenbaum for summary judgment dismissing the complaint insofar as asserted against each of them and declaring that the trust was void ab initio.

30. Damages & Remedies

a. ***In re Trust A & Trust C,* 690 S.W.3d 80 (Texas Supreme Court 2024).** Co-trustee breached duties by unilaterally valuing and transferring stock to subtrust which were then sold to individuals, but court erred by ordering that the shares be restored when trustee no longer owned or controlled the shares and owners were not parties to the action.

(1) Bill Silver started W. Silver Recycling, Inc. as an El Paso scrap yard in the early twentieth century, and it has remained family-owned and -operated ever since. The family members relevant to this case begin with Bill's daughter, Jeannette, who married Bernard Fenenbock. Jeannette and Bernard had two children, Glenna Fenenbock Gaddy and Mark Fenenbock, who are the parties in this case. Glenna and Mark each also had two children, all of whom are now adults: Glenna's sons Weston and Lane and Mark's daughters Elysa and Lauren.

(2) After marrying Jeannette, Bernard succeeded Bill as W. Silver Recycling's manager. Bernard and Jeannette accumulated substantial wealth during their lifetimes. In 2008, they placed their assets in a Living Trust to benefit themselves and their descendants. The trust agreement created three Sub-Trusts (Trust A, Trust B, and Trust C), which would become effective and receive the Living Trust's assets upon Bernard's death. It also established a trust to benefit Glenna and another trust to benefit Mark. After describing certain specific gifts, the trust agreement provided that the remainder of the assets must be distributed equally from the Sub-Trusts to Glenna's Trust and Mark's Trust.

(3) The agreement appointed Bernard and Jeannette as the initial co-trustees of the Living Trust and provided that if Bernard died or otherwise ceased to act as a trustee before Jeannette, then Glenna would replace him and act as a co-trustee of the Sub-Trusts with her mother, Jeannette. When both Bernard and Jeannette ceased to serve, the agreement appointed Mark to serve as a co-trustee with his sister, Glenna. In addition, the agreement appointed Glenna and Mark to each serve as the sole trustee of their own trusts.

(4) Bernard died in 2012, and Glenna began serving as co-trustee with her mother Jeannette. At the same time, Glenna's son, Lane, succeeded Bernard as W. Silver Recycling's manager. Over the last several years, clashes between Glenna and Mark and their children have resulted in multiple legal disputes. Jeannette was particularly distressed and saddened when Mark's daughters, Elysa and Lauren, sued W. Silver Recycling in 2014. Jeannette amended the trust agreement in 2015 to instruct that the shares the Sub-Trusts held in W. Silver Recycling must be distributed only to Glenna's Trust, but assets of an equivalent value must be allocated to Mark's Trust. At the same time, Jeannette executed a will that included the same instructions. Jeannette instructed that Glenna's Trust and Mark's Trust must still receive equivalent values of the Sub-Trusts' assets, but only Glenna's Trust would receive the shares in W. Silver Recycling.

(5) Jeannette died in 2016, and her will designated Glenna as the sole executor. Acting in that capacity, Glenna hired an appraiser to value the assets. The appraiser valued the shares the Sub-Trusts held in W. Silver Recycling at $3,450,000. Glenna apparently believed she also became the sole trustee of the Sub-Trusts. Acting in that capacity, she transferred the shares from the Sub-Trusts to her own trust, consistent with the instructions in the amended trust agreement and her mother's will. After the transfer, the Sub-Trusts retained assets exceeding $9 million. That same day, acting in her capacity as sole trustee of her own trust, Glenna sold the shares in equal amounts to her two sons, Weston and Lane. In exchange,

each son provided a promissory note for $1,725,000, consistent with the shares' appraised value. Three days later, W. Silver Recycling paid $6 million in dividend distributions to its shareholders—Glenna, Weston, and Lane.

(6) Mark sued Glenna, asserting that Glenna's transfer of the shares from the Sub-Trusts to Glenna's Trust was void because Mark had become a co-trustee of the Sub-Trusts upon their mother's death, and he had not approved the valuation or the transfer. He argued that, as a co-trustee, he was entitled to an equal say on the valuation of the shares and the timing of the transfer. Although Weston and Lane had already purchased the shares from Glenna's Trust, Mark did not name them as defendants.

(7) The probate court declared that Mark was a co-trustee of the Sub-Trusts. Glenna did not appeal that ruling and conceded that she should have included Mark in the valuation and transfer process. Mark moved to void the transfer of the shares to Glenna's Trust and Glenna opposed the motion. The probate court granted Mark's motion, declared the transfer null and void ab initio, imposed a constructive trust on the shares, ordered that the shares be restored to the Sub-Trusts, required Glenna to deposit into the court's registry an equivalent value of any dividends that had been paid on the shares since the transfer, ordered the co-trustees to agree on a new valuation process, and ordered Glenna to provide an accounting to the trust beneficiaries.

(8) Glenna appealed. The court of appeals vacated the order and remanded the case to the probate court. On further appeal, the Texas Supreme Court reversed the court of appeals' judgment vacating the probate court's order for lack of jurisdiction, reversed the probate court's order, and remanded the case to the probate court on the following grounds:

(a) Weston and Lane were not jurisdictionally indispensable parties. The parties' failure to join a person will rarely deprive the court of jurisdiction. No one disputes that the probate court had jurisdiction to resolve the dispute between Glenna and Mark. Assuming Weston and Lane should have been joined, it was incumbent on the probate court to decide whether to dismiss the case or proceed without them, as it in fact decided to do. Weston and Lane's absence may have limited the relief the court could grant, but it did not deprive the court of jurisdiction to resolve the case before it.

(b) By acting without involving Mark in the process, Glenna acted as a sole trustee when she was actually a co-trustee. The trust agreement expressly required the joinder and consent of both co-trustees. Glenna breached her duties by acting unilaterally with regard to the valuation and transfer of the shares. The valuation may have reduced the equivalent value of other assets that must be allocated to Mark's Trust, and the timing of the transfer prevented the Sub-Trusts from receiving the dividend payments and thus reduced the trust assets available for distribution to Mark's Trust after the transfer.

(c) The court erred by ordering that the shares be restored to the Sub-Trusts because Glenna, as the only named defendant, does not own or have any control over the shares. Because Weston and Lane were not parties to the suit, the probate court could not require them to transfer the shares back to Glenna's Trust or to the Sub-Trusts. But their absence did not empower the probate court to order Glenna to perform an act she has no power or ability to perform. If Glenna had not sold the shares and her trust still owned them, the Property Code would allow Mark to choose between a damages award or an order requiring Glenna to restore the shares to the Sub-Trusts.

(d) A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment. Courts may impose a constructive trust if the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. Glenna disposed of the W. Silver Recycling shares by transferring them from the Sub-Trusts to her trust and then selling them to Weston and Lane. If Weston and Lane were named as parties in this action, the probate court could potentially impose a constructive trust and compel them to restore the shares to Glenna's Trust or to the Living Trust, subject to whatever defenses they may raise. Alternatively, the court could potentially impose a constructive trust on any traceable proceeds Glenna or her trust received from the sale to Weston and Lane. Or the court could impose personal liability against Glenna and her trust for money damages resulting from the wrongful transfers. But it cannot impose a constructive trust requiring Glenna to restore the shares to the Sub-Trusts when she no longer owns or controls those shares.

(e) There is no reason why the probate court should or could require the shares to be transferred back to the Sub-Trusts when the trust agreement required that they be transferred to Glenna's Trust and gave Glenna the sole authority over them from that point. Mark must be permitted to participate in the valuation process, but the shares do not need to be restored to the Sub-Trusts to make that happen. On remand, Mark may attempt to prove that the value of the shares on the date of Jeannette's death was greater than the valuation Glenna unilaterally accepted. If he meets that burden, the total value of the Sub-Trusts' assets, and thus his trust's proportional "equivalent" share of those assets, will increase over the values fixed by the $3,450,000 value Glenna unilaterally accepted.

(f) A proper valuation of the shares as of the date of Jeannette's death must reflect the company's value prior to any distribution, and that value should reflect the $6 million the company had available for distributions at that time. Therefore, the timing of the transfer should not meaningfully affect the amount Mark's Trust receives as its equivalent allocation of the Sub-Trusts' assets based on the shares' value on the date of Jeannette's death, which value should reflect the company's then-present ability to distribute $6 million in dividends.

(g) Even after Glenna unilaterally transferred the shares to her trust, the Sub-Trusts retained assets exceeding $9 million. Assuming that remains the case, the Sub-Trusts should possess sufficient assets to permit any disproportionate allocation necessary to ensure Mark receives a recovery that reflects the shares' proper value. In resolving this dispute, both Glenna and Mark owe fiduciary duties as co-trustees to all beneficiaries, meaning both their trusts, which precludes each of them from attempting to benefit only herself or himself in the process.

31. Disclaimers & Powers

a. ***Kelley v. Sav. Bank Primghar,* 2024 Iowa App. LEXIS 748 (Court of Appeals of Iowa 2024).** Trustee does not owe a duty to ensure beneficiary understands rights under trust to dispose of any remaining trust property in his will by exercising his general power of appointment.

(1) In 2006, Gregory Autenrieth's father created a revocable living trust. The trust's terms provided that upon the father's death, a share of the trust would be established for the benefit of Autenrieth. During his lifetime, Autenrieth would receive "income and principal" distributions "as necessary for his health, education, maintenance and support." The trust also gave Autenrieth a choice in who receives any remaining trust property upon his death. This general power of appointment provided that: "If [Autenrieth] dies prior to receiving distribution in full of the trust, the remaining property of the trust shall [*3] be distributed as he may appoint by his last will, with specific reference to the power herein given, which power may be exercised in favor of any person or charity or the beneficiary's estate or the creditors of the beneficiary's estate. . . .If [Autenrieth] dies prior to receiving distribution of the Trust, not having exercised the general power of appointment or having exercised it only partially, all the property as to which such power is not exercised shall be distributed as provided in Article 11 Contingent Beneficiaries."

(2) In 2015, Autenrieth's father died, triggering Autenrieth's trust. The then-trustee wrote to Autenrieth notifying him of the trust and enclosing a copy of the trust document. The trust was later transferred to Savings Bank Primghar, which took over as successor trustee.

(3) In early 2016, Autenrieth met with the bank to discuss administration of the trust. The bank asked Autenrieth to provide the names of his attorney and accountant, along with a copy of his will. It also advised him to contact an attorney and accountant for advice on managing his assets and affairs. Indeed, Autenrieth hired an attorney to assist him with his estate planning and eventually supplied a copy of the will to the bank. But Autenrieth did not exercise his power of appointment to direct the disposal of the remaining trust property in his will.

(4) In May 2020, Gregory Autenrieth died. His will named Douglas Kelley as the executor of his estate. He left the residue of his estate to Kelley and Mary Iverson in equal shares.

(5) Kelley—as executor of Autenrieth's estate—sued the bank, asserting two claims. First, the estate claimed that the bank failed to give Autenrieth a copy of the trust document, preventing him from exercising the power of appointment to dispose of the trust property in his will to Iverson and Kelley (who again, is also the executor asserting the claim). And second, the estate asserted the bank violated its duty as trustee by failing to recognize a lack of understanding on the part of Gregory Autenrieth about the power of appointment and failing to advise him of the nature and effect of the power of appointment, again preventing him from disposing of his property in his will to Kelley and Iverson.

(6) The district court granted summary judgment for the bank on the estate's first claim. The court reasoned that the undisputed facts showed that Autenrieth was sent the trust document by first-class mail by a previous trustee. The district court also granted the bank summary judgment on the estate's second claim and held that the bank did not have a duty to advise Gregory Autenrieth about the power of appointment found in the trust agreement.

(7) The estate appealed and the court of appeals affirmed on the following grounds:

(a) The Iowa Trust Code imposes a duty to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and the material facts necessary to protect the beneficiaries' interests. It goes on in detail to impose specific requirements, including as relevant here a duty to inform a beneficiary of the right to receive an annual accounting and a copy of the trust instrument. The trustee must do so at specific triggering events, such as at "commencement of the trust administration" and when the trust becomes "irrevocable." A violation of these duties is actionable by the beneficiary or a beneficiary's estate.

(b) Consistent with these statutory duties, Autenrieth was provided a copy of the trust when it became irrevocable. And beyond that, at Autenrieth's first meeting with the bank, its employee informed Autenrieth he should consult an attorney to understand the trust terms and to devise a will. Autenrieth followed this advice and obtained an attorney to assist in his administrative affairs. What's more, this attorney knew of the trust's existence from Autenrieth and worked with Autenrieth to craft his will.

(c) Before the enactment of the Trust Code, Iowa courts similarly recognized a trustee's duty to inform under the common law. But very little case law has developed to define the scope of the duty. A trustee must provide beneficiaries adequate information related to the trust, such as what the trust is and how the trustee has dealt with it. The duty also includes informing beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship. Generally, the information a trustee must disclose to the beneficiary includes: the existence, source, and name (or descriptive reference) of the trust; the extent and nature (present or future, discretionary or conditional, etc.) of their interests; the name(s) of the trustee(s), contact and compensation information, and perhaps the roles of co-trustees, along with the beneficiary's right to request further information.

(d) Of course, a beneficiary always has the right to request more information than initially received concerning the trust's terms. But this does not mean the trustee must explain every detail of the trust instrument and ensure the beneficiary is fully aware of each term's significance. And from this, the duty does not mean the trustee must ensure the beneficiary hews their own estate plan to maximize a non-beneficiary's interest in the trust. A trustee rarely has a duty to provide specific information without a beneficiary's request.

(e) The bank's common-law duty was thus also fulfilled when Autenrieth received a copy of the trust document and adequate disclosures. Autenrieth was informed of the trust, his role as beneficiary, the role of the bank as trustee, and advised to seek legal advice. He did in fact seek the advice of an attorney. The information the trustee bank provided at the start gave enough information for Autenrieth (or his attorney) to either make an informed request for further information or devise his will with the proper appointing language. And neither the attorney nor Autenrieth ever asked for more information from the bank.

(f) The estate has failed to support its novel legal theory with governing or persuasive authority. There is no Iowa statute or precedent—or common-law precedent from any state—that extends a trustee's duty so far that it requires the trust to affirmatively ensure the beneficiary understands his right under the trust to dispose of any remaining trust property in his will. And none of the out-of-state cases the estate cites is even somewhat analogous to the expansive duty it seeks to enforce here. The district court did not err in holding that the bank did not violate any duty as trustee to its beneficiary, Autenrieth, under Iowa law.

b. ***Sullivan v. Giarmarco (In re December 2002 Restatement of the Vivian Stolaruk Living Trust),* 2024 Mich. App. LEXIS 2606 (Court of Appeals of Michigan 2024).** Statute of limitations on claims that power of appointment was wrongfully included in trust began to run when trust became irrevocable at settlor's death. Exercise of power of appointment to trustee of donee's revocable trust for conditional distribution to charity did not expose appointed assets to donee's creditors or confer an economic benefit on donee.

(1) Vivian and Steve Stolaruk each created a revocable trust for the disposition of their assets. On December 23, 2002, Vivian made the final restatement of her trust before her death in March 2003. Vivian named petitioners Ann Marie Sullivan and Marc Stolaruk as beneficiaries and granted them distributive shares of $4,000,000 to Marc and $1,500,000 to Ann Marie. The restatement, which was drafted by Julius Giarmarco, named Steve as successor trustee and granted Steve a limited power of appointment ("LPA") that authorized him to appoint assets from Vivian's marital and family trusts to Vivian's descendants, spouses of her descendants, and charitable organizations. This final version of the Vivian Stolaruk Living Trust ("VSLT") became irrevocable upon Vivian's death in March 2003.

(2) According to petitioners, they did not realize that the LPA gave Steve the power to disinherit them from the VSLT and transfer their expectant shares to appellee, St. Joseph Mercy Oakland ("SJMO"). Petitioners alleged that Giarmarco prepared flow charts that showed them how the VSLT assets would be distributed after Steve's death, but did not indicate that Steve could exercise his LPA to disinherit them. Petitioners allege that they relied on the flow charts and did not further investigate the extent of Steve's power under the LPA.

(3) In 2017, Steve amended his trust. As amended, Steve's trust did not award any assets to petitioners. He transferred assets to several charitable organizations, with SJMO to receive the residue, subject to the condition that SJMO name a patient tower after him and Vivian. He also exercised the LPA from the VSLT by appointing the assets under his control to

Giarmarco, as his successor trustee, who was instructed to appoint the assets to SJMO, subject to the same tower-naming condition.

(4) Steve died on February 12, 2018. Petitioners alleged that they then learned, for the first time, that they would not receive any distribution from either of their parents' trusts. Petitioners filed a petition against Giarmarco to reform the trust. Giarmarco moved for summary disposition on the ground that petitioners unreasonably delayed challenging the LPA and their petition was barred by the doctrine of laches. He also argued that the Steve Stolaruk Living Trust ("Steve's trust") and SJMO would be unfairly prejudiced by the belated attempt to invalidate the LPA. SJMO supported Giarmarco's motion based on laches, and also filed its own motion asserting that the petition was untimely under the applicable statute of limitations. The probate court granted the motions.

(5) The court of appeals reversed the probate court's order and remanded the case to the probate court for further proceedings. On remand, Giarmarco moved for summary disposition on the ground that the petition was untimely under the applicable statutes of limitation. While the motion was pending, petitioners served interrogatories and requests for production of documents on Giarmarco and SJMO. In particular, they sought copies of Steve's individual and trust tax returns, and documents related to the pledge of the gift. Giarmarco moved for a protective order and to quash a subpoena served on his counsel. The probate court granted these motions, without prejudice to petitioners pursuing the requested discovery in the future upon a proper showing that the requested materials were relevant to disputed issues. The probate court also granted Giarmarco's motion for summary disposition and dismissed petitioners' amended petition.

(6) Petitioners appealed, and also filed a separate petition for declaratory relief, seeking a declaration that Steve exercised the LPA in violation of the terms of the VSLT because the appointment exposed VSLT assets to Steve's creditors and conferred an economic benefit on Steve. Following a bench trial, the probate court found that petitioners' claims were without merit and dismissed the petition. Petitioners appealed.

(7) On appeal, the court of appeals affirmed on the following grounds:

   (a) The relevant statue provides that "all other personal actions shall be commenced within 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. Unless otherwise provided by statute, a claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damages results.

   (b) The question whether petitioners' claim accrued either when Steve was granted the LPA, when that grant became irrevocable, or when Steve's use of it to petitioners' detriment became irrevocable depends on the nature of petitioners' claim. In their amended petition, petitioners claimed that Vivian never intended to allow Steve to have an opportunity to disinherit them, contrary to Vivian's intentions, and that the LPA in the VSLT was a mistake of fact or law. The relevant dates are December 23, 2002, when Vivian executed the 2002 Restatement that contained the LPA; March 26, 2003, when Vivian died and the VSLT became irrevocable; November 14, 2017, when Steve exercised the LPA to reallocate petitioners' expected distributions to SJMO; and February 12, 2018, when Steve died, at which time his prior exercise of his LPA became irrevocable. The basis of petitioners' claim is that the 2002 Restatement of the VSLT should be reformed to invalidate the LPA because it gave Steve the power to disinherit petitioners, contrary to Vivian's intentions as expressed elsewhere in the trust. The alleged wrong was the wrongful inclusion of the LPA in the VSLT, which allegedly conflicted with Vivian's intentions, and the injury occurred in 2003, when Vivian died and the VSLT and accompanying LPA became irrevocable. It was at that point that petitioners were harmed because Steve then had the power to use the LPA to petitioners' detriment. Although Steve did not actually use this LPA until 2017, petitioners lost the certainty of any distribution under the VSLT in 2003, before Steve exercised that power. The probate court did not err by ruling that petitioners' claim accrued in 2003, and as a result, their petition challenging the validity of the LPA, which was not filed until 2019, was untimely.

(c) Petitioners requested discovery of Steve's tax returns and information regarding his assets and financial information, and Steve's pledges to and communications with SJMO. The motions based on the statute of limitations did not require any showing that Steve or SJMO were prejudiced by any delay in petitioners bringing their petition. Thus, prejudice from petitioners' delay was not at issue in the proceedings at the time the probate court granted Giarmarco's motion for a protective order and to quash the discovery subpoena. Further, at the time the probate court granted Giarmarco's motions, there was no claim then pending before the court that Steve improperly exercised the LPA in a manner that was economically beneficial to him. Petitioners did not demonstrate the relevancy of Steve's tax returns and financial information or his communications with SJMO to the intent issue, or to the issue whether petitioners timely filed their claim.

(d) The VSLT created subtrusts identified as the Marital Trust and the Family Trust. Article Nine of the VSLT governed the Marital Trust, and Article Ten governed the Family Trust. Article Nine, Section 4 of the VSLT, titled My Spouse's Limited Testamentary Power of Appointment, states, in pertinent part: "My spouse shall have the limited testamentary power to appoint to or for the benefit of my descendants, persons who at any time were married to a descendant of mine, and/or to religious, scientific, charitable, or educational organizations described in IRC Section 501(c)(3), as amended, either by a valid last will and testament or by a valid living trust agreement executed by my spouse, all or any portion of the principal and any accrued and undistributed net income of the Marital Trust as it exists at my spouse's death. This power shall not be exercised in favor of my spouse's estate, the creditors of my spouse's estate, or in any manner that would result in any economic benefit to my spouse."

(e) Similarly, Article Ten, Section 3 of the VSLT, titled Limited Power of Appointment, provides, in pertinent part: "My spouse shall have the limited testamentary power to appoint to or for the benefit of my descendants, persons who at any time were married to a descendant of mine, and/or to religious, scientific, charitable, or educational organizations described in IRC Section 502(c)(3), as amended, either by a valid last will and testament or by a valid living trust agreement executed by my spouse, all or any portion of the principal and any accrued and undistributed net income of the Family Trust as it exists at my spouse's death. This power shall not be exercised in favor of my spouse's estate, the creditors of my spouse's estate, or in any manner that would result in any economic benefit to my spouse."

(f) The phrase "to or for the benefit of" gives the holder of the LPA two options for appointing the available assets to the three classes of permissible beneficiaries, namely, Vivian's descendants, persons who were married to Vivian's descendants, and qualified organizations. The first option, allowing appointment "to" any of these parties, allows for a direct appointment to the eligible recipient. The second option, allowing appointment "for the benefit of," allows for appointment through a third-party, e.g., a trustee of trust, who will hold the distribution for the benefit of the recipient. There is nothing in the language of the provisions that excludes eligible organizations from the "for the benefit of" option. Additionally, the "and/or" conjunction further indicates that there is no differentiation among the three categories of eligible recipients with respect to how Steve may use the LPA to make appointments for their benefit.

(g) Steve's exercise of the LPA in his own trust provides that the subject property "shall not be an asset of Grantor's probate estate, or . . . be treated for any other purpose as if it were an asset of Grantor's probate estate." Petitioners contended, however, that Steve's exercise of the LPA exposed the appointed property to his creditors, given that Article Ten of Steve's trust provides: "Notwithstanding anything contained in this Trust Agreement to the contrary, no expenses, claims, or taxes shall be apportioned to the trust shares established for the beneficiaries named in Paragraphs A through F above." Paragraphs (A) through (F) named individual family members. The remaining beneficiaries, listed in Paragraphs (G) through (M), were charitable organizations, including SJMO in Paragraph (M). Petitioners argue that by excluding the distributive shares to the beneficiaries listed in Paragraphs (A) through (F) from reduction for any claims or expenses in Article Ten, Section 1 of Steve's trust, Steve exposed the beneficiaries listed in Paragraphs (G) through (M) to any expenses, claims, and taxes. Petitioners believe that Steve's exercise of the LPA allowed him to appoint funds from the VSLT, combine them with his own assets, and give SJMO a gift under Article Ten, Section 2, Paragraph (M) of his trust, composed of money from these sources. Petitioners also contend that by combining these two sources for SJMO's gift, Steve exposed the assets in the VSLT to his creditors because it became part of the Article Ten, Section 2, Paragraph (M) gift. In support of their position, petitioners cite Giarmarco's testimony in which he admitted that although he tried to keep assets segregated, the assets in Vivian's trust became titled in the name of Steve's trust.

(h) Although Steve provided in Article Four, Section 5 of his trust that it was his intent that the property appointed under the VSLT "shall not be an asset of Grantor's probate estate, or be subject to administration by the Personal Representative of Grantor's Will, or otherwise be treated for any other purpose as if it were an asset of Grantor's probate estate," petitioners argue that Steve violated the terms of the VSLT by channeling the LPA property to his own trust and disposing of it in the same manner that he disposed of his own assets.

(i) Steve's reference merely described the condition for granting the LPA funds to SJMO, namely, that SJMO name the patient tower after Vivian and Steve. That is, it "merely point[ed] the trustee to some language contained in the trust that tells it what circumstances under which they will make a distribution to St. Joseph Mercy Oakland." Giarmarco testified that the LPA assets were never commingled with the assets of Steve's trust. Thus, the LPA assets were never subjected to creditors of Steve's trust.

(j) Steve's exercise of the LPA in this case is analogous to In re Estate of Reisman, 266 Mich App 522; 702 NW2d 658 (2005). There, the decedent, Geraldine Reisman, established a revocable living [*25] trust, which created a marital trust for the benefit of her husband, Samuel Reisman. Id. at 524. Geraldine granted Samuel an LPA to appoint assets in her trust to her descendants. Id. Samuel exercised the LPA to appoint "all the property to the trustee of his revocable living trust, and directing that it be distributed pursuant to § 5 of his trust." Samuel also provided that the property he appointed would not be an asset of his probate estate or subject to administration by the personal representative of his will, "or otherwise be treated for any purpose as if it were an asset of my probate estate." Id. As this Court explained, § 5 of Samuel's trust "provided for distribution into issue trusts for his surviving children and, on a per capita basis, to descendants of his deceased children." Samuel later amended § 5 "to state that if petitioners, but not their living descendants, survived him, petitioners should be treated as having predeceased him." Id. at 525. The effect of the amendment was "to bypass petitioners in favor of petitioners' children." Id.

(k) The petitioners argued that Samuel's transfer of the marital trust assets to his own revocable trust "had the effect of benefiting his own estate and creditors [*26] and exposed the marital trust assets to expenses incurred in the operation of the revocable living trust as well as potentially adverse tax consequences." Id. at 532. According to the petitioners, "[t]he exposure of the marital trust assets to these potential liabilities . . . constitutes a transfer to the benefit of persons outside of the class delineated" by the decedent. Id. This Court rejected that argument because Samuel "specifically transferred the marital trust property to the trustee of his revocable living trust with instructions that those assets were not to become part of his estate, but were to be distributed pursuant to § 5 of his trust." Id. This Court concluded that this language "effectively stripped the trustee of any authority to utilize those particular assets for anything other than distribution pursuant to that section." Id. This Court further held that MCL 700.7501(4) prohibited third parties from invading the marital trust assets for payment of administration expenses, payment of claims against the husband's estate, and for payment of an allowance. Id. at 532-533.

(l) Petitioners argue that the VSLT did not contain language allowing Steve to exercise the LPA "subject to any conditions, trusts, and restrictions as may be determined" by him. Petitioners assert that the VSLT restricted Steve's power to make distributions to only Vivian's descendants. They quote Article Ten, Section 3 of the VSLT, which states that Steve "may make distributions among my descendants in equal or unequal amounts, and on such terms as conditions, either outright or in trust, as my spouse shall determine." The LPA for the VSLT family and marital trusts, and the Article Eighteen, Section 5 definition permitted Steve to appoint VSLT assets to the trustee of his own trust for the benefit of SJMO. Accordingly, the probate court did not err by finding that Steve's exercise of the LPA did not improperly expose the VSLT marital and family trust assets to Steve's creditors.

(m) Petitioners' argument that Steve's exercise of the LPA was invalid because it benefited him economically is largely based on a reiteration of their argument that Steve's exercise of the LPA exposed the VSLT assets to his creditors, which we have already rejected. Giarmarco argued that Steve would have structured his estate plan differently if he had known that he could not exercise the LPA in the VSLT in the manner that he did. However, the availability of different options for distributing his assets was not an economic benefit to Steve. There was no evidence that Steve incurred any liability or enforceable obligation to SJMO such that the LPA assets helped Steve satisfy an obligation. Petitioners fail to present any evidence of any other actual or potential benefit that Steve received from his exercise of the LPA.

c. ***Cadwell v. Citibank, N.A.,* 2023 U.S. Dist. LEXIS 229798 (United States District Court for the Southern District of New York 2023); 2024 U.S. Dist. LEXIS 28608 (2024); 2024 U.S. Dist. LEXIS 77946 (2024).** Probate exception to federal court jurisdiction does not apply when a suit is brought by the administrator of an estate to determine validity of exercise of power of appointment. Exercise of a power of appointment in favor of a trust for the benefit of an individual, rather than to the individual outright, is a proper exercise of the power of appointment. It is inappropriate to use extrinsic evidence to interpret an unambiguous expression of an intention to exercise a limited power of appointment contained in a will.

(1) Citibank, N.A. ("Citibank") is the Trustee of the Edward A. Deeds Trust under a Trust Agreement dated March 1, 1945 and the Trustee of the Edith W. Deeds Trust under a Trust Agreement dated March 1, 1945 (collectively the "Grandparent Trusts"). Edward A. Deeds (the "Grandson") was the son of Charles W. Deeds and the grandson of Edward A. Deeds and Edith W. Deeds. During his lifetime, and following the death of his father, the Grandson was a beneficiary of the Grandparent Trusts, which each created separate trusts for the Grandson's benefit. Both of the Grandparent Trusts granted a limited power of appointment to the Grandson over the assets held in the separate trusts for his benefit, and for alternative disposition of the assets of each trust should the Grandson not exercise that limited power of appointment. In the event that the Grandson did not exercise his limited power of

appointment, the Grandson's children (the Individual Defendants in this action) would be entitled to the assets in those trusts as the contingent remainder beneficiaries.

(2) On February 28, 2022, the Grandson, then a resident of Vermont, died. By order of the Vermont Superior Court, Probate Division (the "Vermont Probate Court"), the Last Will and Testament of the Grandson ("the Will") was admitted to probate and his wife, Birgit N. Deeds ("Ms. Deeds") was appointed Executor of his estate. The Will was admitted, allowed without objection from all interested parties, and authenticated by the Vermont Probate Court. The Will contained two provisions, Sections 3(a) and 3(b), wherein the Grandson purportedly exercised his limited power of appointment in favor of Jason N. Cadwell and Harold B. Findlay ("Plaintiffs") as Co-Trustees of the Edward A. Deeds Revocable Trust dated December 23, 1999, as amended (the "Grandson Trust"). Section 3.2(a) of the Grandson Trust, in turn, contains a provision specifying that assets received from the Grandparent Trusts shall be held by the Trustees of the Grandson Trust in a separate and distinct Trust for Birgit's benefit called the Birgit N. Deeds Trust I.

(3) Ms. Deeds, as Executor, moved the Vermont Probate Court for an order directing Citibank to transfer the assets in the Grandparent Trusts for the benefit of the Grandson to the Plaintiffs in their capacity as Co-Trustees of the Grandson Trust. The request was styled as a motion to disgorge trust assets and to cease and refund management fees. The Vermont Probate Court granted the motion and issued an order directing the transfer of the funds held in the two Grandparent Trusts administered by Citibank. The Vermont Probate Court rescinded its order after Citibank objected to the Vermont court's exercise of jurisdiction over the New York-based Grandparent Trusts. The Vermont Probate Court took notice of the proceedings in this Court and dismissed its own proceedings on the ground of forum non conveniens. Citibank has taken no position on the validity of the Grandson's exercise of his limited power of appointment but has refused to transfer any assets until a Court resolves the competing claims to the assets, or in the alternative, until the Individual Defendants sign releases permitting Citibank to make the transfer. Further, Citibank has indicated that it is pursuing its statutory right to an accounting of the Grandparent Trusts.

(4) Plaintiffs sought an order declaring that the Grandson properly exercised his limited powers of appointment as provided by the Grandparent Trusts, and directing Citibank, as Trustee of the Grandparent Trusts, to turn over the assets in the two trusts to the Plaintiffs in their capacity as Co-Trustees of the Grandson Trust. The Individual Defendants argue that the Grandson failed to properly exercise his limited powers of appointment because he appointed the assets to the Co-trustees of the Grandson Trust for the benefit of his spouse, rather than simply outright to his spouse, Ms. Deeds. If the Court found that the exercise of the limited power of appointment was ineffective, that would leave the Individual Defendants entitled to the assets contained in the Grandparent Trusts as the remainder beneficiaries. Although the Individual Defendants did not dispute the Will's admission to probate, they argued that the Will's provisions could have resulted from Ms. Deed's "undue influence" over the Grandson and that they require discovery to determine the Grandson's intentions and capacity when executing the Will.

(5) The United States Magistrate Judge recommended that the federal district court deny the Individual Defendants' motion to dismiss for lack of subject matter jurisdiction, and granted the Plaintiffs' motion for summary judgment in part and denied in part on the following grounds:

   (a) There is no dispute here that parties are citizens of different states, nor whether there is substantially more than $75,000 in controversy.

   (b) The probate exception has been subject to a variety of misunderstandings and adjustments throughout its history. The Supreme Court has since clarified that the exception deprives a federal court of jurisdiction only where the complaint seeks to administer an estate, probate a will, or do any other purely probate matter or to reach a res in the custody of a state court. Therefore, the federal courts retain their jurisdiction where parties seek a judgment that does not dispose of property in the custody of a state probate court, even if the judgment may be intertwined with and binding on state proceedings.

(c) Since the Will in this case was already admitted to probate and an administrator was appointed without objection, there is no probate proceeding to interfere with. Instead, Plaintiffs seek an order enforcing the Grandson's intent to exercise his limited power of appointment over assets in the Grandparent Trusts, as provided in his already admitted Will. The probate of the Will is already complete, which precludes the Individual Defendants' arguments that challenge the validity of the Will and those invoking the first prong of the probate exception. Plaintiffs are requesting that the Grandparent Trusts' assets, currently outside the jurisdiction of the Vermont Probate Court, bypass probate entirely and be added to the Grandson Trust. Even the Individual Defendants are seeking to bypass the estate and disburse the Grandparent Trusts' assets to themselves as the remainder beneficiaries. In other words, no party is seeking to move assets out of an estate, the typical scenario when the probate exception would apply. And, even if the Court were to view this action as an attempt to add assets to the decedent's estate that were not part of the estate at the time of his death, as would be the case here, such efforts fall outside the bounds of the probate exception. The probate exception similarly does not apply when a suit is brought by the administrator of an estate to add property to an estate or trust.

(d) The argument that the court should abstain under *Colorado River* is not persuasive because the only possible parallel state court action they can point to is the discontinued action in Vermont Probate Court. Once the Vermont Probate Court rescinded its previous order on the ground of forum non conveniens, the existence of a parallel state action ceased and the threshold inquiry for *Colorado River* cannot be satisfied.

(e) It is hard to imagine more explicit exercises of a limited power of appointment than those contained in the Will. Sections 3(a) and 3(b) of the Will are titled, "Exercise of Power of Appointment for Edward A. Deeds Trust" and "Exercise of Power of Appointment for Edith W. Deeds Trust," respectively. Each section states, "I hereby exercise this limited power of appointment, and appoint the remaining principal of the separate trust created for my benefit under the [Edward A./Edith W.] Deeds Trust to the Trustees of the Trust Agreement described in Section 5 hereof, to be held, managed, and disposed of in accordance with the terms of Article 3 thereof." Further, Section 3.2(a) of the Grandson Trust emphasizes that the Grandson's exercise of his power of appointment was intentional. If the Grandson did not intend to exercise the power of appointment, why would the Grandson Trust also provide for the creation of the Birgit Deeds Trust "pursuant to the Donor's exercise in his will of certain limited powers of appointment." The Grandson Trust documents contain no qualifying language such as "if the Donor should exercise the power of appointment" — instead it uses the clear phrase "pursuant to Donor's exercise in his will." No linguistic canons are necessary to parse this language — the Grandson explicitly exercised his power of appointment in the Will in favor of the Grandson Trust for the benefit of his wife.

(f) The Grandparent Trusts are governed by New York law, which recognizes that the exercise of a power of appointment in favor of a trust for the benefit of an individual, rather than to the individual outright, is nonetheless a proper exercise of the power of appointment. The Grandson's choice to appoint the assets in further trust for the benefit of his spouse, rather than to his spouse outright, is consistent with (and less extensive than) the power provided in the Grandparent Trusts to pay over the remaining principal thereof to his spouse. And notably, under the terms of the Grandson Trust, the remaining principal of the Birgit Deeds Trust will ultimately be paid to the Individual Defendants, which is similarly allowed by the Grandparent Trusts.

(g) The Individual Defendants contend that discovery is needed to show, through extrinsic evidence, that the Will is invalid because the Decedent was subject to undue influence when drafting his Will or had a contrary intent than what is stated in the Will. However, their challenges to the Will are all barred by Vermont law. The Will was already admitted to probate, without objection, and with notice having been given to "all interested parties." Individual Defendants conceded at oral argument that they did not contest the Will in the Vermont Probate Court. By failing to timely challenge the Will in Vermont Probate Court, the Individual Defendants have already allowed a court of competent jurisdiction to decide that the Will was made by someone with the requisite mental capacity, free from undue influence or fraud, and was properly witnessed. This Court is not free to revisit these issues, as failure to appeal the order of the Vermont Probate Court renders the Will immune from collateral attack. Any discovery sought on those issues would not be relevant to the outcome of this litigation.

(h) It is inappropriate to use extrinsic evidence to interpret an unambiguous expression of an intention to exercise a limited power of appointment contained in a will. The only argument the Individual Defendants make regarding the Will's terms themselves is that nearly all of his other assets were going to his wife. That fact is neither disputed, nor evidence of the Grandson's intention to leave the Grandparent Trusts' assets to his children immediately upon his death. It is just as likely evidence of the Grandson's intention for his wife, who he appointed executor of his estate, to have the benefits she was accustomed to until she also passes away.

(i) Since the Individual Defendants are barred from offering extrinsic evidence of the Grandson's intent and have not advanced any arguments that the Will or Trust documents by their terms or "necessary implication" express a contrary intent, the question before the Court is a purely legal one. It is irrelevant that the Individual Defendants believe discovery would reveal more information that are reasonably expected to create additional genuine issues of material fact. That belief both misunderstands the relevant law, as only the underlying documents are relevant, and is an insufficient basis to deny a motion for summary judgment. Where, as here, the only role for the Court is construing legal documents, summary judgment is appropriate without further discovery. There is no material dispute of fact that precludes a finding that the Grandson validly exercised his limited power of appointment in the Will. Further, applicable law requires a finding that the Grandson did validly exercise his limited power of appointment when, in the Will admitted to probate, he directed the Grandparent Trusts' assets be transferred to the Grandson Trust to fund a Trust for Ms. Deeds' benefit.

(j) Citibank's interest in pursuing an accounting of the Grandparent Trusts' assets is reasonable, given both the age and value of assets in the trusts (which amount to millions of dollars). However, Citibank contends that the accounting will require the gathering and review of nearly 80 years of documents. At oral argument, counsel for Citibank indicated that it may take an additional six to nine months to file the accounting in New York Surrogate's Court, with no prediction when the accounting might be complete. The parties suggest various different mechanisms whereby Citibank could retain a portion of the Grandparent Trusts' assets until the accounting is complete or issue a refund bond to the Co-Trustees of the Grandson Trust. However, on the record currently before the Court, it is impossible to determine how to balance the competing interests of Plaintiffs' right to receive the Grandparent Trusts' assets and Citibank's right to reasonable fees for completing the accounting. The Motion for Summary Judgment should be denied without prejudice insofar as it seeks an order requiring Citibank to transfer assets at this time. Instead, the parties should be required to submit additional evidence and briefing on the anticipated funds required to complete the accounting and how any portion of the Grandparent Trusts' assets might be transferred before the accounting is complete.

(k) The federal district court adopted the report and recommendations of the Magistrate Judge and directed the parties to submit additional evidence and briefing on the anticipated funds required to complete the accounting and how any portion of the Grandparent Trusts' assets might be transferred before the accounting is complete.

(l) The Magistrate Judge then recommended that the court grant Plaintiffs' motions seeking an order directing Citibank to transfer certain trust assets over to Plaintiffs subject to Defendant's holding two million dollars of such assets in reserve to cover expenses for an accounting of that Trust, on the following grounds:

(m) The Individual Defendants fail to provide any authority which states that "takers in default" or remainder beneficiaries are among those who would be considered "prejudiced parties" in the event of a partial distribution of trust assets. The Individual Defendants are not creditors, the executors, or the trustees. Plaintiffs and Citibank are the relevant parties, and here, they agree on the method of transfer. While such a transfer cannot be done if it would be "manifestly unfair" to some of the parties — the Individual Defendants have made no such showing. They remain contingent remainderpersons of the assets.

(n) The Grandson Trust only provides for Plaintiffs, in their discretion as trustees, to "pay to [Ms. Deeds] so much of the net income and or/principal. ... necessary or advisable for [Ms. Deeds'] health, support and maintenance." When Ms. Deeds dies, the Trustees shall then distribute the remaining principal, along with any interest, to the Individual Defendants. The Individual Defendants' fear that "[the] assets could well be dissipated completely by the time the judgment in this case becomes final" is entirely speculative and unpersuasive. In the event the Plaintiffs abuse their discretion as trustees, the Individual Defendants could bring a claim against Plaintiffs for breach of a fiduciary duty. Given the speculative nature of the Individual Defendants' fears, coupled with the available remedies should breaches of fiduciary duty actually occur, there is little to no risk of prejudice to the Individual Defendants from an order to transfer the assets to the Grandson Trust.

d. ***In re Miyamoto,*** **2024 Haw. App. LEXIS 343 (Intermediate Court of Appeals of Hawai'i 2024).** Trust does not reflect an intent to limit the means by which predeceasing spouse could exercise power of appointment over a trust not yet funded at her death, and not funded until death of surviving spouse.

(1) In 1980, Tadami Tad Miyamoto ("Tadami") created the Tadami Tad Miyamoto Trust Agreement, dated July 22, 1980, as later amended and restated ("Trust"), as a revocable living trust. The Second Amendment to Trust Agreement, dated January 8, 1997, is the operative trust document and the subject of the parties' dispute. The Trust named Tadami and his wife, Hisako Shirley Miyamoto ("Hisako"), as Trustees.

(2) Ted and Eileen are the only children of Tadami and Hisako. On July 8, 2003, Tadami was declared incompetent. Pursuant to the terms of the Trust, Hisako became the sole trustee at that time. Hisako executed her will ("Will" or "Hisako's Will") on July 31, 2003. Hisako died on October 16, 2003. When Hisako died, Ted became the sole Successor Trustee of the Trust. Tadami died about seven years later, on September 3, 2010.

(3) Hisako's Will was submitted to probate in 2004. Hisako's Will exercises a power of appointment given to her in Subparagraph 4.B.(5) of the Trust. Specifically, Hisako's Will exercises a power of appointment as to property held pursuant to the Residuary Trust or Trust B as defined in and created under the Trust. Hisako's Will directs the Trustee to distribute this property as specified in the Will.

(4) Eileen petitioned the court. The Circuit Court entered Order 1, which granted in part and continued in part the petition, and ordered Ted: (1) to file an inventory of the Trust's assets; (2) to file an accounting of the affairs of the Trust; (3) to distribute to Eileen the Trust's interest in three properties ("Properties"), pending resolution of allocating the outstanding federal and state taxes owed by the Trust; and (4) to pay from Ted's share of the Trust assets or as a surcharge, all amounts owing for federal and state tax penalties and interest incurred to date. The Circuit Court then entered Order 2, under which the court: (1) appointed a master ("Master") to review who should be allocated responsibility to pay the income taxes owed from the rental income obtained from two of the three Properties, and any disputes raised by Eileen regarding the accounting and inventory filed by Ted; and (2) ordered Ted to distribute to Eileen forthwith the Trust's interest in the Properties.

(5) Ted appealed and contended that the Circuit Court erred: (1) in determining that the power of appointment that was granted to Hisako in the Trust was validly exercised in Hisako's Will; (2) in determining that the power of appointment that was granted to Hisako in the Trust was broad enough to allow Hisako to alter the substantive distribution of Trust Properties; and (3) in ordering Ted to distribute the Trust Properties to Eileen.

(6) The court of appeals affirmed on the following grounds:

(a) Ted's contentions rest on the argument that the power of appointment granted to Hisako was not validly exercised in Hisako's 2003 Will, because that power could only be effectuated after Tadami's death in 2010.

(b) The Trust as a whole reflects Tadami's intent to provide for him and Hisako during their lifetimes, to provide for Hisako should he die before her, and to benefit their children upon his eventual death. During Tadami's life, the Trust was set up to pay Tadami net income and principal of the trust estate, and to pay, at the trustees' discretion, "for the support, maintenance in health, comfort and welfare" of Tadami and Hisako.

(c) Upon Tadami's death, Paragraph 4 of the Trust provides for the allocation of Trust properties to two (and potentially three) subtrusts, as follows: (1) if Hisako survives Tadami, a "Marital Trust" or "Trust A" ("Trust A"), over which Hisako was granted a testamentary general power of appoint — because Hisako died before Tadami, this trust was not created; and (2) a Family Share was to be held as a separate trust estate referred to as the "Residuary Trust" or "Trust B" ("Trust B") — because Hisako died before Tadami, all Trust property went into Trust B when Tadami died in 2010.

(d) The Trust further provides that from the date of Tadami's death, the trustees shall pay to or for the benefit of Hisako (if she had still been living), the net income from Trust B, and such additional portions of the principal of Trust B as may be needed to support "her accustomed manner of living, education, . . . maintenance in health, medical, dental, hospital and nursing expenses and expenses of invalidism."

(e) The Trust also gave Hisako two powers of appointment as to Trust B. First, Subparagraph 4.B.(4) provides that after Tadami's death and "during [Hisako's] life," the trustees are to distribute portions or all of the principal of Trust B "to and among [Tadami's] issue upon such conditions and estates, in such manner, as [Hisako] shall appoint by signed instruments delivered to the Trustees during the life of [Hisako]." This power was not exercised, as Hisako died before Tadami.

(f) Subparagraph 4.B.(5) further provides: "The Trustees shall upon the death of [Hisako], distribute such portions of the principal and unpaid income of [Trust B] to and among [Tadami]'s issue upon such conditions and estates, and in such a manner as [Hisako] may appoint by her Last Will and Testament."

(g) Hisako exercised this power in her 2003 Will.

(h) Ted's argument rests on a faulty premise — that Trust B was not "created" until Tadami's death. Trust B was created by Subparagraph 4.B. of the Trust; it simply was not funded, and its assets could not be distributed, until after Tadami's death. The language of Subparagraph 4.B. does not state that Hisako must exercise the power of appointment contained in Subparagraph 4.B.(5) in a will made after Tadami's death. This is in contrast to subparagraph 4.A.(2), which expressly states that if Hisako survives Tadami, upon Hisako's death, the trustees are to transfer, free of trust, the remaining principal of Trust A to persons or Hisako's estate, as she appoints "by a [w]ill made after [Tadami's] death[.]" In short, the language of the Trust, read as a whole, does not reflect an intent to limit the means by which Hisako could exercise Subparagraph 4.B.(5)'s power of appointment to a will made after Tadami's death and the funding of Trust B. A power of appointment created in the donor's inter vivos trust is created when the trust is established, even if the trust is a revocable trust. If the donee survives the establishment of the trust, the power is created, and can be exercised by a document executed before or after the establishment of the trust.

(i) There is no dispute that Hisako exercised this power of appointment in her Will. Accordingly, the Circuit Court did not err in determining that the power of appointment that was granted to Hisako in Subparagraph 4.B.(5) of the Trust was validly exercised in Hisako's Will.

(j) Ted contended that at most, Hisako had the power to control the manner in which Trust Property was distributed, but not to change which children received which property. The language of Subparagraph 4.B.(5) does not make this distinction or create this limitation. Tadami gave Hisako a testamentary power as to the distribution of "such portions of the principal and unpaid income of [Trust B] . . . to and among [Tadami]'s issue upon such conditions and estates, and in such a manner as [Hisako] may appoint. . . ." In the event that power was not exercised, Subparagraph 4.B.(7) provided that the properties in Trust B would be distributed per the terms of the Trust after Tadami and Hisako died. Ted's argument is without merit.

e. ***Honegger v. Willhite,* 2024 Cal. App. Unpub. LEXIS 2053 (Court of Appeal of California 2024).** Allegation that exercise of beneficiary's powers of appointment is not valid unless it complies with the Uniform Decanting Act is sufficient to preclude summary judgment approving the exercise.

(1) Hal P. Cline ("Hal") and Claudette Cline ("Claudette") were a married couple who, in 2007, entered into a trust agreement regarding their marital assets. Appellants are the only children of the marriage. The trust agreement spans nearly 70 pages.

(2) The Cline Family Trust was set up to be revocable during the period both Hal and Claudette were alive. The full trust was designated as the Settlors' Trust ("Trust Agreement"). Upon the death of either spouse, the Trust Agreement would be divided into multiple subtrusts, including a Survivor's Trust, a Marital Trust, and a Credit Trust. Upon the death of either settlor, the Trust Agreement became irrevocable and unamendable, except that the surviving spouse retained, during his or her lifetime, the rights of revocation and amendment with respect to the whole of the Survivor's Trust and all the provisions of the Trust Agreement relating to the Survivor's Trust. The Survivor's Trust was designed to provide the surviving spouse with income reasonably necessary for their maintenance and support. It was funded with both spouses' interest in specific personal property and "that amount of the remainder of the Balance as shall equal the Surviving Settlor's interest therein."

(3) The surviving spouse retained the right to terminate the Survivor's Trust and to gift portions of the trust to others. In addition, the surviving spouse was given a Testamentary General Power of Appointment over the Survivor's Trust allowing them to distribute all or any portion of the principal and undistributed income of the Survivor's Trust as the Surviving Spouse shall appoint upon death. The Trust Agreement defined this general power as one that "may be exercised in favor of any person or Charitable organization, without limitation."

(4) Upon the death of the surviving spouse, the Trust Agreement stated the Survivor's Trust would convert to the Administrative Survivor's Trust and required that the trustee "(i) pay all taxes and expenses relating to the Administrative Survivor's Trust, (ii) distribute the portion of the Administrative Survivor's Trust that the Surviving Spouse has effectively appointed pursuant to paragraph (c) ..., and (iii) distribute the balance of the Administrative Survivor's Trust ... as provided" in additional instructions.

(5) The net income from the Marital and Credit Trusts was to be paid in at least quarterly installments to the surviving spouse. The surviving spouse was permitted to draw principal from the Marital Trust as necessary. In addition, the surviving spouse was granted a Testamentary Limited Power of Appointment that was executed in the same way as the Testamentary General Power of Appointment. Unlike the Testamentary General Power of Appointment, however, the Testamentary Limited Power of Appointment could be exercised only in favor of the holder's spouse, issue or a Charitable Organization. Upon the death of the surviving spouse, the Trust Agreement stated the Marital Trust would convert to an administrative form and required that the trustee "(i) pay all taxes and expenses relating to the Administrative Marital Trust(s), (ii) distribute the portion of the Administrative Marital Trust(s) that the Surviving Spouse has effectively appointed pursuant to paragraph (b) ..., and (iii) distribute the balance of the Administrative Marital Trust(s) ... as provided" in additional instructions. A similar structure covered the Credit Trust.

(6) Additional instructions provided that the remaining balances identified in step (iii) would be divided "by right of representation, into separate trust shares, one trust share for each of Settlors' children then living." The Trust Agreement then provided additional distribution instructions should the children and/or any grandchildren fail to survive the settlors.

(7) In 2014, Claudette died. This triggered the creation of the subtrusts. On September 8, 2020, Hal died. On October 16, 2020, Gregory W. Honegger, the successor trustee of the Cline Family Trust, mailed a notice to Carie R. Cline Willhite and Daymon A. Cline ("Appellants"). The notice included a copy of the Trust Agreement and two instruments showing Hal had exercised his Testamentary General and Limited Powers of Appointment prior to his death. The first exercise of these powers was dated July 11, 2020. The document, containing handwritten notes, purported to transfer one-half of the entire trust (meaning the collection of all subtrusts) to St. Jude Children's Research Hospital and the other one-half to Sandra Crosby, identified as Hal's niece. The handwritten additions were dated and initialed, and the document was signed and dated by Hal and witnessed by Honegger's counsel and one Vincent Oddo. The second exercise was dated July 20, 2020, and included the same instructions but without any handwritten additions—essentially a restatement of the first exercise. The second exercise was signed and dated by Hal and notarized.

(8) Honegger petitioned to determine construction of a trust and for instructions to the trustee. Hal allegedly "did not want his children to receive anything" and attempted to leave his estate to St. Jude Children's Research Hospital. Hal then modified the attempt to leave half to St. Jude Children's Research Hospital and half to Sandra Crosby but did not specify from which trusts these payments would be made.

(9) In a declaration submitted with the petition, counsel who prepared documents relating to this action stated, "There was no opportunity to prepare a document that would specifically identify that the one-half of the estate" going to St. Jude Children's Research Hospital would come from the Marital and Credit Trusts and that "the other one-half of the trust estate" would come from the Survivor's Trust. Similarly, the declaration stated that "the handwritten change to the Exercise of Power of Appointment" should be interpreted in that manner and that the relevant shares "will be equal since Hal failed to divide the assets of the Trust into the required subtrusts ... following Claudette's death." Honegger requested that the "assets of the Survivor's Trust, comprising one-half of the combined Trust assets, be distributed to Sandra Crosby," the "assets of the Marital Trust, if any, and the Credit Trust, comprising

one-half of the combined Trust assets, be distributed to St. Jude Children's Research Hospital," and that the court instruct Honegger to so act. Honegger attached a copy of the Trust Agreement, the purported exercise of the appointment, and other relevant documents to the petition.

(10) Appellants objected to the petition and asserted the distribution plan constituted a decanting and that Honegger had failed to comply with aspects of the decanting statute. In addition, appellants requested an accounting that showed the amounts properly contained in each subtrust and requested that the court require Honegger to brief whether the court can "add language" concluding Hal properly sought to disinherit his children "based upon the written power of appointment." Finally, appellants sought information on whether Honegger's counsel should be disqualified and requested the court "provide instructions ... regarding whether a proposed exercise of the decanting power is permitted ... and is consistent with the fiduciary duties of the authorized fiduciary."

(11) Honegger moved for summary judgment.

(12) Appellants opposed the motion for summary judgment claiming that "a continuance is necessary to allow [appellants] to obtain additional essential evidence." Appellants noted that several changes were made to the trust when Hal was nearing the end of his life and when Sandra Crosby was his caregiver: that Hal had not properly separated Claudette's portion of the trust and that Sandra Crosby had become the beneficiary of the trust in that time. Appellants alleged this showed a potential lack of capacity. Appellants filed an ex parte motion to compel discovery. Honegger opposed, arguing the discovery requested was not relevant to any issue that had been raised in the case.

(13) The probate court ordered a brief continuance of the summary judgment hearing and set the hearing on the discovery motion for the same day. The court additionally ordered appellants to refile their motion to continue summary judgment and file any motion to continue the trial in time to hear that motion with the discovery and summary judgment motions. Any request by appellants to amend their opposition to the petition or file any other actions was to be completed in time to have those heard at the same time. In response to this order, appellants refiled their motion to continue summary judgment and sought to file an amended objection to the petition. This amended objection included claims Hal did not properly exercise his powers of appointment in part because he was subjected to undue influence and in part because he was under hospital care at that time. Appellants included several allegations of fact supporting their claims of undue influence and improper behavior by Sandra Crosby prior to Hal's death.

(14) The probate court denied the motions to amend the objection and continue the summary judgment motion hearing and denied the discovery motion on the ground no pleading placed relevant facts at issue and, thus, the discovery was irrelevant. Finally, the court granted the summary judgment motion, stating there were no triable issues of material fact and that Hal validly exercised his general power of appointment over the survivor's trust and exercised his special power of appointment over the credit trust and the marital trust. The court ordered one-half of the Trust Agreement assets be distributed to Sandra Crosby and the other one-half to St. Jude Children's Research Hospital.

(15) On appeal, the court of appeals reversed and remanded on the following grounds:

(a) The crux of Honegger's motion for summary judgment in this case was a claim that appellants' objection did not contest any material facts alleged in the petition. However, appellants challenged material aspects of the petition.

(b) Reversal would be required because the probate court could not have relied on the verified petition to grant summary judgment once any form of contest was filed against the petition. Appellants raised a challenge to a material issue contained in the petition. As appellants did challenge a material issue contained in the petition, the court's conclusion there were no triable issues of material fact because appellants "admitted the material allegations in the petition by failing to controvert any of the allegations in their objection" was improper and reversal is required.

(c) The petition asserted a limited set of facts which were adopted by the probate court when it granted summary judgment: (1) Honegger was the current trustee; (2) Hal validly executed powers of appointment contained within the trust instrument; and (3) the Survivor's Trust share comprised one-half of the combined Trust assets, while the Marital and Credit Trusts comprised the other one-half, such that the full trust could be apportioned between Sandra Crosby and St. Jude Children's Research Hospital. In order to prove these facts, Honegger relied upon the verified petition for information about the trust document, affidavits of counsel regarding Hal's intent and the status of the trust assets, and documents submitted with the summary judgment motion for proof Hal exercised his powers of appointment.

(d) Appellants objected on the ground that such a distribution constituted a decanting or modification of the trust instrument for which proper notice had not occurred. Included within this objection was a request that the trust assets be accounted for within each subtrust and instructions regarding whether Hal could disinherit his children from any inheritance owed to them through his appointment powers.

(e) The act of decanting a trust is governed by the Uniform Trust Decanting Act. It is a defined power granted to a fiduciary to modify an existing trust, usually to pour funds from that trust into another, through means outside of the trust instrument itself.

(f) Appellants' objection under the decanting statutes—although inartful as stated—challenged the trustee's ability to make the requested distribution without satisfying the decanting statute requirements. With the included request for an accounting of the subtrusts, the objection necessarily challenged the ability to transfer one-half of the proceeds to Sandra Crosby and one-half of the proceeds to St. Jude Children's Research Hospital. This contention thus placed in dispute any assertion that Hal's valid exercise of his appointing powers could result in an even split of the trust assets in a manner that excluded appellants. With the included request for instructions regarding Hal's purported disinheriting of appellants, the objection also challenged whether Hal had properly exercised his appointment powers through his attempted split of the assets.

(g) The record further supports that these contentions were meaningful. The proffered language of the Trust Agreement does not indicate that the trusts created after Claudette's death and used during Hal's life would necessarily result in one-half of the assets remaining in the Survivor's Trust and one-half of the assets split between the Marital and Credit Trusts. Even if initially split equally, the trust instrument states that the Survivor's Trust is meant to provide the surviving spouse with income reasonably necessary for their maintenance and support while the Marital and Credit Trusts only provide quarterly installments of net income unless principal distributions are requested. The Trust Agreement further indicates that the settlors specifically recommended drawing from the Survivor's Trust first.

(h) Should the subtrusts not be equally funded at the time of Hal's death, Hal's request to provide one-half of the total assets to Sandra Crosby and one-half of the total assets to St. Jude Children's Research Hospital could require modifying the terms of the Trust Agreement. Absent modification, appellants appear to be entitled to any portion of the irrevocable Marital and Credit Trusts that exceeds the one-half of the total assets that could be distributed if Hal's powers of appointment and specific split of funds were valid. And Sandra Crosby would be entitled only to the amount of funds properly remaining in the Survivor's Trust up to the one-half of trust assets purportedly left to her.

(i) By claiming a failure to provide proper notice of a decanting and requesting an accounting of related subtrusts, appellants, at a minimum, placed in issue whether the appointing power could be properly exercised as Hal requested and whether properly complying with Hal's attempt to exercise those powers actually resulted in all trust funds being distributed to Sandra Crosby and St. Jude Children's Research Hospital. As these issues were essential to the relief requested in the original petition, there is no basis to conclude that the petition remained uncontested such that the probate court could either find no triable issues of material fact existed or rely upon affidavits and the verified petition as if the proceedings were uncontested.

(j) The underlying issue is not whether exercise of the powers of appointment is part of the trust instrument, but whether those powers were properly exercised under Hal's split of assets. Even assuming the powers of appointment are part of the trust instrument and properly allow the general actions taken by Hal, the factual dispute regarding the propriety of Hal's specific split of assets and its impact on funds that would otherwise have gone to appellants remains. As appellants properly challenged the proposed distribution through their claim that a decanting was required to execute the requested distribution, their purported failure to challenge the legal premise by which the distribution flowed does not prevent summary judgment.

(k) Ultimately, although appellants' objection to the petition was poorly framed, it was minimally sufficient to challenge at least one of the core factual contentions supporting the petition. The probate court could not, therefore, grant summary judgment to Honegger based on the assertion appellants failed to contest any material facts alleged in the petition.

32. Decanting

a. ***In re Niki & Darren Irrevocable Trust,* 2024 Del. Ch. LEXIS 261 (2024).** Decanting a nullity where trustees do not have power to invade trust principal.

(1) Ildiko Juhasz de Tesak ("Ildiko") is a citizen of Hungary and El Salvador and a resident of El Salvador. She is not a U.S. citizen. Claudia Elena Tesak ("Niki") is a citizen of El Salvador and a resident of California. Darren J. Rushin is a resident of California.

(2) Ildiko married Pablo Tesak in El Salvador and the pair had three children: Claudia Elena Tesak, Carla Tesak Arzente, and Jose Andres Tesak Juhasz ("Andy"). Ildiko and Pablo were married for almost 40 years, until his death. During his lifetime, Pablo co-founded Productos Alimenticos Diana SA de CV ("Diana"), a snack food conglomerate headquartered in El Salvador. After founding Diana, Pablo formed another snack food company in El Salvador named Bocadeli. Pablo owned 50% of Diana, and Bocadeli was owned equally by Niki, Carla, and Andy.

(3) Niki and Darren J. Rushin ("Darren") married in El Salvador in 1997. Prior to their marriage, Darren held various jobs ranging from sales to private tennis coach to private pilot. After marrying Niki, Darren worked at Bocadeli as a general manager of the company for approximately a year before he and Niki moved to California in 2004. In order to fund the move and their living expenses in California, Niki sold her shares of Bocadeli to Carla and Andy for $15 million. Two years later, Niki and Darren executed a trust instrument, on June 16, 2006 (the "2006 Trust"), which was never funded. The 2006 Trust instrument specified that if Niki and Darren divorced, the trust would be divided into two equal shares and administered as separate trusts (the "Divorce Provision"). Three years after the execution of the (never funded) 2006 Trust, Pablo passed away.

(4) In 2012, Ildiko executed a trust (the "2012 Trust") to benefit Niki, Darren, Niki and Darren's two children, and herself. Ildiko settled the 2012 Trust on April 30, 2012. The 2012 Trust was administered in and governed under the laws of California. Ildiko was the settlor, trustee, and

sole income beneficiary of the 2012 Trust. The 2012 Trust was funded with Ildiko's interest in Global Infinity, Inc. Global Infinity is an investment company that holds various securities and Ildiko is its sole director. Previously in 2003, Ildiko had granted Niki and Darren power of attorney over Global Infinity. Through the years, Darren primarily made investment decisions on behalf of Global Infinity by working closely with the Tesak family's advisor, Robert Brower.

(5) The 2012 Trust is irrevocable by the settlor but could be revoked (but not amended) with the unanimous consent of Ildiko, Niki, and Darren. The 2012 Trust provided for discretionary income to Ildiko, but not principal, and prohibited distributions to any other beneficiaries during her lifetime. Upon Ildiko's death, the 2012 Trust would be divided into separate trusts, with 55% held for Niki's benefit and 45% held for Darren's benefit. Subsequently, Niki and Darren would be entitled to discretionary income and principal of their separate trusts for health, education, support, and maintenance. Niki and Darren participated in each discussion with Ildiko's attorneys concerning the creation of the trust, with Darren primarily leading these discussions.

(6) Two years after the formation of the 2012 Trust, Mr. Brower informed Ildiko, Darren, and Niki that he did not feel comfortable with the tax advice received in light of the amount of assets involved in the trust. Darren was dissatisfied with the 2012 Trust for reasons of his own, as Mr. Brower also informed him that the 2012 Trust did not contain a Divorce Provision like the one in the 2006 Trust. Darren retained new counsel to review the 2012 Trust. Darren directed counsel to draft a new trust with distribution provisions that followed the 2006 Trust, not the 2012 Trust. In particular, Darren directed counsel to form the trust to be divided equally upon Ildiko's death, and to include a provision that required his half of the trust to vest immediately upon a divorce occurring during Ildiko's life.

(7) Counsel drafted a set of documents to: (a) transfer the situs of the 2012 Trust from California to Delaware; (b) appoint Comerica Bank & Trust, NA ("Comerica") as co-trustee of the 2012 Trust; and (c) create the 2014 Trust (the "2014 Trust") with Comerica as sole trustee. It was determined to decant the principal and income of the 2012 Trust to Comerica as Trustee of the 2014 Trust under the Delaware decanting statute. The draft of the 2014 Trust was changed to reflect an even 50/50 spilt between Niki and Darren, and to provide for the Divorce Provision under which Darren's share would vest upon their divorce. Counsel sent execution copies for the execution of the 2014 Trust to Niki on December 19, 2014, so that Niki could hand-deliver the documents to Ildiko in El Salvador during the holidays. The documents provided to Niki included an instruction letter for Darren, an instruction letter for Ildiko with a Spanish translation, and execution copies of the 2014 Trust and related documents with a Spanish translation.

(8) On Christmas Eve of 2014, Ildiko, in her capacity as trustee, moved the situs of administration of the 2012 Trust to Delaware, changed the governing law to Delaware, and appointed Comerica to be the co-trustee of the 2012 Trust. Also on this day, Ildiko settled the 2014 Trust, appointing Comerica as the sole trustee and leaving herself as life beneficiary. Later, Ildiko and Comerica (the "Trustees"), as trustees of the 2012 Trust, decanted (or purported to decant) the 2012 Trust corpus into the 2014 Trust (the "Decanting"). Ildiko, in her capacity as one of the 2012 Trust's two co-Trustees, and Comerica executed a trustee resolution (the "Trustee Resolution") purporting to exercise her discretionary power to distribute all of the principal and income of the 2012 Trust and appoint all of the principal and income of the 2012 Trust to Comerica as trustee of the 2014 Trust. The assets purportedly appointed to the 2014 Trust by the Trustee Resolution were the 2012 Trust's ownership interests in Global Infinity and Hacienda 2-503 LLC, which owns a condominium in Mexico.

(9) Ildiko, Niki, and Darren, as beneficiaries of the 2012 Trust, all signed acknowledgements and statements of non-objection or consent to the Decanting within three months of the execution of the Decanting. Ildiko and Niki claimed that they never reviewed the contents of the 2014 Trust's execution documents provided by counsel, and claimed Darren did not make

them aware that the 2012 Trust did not specify that Ildiko could distribute the principal of the 2012 Trust during Ildiko's lifetime. Niki did not obtain nor consult separate counsel throughout the formation and execution of the 2014 Trust. Ildiko, also, did not consult her own counsel before signing the documents in December 2014.

(10) In 2018, Darren's attorneys proposed a financial divorce from Niki, which would include separate trusts apart from the 2014 Trust but would allow him to remain manager of all the assets and to receive a management fee. Darren engaged counsel to explore avenues to modify the 2014 Trust pursuant to this plan. Niki engaged counsel to advise her on the proposed financial divorce. Niki and Darren separated and began California divorce proceedings and were divorced in 2019.

(11) Ildiko engaged Delaware counsel. Ildiko's Delaware attorneys contacted Comerica and advised that Ildiko and her counsel believed that the Decanting, and thus the funding of the 2014 Trust, was invalid. Comerica retained Delaware trust counsel to review the Decanting and concluded that the Decanting was invalid since the Trustees lacked the power to distribute principal during Ildiko's lifetime, and the interests of the remainder beneficiaries under the 2014 Trust were not substantially identical to their interests under the 2012 Trust.

(12) Comerica petitioned for instructions. Darren answered and filed claims against Comerica and Ildiko for breach of fiduciary duties and civil conspiracy. The parties filed cross-motions for judgment on the pleadings. The Chancery Court denied the Trustees' Motion, holding that the doctrine of unclean hands, pertaining to Ildiko and Comerica, barred the Court from hearing the merits of their petition, on the grounds that: (a) Comerica and Ildiko, as Trustees had a duty to ensure that the Decanting did not violate applicable statutory law, but nonetheless relied in their petition on their assertion that they had violated the law; and (b) they could not themselves invoke equity on that basis to benefit one of the beneficiaries to the detriment of another, and to benefit Ildiko, as a beneficiary, as well.

(13) Niki filed claims against Comerica and Darren seeking a declaration that the Decanting was invalid and void ab initio and seeking the return of the decanted assets to the 2012 Trust. Darren filed a cross-claim for conspiracy against Niki, which was identical to his claim against Comerica and Ildiko and sought a declaration instructing Comerica to distribute any non-decanted assets in accordance with the terms of the 2014 Trust.

(14) Niki moved to dismiss Darren's claims. Mediation was unsuccessful. Darren moved for partial summary judgment. Following trial, the Chancery Court held that the Decanting of the 2012 Trust into the 2014 Trust was a nullity, and equity does not preserve the funding of the 2014 Trust with these assets, on the following grounds:

(a) The Delaware "decanting" statute provides that, to have the power to decant the principal from one trust to another, the trustee must have the power to invade and distribute that principal. The power of a trustee to thus decant logically must come from the power of that trustee to exercise her discretion to appoint or distribute the fruits of the beneficial interest under the terms of the old trust; from this, it follows, she has a concomitant (but not greater) power to transfer the beneficial interest to a new trust. The discretionary or appointment power of a trustee toward a beneficiary, up to but not beyond such power, may instead be transferred to and administered from a new trust. Where, as here, the decanting is of the principal of the old trust, the power of the trustee to invade the principal of the old trust is a necessary predicate to the decanting. The Decanting is invalid because the Trustees had no power to distribute the principal of the 2012 Trust, as they could only distribute income to Ildiko during her lifetime.

(b) The attempted Decanting was ultra vires, and a nullity. Because the purported Decanting is a nullity, the assets that theoretically flowed thereby from the 2012 Trust to the 2014 Trust should be viewed as never leaving the 2012 Trust. Since the actions of the Trustees were premised on the Decanting Statute, and since they were not authorized by the statute, the purported Decanting is a nullity. Consequently, the assets that stemmed from the Decanting must be viewed as never leaving the 2012 Trust.

(c) Darren no longer contests the validity of the Decanting but asserts a number of equitable claims to bar the return of the assets from the 2014 Trust to the 2012 Trust including the consent of the parties, unclean hands, and delay.

(d) To prevent the exercise of equity from serving as a tool of oppression or unfairness, the Court may refuse to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals. For the doctrine to apply, the alleged inequitable conduct must have an immediate and necessary relation to the claims under which relief is sought. The actions of Niki that Darren sets forth to support his contention for the application of the doctrine pertain to her part in the creation of the provisions and execution of, and her acknowledgement and consent to, the 2014 Trust. These actions do not have an immediate and necessary relation to the Decanting, which is the sole issue at dispute in this matter. More significantly, Niki did not owe a legal responsibility to Darren; as Trustees of the 2012 Trust, Ildiko and Comerica owed fiduciary duties to the trust's beneficiaries. Niki's consent to the terms of the 2014 Trust does not invoke unclean hands in her position on the Decanting. The doctrine of unclean hands does not bar the relief that Niki seeks.

(e) In order to invoke laches here, Darren must assert that Niki unreasonably delayed asserting her rights in a manner that led to his detriment. He has not pointed to a detriment which equity may address, however. The most he can refer to is the legal fees he has expended, which do not support laches here. There is no indication that Niki was aware of the illegality of the Decanting until shortly prior to this litigation, further preventing application of laches.

(f) For the doctrine of acquiescence, Darren must demonstrate that Niki was aware that the Decanting was illegal, a fact that was undoubtedly material to Niki's full knowledge of her rights. Those facts were not demonstrated at trial. Darren simply asserts that Niki knew about the divorce provision and that counsel had the opportunity to review the 2014 Trust and Decanting documents. That, without more, is insufficient to prove that Niki was aware that the Decanting was a nullity and subsequently declined to assert her rights.

(g) This decision does not dispose of Darren's claim against Ildiko for breach of trust. Unclean hands barred Ildiko from employing equity to benefit as a beneficiary from her malfeasance as a trustee. That does not, support Darren's invocation of equity to ratify a null act, based on the fact that non-ratification would work an incidental benefit on the trustee. It was counsel acting primarily at the behest of Darren who proposed the Decanting. Finally, to the extent equity is available and necessary to prevent a windfall to Ildiko, there are actions short of ratification of the Decanting which may be applied.

33. State Nexus & Taxation

a. ***Daniels v. Comm'r of Revenue Servs.,* 2024 Conn. Super. LEXIS 2185 (Superior Court of Connecticut 2024).** The amount of time spent in Connecticut, together with the full personal, social, and property connections maintained by decedent over that same time period, supports imposition of Connecticut estate tax on decedent's estate.

(1) Jack Anderson was born February 14, 1925, in Ohio. Mr. Anderson passed away on March 28, 2015, in Florida. Mr. Anderson's funeral was held in Florida, and he is buried in Arlington National Cemetery. Mr. Anderson's obituary was published in the *Vero Beach News* (Fla.), the *Greenwich Times*, and the *New York Times*. Mr. Anderson was married and had three grown children, two of whom live in Texas and one of whom lives in Pennsylvania. The executor described Mr. Anderson as a man who was private, meticulous, honest, and fair.

(2) Mr. Anderson was a very successful businessman and moved around the United States several times in pursuit of his business interests. Mr. Anderson spent significant portions of his life in Ohio, New York, Connecticut, Tennessee, Texas, and Florida. From approximately 1957 to 1970, Mr. Anderson lived in Greenwich, Connecticut, with his family. In approximately 1970, Mr. Anderson moved to Tennessee to pursue his business interests. In approximately 1980, Mr. Anderson moved to Texas to pursue additional business interests and was domiciled there until approximately 2006.

(3) In 2006, Mr. Anderson filled out a declaration that he was domiciled in Florida. Reflecting this decision, Mr. Anderson also held a Florida driver's license, was registered to vote in Florida, and maintained a local bank account in Florida.

(4) In 1984, Mr. Anderson purchased an approximately 4,000 sq. ft. condominium in Greenwich, Connecticut. In 2010, Mr. Anderson purchased a second condominium in Greenwich of approximately 3,000 sq. ft. in size. In 2014, Mr. Anderson purchased a third condominium in Greenwich of approximately 2,000 sq. ft. in size. Mr. Anderson owned all three of his Connecticut condominiums until his death in 2015. All three of Mr. Anderson's Connecticut condominiums were located in the same condominium complex. Mr. Anderson used the condominium he purchased in 1984 as a personal residence for himself and his wife. The additional Connecticut condominiums were used for guests, and, as Mr. Anderson and his wife aged, to house personal assistants and persons assisting with the Andersons' health care needs.

(5) In July of 1989, Mr. Anderson purchased a home in Carefree, Arizona. The Arizona home was comparable in size and accommodations to Mr. Anderson's Florida and Connecticut homes. Mr. Anderson owned the Arizona house at the time of his death.

(6) By 1991, Mr. Anderson had acquired land and built a large beach front home in Vero Beach, Florida. The Florida home was approximately 9,700 sq. ft in size. Mr. Anderson owned the Florida house at the time of his death.

(7) From 2006 until his death in March of 2015, Mr. Anderson split his time among the Connecticut, Florida and Arizona properties on a very regular basis. During the time period of 2006-2015, Mr. Anderson had a regular practice of staying approximately 5 1/2 months in Connecticut (approximately May through mid-October); 3 1/2 months in Florida (approximately November through mid-February) and 3 months in Arizona (mid-February though early May).

(8) Mr. Anderson was a successful and wealthy businessman. He had the financial resources to maintain full homes, including all the furnishings and personal possessions one might anticipate for a wealthy individual, at each of his three homes (Connecticut, Florida, Arizona). At the time of his death, Mr. Anderson had four cars registered in Connecticut and three cars registered in Florida. Mr. Anderson had access to a private jet to facilitate travel between his homes. Mr. Anderson's personal assistants testified at trial that they would commonly go ahead to whichever house Mr. Anderson was traveling to next in order to open up the house and transport any personal belongings (including cars) that Mr. Anderson wanted to bring from one house to the other. Reflecting the regular and extended time periods he spent in both Connecticut and Florida, Mr. Anderson maintained all the personal friendships and social connections one might expect for a wealthy, active, retired businessman living in a community. For example, Mr. Anderson maintained long-standing memberships at various country clubs in both Connecticut and Florida. He had substantial (and roughly equal) connections to both Connecticut and Florida.

(9) Mr. Anderson participated in "concierge" medicine and had physicians available regardless of his location and all of the doctors would communicate with each other to coordinate Mr. Anderson's medical care as he moved about his various homes. Mr. Anderson had sufficient

resources to receive appropriate medical care wherever he happened to be and favored no particular location for his medical needs.

(10) The Connecticut and Florida houses were equally "grand," or important. When the sizes of the three Connecticut condominiums are added together, the Connecticut and Florida residences are approximately the same size and are of similar market value. Neither the Connecticut nor the Florida homes were Mr. Anderson's "primary" or "secondary" residences, or that one home's characteristics are more important to determining domicile than the other. Mr. Anderson had sufficient resources to simply have two residences of equal value and importance, and Mr. Anderson traveled between them as he saw fit. Mr. Anderson had equally deep and meaningful social connections and attachments in Connecticut and Florida for the purposes of determining domicile. Reflecting Mr. Anderson's longstanding habit of traveling regularly between Florida and Connecticut and staying in both locations for extended periods of time, Mr. Anderson maintained strong social connections in both locations.

(11) Leslie B. Daniels, Executor of the Estate of Jack Anderson ("the executor"), contested a deficiency assessment rendered by the Commissioner of Revenue Services (the "commissioner"), under Connecticut's estate tax on the Estate of Jack Anderson (the "estate"). The commissioner issued a final determination finding that the estate owed $13,198,544.60 in Connecticut estate taxes because the executor failed to prove that Mr. Anderson was not a Connecticut domiciliary at the time of his death, and therefore, Connecticut taxes were owed. The executor challenged the commissioner's finding that Mr. Anderson was a Connecticut domiciliary at the time of his death. The executor claimed Mr. Anderson was a domiciliary of Florida at the time of his death. The executor also raised a procedural due process claim asserting that Department of Revenue Services ("DRS") examiners were not properly trained in applying the 28-factor test used to determine domicile in Connecticut and that DRS used undisclosed "weighting" when considering the relative importance of the 28 factors when determining Mr. Anderson's domicile.

(12) The court found in favor of the commissioner, and concluded that the executor failed to meet his burden of demonstrating by clear and convincing evidence that the commissioner's assessment was erroneous or unreasonable because Mr. Anderson was not a Connecticut domiciliary at the time of his death, on the following grounds:

(a) The burden of proving an error in a deficiency assessment is on the plaintiff. The plaintiff must present clear and convincing evidence that the assessment is incorrect or that the method of audit or amount of tax assessed was erroneous or unreasonable.

(b) Connecticut law imposes an estate tax on its residents. For purposes of the estate tax each decedent shall be presumed to have died a resident of Connecticut. Because the estate tax statute does not include a specific definition of "resident," the commissioner looks to Connecticut's definition of "resident" in the income tax statute. That statute, General Statutes § 12-701(a)(1), states that "Resident of this state" means any natural person . . . who is domiciled in this state. . . ." To determine a taxpayer's "domicile," the commissioner has promulgated detailed regulations.

(c) The determination of an individual's domicile is a question of fact to be determined through the consideration of a wide range of factors. It is also clear that no one factor controls the outcome. The court must consider all the evidence that might go toward determining domicile. In this case, the task is made even more complicated by Mr. Anderson's financial resources and his peripatetic lifestyle. The fact of the matter is that Mr. Anderson was wealthy enough to have multiple homes in multiple states which would, under normal circumstances, qualify as a primary residence. It is also a fact that Mr. Anderson chose to regularly and consistently — over a period of years — spend significant amounts of time in multiple states. Finally, it is a fact that because of the large amount of time he spent in different states and the large homes he maintained in those states, Mr. Anderson had significant social and personal connections in multiple states, and, as most relevant to this matter, in Connecticut and in Florida. Nevertheless, it is settled law that a person thus may have more than one residence at a time but only one domicile.

(d) Mr. Anderson held a Florida driver's license, was registered to vote in Florida, maintained a local banking account, and declared himself a Florida domiciliary. But these are one-time, administrative tasks accomplished with little more than an afternoon's or a day's effort, and carry little practical significance in or impact on Mr. Anderson's day-to-day life. Carrying a Florida driver's license rather than a Connecticut driver's license had no impact on Mr. Anderson's day-to-day life or actions and, given our national (and international) banking system, maintaining a Florida banking account no more tied Mr. Anderson to Florida than having a credit or debit card issued by a New York bank would tie him to that state. Given ATM machines and credit cards that are readily accepted anywhere in the country (and the fact that Mr. Anderson had his day-to-day financial obligations handled by personal assistants in Texas), it is difficult for the court to conclude that the Florida name on Mr. Anderson's bank account and credit cards is truly a meaningful expression of Mr. Anderson's intention to be considered a Floridian.

(e) The undisputed testimony at trial was that Mr. Anderson was an honest and fair man who did not seek to improperly avoid paying taxes he otherwise owed. In the exercise of common sense, human experience, and reasonable inference, the court concludes that no reasonable person, including Mr. Anderson, seeks to pay taxes that they might legally avoid. That is particularly the case when the tax amount is likely substantial, and the effort that might be required to perhaps avoid those taxes is minimal and carries little practical impact on how one lives one's life. Filling out a domicile declaration and making the other one-time administrative elections set forth above are easy and had little (or no) impact on Mr. Anderson's day-to-day life. They are, therefore, comparatively less persuasive indicators of Mr. Anderson's intention than other acts that Mr. Anderson undertook over a period of years and that directly demonstrate how he actually lived his life.

(f) Mr. Anderson spent approximately 5 1/2 months each year, for some eight years (2006-2014) in Connecticut. That is more time than Mr. Anderson spent in either Florida or Arizona during the same time period. While the executor is correct that the time Mr. Anderson spent in Connecticut is less than the combined time Mr. Anderson spent in Florida and Arizona together, Mr. Anderson can only have one domicile. The court cannot find that Mr. Anderson was a domiciliary of both Florida and Arizona based on the total time Mr. Anderson spent in both states, or that Mr. Anderson was a Florida domiciliary based on the time he spent in both Florida and Arizona. As among Connecticut, Florida, and Arizona, Mr. Anderson's actions (and therefore his intent) demonstrate a consistent, long-term decision to spend more time in Connecticut than in any other state.

(g) Mr. Anderson maintained strong personal, social, and property connections in Connecticut over an extended period of time. Essentially, Mr. Anderson lived a full and complete life in Connecticut for the part of the year that he was in Connecticut. It is clear to the court that while in Connecticut, Mr. Anderson was not simply "visiting" or "vacationing." Instead, Mr. Anderson had chosen to live part of a full life (with all the personal, social, and property connections that entails) in Connecticut, and part of that full life in Florida and Arizona. It is the combination of the amount of time spent in Connecticut, together with the full personal, social, and property connections maintained by Mr. Anderson over that same time period, that the court considers persuasive in determining domicile.

(h) One-time administrative elections favor Florida. Personal, social, and property connections favor neither Connecticut nor Florida because Mr. Anderson maintained essentially equal connections in each state. Significant time spent in each state favors Connecticut. As between balancing the relative importance and persuasiveness of one-time administrative elections and where Mr. Anderson chose to spend his own valuable and limited time each day over a period of years, where Mr. Anderson chose to spend his time is a more persuasive indicator of Mr. Anderson's intent, and, at a minimum, is sufficient to prevent the court from concluding that there is a "high probability" that Mr. Anderson was, in fact, a Florida domiciliary and that the commissioner's assessment was erroneous and unreasonable.

(i) Different DRS examiners testified to differing views on whether weighting of the various factors used to determine domicile was appropriate and to what extent DRS personnel were given training on the application of the 28-factor test. However, the executor suffered no prejudice from these issues and was deprived of no procedural due process because the court tries this case de novo and has made its own, independent determinations of the facts, without regard to whatever determinations may have been made by the commissioner. The court gave the commissioner no deference in whatever factual or legal conclusions he may have reached. Moreover, domicile is a question of fact, based, in part, on the decedent's intent. Determining questions of fact and intent inherently involve the balancing of conflicting evidence. This is particularly the case when the determination of the fact and intent questions at issue involve application of a 28-factor test spanning such wide-ranging issues as employment, tax filings, property ownership, location of union membership, and location of pet licenses. The executor points the court to no legal authority for the proposition that it is a deprivation of constitutional rights for an administrative agency to use a degree of discretion and judgment in evaluating such complicated factual issues.

34. Medicaid

a. ***In re Est. of Abad,* 540 P.3d 244 (Supreme Court of Alaska 2024).** Medicaid estate recovery claims arise before death and therefore must be filed within four months after notice to creditors. Although the state may not pursue these claims until after the Medicaid beneficiary has died, these claims arise when Medicaid services are provided, not when the claims become enforceable.

(1) Fe Perez Abad passed away on August 19, 2020, after receiving Medicaid home and community-based services. Her daughter opened an informal probate case approximately two months later and was appointed the personal representative of Abad's estate. Abad's estate issued its first notice to creditors on October 19, 2020. On December 30, 2020 — less than four months after the estate published its first notice to creditors, but more than four months after Abad's death — the state of Alaska ("State") filed a claim against the estate for $200,621.62 in Medicaid reimbursement. The estate disallowed the State's claim. The State petitioned the superior court to allow its Medicaid reimbursement claim. The estate objected, arguing the claim was time-barred. The trial court agreed with the estate. The State filed a motion for reconsideration, which the superior court denied. The State appealed.

(2) Sandra Lee Boatner passed away on September 1, 2020. During her life she was the beneficiary of Medicaid services. Roughly two months after her death, David E. Cook opened an informal probate case; he was appointed the personal representative of her estate. The estate issued its first notice to creditors on December 22, 2020. On March 24, 2021 — less than four months after the estate published its first notice to creditors, but more than four months after Boatner's death — the State filed a claim against the estate for $300,647.29 in Medicaid reimbursement. The estate disallowed the claim, maintaining that it was not timely filed. The State petitioned the superior court to permit its claim against Boatner's estate, asserting that its claim was timely filed. The parties each moved for summary judgment. A standing master recommended that the superior court adopt the State's reading of Alaska's

probate filing deadlines, and the superior court adopted the standing master's recommendation. Boatner's estate appealed.

(3) The Alaska Supreme Court consolidated the appeals, reversed the Abad decision and affirmed the Boatner decision, on the following grounds:

(a) Under Alaska's probate code the deadline for filing a claim against a decedent's estate depends on when the claim arose. For claims arising before the death of the decedent, whether due or to become due, absolute or contingent, the creditor must file within four months after the representative of the estate first published notice to creditors. For claims arising at or after the death of the decedent, the creditor must file within four months after the claim arose.

(b) Medicaid estate recovery claims arise before death and therefore must be filed within four months after notice to creditors. Although the State may not pursue these claims until after the Medicaid beneficiary has died, these claims arise when Medicaid services are provided, not when the claims become enforceable.

(c) Congress authorizes states to seek reimbursement for the cost of certain Medicaid services from the estates of deceased beneficiaries. Estate recovery was initially optional for state Medicaid programs. But in the face of rapidly escalating Medicaid costs, Congress amended the law to require states to conduct estate recovery. Because the State of Alaska has chosen to participate in Medicaid, it is obliged to comply with this federal statutory requirement. Accordingly, the Alaska Legislature authorized the State's Division of Health Care Services to seek reimbursement from the estates of deceased Medicaid recipients. The claim may be made only after the death of the individual's surviving spouse, if any, and only if the individual has no surviving child who is younger than 21, blind, or totally and permanently disabled.

(d) Medicaid estate recovery claims arise before death for purposes of the probate code's filing deadline. A medicaid estate recovery claim arises when the services are provided to the beneficiary, even if it is not enforceable and therefore remains contingent until the beneficiary's death.

(e) The legislature's decision to explain that a claim may arise whether it is "due or to become due" and whether "absolute or contingent" favors the State's position. These qualifiers suggest that the legislature meant that a claim might arise even before the claimant could enforce it. A Medicaid estate recovery claim, though contingent and unenforceable before the beneficiary's death and the death of a surviving spouse, can therefore fall in the category of claims arising before death.

(f) The probate code's definition of "claim" reinforces the conclusion that Medicaid estate recovery claims arise before death. "Claims" in respect to estates of decedents include both liabilities of the decedent, whether arising in contract, in tort, or another way, and liabilities of the estate that arise at or after the death of the decedent, including funeral expenses and expenses of administration. A Medicaid estate recovery claim is akin to a contract claim: in exchange for receiving services, the beneficiary incurs a contingent obligation to repay after death, with funds from the beneficiary's estate. It is far less similar to funeral expenses and expenses of administration, the kinds of claims the statute offers as examples of claims arising at or after death.

(g) Secondary sources support this distinction and confirm that Medicaid estate recovery claims fall in the category of claims arising before death for probate purposes.

(h) The Stein treatise illustrates the distinction between claims arising before death and claims arising after death with helpful examples. Before-death claims include last illness charges, charges for illness during the year immediately preceding death, personal service charges during lifetime, recovery on warranties, liability as a surety or guarantor, claims of the state or county for support in state or county mental institutions, equitable claims, and other general contract claims. Claims that arise after death include accountants' fees, representative's and attorneys' fees, repair and maintenance expenses of property of the estate, insurance premiums, storage costs, platting costs, and charges for all services rendered to the personal representative for the estate. Medicaid estate recovery claims, which are based on healthcare costs incurred prior to a recipient's death rather than estate administration expenses, are similar to the kinds of claims that the treatise describes as claims arising before death.

(i) Subjecting Medicaid estate recovery claims to a potentially more restrictive filing deadline is inconsistent with the priority the Legislature has assigned these claims vis-à-vis the claims of other creditors. Interpreting Medicaid estate recovery claims as arising at or after death would undermine this legislative purpose by making it more expensive to pursue estate recovery. Classifying Medicaid estate recovery claims as arising at or after death would also subject the State to a risk of nonrecovery not faced by other creditors.

(j) Subjecting the State to additional recovery costs and risks would be directly at odds with the legislature's decision to give Medicaid estate recovery claims priority over other creditors' claims. The legislature designated Medicaid estate recovery claims as debts with preference. An estate is required to pay such debts before all other claims—excluding estate administration, funeral expenses, and a few other debt categories. Creditors whose claims are based on obligations incurred by the decedent while alive (like doctors, lenders, or business partners) are subject to the deadline for claims arising before death: four months after notice to creditors is published, or three years after death if no notice is published. Medicaid estate recovery claims are also based on obligations incurred by the decedent while alive. Making these claims subject to a different and sometimes more restrictive deadline (four months after death if the decedent had no surviving spouse or qualifying child) than other creditors' claims would be inconsistent with the legislature's decision to give Medicaid claims priority.

35. Odd & Ends

a. ***In re Est. of Marchione,* 2024 Pa. Super. Unpub. LEXIS 2877 (Superior Court of Pennsylvania 2024).** Endorsing checks in blank does evidence intent to make gifts.

(1) Joseph M. Marchione ("Decedent") died testate on March 28, 2021. Before he died, he wrote two checks payable to himself and endorsed in blank. On or about January 8, 2021, Emanuel Bet-Esfandiar ("Bet-Esfandiar") deposited one of these checks, in the amount of $100,000.00, into Bet-Esfandiar's personal bank account, and on or about February 17, 2021, he deposited the second check, in the amount of $50,000.00, also into his personal bank account. His relationship to Decedent was unclear. Meanwhile, on January 11, 2021, Decedent executed a will leaving the remainder of his estate to his friend, Barbara Roux. After his death, the register of wills granted letters testamentary to Harvey Iseman ("Executor") as executor of the Estate on June 1, 2021.

(2) Executor filed a petition seeking to compel Bet-Esfandiar to return $150,000.00 to the Estate, account for Decedent's funds administered by Bet-Esfandiar as Decedent's agent under a power of attorney and be surcharged for costs incurred by the Estate. The parties stipulated to the will and letters testamentary that the signatures on the checks were in fact signed by Decedent, and that the amount in controversy was $123,962.13. The orphans' court issued a final decree in favor of Executor, finding that Bet-Esfandiar did not meet his burden of proof necessary to establish an inter vivos gift and ordering him to place $123,962.13 into a constructive trust for the benefit of the Estate.

(3) Bet-Esfandiar appealed, and the superior court affirmed on the following grounds:

(a) A valid inter vivos gift requires donative intent, delivery, and acceptance. There must be evidence of an intention to make a gift accompanied by delivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property, but to invest the donee with complete control. Initially, the burden is on the alleged donee to prove an inter vivos gift by clear, precise and convincing evidence. Donative intent is the intention to make an immediate gift.

(b) The legal effect of an endorsement in blank by the alleged donor is, per se, neither controlling nor indicative of the existence of a donative intent to make a gift to the alleged donee. Where there is no express indication of donative intent, it may be inferred from the relationship between the donor and donee where the relationship is closer than a non-familial, close personal friendship.

(c) All that was proven was that the checks were provided to Bet-Esfandiar to deposit, and those funds were then used for the benefit of the Decedent alone, up until he passed away. Bet-Esfandiar never established that there was an intent by the Decedent that the remainder of the money after his passing was to be used as a gift to Bet-Esfandiar. Further, there is no mention of the relationship between Bet-Esfandiar and Decedent. From the inception of this matter, all the orphans' court knows of this relationship is that the Decedent advised Bet-Esfandiar that he was named as Agent under Power of Attorney as well as being named Executor under the Decedent's will. Bet-Esfandiar never established the relationship that existed between himself and the Decedent.

(d) There is no record evidence that Decedent intended to gift the two checks to Bet-Esfandiar, and his reliance on Decedent's endorsement in blank on the checks is not clear, precise, and convincing evidence to make a prima facie showing of donative intent. Nor may the court infer donative intent from Bet-Esfandiar's purported relationship with Decedent; there is no record evidence of their relationship, much less any evidence that it was closer than a non-familial, close, personal friendship.

(e) Bet-Esfandiar has an equitable duty to convey it to the Estate to prevent his unjust enrichment.

b. ***Alicea v. Ganim,* 2024 Conn. Super. LEXIS 1053 (Superior Court of Connecticut 2024).** Court entitled to civil immunity for appointment of conservator.

(1) Judge Paul Ganim, the defendant, in his role as a probate judge at the Probate Court of Bridgeport, ordered the appointment of a conservator for Octavio Alicea, the father of the plaintiff, Maria Alicea. The court found that: Octavio Alicea had been diagnosed as a person with dementia, confusion, delirium, depression and anxiety; is not able to make rational decisions and is unable to care for self; has poor safety awareness and requires 24-hour assistance with all activities of daily living; cannot make informed decisions regarding his/her health or finances on his own; is unable to provide for his/her comfort and maintenance, maintain where he/she lives, apply for benefits or services or consent to routine medical and/or dental procedures; and his personal affairs will be at risk if a conservator of the person is not appointed. Based on this conclusion, the court appointed an independent conservator for Octavio Alicea, citing the great deal of family conflict between Octavio Alicea's children.

(2) Judge Clifford Hoyle accepted the resignation of Fransica Hodges, the second conservator for Octavio Alicea, based on testimony that her ability to effectively serve as conservator has been thwarted by Octavio Alicea's daughter Maria Mercedes Alicea ("plaintiff"). Judge Lisa Wexler heard the plaintiff's petition to dissolve the conservatorship. The probate court again found that the medical condition of Mr. Alicea is such that he continues to require a conservator to assist in his financial affairs and denied the plaintiff's petition to terminate the conservatorship.

(3) The plaintiff, along with Octavio Alicea, also brought an action at the United States District Court of Connecticut, alleging violations of his Fourth, Thirteenth, and Fourteenth

Amendment rights, and the First Amendment rights of both the plaintiff and Octavio Alicea. Judge Vatti recommended that the plaintiff's claim be denied, without leave to amend, on the basis that the plaintiff lacked standing and that the defendants are entitled to immunity from such action. Judge Vatti also recommended, and the court adopted, that the plaintiff not be permitted to amend her claim, as the defects were incurable.

(4) Plaintiff commenced the present action against the defendant and the Bridgeport Probate Court. The defendants moved to dismiss, which the court granted on the following grounds:

(a) It is a long-standing doctrine that a judge may not be civilly sued for judicial acts he undertakes in his capacity as a judge. The rationale is that a judge must be free to exercise his judicial duties without fear of reprisal, annoyance or incurring personal liability. Absolute immunity, however, is strong medicine. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. The protection extends only to those who are intimately involved in the judicial process, including judges, prosecutors and judges' law clerks.

(b) Absolute immunity does not protect a judge if the judicial conduct is so far outside the normal scope of judicial functions that the judge was in effect not acting as a judge. There are exceptions to absolute immunity. Judicial immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

(c) The appointment of a conservator is a judicial act and within the subject matter jurisdiction of the probate court. A judge does not act in the complete absence of authority, even if she acts erroneously, unless the judicial conduct is so far outside the normal scope of judicial functions that the judge was in effect not acting as a judge. The defendant, acting in his judicial capacity, ordered a conservator for the plaintiff's father. This act is within the subject matter jurisdiction of the probate court. And, even if the appointment of the conservator was in error, the appointment of a conservator is not outside the normal scope of judicial functions as a probate judge. Accordingly, the defendant Ganim is entitled to judicial immunity from this suit.

(d) Rather than suing the state directly, a plaintiff instead may elect to sue a particular state official or employee. If, however, the plaintiff sues that person only in his or her official capacity as a representative of the state, that suit will be construed as the equivalent of a suit against the state itself and, without a valid waiver, the suit likewise will be barred by sovereign immunity. To avoid a dismissal on sovereign immunity grounds, a plaintiff must elect to sue the state official in his or her individual capacity. At the outset, the defendant names the Bridgeport Probate Court as a defendant in the complaint. Such a claim directly against a state entity is inherently within the realm of sovereign immunity. If a plaintiff hopes to maintain an action for monetary damages against the state itself, he may do so only if such a suit is authorized pursuant to a clearly expressed statutory waiver of sovereign immunity or if the plaintiff first obtains a waiver from the Claims Commissioner. The plaintiff has not alleged that she has received a waiver from the Claims Commissioner. Without such a waiver, she cannot succeed on a claim for monetary damages. As such, the defendant Bridgeport Probate Court is entitled to sovereign immunity.

(e) The plaintiff does not allege in the complaint whether she is suing the defendant Ganim in his official or individual capacity. It is clear however that the defendant is sued in his official capacity. First, there can be little doubt that, as a sitting judge of the probate court, the defendant is a state official. Second, the plaintiff's allegations arise from the defendant's review and appointment of a conservator for her father. These actions were done in the defendant's role as a judge of the probate court, and accordingly is a matter in which he represents the state. Third, the plaintiff named both the defendant Ganim and the defendant Bridgeport Probate Court as defendants in this matter. The plaintiff does not state that she is suing the defendant Ganim in his individual capacity. Finally, if a plaintiff were able to hold a probate judge civilly liable for issuing a conservator in accordance with his role and responsibilities as a probate judge, it would surely be a constraint on the state's future activities of adjudicating guardian matters. Such a restraint on the judicial process would impermissibly constrain the state's probate operations. Accordingly, the defendant is being sued in his official capacity, not his individual capacity. As such, the doctrine of sovereign immunity is applicable in this case.

(f) There are, however, three exceptions to sovereign immunity: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity; (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority. None of these exceptions are applicable here. The plaintiff has sued the defendant in his official capacity for his actions conducted in his role as a state probate judge. This is construed as a suit against the state itself (as of course is the suit against the Bridgeport Probate Court, a state entity). The plaintiff cannot succeed for claims of monetary damage against the state, as the Claims Commissioner has not given authorization. The doctrine of sovereign immunity prevents such claims from continuing.

(g) It is well settled that a party is precluded from asserting the constitutional rights of another. The alleged constitutional deprivations are the rights of the plaintiff's father, Octavio Alicea, not the plaintiff herself. The proper party to bring these alleged constitutional violations is therefore Octavio Alicea, not the plaintiff.

(h) The plaintiff also claims that she suffered emotional distress from the defendant's actions regarding the conservatorship. Without reaching the merits or sufficiency of this claim, the plaintiff could have standing to bring such a claim as the allegedly aggrieved party. However, as discussed above, the defendant is immune from tort liability for actions conducted in the ordinary course of judicial conduct. As such, even if the plaintiff is the appropriate party for a claim of intentional infliction of emotional distress, that alone does not overcome the doctrine of judicial immunity.

c. ***Parks v. Mickens (In re Estate of Parks),* 2023 Cal. App. Unpub. LEXIS 7736 (Court of Appeal of California 2023).** Order appointing administrator affirmed due to pleading deficiencies by appellant.

(1) Reginald Mickens filed a Petition for Probate of Lost Will seeking to be appointed administrator of Bessie Ruth Parks's estate. Mickens alleged Bessie had a lost will that appointed him and others the administrators of her estate. The case was assigned to the Honorable Thomas Cahraman. After Mickens filed a peremptory challenge against Judge Cahraman, the case was assigned to the Honorable Kenneth Fernandez. Ruqayyah Parks filed a competition petition for probate seeking to be appointed administrator of Bessie's estate.

(2) After a number of continuances, Judge Fernandez held a hearing on the competing petitions. By that point, Mickens still had not filed a copy of Bessie's allegedly lost will. Judge Fernandez denied Mickens's petition, overruled his objections to Ruqayyah's petition, and found that Bessie died intestate. Judge Fernandez later granted Ruqayyah's petition and granted her "letters of administration" for Bessie's estate, meaning that she became administrator of the estate with full authority. Mickens, appearing pro per, timely appealed and the court of appeals affirmed on the following grounds:

(a) The opening brief's statement of appealability reads in full: "Appeal From an Order Before Trial of the Superior Court, County of Riverside. Hon. Kenneth Fernandez, Judge." This fails to comply with California Rules of Court, which requires an appellant to state that the judgment appealed from is final, or explain why the order appealed from is appealable.

(b) Another problem with Mickens's opening brief is that it does not identify the applicable standard of review or tailor its arguments to that standard. This is a concession that Mickens's appeal lacks merit.

(c) Third, and most importantly, the argument section of Mickens's opening brief contains no coherent argument or citations to authority or the record. Instead, it reads in full: "On July 6th, 2020, Reginald Mickens filed a peremptory challenge on Thomas H. Cahraman, the judge. On July 8th, 2020, it was granted. Case reassigned to Judge Kenneth Fernandez and Superior Court California county Riverside historic courthouse department 11th for all purposes. During this time frame, the only case active was conservator case RIP1501062. On July 28th, 2020, A Nunc Pro Tunc Hearing was held at 8:18 am in Dept 11, Judge Thomas H. Cahraman. It appears that Judge Thomas H. Cahraman went into court 11 and separated the conservator case and the probate case from one another. The purpose of filing the 170.6 W hill was to remove Judge Thomas H. Cahraman from the case completely. Judge Kenneth Fernandez takes notice of the Riverside Superior Probate Conservatorship case RIP1501062. It appears that Judge William Berry and Judge Kenneth Fernandez did not read the conservatorship case RIP1501062 and issued letters of administration to Ruqayyah [N.] Parks. After she was removed as the conservator of the Estate in the conservatorship case RIP1501062."

(d) Simply put, Mickens has failed to articulate an intelligible argument supported by appropriate authority and citations to the record in the argument section of his opening brief. We therefore need not consider it.

(e) Mickens is representing himself without an attorney. But he still must "be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." His opening brief violates several rules, contains no reasoned argument supported by legal authority and the record, and is essentially unintelligible.

(f) The court can glean no coherent argument from Mickens's opening brief. The reviewing court is not required to examine undeveloped claims or to supply arguments for the litigants. The order appealed from is affirmed without discussing the merits. (Ewald v. Nationstar Mortgage, LLC, supra, 13 Cal.App.5th at p. 948.)

(g) Mickens's record is also inadequate. The appellant bears the burden of proving an adequate record on appeal, and an appellant's failure to do so requires that the issue be resolved against appellant. The only filing in Mickens's record is the probate court's order appointing Ruqayyah the estate administrator. The court cannot properly review that order without at least reviewing Mickens's and Ruqayyah's petitions to be appointed administrator. Because Mickens has not provided an adequate record on appeal, the court must affirm.

(h) The court acknowledged and appreciated Mickens's vigorous and respectful argument at oral argument. However, the law requires the court to affirm probate court's order.

d. ***Eliason v. United States,* 2024 U.S. Dist. LEXIS 149174 (United States District Court for the District of Utah 2024).** Claims dismissed for lack of legal standing to sue for others.

(1) Plaintiff Veronique Eliason ("Plaintiff") initiated this litigation pro se against Defendants United States of America, Joe Biden, Merrick Garland and The Church of Jesus Christ of Latter-Day Saints ("Defendants") on June 3, 2024, through the filing of a complaint. In her pleading, Plaintiff brings claims on behalf of Max D. Eliason and the Estate of Joyce Eliason

asserting claims for corruption and judicial misconduct, civil conspiracy, obstruction of justice, capital treason, bribery, the wrongful death of Joyce S. Eliason, wire fraud, forgery, theft and conspiracy to commit aggravated assaults on innocent victims of society.

(2) On July 2, 2024, Defendants moved to dismiss or strike Plaintiff's complaint, arguing Plaintiff lacks standing, res judicata and that Plaintiff's pleading attempts to circumvent District Court Judge Ted Stewart's vexatious litigant order issued against Brett Eliason. The magistrate judge recommended dismissal of the claims on the following grounds:

(a) Plaintiff does not assert any right to relief of her own. Rather, she purports to bring this action as the agent and trustee for "The Estate of Max and Joyce Eliason and Max D. Eliason as a Protected Person." Lisa Stephens was appointed as personal representative of Joyce S. Eliason's estate on May 21, 2018 and Lisa and Mark Stephens were appointed as conservators of Max Eliason on June 10, 2019. Plaintiff provides no information to support her claim to authority as an agent, trustee or conservator of Joyce and Max Eliason, and the court takes judicial notice of the prior court orders appointing the Stephens as personal representative and conservator over Max Eliason and the estate. Under the prudential standing doctrine Plaintiff must assert her own legal rights and is prohibited from resting her claim to relief on the legal rights or interests of third parties. Here, because Plaintiff is not the court-appointed personal representative or legal conservator she has not established standing to bring this action on behalf of Max Eliason or Joyce Eliason's estate. Further, even assuming for purposes of argument that Plaintiff was the legally designated representative or guardian, which she is not, as a non-attorney she is prohibited from personally appearing as a representative except through legal counsel. Where plaintiff lacks standing, the court must dismiss the action.

(b) Absent standing the court lacks jurisdiction and the court may not reach any other matters raised by the parties. As a result, Plaintiff's "Motion To Redress President Biden With Grievances As Per The Provisions Provided By The First Amendment to the Constitution," "Motion To Recuse This Matter To The United States Supreme Court," "Motion To Recognize Capital Treason," "Motion To Recognize That Defendant Dallin H. Oaks Has Not Been Required To Respond To The Allegations Against Him In Over 120 Days Thereby Proving The Department of Justice Holds Him Immune To The Laws Of The United States," "Motion To Recognize The United States Department Of Justice Cannot Find A Judge To Prosecute This Matter Due To The Repercussions Against Themselves And The LDS Church," "Motion To Recognize The Attached Invoice Paid To Kirton McConkie As Evidence They Represent Both The Plaintiffs And The Associated Defendants," "Motion To Compel The United States Department Of Justice To Follow The Attached Rules Regarding The Victims' Rights And Restitution Act (VRRA), 42 U.S.C. §10607," "Proposed Order And Motion to Submit," and "Motion To Add Kylie M. Eliason And Brittnie L. Eliason As Plaintiffs Under Rule 23 For A Class Action Complaint" are denied. Additionally, Defendants' Motion to Stay pending the court's resolution of the motion to dismiss is denied as moot.

e. ***Fahnbulleh v. Trans Union, LLC,* 2024 U.S. Dist. LEXIS 183939 (United States District Court for the District of New Jersey 2024).** Motion for more definite statement granted in response to shotgun pleadings with vague references to an estate.

(1) Plaintiff commenced this action on October 27, 2023. Defendant filed the instant Motion seeking a more definite statement as to Plaintiff's Complaint. Plaintiff filed a purported opposition to Defendant's Motion and filed a Cross-Motion to disqualify Defendant's counsel. Plaintiff submitted several additional filings, as follows: Demand of Proof to Show Cause; a "Highlighted Complaint" that was identical to the original complaint in all respects, except that the title of the document is highlighted and circled with a handwritten annotation that states, "claim in equity"; a document titled "Bill of Equity"; an Internal Revenue Service

("IRS") Form 56 titled "Notice Concerning Fiduciary Relationship"; one purported annual report from the Securities and Exchange Commission; three letters from Defendant to Plaintiff dated March 8, 2023, May 4, 2023, and September 22, 2023, concerning Defendant's conclusion that Plaintiff's credit report is accurate, with certified mailing receipts; and copies of letters from Synchrony Bank, Chase Bank, and American Express explaining the reasons for their respective denials of Plaintiff's applications to open credit accounts.

(2) Plaintiff's Complaint was not a model of clarity. It did not contain numbered paragraphs and did not specifically enumerate separate counts alleging causes of action against Defendant. Plaintiff alleges that his undisclosed "rights as a private citizen are in jeopardy," and that he seeks "to declare there is a conflict with variance of law, equity, codes and rules of regulations and statutes." Plaintiff claims that his name "is a Testimony Estate Trust (Cesti Que Vie)" where all his assets "were rolled over into an Estate Trust" named after Plaintiff, and that he "never consented to being restyled as Chattel." Plaintiff further states that "[s]aid bond is in [Plaintiff's] possession, as verified by the Department of State and the recorded, certified copy will stand in evidence," and that Plaintiff is "not subject to statute, as prescribed to 'United States Citizens' in the Trading with the Enemy Act and the Emergency Banking Relief Act."

(3) Plaintiff further alleges that he is the beneficiary and assignee of a "land patent, the first conveyance of title to the property" that he owns and occupies, and that he has "executed and perfected the land patent grant." Plaintiff claims that he has never consented to the actions taken by Defendant, the Chief Executive Office, CEO Chris Cartwright, Venkat Achanta, Todd Cello, Steve Chaouki, Heather Russell, whom all co-operated to attach and deprive Plaintiff of the right to his right to property, liberty and the pursuit of happiness. Plaintiff further claims that Defendant failed to provide Plaintiff with any document that validates their authority to compel Plaintiff to do business with them, and that Defendant continues to collect, store, and furnish Plaintiff's private information for profit which is defaming Plaintiff's character. Plaintiff claims that each of the named defendants have presumed consent to the administration of the Estate and have yet to prove standing to administrate the Estate. Plaintiff seeks a remedy for this trespass on the estate.

(4) Plaintiff asserts that he sent three notices to Defendant to "cease and desist" from using Plaintiff's "private property" and from "furnishing harmful information in an attempt to extort [Plaintiff]" and that Defendant did not have "authority or [Plaintiff's] permission to collect, store, share or furnish said information." According to Plaintiff, these actions resulted in an injury in the form of two denials of an extension of his credit by third parties. In a section titled "Complainant issues of fact," Plaintiff states that "[e]ach of the named defendants are Professionals and had a fiduciary duty to know their actions have been a breach of Trust." The section further states "Unauthorized administration of the Estate. Defendants named have no standing," and claims Plaintiff is "holder in due course and the registered owner of the certified title."

(5) Plaintiff's Cross-Motion seeks to disqualify Defendant's counsel "Jacqueline Weyand and all other attorneys at Buchanan Ingersoll and Rooney P[.]C." Notably, though Plaintiff identifies his brief as supporting both his Motion to Disqualify Counsel and his opposition to Defendant's Motion for a More Definite Statement, Plaintiff does not raise any arguments or otherwise address Defendant's Motion, and thus it is unclear whether he opposes Defendant's Motion at all. Plaintiff argues that Defendant's counsel should be disqualified because Defendant has not produced "any first-hand knowledge sworn under penalty of perjury, failed to rebut all points line by line via affidavit, produced any articulated facts," and is not "the real party in interest in this matter." Plaintiff asserts that it is unlawful for Defendant to "hire an attorney to practice on its behalf," and claims that no evidence exists to establish that Weyand is licensed to practice in the State of New Jersey. Plaintiff also asserts that counsel should be disqualified where her "participation in a case will result in

the appearance of impropriety," though he does not articulate how that principle applies to the instant matter. Plaintiff concludes that Defendant's counsel should be disqualified for these reasons and "for the lack of righteousness, love, fairness, facts of the law, and failure to show cause."

(6) The federal district court granted Defendant's motion and denied Plaintiff's motion on the following grounds:

(a) A party may move for a more definite statement where a pleading is so vague or ambiguous that the party cannot reasonably prepare a response. A "shotgun pleading" arises where a complaint: (1) is replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action; (2) does not separate into a different count each cause of action or claim for relief; or (3) asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

(b) Here, Plaintiff's Complaint does not present a short and plain statement of the alleged claims that suggest Plaintiff is entitled to relief, and a succinct demand for the relief sought. Rather, Plaintiff's "shotgun pleading" is replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action.

(c) Even allowing for liberal interpretation of pro se pleadings, the court cannot discern from Plaintiff's Complaint the facts of the case or legal injury that Plaintiff is alleging.

(d) While the only defendant named in this case is Defendant TransUnion, LLC, Plaintiff's Complaint makes many allegations against Chris Cartwright, Venkat Achanta, Todd Cello, Steve Chaouki, Heather Russell, without making clear the connection between these individuals and Plaintiff's claims.

(e) Furthermore, the unintelligible nature of Plaintiff's Complaint frustrates this Court's ability to determine whether it has jurisdiction. Significant portions of Plaintiff's Complaint refer to an alleged "Estate Trust," "unauthorized administration of the Estate," and Plaintiff's contention that "[e]ach of the named defendants have presumed consent to the administration of the Estate, and have yet to prove standing to administrate the Estate." As this Court does not have jurisdiction over state probate proceedings relating to estate administration, the Court finds that a more definite statement of Plaintiff's claims is merited.

(f) If Plaintiff wishes to cure the deficiencies and file an Amended Complaint, he must at a minimum number the paragraphs, identify his causes of action, and set forth factual allegations instead of conclusory statements.

(g) The New Jersey Rules of Professional Conduct expressly permit an attorney to represent corporate entities, such as Defendant. It is beyond dispute that Defendant is not only entitled to but indeed must retain counsel to act on its behalf. Defendant's counsel is duly licensed to appear before this court.

f. ***Marino v. Marino,* 2024 U.S. Dist. LEXIS 23645 (United States District Court for the Southern District of Alabama, Southern Division 2024).** Federal court claim related to a probate matter, based on the Supremacy Clause of the U.S. Constitution, and seeking punitive damages for violation of human rights civil rights, catastrophic national security risks leading to the southern border crises, human trafficking, cybersecurity risks, stalkings, crimes against humanity, and loss of generational wealth and sovereign rights, dismissed for pleading deficiencies.

(1) Plaintiff Kena LaJuan Marino ("Plaintiff"), proceeding without counsel, filed a complaint and a motion to proceed without prepayment of fees. In her original complaint, Plaintiff named Nolan P. Marino, Tysianna Marino, and Kristie Marino as Defendants. Plaintiff asserted the existence of federal question jurisdiction based on the "Supremacy Clause." Although

Plaintiff did not invoke diversity jurisdiction, she alleged that the amount in controversy in this action was more than $75,000 because "Robert Marino's Estate exceeds 75,000."

(2) When prompted on the complaint form to write a short and plain statement of her claim, Plaintiff stated: "Robert Marino had no will nor any mention of a will befor[e] his passing. Per Nolan P. Marino." When prompted to state the relief she was requesting, Plaintiff wrote: "Punitive damages due to civil rights violations, human rights violations and all other violations including malpractice causing substantial hardships involving heirs of Robert B. Marino. Violations sharing Southern Border human rights and other border violations." Plaintiff attached to her complaint a copy of the Last Will and Testament of Robert B. Marino, along with various other documents apparently filed in or relating to Baldwin County Probate Court Case No. 41264, In Re: Estate of Robert Marino, Deceased.

(3) Plaintiff was informed that her complaint failed to set forth any valid basis for the federal district court to exercise subject matter jurisdiction. The magistrate noted that the Supremacy Clause of the United States Constitution afforded Plaintiff no private right of action and further explained that Plaintiff's "extremely limited factual allegations did not implicate the Supremacy Clause in any way." The magistrate also noted that because "this action apparently involves a probate dispute between family members," Plaintiff's "unexplained references to civil rights violations, human rights violations[,] and . . . [v]iolations sharing Southern Border human rights and other border violations in her prayer for relief appear[ed] to be immaterial and nonsensical." The magistrate found that Plaintiff's complaint failed to present any colorable federal issue or claim and thus did not provide the Court with a basis to exercise federal question jurisdiction over this action.

(4) The magistrate also noted that to the extent Plaintiff's assertion regarding the value of Robert Marino's estate could be construed as an attempt to invoke this Court's diversity jurisdiction, the complaint lacked sufficient factual information to establish the existence of diversity jurisdiction because it failed to allege the citizenship of any party. The court explained that to the extent the state court probate proceedings that appear to be at issue in this case concluded before this action commenced, and Plaintiff complains of injuries caused by any final judgments issued by a state court and seeks this Court's review of such judgments, the Rooker-Feldman jurisdictional bar applies to her claims. The court also noted that to the extent Plaintiff sought injunctive relief with respect to ongoing probate proceedings in state court, her claims were barred by the Younger abstention doctrine.

(5) The court informed Plaintiff of the applicable pleading standards for a complaint in federal court, including what is required to state a claim for relief, the requirements of Federal Rules of Civil Procedure 8 and 10, and the prohibition against "shotgun pleadings" which violate those rules and fail to provide adequate notice of a plaintiff's claims. The court noted that Plaintiff's complaint violated these pleading standards "because it [left] the reader guessing as to why she [was] suing the Defendants and blatantly violate[d] the requirement that a complaint provide adequate notice of a plaintiff's claims and the factual grounds upon which each claim rests." The court ordered Plaintiff to file "an amended complaint that states a valid basis for this Court's subject matter jurisdiction and addresses and corrects the pleading deficiencies noted in this order, to the extent she is able to do so."

(6) Plaintiff was cautioned that if she filed an amended complaint that failed to address and correct the noted deficiencies in her original complaint, the magistrate would recommend that this action be dismissed. Additionally, the court found Plaintiff's motion to proceed without prepayment of fees to be incomplete and internally inconsistent. Accordingly, the Court denied the motion without prejudice and ordered Plaintiff to file a new motion to proceed without prepayment of fees that conveyed a complete and accurate view of her financial situation.

(7) In response to the court's order, Plaintiff timely filed an amended complaint and a new motion to proceed without prepayment of fees. Plaintiff's amended complaint lists Nolan P.

Marino as the sole Defendant. In the amended complaint, Plaintiff again attempts to invoke federal question jurisdiction based on her assertion that the "Supremacy Clause" is at issue. Plaintiff does not invoke diversity jurisdiction, but she repeats her allegation that the amount in controversy is more than $75,000 because "Robert Marino's Estate exceeds 75,000." When prompted on the complaint form to write a short and plain statement of her claim, Plaintiff states: "Robert Marino had no will, nor any mention of a will before his passing. Per Nolan P. Marino." For relief, Plaintiff requests: "Punitive damages in violation of human rights civil rights and all other basic rights violations. These violations include identification fraudulences ongoing more than two or three decades creating unprecedented catastrophic national security risks leading to the southern border crises. Human rights violations including human trafficking, cybersecurity risks, stalkings, and other crimes against humanity. Loss of generational wealth, including inheritances, trusts, sovereign rights."

(8) Plaintiff attached a signed document with a notary stamp which states: "I Kena LaJuan; Marino own all rights to Kena LaJuan; Marino." The federal magistrate judge recommended dismissal of the complaint on the following grounds:

(a) Federal courts are courts of limited jurisdiction and are authorized by the Constitution and statute to hear only certain types of actions. It is a plaintiff's duty in a federal civil action to identify in the complaint the basis for the court's subject matter jurisdiction. Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed. However, this leniency does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action. A pro se litigant is still subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure.

(b) Plaintiff's amended complaint does not provide a basis for federal subject matter jurisdiction and utterly fails to address and correct the pleading deficiencies outlined in the Court's order dated January 4, 2024.

(c) Plaintiff continues to assert that federal question jurisdiction exists in this case because the "Supremacy Clause" is at issue. The Supremacy Clause of the Constitution provides that the laws of the United [*11] States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." However, as the Court previously informed Plaintiff, "the Supreme Court has unambiguously held" that the Supremacy Clause "provides no private right of action." The Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so. Plaintiff has alleged no clash between state and federal law, and her threadbare factual allegations do not implicate the Supremacy Clause in any way. Accordingly, Plaintiff's invocation of the Supremacy Clause fails to present a colorable federal issue or claim.

(d) Moreover, given that this action apparently involves a dispute between family members over the "executorship" of a deceased relative's estate, the unexplained references to "human rights[,]" "civil rights[,]" "national security risks leading to the southern border crises[,]" "crimes against humanity[,]" and "sovereign rights" appear to be immaterial and nonsensical and provide no basis for federal question jurisdiction.

(e) Notwithstanding Plaintiff's immaterial references to the Supremacy Clause and other arguable federal issues, this action appears to solely involve a probate dispute between family members, which is a matter of state law. Plaintiff's amended complaint is devoid of any colorable federal claim or issue and thus does not provide this Court with any basis to exercise federal question jurisdiction over this matter.

(f) To the extent her assertion that the value of Robert Marino's estate exceeds $75,000 can be construed as an attempt to invoke this Court's diversity jurisdiction, the amended complaint lacks sufficient information to satisfy the jurisdictional inquiry because it fails to allege the citizenship of any party.

(g) Assuming arguendo that Plaintiff's allegations regarding residence and the value of Robert Marino's estate are sufficient to establish diversity jurisdiction, the amended complaint still warrants dismissal. First, the Rooker-Feldman doctrine bars claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Further, under the abstention doctrine announced in Younger v. Harris, a federal court should abstain from hearing a case when (1) the proceedings constitute an ongoing state judicial proceeding, (2) the proceedings implicate important state interests, and (3) the plaintiff has an adequate opportunity to raise [her] constitutional challenges in the state-court proceedings.

(h) Additionally, the "probate exception" applies only to cases the resolution of which would require a federal court to (1) probate or annul a will, (2) administer an estate, or (3) "dispose of property that is in the custody of a state probate court." Therefore, to the extent resolving Plaintiff's claims would require this Court to engage in the kinds of tasks that are reserved to the state probate courts, the Court lacks subject matter jurisdiction over such claims.

(i) More broadly, the amended complaint violates the Court's repleading order and fails to satisfy the basic pleading standards for a complaint in federal court. Plaintiff made no more than a cursory attempt to comply with the repleading order. In disregard of the Court's warning and instructions, Plaintiff filed an amended complaint that contains almost all of the same fundamental deficiencies and pleading errors identified by the Court previously. Indeed, other than removing two defendants, Plaintiff defiantly elected to stand on her woefully deficient pleading. Plaintiff is unwilling, and perhaps unable, to revise her pleading to comply with the Federal Rules of Civil Procedure and this Court's orders, and there is no indication that any further opportunities to amend would lead to improved results. Accordingly, this action is due to be dismissed for Plaintiff's failure to comply with the Court's order and the requirement that a complaint contain a short and plain statement showing entitlement to relief.

g. ***Martin v. Jensen,* 2024 U.S. Dist. LEXIS 87102 (United States District Court for the Central District of California, Western Division 2024).** Order removing a trustee in the context of guardianship proceedings do not give rise to claims for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, a RICO conspiracy, mail fraud and obstruction of justice under RICO, deprivation of civil rights under § 1983, intentional infliction of emotional distress, and a request for punitive damages.

(1) Walter Emmanuel Martin sued Samantha P. Jessner, the Los Angeles County Probate Department, Stephen Morgan, Scott Nord, Tamila Jensen, Chevon Robinson Martin, and Emanuel Thomas. This lawsuit arises out of an ongoing state probate action, In re Martin, Rex – Conservatorship ("the Probate Action").

(2) The Probate Action concerns the Gesner L. Martin Living Trust ("the Trust"). The Trust was established by Gesner Martin, Plaintiff's mother, who died on January 26, 2018. Gesner Martin had three children who were named beneficiaries of the Trust, including Rex Martin ("Rex"), who died on August 21, 2020. Plaintiff alleges the Trust provides that he would serve as successor trustee following Gesner Martin, and that neither Rex nor any of his children, including Chevon Martin ("Chevon"), should ever be appointed trustee. Gesner Martin presided over the Trust until March 23, 2013, after which Plaintiff was appointed as successor trustee.

(3) In August 2018, Scott J. Nord, a Los Angeles County Superior Court Commissioner, held a hearing regarding Chevon's petition to appoint a conservator for the person and estate of Rex. In advance of the hearing, Rex's court-appointed attorney, Tamila Jensen ("Jensen"), filed a report that there may be funds available for Rex's care in a trust and that Plaintiff had described the Trust as a "special needs trust."

(4) At the hearing, Commissioner Nord announced that the court would assume jurisdiction over the Trust, freeze all assets, and suspend Plaintiff's ability to act as trustee. Commissioner Nord entered an order to remove Plaintiff as trustee, finding that he failed to account for Trust assets, administer the Trust in good faith, administer the special needs trust for the benefit of Rex, and identify Trust assets to the court, and finding that he violated his fiduciary duties to the beneficiaries of the Trust. Commissioner Nord ordered that the court assume jurisdiction over the Trust, suspended Plaintiff's powers as successor trustee, and freeze all Trust assets. Plaintiff alleges that he was not served with and had no knowledge of that order until April 2023.

(5) Plaintiff filed an ex parte motion to vacate Commissioner Nord's order. Judge Stephen Morgan denied Plaintiff's motion to vacate with prejudice and appointed Jensen to act as counsel for Rex. Judge Morgan discharged Jensen due to a conflict of interest and appointed attorney Candance Jones on behalf of Rex. Judge Morgan vacated the order appointing Jones and appointed attorney Mario Andre Pacione.

(6) Chevon filed a petition to remove Plaintiff as trustee. Plaintiff opposed the petition and filed his own ex parte application to have Chevon disqualified from serving as trustee. Judge Morgan granted Chevon's petition to remove Plaintiff as trustee, appointed Chevon as trustee, and denied Plaintiff's application.

(7) Based upon these facts, Plaintiff alleges violations of the Racketeer Influenced and Corrupt Organizations Act, a RICO conspiracy, mail fraud and obstruction of justice under RICO, deprivation of civil rights under § 1983, intentional infliction of emotional distress, and a request for punitive damages. The Court dismissed Plaintiff's First Amended Complaint with leave to amend.

(8) Defendants filed five separate motions to dismiss. The federal magistrate judge recommended dismissal of the claims on the following grounds:

  (a) Because Plaintiff is no longer a trustee and is proceeding pro se, he is not permitted to sue on behalf of the Trust. He may, however, bring claims on behalf of himself. The Court instructed Plaintiff to connect his claims and remedies to his role as a beneficiary and individual, not to his former position as trustee. Plaintiff's SAC has largely taken the Court's advice, although he still alleges that Defendants' conduct harmed the Trust. Nonetheless, the Court will not dismiss based on standing in light of the SAC's other, more significant deficiencies.

  (b) Younger abstention is appropriate. First, the docket in the Probate Action indicates that the matter is ongoing. Second, this case involves the state's interest in enforcing the orders and judgment issued in the Probate Action and the pending appeal. Third, the enforcement of orders and judgments, such as those issued in the Probate Action and the pending appeal, constitute important state interests. Fourth and finally, Plaintiff has an adequate opportunity to litigate any federal claims by way of the current appeal of the orders issued in the Probate Action or by writ petition.

  (c) Plaintiff's lawsuit challenges judicial decisions made in the Probate Action. These judicial decisions are the sort of core orders involving the administration of the state judicial process. Plaintiff argued that Younger does not apply because the state court cannot be trusted. However, one alleging bias must offer "actual evidence to overcome the presumption of honesty and integrity in those serving as adjudicators." Here, Plaintiff's conclusory allegations of bias are insufficient to warrant this exception to the Younger doctrine. The fact that Plaintiff disagrees with decisions made in the Probate Action is not enough to show there is an institutional bias that hinders the presentment or resolution of Plaintiff's claims.

(d) The Eleventh Amendment bars individuals from bringing lawsuits against a state for money damages or other retrospective relief. The Eleventh Amendment plainly applies to the Judicial Defendants, who serve as judicial officers or employees and are being sued in their official capacity. Plaintiff's SAC does not seek any sort of prospective injunctive relief, but rather compensatory damages based upon their actions taken in the Probate Action. Accordingly, dismissal is warranted under the Eleventh Amendment.

(e) Here, the judicial actions fall within the purview of a judicial act. Plaintiff's SAC challenges court orders issued by Commissioner Nord and Judge Morgan, normal judicial functions that were made in connection with the Probate Action. Plaintiff's assertion that these orders were made with bad intentions do not remove the cloak of immunity, as a judicial act does not stop being a judicial act even if the judge acted with malice or corruption of motive. Plaintiff argues that judicial immunity does not apply because the Judicial Defendants acted without subject matter and personal jurisdiction. Plaintiff offers no credible allegations to support that statement. To the contrary, the allegations in the SAC clearly concern actions taken by the Judicial Defendants in their judicial capacity.

(f) Next, Plaintiff argues that he is suing the Judicial Defendants for their "acts that go beyond their legal jurisdiction," such as the probate court's "deep involvement" in an illegal RICO enterprise. However, the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

(g) Here, Plaintiff has alleged no facts related to wire communications or mail communication that would support claims for wire or mail fraud as predicate acts under his RICO claim. For example, Plaintiff alleges that the Judicial Defendants engaged in mail fraud by faxing attorney Jensen a copy of Commissioner Nord's "fraudulent March 6, 2019 Order." But there are no accompanying credible allegations that Commissioner Nord's order was false or otherwise invalid. As another example, Plaintiff asserts that attorneys Jensen and Thomas bribed the Judicial Defendants. The Court is not required to accept Plaintiff's legal conclusion that are not reasonably drawn from the facts alleged. Otherwise, the SAC asserts predicate acts but fails to provide any factual basis of the predicate acts. Plaintiff's Opposition does not point to a single paragraph of the SAC that, in detail, sets forth the time, place or contents of a predicate act. Instead, Plaintiff repeats that "the moving Defendants committed acts of mail fraud, wire fraud and obstruction of justice." Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Plaintiff has failed to plead facts to support the existence of a pattern of racketeering activity constituting a violation of RICO. As Plaintiff has not adequately pled civil RICO, his claim for RICO conspiracy fails as well.

(h) To state a claim under § 1983, a plaintiff must show (1) violation of a right secured by the Constitution or laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. The Judicial Defendants have been dismissed based on the Eleventh Amendment and absolute judicial immunity, leaving attorneys Jensen and Thomas. Generally, private parties, including court-appointed attorneys such as Jensen and Thomas, are not considered to be acting under color of state law. The only exception is when the plaintiff pleads and proves facts which show the court-appointed attorney conspired with state officials. Plaintiff has not alleged any credible facts to establish that Jensen or Thomas conspired with the Judicial Defendants or any other state official.

(i) Accordingly, dismissal of this claim is warranted.

(j) The elements of an intentional infliction of emotional distress ("IIED") claim are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Plaintiff has failed to establish the first element, extreme and outrageous conduct. However, courts are authorized to remove a trustee. Additionally, Plaintiff offers no allegations to support his claim that his removal caused him the sort of "severe emotional distress" required to establish an IIED claim.

h. ***Baker v. Cuthbertson,* 2024 Ga. App. LEXIS 355 (Court of Appeals of Georgia 2024).** Evidence person sent or attempted to send illicit photographs to a boyfriend during the time she was living with elderly person was relevant to whether she intended to keep her promises to care for that person or whether she made them only to gain control over his money and other assets.

(1) Melissa Baker—who was in her thirties at the time—and Robert Moffitt, a man in his eighties, met in 2014 when he found one of her horses on his land. At the time, Moffitt sold hay, and Baker began buying hay from him on a weekly basis. Moffitt and Baker exchanged numbers, and eventually, he became friends with her and her family. According to Baker, it was a "friendship of helping him," and she began regularly checking in on him.

(2) Around the beginning of 2016, Baker was going through a separation with her husband, and the following spring, she and her four children moved into Moffitt's home (the "Casteel home"). Baker testified that she paid the mortgage, Moffitt paid a second mortgage, and they both paid for different utilities. On June 15, 2016, only a few months after Baker moved in with Moffitt, he executed a new will, which provided that it was "made in contemplation of his marriage to MELISSA JOY BAKER and shall not be revoked by such event." As to the Casteel home, the will provided, inter alia, that upon his death, Baker could instruct the trustee of his estate to sell it at fair-market value, and she would receive 60 percent of the profit, while Tracy Cuthbertson (Moffitt's daughter) would receive the remaining 40 percent.

(3) At some point, Moffitt and Baker obtained a new homeowner's insurance policy with USAA, which was solely in her name, but Moffitt paid the premiums. Around this same time, when Moffitt was 83 years old and Baker was 34 years old, Moffitt added Baker to the mortgage and deed for the Casteel home. According to Baker, by this point, she was handling all of Moffitt's "business affairs."

(4) After Baker and Moffitt obtained the new insurance policy, the Casteel home burned down, destroying all of Moffitt's, Baker's, and Baker's children's belongings. Two or three days after the fire, Baker received an insurance payout from USAA for $367,000, and although she claimed she deposited it in a joint account with Moffitt, she never told him that he was entitled to half of the money. Baker also received another $275,000 from the sale of the Casteel home. Among other things, Baker spent $50,000 of the proceeds on clothes and another $50,000 to buy a truck. Additionally, Baker bought a home in Powder Springs, Georgia, for approximately $430,000, and the title to that property was solely in her name. When asked whether she gave Moffitt anything of value, Baker confirmed in her deposition testimony that she "gave him [herself] taking care of him 110 percent until he died[,]" but she acknowledged that she failed to do so.

(5) Indeed, in 2018, Baker dropped Moffitt off at Cuthbertson's home and immediately left. When she did so, Moffitt could "barely walk," could not hold his head up, and complained that he had "something in his stomach that [did not] belong there." Cuthbertson immediately took Moffitt to the doctor, who discovered he had a foreign object in his stomach that needed

to be surgically removed. According to Cuthbertson, when Baker discovered she had taken Moffitt to new doctors, Baker began to "verbally and emotionally torment him and abuse him to the point where he was so devastated." Baker called Moffitt—who was then 84 years old—a "weak a** mother***er" and told him she "hate[d] [his] guts." Thereafter, Cuthbertson found Moffitt in a fetal position, "sobbing uncontrollably and hysterical." Cuthbertson testified from that point on, "it was basically war" with Baker. Over a year later, when Moffitt became "extremely depressed and more and more despondent and isolated," Cuthbertson then moved him into an assisted living home.

(6) Moffitt filed a complaint against Baker for "legal and equitable relief." Specifically, Moffitt alleged numerous claims against her, including breach of contract, breach of fiduciary duty, conversion of property, and fraud; and he also sought injunctive relief. Baker filed an answer, denying all of the complaint's allegations and attaching several exhibits. On September 1, 2022, while this litigation was pending, Moffitt passed away, and Cuthbertson—as executor of his estate—was substituted in as the plaintiff. Following discovery, the case proceeded to a multi-day jury trial.

(7) At the conclusion of trial, the jury returned a verdict in favor of Cuthbertson, that Moffitt suffered actual damages as a result of the foregoing actions, and awarded Cuthbertson $318,758.55. Finally, the jury awarded Cuthbertson $100,000 in punitive damages and the trial court awarded Cuthbertson $68,000 in attorney fees.

(8) Baker appealed and the court of appeals affirmed on the following grounds:

(a) Baker did not provide the court with a complete chronological recitation of all the material facts necessary to decide this appeal, which is in violation of court rules. This matters in any appeal, but is especially frustrating in one with a 528-page record, a 700-page trial transcript, and four volumes of exhibits. And because Baker has not provided a complete recitation of the material facts (instead primarily referencing her own self-serving testimony, which is skewed against the jury's findings), she has significantly hindered the court's ability to delineate the relevant facts—especially in the light most favorable to the jury's verdict (as the court is required to do). The court is not obliged to "cull the record on behalf of a party, particularly in a case such as this where the record is voluminous." So, while it appears the parties' briefs and our independent review of the record have likely identified the portions of the record and transcripts necessary to resolve the particular claims of error raised, if the court missed something in the record or misconstrued an argument, the responsibility rests with Baker's counsel.

(b) Baker moved to exclude from evidence multiple pictures of her exposed body arguing they had no probative value, were highly prejudicial, and would cause her irreparable harm. In her response, Cuthbertson noted that Baker accidentally sent the photographs to her daughter's phone; and when she apologized, Baker explained that Moffitt liked to keep pictures of that nature on his phone. Cuthbertson argued the images were relevant as to the undue-influence claim to show Baker "used them as a predatory method of controlling [Moffitt's] actions in allowing her to take or convert his property." Thereafter, the trial court denied Baker's motion in a summary order.

(c) At trial, Baker again objected to the admission of the illicit photographs, arguing they lacked any probative value and were extremely prejudicial. Baker also suggested that, even if the photographs were relevant, they were cumulative because Baker stipulated to sending them. In response, Cuthbertson argued the images should be admissible because they were intended for Baker's boyfriend, whom she began dating three months after promising to take care of Moffitt for the rest of his life. According to Cuthbertson, this evidence showed her intention to break that promise. And while Baker contended the images were being proffered only to embarrass her and prejudice the jury against her, the trial court again denied her motion to exclude them. Indeed, the trial court found the images were admissible to show "the efficacy of whatever promises were made" and her motive in making those promises.

(d) At trial, the evidence showed that Baker—a woman in her thirties—befriended Moffitt (a man in his eighties), who began suffering from dementia either before or at some point during their relationship; and she promised to take care of him for the rest of his life. And while Baker denied ever intending to marry Moffitt, he was apparently led to believe otherwise because, after she moved in with him, he executed a new will that indicated it was "made in contemplation of his marriage to [Baker] and shall not be revoked by such event." Baker also admitted that she attempted to have sex with Moffitt at least twice and acknowledged sleeping in the bed with him 85 to 90 percent of the time when they lived together. Further, the evidence showed that Baker took control of Moffitt's finances, was added to the deed to his house, was added as a beneficiary to his will, made herself the sole beneficiary of his homeowner's insurance policy, and used funds from an insurance payout to purchase clothes, a truck, and a home solely in her name. So, to prove her fraud claim, Cuthbertson was required to show Baker intended to induce Moffitt—an elderly man suffering from dementia—to allow her to do all of the foregoing.

(e) The court cannot say that the trial court abused its broad discretion in admitting the complained-of images. Indeed, the trial court reasonably found that evidence Baker sent or attempted to send illicit photographs to a boyfriend during the time she was living with Moffitt, sleeping in his bed, promising to take care of him, and taking control of his finances and property was relevant to whether she intended to keep her promises to Moffitt or whether she made them only to gain control over his money and other assets.

(f) To be sure, evidence may be excluded under Rule 403 if it constitutes a needless presentation of cumulative evidence, and at trial, Baker admitted that she sent her boyfriend or tried to send him a picture of herself without clothes. But when asked about the text message at issue, Baker initially responded that she was not "official[ly]" dating her boyfriend until 2018; and she sent Moffitt to live with Cuthbertson in 2018. Then, Cuthbertson's attorney confronted her with the relevant text message, showing that she sent it in 2017, only a few months after she promised to take care of Moffitt for the rest of his life and obtained half of his interest in the Casteel home. At that point, she conceded that she was "lightly dating" her boyfriend in July 2017. Baker also testified that July 2017 was only the beginning of their relationship, and she did not normally send illicit photographs of that type to someone at the outset of a relationship. So, although Baker generally admitted that she sent (or attempted) to send illicit photographs to her boyfriend, the actual text was significantly probative of whether she did so in 2017 at a time when she was controlling Moffitt's finances or in 2018 when he no longer lived with her.

(g) Considering the overwhelming evidence that Baker—a woman in her thirties—fraudulently induced Moffitt—a man in his eighties suffering from dementia—to (1) give her control of all of his "business affairs"; (2) add her to the deed on his home; (3) make her the sole beneficiary of the homeowner's insurance purchased for his home; (4) purchase clothes and a truck, as well as a new home solely in her name, with insurance proceeds received after his house burned down; and (5) make her a beneficiary in his will "in contemplation of his marriage [to her][,]" the court cannot say the admission of the challenged evidence harmed Baker. Indeed, she admitted to all of the foregoing at trial, but claimed that, in exchange, she promised to take care of Moffitt for the rest of his life—which she conceded she did not do. So, given the overwhelming evidence in support of Cuthbertson's undue-influence claim, it is highly probable that admission of the text message with illicit images she sent or attempted to send to her boyfriend in 2017 did not meaningfully contribute to the jury's verdict.

(h) As a rule, punitive damages may only be awarded in tort actions in which there is a valid claim for actual damages. Punitive damages are not recoverable for breach of contract actions.

(i) The record has not revealed that Baker objected to the verdict form prior to the jury's verdict. Additionally, Baker's opening brief did not include a preservation-of-errors section, which is in violation of court rules. As a result, Baker waived this claim of error concerning the award of punitive damages by failing to object to the verdict form at the earliest possible opportunity. Baker similarly abandoned the claim that the judgment should be reversed because there was insufficient evidence of the "egregious conduct" necessary to authorize the imposition of punitive damages. Baker failed to cite any evidence presented at trial to support her allegations—not even her own self-serving testimony claiming she had Moffitt's consent to take control over his money, homeowner's insurance, and property. And she certainly did not apply any of the Georgia law she recited to the specific circumstances of this case as shown by the record. It is not the function of the court to cull the record on behalf of a party in search of instances of error. Appellate judges will not and should not be expected to take pilgrimages into records in search of error without the compass of citation and argument. To the contrary, the burden is on the party alleging error to show it affirmatively in the record. Baker failed to satisfy this burden, and thus, she abandoned her contention that the evidence was insufficient to authorize the imposition of punitive damages.

i. ***Bouloute v. Carrillo,* 2024 IL App (1st) 220454-U (Appellate Court of Illinois 2024).** Plaintiff's counsel's legal secretary cannot be appointed as the "personal representative" of a deceased defendant's estate where no petition for letters of office has been issued on behalf of the decedent.

(1) In December 2018, plaintiff William Bouloute and decedent Collin Swithin were both driving on the interstate in Illinois when decedent allegedly made an improper lane change, causing a collision with plaintiff's vehicle. At the time, decedent was a resident of Michigan.

(2) In November 2020, plaintiff filed a two-count complaint against decedent and the company which owned the vehicle decedent was driving, alleging that decedent was negligently operating his vehicle at the time of the accident. As decedent was a nonresident, plaintiff served decedent with process through the Illinois Secretary of State.

(3) After serving decedent, and after the expiration of the applicable statute of limitations, plaintiff learned that decedent had died in July 2019. Plaintiff's counsel researched the matter, and discovered that no personal representative had been appointed and no letters of office had been issued on decedent's behalf in Michigan. Plaintiff then filed a motion in the circuit court to spread the death of record and to appoint Malina Carrillo, his attorney's legal secretary, as Personal Representative of the Estate of COLLIN B. SWITHIN, which was granted.

(4) Plaintiff filed an amended complaint, substituting Carrillo, as "personal representative" of decedent's estate, as the defendant. Defendant's counsel filed an appearance and a motion to dismiss, claiming that Carrillo was not eligible to serve as a "personal representative" of the estate. The circuit court denied defendant's motion to dismiss, but instructed that the parties should either file a motion to certify a question concerning the matter or advise whether a substitute personal representative will be appointed for defendant. Defendant filed a motion to certify a question for appeal, and the circuit court ultimately certified the following question: "Whether Plaintiff can name his legal secretary, Malina Carrillo, as the 'personal representative' of the Estate of Collin Swithin under 735 ILCS 5/13-209(c) to represent the estate of the decedent?"

(5) The Illinois court of appeals answered the certified question in the negative on the following grounds:

(a) The applicable law with respect to this issue has evolved during the pendency of the instant appeal. The court granted defendant's petition for leave to appeal in April 2022. During the briefing process, a petition for leave to appeal was filed, and ultimately granted, in Lichter v. Carroll, 2022 IL App (1st) 200828, 468 Ill. Dec. 346, 220 N.E.3d 1125, a case which similarly involved the interpretation of section 13-209. Upon the granting of the petition for leave to appeal in Lichter, the parties in the instant appeal filed an agreed motion for a stay, which the court granted. The supreme court issued an opinion in Lichter v. Carroll, 2023 IL 128468, 472 Ill. Dec. 497, 231 N.E.3d 147, on October 26, 2023. The court subsequently lifted the stay in January 2024, and now consider the matter in light of the supreme court's recent decision.

(b) Under the common law, a dead person is a nonexistent entity and cannot be a party to a suit. If an individual is deceased when an action is brought, the proceedings do not invoke the circuit court's jurisdiction and any judgment entered in the case will be a nullity. Thus, where a party dies, the action remains viable only if timely substitution of another party operates to preserve the cause of action.

(c) Section 13-209 of the Code, titled "Death of party," addresses situations in which one of the parties to an action dies before the applicable limitations period has expired.

(d) Section 13-209(c) of the Code provides that, if a plaintiff commences an action against a deceased person whose death is unknown to the plaintiff prior to the expiration of the statute of limitations, and the cause of action survives and is not otherwise barred, "the action may be commenced against the deceased person's personal representative" if the plaintiff diligently moves the court for leave to file an amended complaint "substituting the personal representative as defendant" upon learning of the death and the plaintiff diligently serves process "upon the personal representative."

(e) Section 13-209(c) uses the term "personal representative" multiple times, and such usage is significant. Our supreme court has explained that the difference in terminology between a "personal representative" and a "special representative" has legal significance, and the terms are not interchangeable. Specifically, a "personal representative" is appointed where petitions for letters of office for the decedent's estate have been filed, while a "special representative" is appointed where no petition for letters of office has been filed.

(f) In this case, Carrillo was appointed as the "personal representative" of decedent's estate pursuant to section 13-209(c), despite the fact that no petition for letters of office was filed for decedent's estate. This does not comport with our supreme court's holding that made clear that "a 'personal representative' means one appointed pursuant to a petition for issuance of letters of office."

(g) In this case, as noted, there is no dispute that no estate was ever opened on behalf of decedent, and that Carrillo was appointed as decedent's "personal representative" pursuant to section 13-209(c). Carrillo's appointment was impermissible, as she was not eligible to be named as a "personal representative" in the absence of issuance of a petition for letters of office.

j. ***Georgacopoulos v. Georgacopoulos (In re Est. of Georgacopoulos),* 2024 IL App (1st) 230776-U (Appellate Court of Illinois 2024).** Decedent's kicking of wife's minor children out of house 28 years before death does not justify invalidating premarital agreement and permitting wife to administer decedent's estate.

(1) Plaintiff Eugenia Georgacopoulos is the daughter of the decedent, George Georgacopoulos, and his first wife. Defendant Kyriaki Georgacopoulos was the decedent's second wife. In

1992, defendant and the decedent entered into an antenuptial agreement. The antenuptial agreement contained the following language: "[Decedent] acknowledges that [defendant] has two (2) children from a prior marriage who are presently living with her, and [decedent] agrees that said children shall continue to reside with [defendant] in the marital home to be provided by [decedent], until said children are adults and/or are emancipated."

(2) The agreement also included each party's waiver of any rights to participate in the other party's estate upon death: "This Agreement is intended by [decedent] and [defendant] as a mutual release of all right, title and interest which either would have or acquire in and to all of the real and personal property of the other during the lifetime or at the death of either of parties hereto, by virtue of the marriage that is contemplated between them under the laws of Illinois."

(3) Soon after the antenuptial agreement was signed by both parties, defendant and the decedent were married in Greece. They remained married until the decedent passed away in August 2020. Plaintiff petitioned for letters of administration, seeking to be appointed as administrator of the decedent's estate. Defendant filed a cross-petition, requesting that the circuit court instead appoint defendant as administrator of the decedent's estate and declare the antenuptial agreement unenforceable. Defendant argued that the agreement should be held to be unenforceable because, among other reasons, the decedent breached the agreement and did not allow defendant's minor children to reside in the marital home.

(4) The circuit court concluded that the antenuptial agreement was enforceable, denied defendant's cross-petition, and appointed plaintiff as administrator of the estate. Defendant appealed and the court of appeals affirmed on the following grounds:

(a) The circuit court heard testimony from defendant that, after returning from the wedding in Greece, she lived in the marital home with the decedent and her two minor children from her previous marriage: Evangelos Pagunas Jr. and Elefteria Pagunas. Three months later, the decedent told the children to move out of the house. The children moved into the residence of defendant's oldest son. Defendant continued to live in the marital home with the decedent. Evangelos Pagunas Jr. testified that both he and his sister lived at the decedent's house for a "couple months" after the marriage, but they left after the decedent "told us a couple times to pack up our stuff and leave."

(b) A condition precedent is a condition which must be performed by one party to an existing contract before the other party is obligated to perform under that contract. When a contract contains an express condition precedent, strict compliance is required, and the contract is not enforceable until the condition is performed. In contrast, the provision breached here was an independent contractual provision (not a condition precedent).

(c) The circuit court expressly declined to invalidate the agreement based on the decedent's breach: "[H]er minor children were kicked out of her house 28 years ago, and for that entire time for those 28 years from that date until the decedent passed she did nothing to challenge that. She did nothing for 28 years. And then after the decedent dies, she comes in and wants to invalidate that. Now, I'm not sure why she did it that way, but in this Court's mind that is not enough to invalidate a prenuptial agreement that was bargained in good faith while the decedent was alive, and he survived for 28 years after that. So she could have challenged it at any time during that time period. So to invalidate it based on that small alleged violation of the agreement, the Court's not going to do that."

(d) The question is not whether George Georgacopoulos breached the antenuptial agreement (clearly he did), but whether his breach was material. Only a material breach of an agreement will justify the nonenforcement of the entire agreement.

(e) The determination of whether a breach is material is a complex question of fact that depends on a variety of factors including the "inherent justice of the matter" and prejudice to the nonbreaching party. The antenuptial agreement here gives us guidance as to the significance of the breach: the agreement expressly provides that the decedent has "no legal obligation to provide any support or maintenance" for defendant's children, and that "any contribution made by [decedent] towards the cost of providing adequate housing and support for [defendant's children] shall be wholely [sic] voluntary on his part." This language supports the conclusion that the decedent's support for defendant's children was not a fundamental objective of the parties when drafting the terms of the agreement.

(f) Against this backdrop, the law and the evidence support the circuit court's conclusion that the decedent's "small alleged violation" nearly 30 years ago was an insufficient basis to invalidate the entire antenuptial agreement.

(g) A surviving spouse is entitled to preference in obtaining the issuance of letters of administration. However, in the antenuptial agreement, defendant waived any right to participate in the decedent's estate. Since the antenuptial agreement is enforceable, the circuit court did not err in appointing plaintiff as administrator of the decedent's estate.

k. ***In re Estate of Amezcua,* 2024 Cal. App. Unpub. LEXIS 1652 (Court of Appeal of California 2024).** Affidavit by attorney in lost will case, who submitted a declaration admitting that she had not dealt with lost wills before and was unaware of the lost will presumption when the will at issue was probated, does not cure failure to raise claims at trial and preserve them for appellate review.

(1) Casimiro C. Amezcua died in September 2021. He was survived by his daughter Veronica Amezcua and three other children from his first marriage, as well as his second wife, Amalia Amezcua, with whom he began living in 1989 and whom he married in 2003.

(2) Veronica filed a petition for probate, seeking admission of a lost 2001 will and requesting appointment as executor of the will. In the petition, which was on a mandatory Judicial Council form, Veronica checked the box indicating that "[t]he original of the will . . . has been lost." The form instructed Veronica to include a copy of the will in an attachment and "state reasons in that attachment why the presumption in Prob. Code, § 6124 does not apply." While Veronica attached a copy of the will she sought to probate, she failed to explain why the presumption does not apply.

(3) The copy of the will, which is five pages long, is dated March 29, 2001. In it, decedent declared that he is a single man with five living children, one of whom later predeceased him. In addition, the will bequeaths all of decedent's property to his children, without making any provision for Amalia.

(4) While most of the will appears to have been prepared on a word processor, it contains lines for decedent's signature and for the signatures of two witnesses which appear to be typewritten with the symbol "s/" above the names. In addition, the number "29" is handwritten into the date before decedent's signature, indicating the date of the will to be March 29, 2001. The number "29" is also handwritten before signatures of the witnesses, but those signatures are dated March 29, 2000, rather than March 29, 2001.

(5) In her petition to probate the lost will, Veronica identified herself and her surviving siblings as the individuals with an interest in decedent's estate but did not mention Amalia. In addition, the petition checked boxes indicating that decedent had no spouse (because he was divorced or never married) and had no registered domestic partner.

(6) A few days before the hearing on Veronica's petition, Amalia filed a verified objection, opposing both probate of the lost will and Veronica's appointment as executor of the will. After Veronica filed an answer to Amalia's objections, which acknowledged that decedent

had married Amalia, the probate court held a hearing. The court admitted the lost will and appointed Veronica as the executor. Subsequently, Amalia filed motions for reconsideration, for a new trial, and for relief from mistake. In these motions, Amalia raised two new arguments. First, she argued that the lost will should be rejected because Section 6124 creates a presumption that the decedent's lost will was revoked, which Veronica failed to rebut. Second, Amalia argued that the lost will was defective because it did not contain any handwritten signatures, because the witnesses' signatures are dated a year before the decedent's, and because the will had been altered by the handwritten addition of dates for the signatures. While Amalia acknowledged she did not make these arguments in opposing the petition, she argued that the failure was due to error by her attorney, who submitted a declaration admitting that she had not dealt with lost wills before and was unaware of the lost will presumption when the will at issue was probated.

(7) The probate court denied Amalia's motions. Amalia appealed and the court of appeals affirmed on the following grounds:

(a) As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal. There are exceptions to this general rule: For example, arguments that raise pure questions of law may be considered in the first instances on appeal. However, the general rule against entertaining new arguments on appeal is stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.

(b) Here, Amalia did not make any arguments regarding the lost will presumption or defects in objecting to the petition to probate the will in the probate court. Moreover, her arguments on appeal do not raise pure questions of law. There is a presumption that a lost will was revoked if the will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death. Thus, to invoke the presumption, three threshold findings must be made: (1) the will was last in the testator's possession, (2) the testator was competent until death, and (3) neither the will nor a duplicate original can be found after his or her death. In addition, because the lost will presumption is merely a presumption affecting the burden of producing evidence, it may be rebutted. Consequently, application of the lost will presumption raises multiple factual issues which Veronica should have been given an opportunity to address in the probate court.

(c) The same is true with respect to Amalia's underlying arguments that the lost will was defective. Amalia argues that the lost will is suspect because it lacks actual signatures, because decedent's signature is dated a year after the witnesses' signatures, and because some numbers have been handwritten into the will. However, even when a will is not properly witnessed, it may nonetheless be enforced if the proponent of the will shows, by clear and convincing evidence, that the testator intended the will to constitute his or her will. As a consequence, Amalia's arguments concerning the defects in the will raise factual issues, which Veronica should have had an opportunity to address in the probate court.

(d) Amalia's failure to raise these arguments in objecting to the petition to admit the will in the probate court bars her from raising these arguments on appeal. The probate court's June 2022 order admitting the lost will cannot be challenged based on arguments that Amalia failed to advance before the order.

(e) It is true that Amalia raised the lost will presumption and asserted defects in the will after the June 2022 order in her motion for reconsideration and a motion for relief from mistake. The probate court, however, declined to entertain these arguments, and far from showing that the court abused its discretion in doing so, Amalia has chosen not to challenge these procedural rulings on appeal. Accordingly, Amalia's challenges to the June 2022 order have been forfeited.

(f) In addition, even if Amalia had not forfeited these challenges, they would fail for another reason: Amalia chose not to include in the appellate record a reporter's transcript, settlement statement, or other record of the hearings before the probate court. Because Amalia elected to proceed without a reporter's transcript or other record of the probate court hearing, we must presume that such a transcript would demonstrate the absence of error. Because Amalia's challenges to the June 2022 order have been forfeited and, in any event, cannot succeed in light of her failure to designate an adequate record, there is no need to address Veronica's arguments concerning lack of service, mootness, and other matters.

I. ***Kelly v. Kelly,* 2023 Cal. App. Unpub. LEXIS 7668 (Court of Appeal of California 2023).** Nonlawyer trustee committed excusable breach of fiduciary duty by awaiting instructions from other lawyer family members concerning whether to extend lawyer decedent's malpractice coverage after death.

(1) After practicing law for decades, Attorney Thomas P. Kelly, Jr., ("Father") died in February 2020. All three of his surviving children were also lawyers. His trust designated his brother Bill, one of the few nonlawyers in the family, to become trustee on Father's death. With Bill's approval, Father's son Tom began winding down Father's law practice.

(2) Tom informed the insurance carrier of Father's death and asked it to cancel his malpractice policy. Tom reported his actions by email to his three paternal uncles: Bill, Hugh Kelly and James Tynan Kelly ("Ty"). Hugh and Ty are lawyers. Over the next two days, Tom exchanged emails with Hugh and Ty about the policy cancellation and what to do next. Bill received each email in the exchange.

(3) The day after the cancellation request, Hugh and Ty sent emails expressing concern and recommending Tom countermand or reconsider it. Attaching the policy, Tom responded that all known claims had been submitted and acknowledged, and any unknown claims would be covered. Ty asked Tom to provide legal support for that view or, alternatively, to rescind the cancellation and let Bill pay the premium and "sort the matter out" with Bill's lawyers. Tom replied that Bill "will need to contact [the insurance carrier] and tell them."

(4) The next day, the carrier emailed Tom that it had canceled the malpractice policy, effective the day Father died. The carrier attached an "Extended Reporting Period Endorsement (a.k.a., tail) quote." The quote was for tail coverage to insure the trust against claims made after Father's death. Tom forwarded the carrier's email to Bill and the lawyer uncles, Hugh and Ty. Tom wrote: "The malpractice carrier offered tail coverage outlined below. This should address your concerns about the policy. I have not responded as Bill should handle this directly." Minutes later, Tom sent another email reiterating the availability of tail coverage. Ty replied, "Ok. That is good to know." Bill did not take any action or make any inquiry in response to the emails.

(5) For several months, Tom heard nothing more about the coverage issue. In July 2020, Oak Grove Construction ("Oak Grove"), a former client of Father, sent a malpractice claim (the "claim") to a lawyer representing Bill. Tom received a copy of the claim and, unaware of Bill's failure to secure tail coverage, reported the claim to the carrier. Two months later, the carrier denied coverage for the claim. By then, Tom's brother, John, had taken over as counsel for Bill in his role as trustee. The carrier thus sent the coverage denial letter to John. John gave a copy of the letter to Oak Grove's lawyer on the condition he not tell Tom about it. John asked the carrier to direct to him any inquiry by Tom about the claim.

(6) Oak Grove filed a malpractice action against Bill and the beneficiaries of the trust in their trust-related capacities. Tom subsequently learned of Bill's failure to buy tail coverage and the carrier's denial of coverage for the claim. Amid escalating tensions, John emailed Tom and others claiming Tom was liable to the trust for his "malpractice" in cancelling the policy and "declining tail coverage."

(7) Tom petitioned the court seeking Bill's removal as trustee for breaching his fiduciary duty by failing to secure tail coverage and then attempting, with John, to fraudulently conceal that breach. In June 2021, the malpractice action settled. The trust paid nothing in the settlement. Five months later, the probate court ordered Bill to provide an accounting, and he did so, resolving the second cause of action.

(8) Tom moved for summary judgment on the removal petition. He asked the probate court to remove Bill as trustee and order him to reimburse the trust for the attorney fees and costs it had incurred to defend the malpractice action. In opposition, Bill asked the court to excuse him from liability for any breach of trust. The court issued an order summarily denying Tom's motion for summary judgment and confirming a trial date. Before trial, the parties lodged over 100 exhibits, as well as a transcript of Bill's deposition. Tom estimated a three-day trial. He filed a trial brief seeking the same relief as his motion for summary judgment. Bill's trial brief again asked the probate court to excuse him from liability under section 16440(b) and exercise its power to protect the trust by dismissing the petition.

(9) The probate court stated its intent to excuse Bill under section 16440(b) from liability for his failure to secure tail coverage on the ground it was reasonable for Bill—as the only nonlawyer on the email thread about the tail quote—to wait for his relatives, who are lawyers, to give him some guidance. Tom appealed from the probate court's orders denying his motion for summary judgment and dismissing the removal petition.

(10) On appeal, the court of appeals affirmed on the following grounds:

- (a) In assessing a decision under section 16440(b) to excuse a trustee from liability for a breach, the court reviews the threshold factual finding that the trustee acted reasonably and in good faith for substantial evidence, and the ultimate decision to excuse the trustee from liability for abuse of discretion.
- (b) To reach its decision, the court assumed Bill breached his fiduciary duty by failing to secure tail coverage but found he acted reasonably and in good faith under the circumstances as known to him. The court based its threshold finding of reasonableness on a few undisputed facts. Bill, the only nonlawyer on the email thread about the tail quote, received several messages from three of his lawyer relatives making inconclusive statements about malpractice insurance. The court found it reasonable under the circumstances for him to assume the lawyers in the family would "shake this out" and then tell him how to handle the unfamiliar issue of tail coverage. The court also implicitly found Bill acted in good faith, a fact Tom does not dispute on appeal.
- (c) Tom cited cases that predate the 1986 enactment of section 16440(b), which modified the law by expressly making good faith—in conjunction with reasonableness—a basis for a probate court to excuse a trustee from liability for a breach of trust. The plain text of the current statute controls.
- (d) Tom's emails did not inform Bill what he should tell the carrier or how he should handle the matter. Substantial evidence supports the finding Bill acted reasonably in awaiting more exact instructions from his lawyer relatives on a complex topic familiar to them and not him.
- (e) The probate court was correct in its threshold findings of reasonableness and good faith, which gave the court discretion to excuse Bill from liability.
- (f) Tom does not deny the fees were the trust's only item of damages, and he does not deny that a low level of damages supports excusal. He merely quibbles with the amount. The order stated he estimated the amount at $25,000. He points out that $25,000 was not an estimate of the total fees, but the amount of one payment to a law firm shown in Bill's accounting. The accounting reflected other such payments of approximately

$26,700, $2,500 and $6,600, and Tom speculates those sums were also paid for the malpractice case. Tom's speculation cannot establish an abuse of discretion.

(g) Tom attacked the probate court's finding that the breach created no risk of future harm. He complains the order cited no evidence to support the finding, but Bill, in seeking relief from liability was not obliged to prove a negative.

(h) Tom contended the finding disregards the trust's ability to recover from Bill, as damages, the fees it incurred in the malpractice action. Tom is mistaken. The probate court knew the trust incurred fees because of Bill's assumed breach and knew it could potentially recover those fees as damages: Its order stated the "only damage claim is for the attorney's fees and costs . . . paid to defend the malpractice claim." The court did not find the trust had no potential damages; it found a three-day trial would cost the trust more than it could recover. Tom has not shown this rationale was an abuse of discretion.

(i) By the time of trial, the allegations of fraud were directed only at John. In his petition, Tom did ascribe each allegedly fraudulent act to "Trustee and his counsel John." But after taking Bill's deposition, Tom no longer ascribed the fraudulent acts to Bill. Tom's trial brief claimed only that Bill had failed to supervise John. Citing Bill's deposition, the brief criticized Bill for having been unaware of the coverage denial when John concealed it. It also stated John made malpractice threats without Bill's "knowledge or authorization." Because the petition sought relief only against Bill, there was no need to address allegations of fraud no longer directed at Bill.

(j) Tom does not identify any interest the probate court failed to protect when it dismissed his petition to remove Bill—the trustee named by the trustor—based on one good faith error that caused limited past harm, threatened no future harm, led no other beneficiary to seek Bill's removal, and would require a three-day trial to assess.

(k) Tom has not shown probate courts lack jurisdiction to make such rulings absent a pending motion to dismiss. Nor has he shown the court in this case abused its discretion by doing so. Tom fails to show the probate court abused its discretion by considering dismissal at the start of trial. Tom also complains of the probate court's failure to hear evidence, such as his proposed expert testimony on fiduciary standards, but he identifies no prejudice. Here, the court made its order only after admitting into evidence Tom's exhibits comprising the emails discussed above, and assuming the evidence at a trial would be consistent with Tom's verified petition. Moreover, it based its ruling on a specific assumption resolving in Tom's favor what Tom himself labels "[t]he central issue in this case," namely, whether Bill breached his fiduciary duty. Tom identifies no remaining factual dispute an evidentiary hearing was required to resolve, and he cites no authority precluding the court's eminently sensible ruling.

m. ***Matter of Ellen H. (Cassandra H.),* 2024 N.Y. Misc. LEXIS 1094 (Supreme Court of New York 2024).** Trustee of special needs trust surcharged for using trust assets to pay personal car loans and an RV loan, for personal vacations, cash withdrawals, and hot tub maintenance.

(1) In or about 1984, Ellen H. and Scott H. filed a personal injury action individually and as parents and natural guardians of Cassandra H., an infant at the time. The suit resulted in the entry of a settlement order dated October 24, 1986. The settlement order directed payment on behalf of and for the benefit of Cassandra H. in the amount of a lump sum of $475,000; $2,000 per month, increasing at a rate of three percent (3%) per annum, compounded annually, after 4 years, for the remainder of Cassandra's life; and periodic lump sums totaling $275,000, the last a $155,000 lump sum payment on November 1, 2016.

(2) Ellen H. and Scott H. were appointed as guardians of the person of Cassandra H. They were later appointed as Co-Guardians of the Person and Property of Cassandra H., superseding and terminating the Surrogate's Court guardianship. The order directed the creation of the

Cassandra H. Supplemental Needs Payback Trust ("SNT") for Cassandra's benefit. Cassandra's SNT was executed on July 11, 2003 and appointed Scott H. and Ellen H. as trustees.

(3) Broome County Court Examiner Jo A. Fabrizio, Esq. was appointed by the Supreme Court, Appellate Division, Third Department to examine initial and annual guardianship reports required to be filed in Broome County. The examiner filed a motion alleging Scott H., who was by that point deceased, and Ellen H., as Co-Guardians of the Person and Property of Cassandra H., had not filed requested amended annual reports for the years 2016 and 2017 and had not filed any reports for the years 2018 through 2022, and seeking an order of the Court requiring compliance by the Co-Guardians.

(4) Ellen H. did not appear at the return on the compliance motion, and the Court appointed MHLS as counsel to locate and represent Cassandra H. in this matter.

(5) The Court convened the next appearance in this matter on March 28, 2023, at which time Ms. Fabrizio appeared; Mental Hygiene Legal Service (3rd Dept.) ("MHLS"), Mr. Charnetsky, Esq., of counsel, appeared; and Ellen H. appeared. Following this appearance, the Court terminated Ellen H.'s authority as guardian of the property of Cassandra H. That order also froze withdrawals from certain bank accounts held in the name of Ellen H. only, though Ms. H. purported to hold the funds in those accounts as fiduciary for Cassandra.

(6) The Court determined that the appointment of a court evaluator would be helpful to the resolution of this matter, particularly in providing the Court with sufficient information regarding Cassandra H.'s past and current financial situation, as well as recommendations regarding the property management of the guardianship and Cassandra's SNT. The Court appointed Ms. DeFazio as Court Evaluator. Ms. DeFazio submitted her report to the Court and counsel on June 13, 2023. The Court found that Cassandra H. requires the appointment of a successor property guardian and trustee of her SNT. On the record, the Court removed Ellen H. as trustee of Cassandra's SNT. The Court also appointed Ms. DeFazio as Guardian of the Property of Cassandra H. and successor trustee of Cassandra's SNT.

(7) Ellen H. appealed and the supreme court affirmed on the following grounds:

   (a) Once established, the supplemental needs trust must be used for the benefit of the disabled individual. Any provisions that provide benefits to other individuals or entities during the disabled person's lifetime will result in disqualification for the special needs trust exception. If the trustee uses funds from a trust that is a resource to purchase durable items, such as a car or a house, the deed or title must show the individual (or the trust) as the owner of the item in the percentage that the funds represent the value of the item, and failure to do so may constitute evidence of a transfer of assets in violation of the terms of the trust's terms.

   (b) Cassandra has been the recipient of monthly annuity payments for nearly 40 years. The payments are currently in excess of $5,000 per month and continue to increase at a rate of three percent (3%) per annum compounded annually, for her lifetime. An initial and multiple subsequent lump sum payments have also been made pursuant to the settlement, with the most recent payment made in the amount of $155,000 on November 1, 2016. Ellen and Scott H., as trustees, were tasked with funding Cassandra's SNT with these annuity payments. The trust directs the funds be held at HSBC Bank, N.A., which initially occurred and continued for the first few years. HSBC Bank underwent several mergers, ultimately becoming KeyBank. In or about 2016, prior to his death in 2018, Scott H. switched the depository of the annuity payments to SEFCU. Since that time the funds have not been deposited into Cassandra's SNT but in accounts titled in Scott's and/or Ellen's names individually, with account nicknames of "Cassie's checking" and "Cassie's savings."

(c) Ms. Fabrizio, as Court Examiner, was unable to approve as accurate and complete the guardianship and trust accountings provided to her by Ellen H. for the period of 2016 to 2022. A significant number of the payments from the trust in the accounts that were filed lack any indication or supporting information that they were made for legitimate trust expenses or applied for the benefit of Cassandra. The accountings contain numerous expenditures that are not itemized and are unsupported by reliable documentation.

(d) During the period of 2016 through June 2023, the accounts held for Cassandra received a total of $574,965.49 in settlement payments from the annuity. During this entire period Cassandra resided in a Medicaid-paid group home with supporting services. The accounts held for Cassandra's benefit held a total of about $58,200 at that time, $516,765.49 unaccounted for. There were $200,000 in specific noted expenditures from the accounts held for Cassandra, including: payments on multiple automobile loans, none used primarily or substantially for Cassandra's benefit; several large payments on personal loans of Ellen and/or Scott H.; payments on a substantial RV loan at a time it was and could not have been used for Cassandra's benefit; transfers and expenditures made in Arizona and California while the trustees/guardians were in those states and Cassandra was in New York; unexplained cash withdrawals; expenses for a hot tub at Ellen's home during the Covid-19 pandemic, while Cassandra was unable to leave her group home; repaving of the driveway at Ellen's home in that same time period; car repairs; and miscellaneous shopping expenditures.

(e) In 2006, improper expenditures from Cassandra's funds and reporting deficiencies were brought to the attention of Ellen and Scott H., with the involvement of their counsel. The guardians/trustees acknowledged their errors and committed to not repeating them, and yet the exact same malfeasance reoccurred. The nominal responses by Ellen H. during the course of the current inquiry have included her expression of lack of knowledge and understanding about her fiduciary duty to her daughter. This is beyond lacking credibility, and very relevant to the determination made here. It compels a finding of malfeasance, not misfeasance.

(f) Ellen H. abused her discretion, in derogation of her fiduciary duty as trustee of the SNT, when she expended money from Cassandra's financial resources. These payments potentially threaten Cassandra's eligibility for public benefits, and it is clearly not in Cassandra's best interest to have her entitlement to governmental benefits like Medicaid threatened in such a way. Cassandra H. was not the sole or primary beneficiary of the vast majority of the expenditures paid for with Cassandra's financial resources from the period of 2016 through June 2023.

(g) Ellen H. breached her fiduciary duty by using Cassandra's resources in a manner inconsistent with the terms of the SNT and Cassandra's needs as a person under a disability. The receipt and holding of Cassandra's assets in accounts not titled in the name of the guardianship or the trust is similarly a breach of Ellen's fiduciary duty.

(h) Ellen H. was unable to bring forth information or documentation indicating the accountings are accurate and complete or that the funds expended were used for Cassandra's primary or sole benefit. It is clear Ellen H. acted negligently and did not prudently exercise her authority and discretion as trustee or property guardian. Having failed to account properly or act in a prudent manner as fiduciary, Ellen H. is surcharged for her actions and inactions as former trustee of the SNT and guardian of the property of Cassandra. Petitioner has established that a surcharge against Ellen H. in the amount of $450,000 is appropriate.

(i) In rendering this decision, the Court did not find that Ellen H. had failed to fulfill her responsibility as person guardian for Cassandra. That relief was not sought, despite the serious and substantial financial malfeasance evident here, and there is no indication that Ellen should not continue as person guardian for her daughter. The Court also recognized that the travails and challenges of being the parent of a disabled child are immeasurable, beyond the true ken of the undersigned. Nonetheless, fiduciary duty applies.

n. ***Stordahl v. Johnson,* 2024 Cal. App. Unpub. LEXIS 327 (Court of Appeal of California, Second Appellate 2024).** Allegation that account was intended to be held for "certain relatives and other third parties" is not adequate to create an oral trust.

(1) After opening four multiple-party bank accounts with Wells Fargo Clearing Services, LLC dba Wells Fargo Advisors ("Wells Fargo"), Michael Swoope designated his nephew, Richard Swoope, as a joint account holder with express rights of survivorship to each account. In total, the accounts Michael opened held approximately $1.2 million. Michael designated his nephew, Richard, as the joint account holder in the joint tenancy accounts and the pay on death beneficiary in the P.O.D. account. Despite designating Richard as joint account holder or pay on death beneficiary with express rights of survivorship, Michael verbally instructed Richard to hold the funds in trust for certain relatives and other related third parties.

(2) Prior to his death, Michael removed Richard as the joint account holder and pay on death beneficiary and replaced him with Johnson, Michael's close friend. It was alleged that Michael intended the Wells Fargo accounts to be held in trust "for the benefit of certain relatives and other third parties," "specific relatives and third parties," and "certain third parties." Michael allegedly stated these wishes to Johnson, Wells Fargo, and Bryant, a Wells Fargo financial advisor and stockbroker. Tim Stordahl was Michael's grandson and allegedly one of the persons for whom the funds were intended to be held in trust and to whom the funds were to be distributed.

(3) Following Michael's death on February 13, 2018, Johnson took sole ownership of the Wells Fargo accounts. As executor of Michael's estate, Johnson filed several inventories and appraisals of probate assets in Michael's estate. The inventory and appraisals did not list the Wells Fargo accounts.

(4) In October 2019, Johnson filed a petition for approval of settlement in Michael's estate following mediation between Johnson, Johnson's wife, and Michael's children and remaining heirs, Aimee Brennan and John Douglas Swoope. The settlement agreement stated that Johnson had disclosed all assets and liabilities of Michael outside and inside of the estate to all parties. The agreement provided that Johnson was to retain the funds that were held jointly in each Wells Fargo account.

(5) Michael's grandson, Tim Stordahl, commenced this action against Johnson, Wells Fargo, and Sean Bryant, a Wells Fargo financial advisor named on each account, for breaches of fiduciary duty. He alleged Michael created an express oral trust in which Johnson was to hold funds in the Wells Fargo accounts as trustee and, upon Michael's death, was to distribute the funds to "relatives and certain third parties."

(6) Johnson filed a demurrer, as did Wells Fargo and Bryant. Following hearings on both demurrers, the trial court sustained the demurrers without leave to amend. As to Johnson, the court found Stordahl failed to allege the creation of an enforceable trust. Absent an enforceable trust, Stordahl could not maintain either cause of action against Johnson. The court also found Stordahl failed to allege a fiduciary relationship between Stordahl and Wells Fargo/Bryant.

(7) Stordahl appealed and the court of appeals affirmed on the following grounds:

(a) An oral trust in personal property is valid and may be proved by parol evidence. The existence and terms of an oral trust of personal property must be proved by clear and convincing evidence. The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property. To plead an enforceable trust, the plaintiff must allege facts establishing (1) trust intent, (2) res, (3) trust purpose, and (4) an identifiable beneficiary or class of beneficiaries.

(b) To establish an identifiable beneficiary or class of beneficiaries, the plaintiff must plead facts establishing a beneficiary or class thereof that is ascertainable with reasonable certainty or that is sufficiently described. A class of beneficiaries is indefinite if the identity of the individuals comprising its membership cannot be ascertained. Depending on how the complaint pleads an alleged class of beneficiaries, it may be impossible to determine all of the persons who fall within it. In such a situation, the class or group is indefinite. In such a scenario, no trust is created because it is impossible to make any distribution among all of the members of an indefinite class.

(c) Stordahl failed to allege an ascertainable class of beneficiaries, and by extension, an enforceable oral trust. As alleged, Michael advised Johnson to distribute funds held in the Wells Fargo accounts upon his death to "certain relatives and certain third parties outside probate administration," "certain relatives and other third parties," "specific relatives and third parties," and/or "certain third parties." These allegations do not sufficiently identify persons who fall within the intended class, nor do they provide any directives on how to distribute account funds to these people.

(d) The allegations in this case identify neither a particular individual nor a defined group. They simply refer to "certain relatives" and/or "third parties" of which Stordahl may be part.

(e) Had Michael identified Stordahl or other identifiable persons, presumably by now Stordahl would have included that information in his complaint. But he did not do that. Indeed, the inference would be natural and reasonable that his failure arose from the want of facts rather than from lack of skill in stating them.

(f) Without a readily ascertainable class, Stordahl failed to allege an ascertainable class of beneficiaries, and by extension, an enforceable oral trust. As alleged, Michael advised Johnson to distribute funds held in the Wells Fargo accounts upon his death to "certain relatives and certain third parties outside probate administration," "certain relatives and other third parties," "specific relatives and third parties," and/or "certain third parties." Stordahl failed to allege an enforceable oral trust, and therefore failed to allege facts supporting a fiduciary relationship between Johnson as trustee and Stordahl as beneficiary. Consequently, any funds held in the Wells Fargo accounts belonged to Johnson through his rights of survivorship.

(g) Because Stordahl has not stated a cause of action for breach of fiduciary duty as to Johnson, he has also failed to state a cause of action for aiding and abetting a breach of any duty. Stordahl identifies no allegation establishing any relationship, fiduciary or otherwise, between himself and Wells Fargo or Bryant. Bereft of any fiduciary relationship, Wells Fargo and Bryant owed him no fiduciary duty.

(h) Stordahl may not litigate a breach of fiduciary duty claim on behalf of Michael. Stordahl does not allege any fact demonstrating more than an ordinary financial advisor-client relationship between Wells Fargo and/or Bryant on the one hand and Michael on the other. As the trial court aptly noted, any obligation Wells Fargo/Bryant owed Michael ended with the disbursement of funds to Johnson under each contract of deposit.

o. ***In re Est. of Brockbank,* 2024 MT 205N (Supreme Court of Montana 2024).** Self-deleting text messages sent on Wire are not a valid will.

(1) On January 8, 2022, Darcy Brockbank ("Brockbank") separately sent three individual text messages, each nearly identical in content except for changes in recipient names, to Peeti Karnasuta ("Karnasuta"), Ted Tenold ("Tenold"), and David Holden ("Holden"). Brockbank used the Wire secured text messaging application ("Wire") to communicate as he was very

"security minded." Brockbank identified himself on Wire by the username "DBK" and a picture of a motorcycle. Wire automatically deletes messages unless the user changes the default setting, which Brockbank did not. Holden and Tenold did not save the message. Karnasuta took a screenshot of the text message before it deleted because the message "seemed a little out of the ordinary." Brockbank did not direct Karnasuta to do so. In the text message saved by Karnasuta, Brockbank wrote he was "touching up [his] will" and that ownership of his sword company and the inventory of swords, located in Montana, "is going to go" to Karnasuta, Holden, and Tenold.

(2) Brockbank was visiting Kyiv, Ukraine, and experiencing significant health problems when he sent the text messages. On February 24, 2022, Brockbank died abroad.

(3) Tenold petitioned to have the screenshot of the text message taken by Karnasuta entered into probate as a testamentary. The parties agreed that the text message did not meet the requirements of either a duly executed or holographic will. Instead, the dispute concerned whether Brockbank intended the text message to constitute a will under § 72-2-523, MCA. The District Court determined that the text message did not demonstrate the appropriate intent to become an operative testamentary document. Tenold appealed and the Montana Supreme Court affirmed on the following grounds:

(a) A writing not in compliance with the requirements of a duly executed will, or the requirements of a holographic will, may nonetheless be treated as a valid will if the proponent establishes by clear and convincing evidence that the decedent intended the writing to constitute the decedent's will. Whether sufficient testamentary intent is present in an alleged will should be determined by first looking to the writing itself. If the writing contains no clear indication of intent, surrounding circumstances may be considered. Under no circumstance, however, may extrinsic evidence be utilized to manufacture testamentary intent where the alleged testamentary document contains no indication of an intent by the testator to make a disposition of property effective on death.

(b) The District Court correctly concluded that the text message did not demonstrate the requisite intent to be a testamentary device. Brockbank's text message did not contain a clear indication of intent. The language of the text message claimed that Brockbank was "touching up [his] will" and that the sword business was "going to go" to the three friends. Additionally, he neither signed the text message nor appended his name at all. The message came from Brockbank's Wire account where he only identified himself by the username "DBK" and a picture of a motorcycle. The plain language of the text message appears to inform the recipients that Brockbank desired to modify his will, but the record contains no evidence he did so prior to his demise.

(c) Beyond the language of the text message, the medium in which Brockbank sent the text further undermines Tenold's claim: Brockbank had not changed the settings to prevent the automatic deletion of the message and he provided no instructions to his friends to save the contents of the message. Karnasuta created a screenshot of his own volition. This suggests that the message itself was meant to be informative rather than testamentary.

p. ***In re Est. of Samuel,* 2024 NYLJ LEXIS 202 (Surrogate's Court of New York, Kings County 2024).** Attorney sanctioned for filing in will contest litigation a pleading created through Generative Artificial Intelligence that contained multiple citations to fictional cases, and not checking those citations in Lexis or Westlaw.

(1) Phylliscita Ismay Samuel ("Decedent" or "Phylliscita") executed a purported prior will on May 11, 2012 (the "2012 instrument"). In 2014, Phylliscita was the subject of a guardianship proceeding. By order dated September 8, 2014, Phylliscita was adjudicated incapacitated and the court appointed Morgan Samuel ("Samuel") as her guardian of the person and property.

Thereafter, on October 30, 2014, the Decedent executed a purported 2014 will dated October 30, 2014 ("the 2014 instrument").

(2) Decedent died on April 23, 2016. The 2014 instrument was filed with the Court, along with her death certificate and an affidavit of domicile. A petition for the denial of the petition for probate and to grant letters of administration, with supporting documents, was filed by Leopold J. Osborne ("Osborne"), by his attorney. Thereafter, a Notice of Appearance was filed by Counsel to Morgan Samuel, along with a petition seeking probate of the 2014 instrument and letters testamentary issued to Samuel.

(3) Osborne moved to dismiss the cross-petition and for summary judgment. In addition to summary judgment, Osborne sought dismissal of Samuel's petition and denial of the propounded 2014 instrument, alleging that the Decedent lacked capacity at the time of execution, and that the instrument was procured as a result of fraud, duress and undue influence by Samuel and others.

(4) A court conference was scheduled for May 18, 2021. Another Court conference was held on September 12, 2023, at which time Osborne's attorney was given a final opportunity to file a reply and another conference was scheduled for October 11, 2023 at 3:00 pm. On October 11, 2023 at 9:16 am, Osborne's attorney emailed the Court to inquire whether the opposition to his motion could be uploaded and he indicated that he would "file a response within 7 days." Samuel's attorney responded at 9:28 am that he objected to an extension of time for the filing of a reply, asserting that "an 11th hour extension, for no justifiable reason, would be highly inappropriate and prejudicial." Samuel's counsel sent another email at 9:36 am attaching verification that the opposition papers had been sent to Osborne's attorney no less than four times. At 10:10 am, the Court responded that the request for an extension of time would be discussed at the 3:00 conference. At 2:20 pm, Osborne's attorney emailed the Court and Samuel's attorney a copy of his reply, the Attorney Affirmation in Response to Opposition to Summary Judgment, which he also uploaded to NYSCEF. The conference was conducted as scheduled, and Samuel's attorney requested an opportunity to review the reply and respond as needed. This request was granted. On October 18, 2023, Samuel's attorney emailed the Court and Osborne's attorney with a copy of an Affirmation in Furtherance of the Parties' October 11, 2023 Court Conference, which raised the concern that the October 11, 2023 reply papers contained fake caselaw resulting from Artificial Intelligence hallucinations.

(5) The surrogate denied the motion for summary judgment to dismiss the cross-petition and deny probate in its entirety, struck the Attorney Affirmation in Response to Opposition to Summary Judgment from the record, and scheduled a hearing to address the attorney's conduct, on the following grounds:

  (a) The Court was compelled to address the allegation that Osborne's attorney submitted reply papers which contain fictional and/or erroneous citations as a result of his reliance on a website which contained information created by Generative Artificial Intelligence ("AI").

  (b) Even without definitive proof that AI was used to prepare the reply, or an admission by Osborne's counsel, or in fact any acknowledgment by him of the allegations raised by Samuel's attorney whatsoever, it was evident that five of the six cases cited in his reply are either erroneous or nonexistent.

  (c) Although the court is dubious about using AI to prepare legal documents, it is not necessarily the use of AI in and of itself that causes such offense and concern, but rather the attorney's failure to review the sources produced by AI without proper examination and scrutiny. In his haste to submit a response, Osborne's attorney took no steps to ensure that the information and citations that he was presenting to the Court were legitimate and factual, and he certified and affirmed under penalty of perjury that "to the best of his knowledge, information and belief, formed after inquiry reasonable under the circumstances, that the presentation of the paper or the contentions herein are not frivolous as defined in Subsection C of 130-1.1 of the Rules of the Chief Administrator of the State of New York."

(d) A simple Lexis search of the cases cited, which takes mere seconds, shows that the cases and citations contained within the response are incorrect or fake and non-existent. Had counsel taken the minimal time and effort needed to cross-check this information, he would have realized this as well.

(e) Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system.

(f) The penalty for committing this fraud upon the Court should include striking the pleading from the record and the scheduling of an appearance before the Court to address whether the imposition of economic sanctions is warranted. These consequences are similar to the penalties imposed by an Ohio court upon violation of the Artificial Intelligence Provision established its Standing Order Governing Civil Cases, which prohibits the use of AI in the preparation of any filing submitted to the court.

(g) The New York Code of Rules and Regulations ("NYCRR") states that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

(h) Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(i) Counsel's conduct was frivolous since his reply asserts material factual statements regarding the caselaw and court holdings that are false. He had ample time available to investigate the legal and factual bases of the contents of his reply, as over three years had elapsed since the filing of his own motion and Samuel's opposition in March 2020. Furthermore, Osborne's attorney was explicitly provided an additional and final opportunity to file the reply during the Court conference held on September 12, 2023. Lastly, as previously noted, it should have been apparent to counsel that his research was completely erroneous by simply checking the citations on legal search engines such as Lexis or Westlaw.

(j) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct.

(k) Therefore, the Court would be well within its discretion to sanction Osborne's counsel for such conduct, and the appropriateness of sanctions will be addressed at a date to be set by the Court.

(l) The crux of Osborne's argument that Phylliscita lacked capacity at the time of execution of her will is because she had been found to be incapacitated and was appointed a guardian. However, capacity in the context of guardianship proceeding is much different from the testamentary capacity needed to execute a Will. It is an incorrect reading of the law to assert that "as a result" of the appointment of a guardian, the Decedent lacked testamentary capacity with respect to due execution of the 2014 instrument. Osborne has not established a prima facie showing of entitlement to judgment as a matter of law, and that triable issues of material fact exist in this instance as to testamentary capacity. Thus, the motion for summary judgment on the grounds that the Decedent lacked capacity at the time of execution must be denied.

(m) A guardian appointed by the Supreme Court is not automatically deemed to be in an adversarial role or assumed to unduly influence its ward. While the order appointing guardian conveyed certain authority to the guardian, it did not prohibit Phylliscita from executing a will or revoking a prior will. By faulting the guardian for not requesting authority from the Supreme Court to allow Phylliscita to execute a will, and alleging that the guardian acted outside the scope of his appointment, Osborne attempts to retroactively impose a burden upon the guardian which does not exist under the law.

(n) Osborne suggested that undue influence "is abundantly clear" since the 2014 instrument named Samuel as executor and beneficiary, and by that time he was also acting as her court-appointed guardian. However, even "hounding" a testator to make a will, or exercising control over a testator's activities, do not necessarily rise to the level of undue influence. Osborne has argued that the attorney who drafted Phylliscita's 2014 instrument was also Samuel's attorney in the guardianship proceeding, and she could not have believed Decedent to be of sound mind or knowledgeable of the extent of her bounty or relations. This is an issue of fact for consideration by a jury.

(o) Osborne has failed to establish a prima facie showing of entitlement to judgment as a matter of law, and that triable issues of material fact exist as to the question of undue influence.

q. ***Kennedy v. Garcia,* 2024 U.S. Dist. LEXIS 152782 (United States District Court for the Northern District of Texas 2024).** Claims by alleged child of John F. Kennedy and Marilyn Monroe against Dallas police chief, Director of the Secret Service, and Chief of the Texas Rangers dismissed as fanciful, fantastic, and delusional.

(1) Plaintiffs John Fitzgerald Kennedy (he changed his name from John Ruben Burton to John Fitzgerald Kennedy in 1994) and Hilda Tobias Kennedy, a married couple, filed their pro se Complaint against Defendants Eddie Garcia in his official capacity as Dallas Police Department Chief, Michel Moore in his official capacity as Los Angeles Police Chief, Kimberly Cheatle in her official capacity as Director of the Secret Service, Paul Landis, former Secret Service agent and whistleblower, and Jason Taylor, Chief of the Texas Rangers. This was not Mr. Kennedy's first time in federal court. The Ninth and Second Circuits have both rejected similar claims related to his alleged parentage.

(2) The Kennedys allege that Mr. Kennedy is the child of former President John F. Kennedy and Marilyn Monroe, but that he was kidnapped at a young age, given a false birth certificate, and subjected to physical and sexual abuse. The Kennedys allege that President Kennedy provided for Mr. Kennedy's future care with references in his will to "child of mine" and an Executive Order defining "child" as "a legitimate or an illegitimate child from the date of its conception." The Kennedys state that "Plaintiff brings this action pursuant to Section I of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§

2201-02, for violations of the First and Fourteenth Amendments to the United States Constitution."

(3) The Kennedys request that the Court issue several declaratory judgments, including a declaratory judgment "that I, plaintiff John Fitzgerald Kennedy am the child of President John Fitzgerald Kennedy by DNA testing done by TEXAS RANGERS as court officers or otherwise"; "that I, the plaintiff, John Fitzgerald Kennedy was kidnapping abused, tortured, molestation [sic], suffered intentional humiliation"; "that President John F. Kennedy's Executive Order 11098 is a reflection of his personal views of the obligations and what is considered a child"; and "that Paul Landis, and all other defendants negligently failed in their legal obligations to President John F. Kennedy and his son plaintiff Mr. Kennedy." The Kennedys also seek permanent injunctions "mandating the reopening of the death[s]" of President John Kennedy, Marilyn Monroe, and Linda Procter, id., as well as permanent injunctions "mandating the Secret Service and their agents enforce them to protect the rights of a child of the president both legitimate and illegitimate en toto" and "prohibiting Defendants and their agents from infringing on the rights/and or failing to enforce the rights of a child en toto."

(4) Defendant Cheatle and Defendant Garcia filed motions to dismiss, which the magistrate recommended granting to these and all other defendants, on the following grounds:

(a) In this case, the Kennedys assert claims for relief under Section 1983 for violations of the First and Fourteenth Amendments. But instead of factual allegations explaining how the Defendants' actions violated their constitutional rights, most of the Complaint details, in a meandering and fanciful fashion, Mr. Kennedy's belief that his parents are John F. Kennedy and Marilyn Monroe, his childhood memories of being kidnapped and suffering physical and sexual abuse, his Jewish heritage, his prior lawsuit against the trustees of President Kennedy's will, and what he views as the negligence of the Defendants in investigating President Kennedy's assassination. Indeed, Mr. Kennedy does not identify how the First or Fourteenth Amendment applies to the alleged harm he has suffered, nor does the Amended Complaint include any facts whatsoever connecting the individual Defendants to any alleged injury. The Amended Complaint is near silent as to injuries suffered by Mrs. Kennedy, except for a statement that "I, your plaintiff, Hilda Tobias Kennedy due to the many injuries request expedited DNA testing by the Texas Rangers and trial for my husband and me."

(b) The Court has little difficulty concluding that Plaintiffs' claims are patently frivolous and should be dismissed for lack of subject matter jurisdiction. Alternatively, the Court concludes that the facts set forth in the Plaintiffs' complaint are clearly baseless because they are fanciful, fantastic, or delusional. Plaintiffs have therefore failed to state a claim for relief against any of the Defendants, and their claims should be dismissed.

(c) This conclusion that Plaintiffs' claims are patently frivolous pretermits the necessity to consider any of the Moving Defendants' other arguments. However, the Court notes that the Kennedys' claims against Cheatle—named in her official capacity as director of the United States Secret Service—are also barred by sovereign immunity. Absent a waiver of sovereign immunity or consent to be sued, any suit brought against the United States or any federal agency must be dismissed for lack of subject matter jurisdiction.

(d) Defendants Landis, Moore, and Taylor have not appeared in this lawsuit. After encountering difficulty properly serving Landis and Moore, the Kennedys moved to serve Landis and Moore by alternate means. But regardless of whether the Kennedys have properly served Taylor, and even without Landis and Moore appearing in this lawsuit, the claims against these Defendants should be dismissed alongside the claims against the Moving Defendants as frivolous. Here, the Kennedys assert the same claims against Landis, Moore, and Taylor as against Garcia and Cheatle, and the analysis is not unique to any Defendant. Therefore, the District Judge should dismiss the Kennedys' claims against Landis, Moore, and Taylor along with their claims against Garcia and Cheatle.

(e) The Kennedys have already availed themselves of one opportunity to amend their pleading. And even based on the most deferential review of the Kennedys' Amended Complaint, it is highly unlikely that, given the opportunity, they could allege viable legal claims based on the factual basis of their complaint. Therefore, the Court should conclude that granting leave to amend under these circumstances would be futile and cause needless delay. The District Judge should DENY Plaintiffs' request for leave to amend.