The Past Year's Most Significant, Curious, or Downright Fascinating Fiduciary Cases (2018 Edition)*

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

Updated December 31, 2018

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THE PAST YEAR'S MOST SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES (20187 Edition)*

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I. Elder Abuse, Powers of Attorney, Guardianship, Special Needs & Disability

A. *Knox v. Vanguard Group, Inc.*, 2018 U.S. Dist. LEXIS 1993 (Mass. 2018). Claims dismissed that brokerage firm should be liable for additional taxes with respect to an IRA, where it refused to accept a bare durable general power of attorney and insisted on completion of its own forms.

1. In 1999, Kenneth opened an IRA with Vanguard and signed the account opening agreement in which he approved Vanguard's standard agreement terms. Those terms provided that Vanguard could amend the agreement and that the client would be deemed to consent to any amendment if the client did not object within 30 days of notice of the amendment. Kenneth named his wife Margaret as beneficiary of the IRA and died in 2012. The IRA had assets of $45,000 at that time. At that time, the agreement provided that: (a) a beneficiary's request for distributions must be made in a form and manner acceptable to Vanguard; (b) Vanguard would not be responsible to make any distributions until it receives directions in a form and manner acceptable to Vanguard; and (c) that the agreement was governed by Pennsylvania law. Vanguard generally requires that distribution requests be executed on its own forms, including special forms when a person is acting as agent. Vanguard will accept externally drafted powers of attorney on a transaction by transaction basis, subject to its determination that the agent has authority to act, and in some instances, that a power of attorney be certified independently (such as by an attorney). Those policies were established to protect itself and its account holders from potential fraud.

2. Margaret named her son, Peter (a Massachusetts lawyer), as agent under a durable general power of attorney signed in 2009. Peter sent the DGPOA to Vanguard in 2009, they sent him their standard agent authorization form, but Peter refused to sign it and believed the DGPOA was sufficient.

3. In 2012 after his father's death, Peter called Vanguard to transfer the IRA to an inherited IRA in his mother's name. Vanguard resent him the agent authorization form, which he declined to execute. Vanguard sent an IRA opening package to Margaret at her address of record (Peter's address), and Peter signed Margaret's name and submitted the papers without indicating he had signed as agent. He named himself and his sister as beneficiaries on the account. The paperwork he signed for Margaret provided that Margaret accepted the standard Vanguard account terms (described above). Peter made prohibited handwritten changes to Vanguard's forms, and when Vanguard called to say the changes were unclear, Peter demanded that the account be closed and the funds moved to Fidelity. Peter submitted email trade instructions to Vanguard and attached the DGPOA, but still refused to provide the requested certification. Vanguard issued a check but stopped payment on the check when its fraud prevention department flagged the transaction for

lacking certification and for the agent naming himself on the account. Vanguard renewed its request for third party certification, Peter admitted he had signed her name to the forms, and Vanguard refused to accept his signature on the forms without Margaret designating him as agent on its forms. Vanguard explained that an externally prepared DPOA could be used but it needed to have a certification for each transaction that it is still valid. Peter repeated his demands for action and Vanguard repeated its request for the forms. Peter never informed Vanguard about his concerns about his mother's incapacity. While he had Margaret sign a demand letter, he never had her sign the Vanguard standard forms.

4. Peter sued Vanguard in federal court alleging breach of contract, breach of the covenant of good faith and fair dealing, negligence, breach of fiduciary duty, violation of the Massachusetts consumer fraud statute, and unfair trade practices under Pennsylvania law. He alleged that the delay caused Margaret to incur the tax on the funds when she could not file jointly with her deceased husband and use medical expense deductions, increasing her tax burden by $25,000, and she incurred penalties of $13,000 for failure to take required minimum distributions from the IRA.

5. The federal district court granted Vanguard's motion to dismiss all of the claims on the following grounds:

   a. A binding contract between the parties was in place at all times. Peter executed an agreement for Margaret agreeing to the Vanguard account terms. He cannot claim he did not have authority to sign as her agent, and at the same time sue Vanguard for not recognizing his authority as agent. Margaret was also a third-party beneficiary of the contract signed by her husband when he opened the IRA and is bound by the agreement. The argument that no contract exists between Vanguard and Margaret would lead to absurd and unworkable results – some portion of its customers die every day, and if contracts evaporated on the death of the account owner there would be chaos and ample opportunities for fraud and other misconduct.

   b. The contract provided that: (a) a beneficiary's request for distributions must be made in a form and manner acceptable to Vanguard; (b) Vanguard would not be responsible to make any distributions until it receives directions in a form and manner acceptable to Vanguard; and (c) that the agreement was governed by Pennsylvania law. By the terms of the contract, Vanguard was not required to accept a DGPOA valid under state law and could establish reasonable procedures to ensure that transactions were not fraudulent and were made in accordance with the account owner's intent. Vanguard had such a policy, Peter acted in direct contravention of Vanguard's repeated instructions, and failed to submit a distribution request in a manner and form acceptable to Vanguard. The Vanguard conditions were clearly reasonable and did not breach the contact. The issue is not (a) whether Vanguard provided good customer service to Peter or could have found a more amicable way to resolve the situation or (b) whether Peter brought the problem on himself by his own stubbornness and inflexibility. The issue is simply whether Vanguard breached its account agreement terms, and it did not.

c. It was reasonable for Vanguard to insist that distribution requests include basic protections against fraud and self-dealing. Once Peter signed his mother's name without indicating it was his signature, coupled with naming himself as beneficiary of his mother's IRA, Vanguard had a specific basis to suspect potential fraud and could reasonably refuse to relax its requirements.

d. Vanguard was a mere custodian for Margaret and did not owe her fiduciary duties.

e. The account agreement provides that it is governed under Pennsylvania law and therefore Peter could not sue under Massachusetts statutes. Further, choice of law principles would result in the application of Ohio law (where Margaret, the real party in interest, resides) or Pennsylvania law (where the allegedly wrongful conduct occurred), and not Massachusetts law (where Peter resided).

f. Vanguard's conduct could not be considered unfair or deceptive. Vanguard repeatedly informed Peter about its policies and procedures and did not breach its contract. Stopping payment on a check was not a "trade" under consumer protection laws, and by declining Peter's instructions it did not "seize" the accounts. The account grew from $45,000 to $69,000 by the time the assets were withdrawn.

B. *In re Guardianship of Robbins,* 2018 Ind. App. LEXIS 262 (2018). Court cannot refuse funding of self-settled special needs trust due to its disagreement with federal and state policy for severely disabled persons.

1. Timothy's car was hit by a semi-truck, resulting in his being ejected from his car and receiving a traumatic, catastrophic, permanent and degenerative brain injury. His father was appointed as guardian, and following an $18.5 million tort award, settled the tort lawsuit for $17.75 million. The parties agreed that, after payment of legal fees, reimbursement of Medicaid for already incurred medical costs, and funding an annuity for Timothy's benefit, the amount of $6.75 million would be placed into a self-settled special needs trust for Timothy, with the requisite Medicaid and SSI reimbursement provision upon Timothy's death and before any remaining assets would pass to his heirs.

2. The parties presented the settlement to the court for approval. The court held that only $1 million could go into the trust, and the rest would be funded directly into the guardianship estate, based on the court's view that: (a) fully funding the trust would shift considerable expenses to the taxpayers; (b) the settlement amount is adequate to provide for his care without public assistance benefits; and (3) the trust is for the benefit of Timothy's heirs. The court stated that it "disagreed with the legislative policy" and that "it's the legal fiction of impoverishment which I'm having trouble buying into when we have 12 million sitting here". The father as guardian brought an uncontested appeal.

3. On appeal, the Indiana Court of Appeals reversed the trial court on the following grounds:

   a. Special needs trusts are a creation of, and approved by, both federal and state legislation, and both federal and state law permit disabled persons to shield assets for purposes of determining Medicaid or SSI eligibility, so

long as the trust provides for paying back the state for the total benefits paid upon the death of the disabled person. This serves the public policies of allowing disabled persons to obtain services not paid for by Medicaid and eliminates the need for a disabled person to spend down resources to qualify for benefits.

b. The trial court may have a genuine disagreement with the policy decisions of the state and federal legislatures but is still bound to abide by them. Here there are no constitutional concerns with those policy choices. It is a mistake of law to hold the trust is for the benefit of Timothy's heirs, where the trust is for his exclusive lifetime benefit, but the state has a priority right to reimbursement ahead of any interest of any heirs.

C. *Colburn v. Cooper,* 2018 Ohio 5190 (2018). Daughter has standing under UPOAA to petition court for accounting of acts of agent under durable power of attorney, even after the death of the principal.

1. Cheryl alleged that her brother mismanaged their mother's assets when acting as her agent under a power of attorney from 2008 until 2016. She petitioned the court to compel him to provide an accounting (she brought other claims that were dismissed but did not pursue them on appeal). Their mother was placed into guardianship in 2016.

2. The court dismissed the claim and Cheryl appealed. Their mother died while the appeal was pending. On appeal, the court of appeals reversed on the following grounds:

   a. The Ohio UPOAA grants standing to petition the court for an accounting to persons including "presumptive heirs" of the principal and the beneficiaries of the principal's estate plan. The "presumptive heir" category does not apply only after the principal's death, because only a living person has "presumptive" heirs, and a deceased person has only actual heirs. Cheryl was also named as a beneficiary under her mother's will. There is nothing to support the position that a principal must be deceased before a presumptive heir or designated beneficiary has the right to seek review of the agent's conduct.

   b. The statute that lists the parties to whom the agent is required to provide information upon request (i.e. the principal, the guardian or conservator, a governmental agency, or the principal's personal representative) does not require a different result by excluding the presumptive heirs and beneficiaries. That statute provides that an agent must provide accountings when ordered by the court, and Cheryl has standing to ask the court to compel the accounting. If the court finds merit in her request, it will issue an order and the agent is required to comply.

   c. The mother's death does not render Cheryl's petition for an accounting moot. While the UPOAA provides for disclosure to the personal representative upon the principal's passing, this provision is not exclusive. While no longer a presumptive heir, Cheryl is still a beneficiary of the estate plan and there is nothing in the statute that prevents the existence of two viable alternative means of seeking an accounting. Judicial prudence and economy favor ruling on the merits of the case.

II. State Nexus & Taxation

A. *Fielding v. Commissioner of Revenue,* File Nos. 8911-8914-R (Minnesota Tax Court 2017); A17-1177 (Minn. 2018). Minnesota statute that taxes worldwide income of an irrevocable non-grantor trust based solely on the domicile of the grantor violates the due process clauses of the Minnesota and U.S. constitutions.

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

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

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

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

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

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

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

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

6. On appeal, the Minnesota Supreme Court (with one dissenting justice) affirmed on the following grounds:

   a. Looking at all relevant facts about the contacts between the taxpayer and the state, the income attributed to the state, and the benefits the taxpayer received from the state, the trusts lack sufficient relevant contacts with the state during the tax year to be taxed on all sources of income as a resident.

   b. The grantor's connections to the state are not relevant. A trust is its own legal entity separate from the grantor and beneficiaries, and the relevant connections are those between the state and the trustee. Here the trusts are the taxpayer and the grantor did not retain any control over the trust assets. For similar reasons, the residency of a single beneficiary in the state does not justify taxation.

   c. The drafting of the trusts by a Minnesota law firm is not sufficient to support taxation where the firm represented the grantor and not the trustee. The firm's storage of the original trust instruments in the state is not to be awarded legal significance and was likely nothing more than a service or convenience to the grantor.

   d. The trusts did not own physical property in the state, and ownership of a Minnesota S corporation interest is an intangible asset held outside the state and not adequate to support taxation.

   e. Contacts with the state before the tax year at issue cannot justify taxation. Contacts must be assessed in the tax year at issue, and it is only contacts in the tax year that can establish a rational relationship to the taxing state. Allowing the state to look to historical contacts outside the tax year would create uncertainty for taxpayers and be unworkable, because there is no reasonable way of determining when past contacts have sufficiently decayed such that they no longer support taxation.

f. Here, all trust activities occurred outside the state in the tax year, and the trustees never visited the state for trust matters. The trustees, and not the grantor, made trust decisions including the decision to sell the stock in the Minnesota S Corporation, and those decisions were made outside the state.

g. The choice of Minnesota substantive law to govern the trusts is not enough to allow taxation. The state laws protect residents and non-resident alike, and the court will not demand that every party who chooses to look to state law (without invoking the jurisdiction of its courts) must pay resident income tax for the privilege, and (i) these inter vivos trusts have not been probated in the courts and have no existing relationship to the courts and (ii) the trustees were never plaintiffs or defendants in any suits in the state as trustees.

h. The state lacks sufficient contacts with the trusts to support taxation of the trusts as residents. The state cannot fairly ask the trusts to pay taxes as residents in return for the mere existence of Minnesota law and the physical storage of a trust instrument in the state, and therefore the state taxing statute is unconstitutional as applied to the trusts.

7. Minnesota petitioned the U.S. Supreme Court to grant *certiorari* in the case.

B. *Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of* Revenue, 2015 NCBC LEXIS 39 (2015); 2016 N.C. App. LEXIS 715 (July 5, 2016); 2016 WL 7189950 (2016); 2018 B.C. LEXIS 431 (2018). Taxation of wholly discretionary trust based on residence of beneficiaries, without other contacts, violates the Due Process and Commerce Clauses. The North Carolina Court of Appeals affirmed the decision. The state Supreme Court also affirmed the decision.

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

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

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

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

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

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

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

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

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

5. The Commerce Clause issues were not addressed on appeal.

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

7. On appeal, the North Carolina Supreme Court (over one dissenting Justice) affirmed the taxpayer victory, and held that the North Carolina statute violated the Due Process Clause *as applied* to the taxpayer (and not on its face) on the following grounds:

a. For tax purposes, a trust has a separate existence and is a separate legal entity. Therefore, the trust's minimum contacts with the taxing state cannot be established by contacts with the state by third parties (the beneficiaries). Here, the beneficiaries reaped the benefits and protections of North Carolina law by residing there, but due process is not satisfied by their contacts with the state.

b. The trustee's contacts with the beneficiaries are not adequate to support taxation because (i) meeting with the beneficiaries occurred outside the state; (ii) any loans made to the beneficiaries happened outside the tax year at issue; and (iii) the U.S. Supreme Court has directed that minimum contacts analysis looks to contacts with the taxing state itself, and not contacts with persons who reside in the taxing state. Mere contact with a North Carolina beneficiary is not purposefully availing itself of the benefits and protections offered by the state.

c. To satisfy due process considerations, there must be minimum contacts between the trust and the taxing state such that the trust enjoys the benefits and protections of the state. Imposing tax solely based on the beneficiaries availing themselves of those protections would violate due process guarantees, and therefore the state taxing statute is unconstitutional as applied to the trust.

8. North Carolina petitioned the U.S. Supreme Court to grant *certiorari* in the case, which was granted by the U.S. Supreme Court on January 12, 2019.

C. *Hansjoerg Wyss 2004 Descendant's Trust*, Docket 1608934 (2017). The Pennsylvania Board of Finance and Revenue reversed the Board of Appeals, and ordered a refund of 2012 income taxes imposed on a trust created by a Pennsylvania settlor as a Pennsylvania resident trust, on the grounds that: (1) the trust was administered outside the state, the books and records were out of state, the trust did not have any in-state assets during the tax year, and the trust had no in-state beneficiaries; (2) taxing the trust based on the domicile of the settlor is constitutionally prohibited under McNeil v. Commonwealth, 67 A. 3d 185 (Pa. Commw. 2013); (3) the presence of two of the four co-trustees in the state cannot support taxation because the tax department regulations state that "the residence of the fiduciary and the beneficiaries shall be immaterial"; (4) simply retaining legal and accounting services in the state cannot provide sufficient nexus for taxation; and (5) the Board is constrained by McNeil and the failures of the legislature and tax department to act since the case was decided, causing a loss of funds to the public fisc.

D. *Paula Trust v. California Franchise Tax Board*, Case No. CGC-16-556126 (2018). The San Francisco Superior Court granted summary judgment in favor of a trust reversing The California Franchise Tax Board, and ordered that 50% of the income taxes paid by the trust on the sale of trust owned business assets (that were also located in California) in the tax year be refunded, on the grounds that: (1) the trust had one California co-trustee and one out of state co-trustee, and any in-state beneficiaries were contingent; (2) Cal. Rev. & Tax Code Section 17743 apportions California trust income based on the number of California versus non-California fiduciaries; and (3) while California law also apportions income based on California non-contingent beneficiaries, none were present. The California Franchise Tax Board filed a notice of appeal of the ruling.

E. *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018). A divided United States Supreme Court (in a 5-4 decision) overruled its precedent in National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967) and Quill Corp. v. North Dakota, 504 U.S. 298 (1992), and held that South Dakota could within constitutional Commerce Clause limits require out-of-state sellers without a physical presence in the state to collect sales tax on internet sales inside the state, on the grounds that: (1) the physical presence test in Quill is not a necessary interpretation of the "substantial nexus" test under the Commerce Clause jurisprudence, in modern commercial life physical presence is not necessary to create a substantial nexus, and physical presence is a poor proxy for the compliance costs of companies that do business in multiple states; (2) Quill creates market distortions; (3) Quill imposes an arbitrary distinction that modern precedent disavows, and the court should instead ground its jurisprudence on functional marketplace dynamics; (4) it is not the purpose of the Commerce Clause to relieve companies engaged in interstate commerce from their just share of the state tax burden, or to create market distortions that put businesses with a physical presence at a competitive disadvantage to remote sellers, create a judicial tax shelter for remote businesses, and incentivize companies to avoid a physical presence in the state; and (5) the physical presence rule is an extraordinary judicial imposition on state taxing authority and does harm to federalism, state sovereign power, and free market principles, has become an increasingly more egregious error since it was decided as a result of the Internet revolution, and is therefore unsound and incorrect and overruled.

F. *Comptroller of the Treasury v.* Taylor, 2018 Md. App. LEXIS 717 (2018). Maryland may not impose state death tax on QTIP trust at death of surviving spouse.

1. Under his will and upon his death in Michigan in 1989, John created a marital trust for his wife Margaret funded with $2.3 million. A QTIP election was made for the trust on a timely filed estate tax return. Margaret moved to Maryland in 1993 and died testate in 2013. At the time of her death, the trust had a value of $4.1 million.

2. Margaret's executor included the trust on her federal estate tax return but excluded it from her Maryland estate tax return. The Maryland comptroller disallowed the exclusion, and imposed tax, interest, and penalties against the estate (for a total of $440,000). On petition for review by the executor, the Maryland tax court affirmed the tax on the grounds that the tax provisions link the federal and Maryland taxable estates, and affirmed the interest assessment, but reversed the imposition of penalties. The executor appealed.

3. On appeal, the Maryland Court of Special Appeals reversed the tax court and held that Maryland could not impose its estate tax on the trust on the following grounds:

    a. The Maryland tax code imposes its state estate tax on the transfer of the Maryland estate of a Maryland decedent. The Maryland estate is defined as the "federal gross estate", but the tax code further provides that the Maryland estate is "the part of an estate that [Maryland] has the power to subject to the Maryland estate tax". Another tax code provision provides

that "for purposes of calculating Maryland estate tax, a decedent shall be deemed to have had a qualifying income interest for life under [IRC Section 2044(a)(2)] with regard to any property for which a marital deduction [QTIP] election was made for the decedent's predeceased spouse on a timely filed Maryland estate tax return". Other provisions recognize a federal QTIP election and also allow a Maryland state only QTIP election.

b. The court will not extend a tax statute by implication beyond the clear import of the text. In cases of doubt, tax statutes are construed most strongly against the government and in favor of the citizen. The statutes contemplate the possibility that there would be property in the estate of a Maryland decedent that the state did not have the authority to tax. The statute explicitly delineates that an election be made on a timely filed Maryland estate tax return. No such election exists here, and the court will not ignore that statutory requirement.

c. The assets were not transferred as part of Margaret's estate. Trusts vest at the time of the testator's death, absent trust terms to the contrary. The federal QTIP election did not miraculously convert these trust assets so that they become her property. She started receiving income in Michigan, and she paid Maryland income tax on all income received after she moved to Maryland. She had no legal right to control the entire value of the trust and did not have power of disposition over its assets. Her terminable interest in the trust did not transfer at her death, it terminated. The QTIP fiction that includes the assets in the estate of the surviving spouse does not prevent the transfer of legal title to the trust, and therefore there was no transfer by her at her death.

G. *Estate of Evelyn Seiden*, 2018 N.Y. Misc. LEXIS 4477 (New York County Surrogate 2018). New York may not impose state death tax on QTIP trust at death of surviving spouse.

1. Jules died in 2010 during the year of temporary estate tax repeal. Under his estate plan, he created a trust for the benefit of his wife, Evelyn. Due to repeal, no federal QTIP election was made for the trust. However, the executor filed a New York estate tax return and made a state QTIP election (and filed a pro forma federal return). A marital deduction was taken against the state estate tax and the state taxing department issued a closing letter accepting the return in 2012.

2. Evelyn died in 2014. Her executor excluded the trust assets from her estate on the basis that no federal marital deduction was claimed or allowed in the husband's estate that would require inclusion under IRC Section 2044 (and New York defines its gross estate by reference to the federal gross estate). The IRS issued a closing letter accepting the return as filed. New York disagreed and assessed tax, interest, and penalties in the amount of $529,342.86. The executor appealed the Notice of Deficiency to the surrogate's court.

3. The surrogate vacated the notice of deficiency on the following grounds:

   a. New York law defines the state gross estate by reference to the federal gross estate.

b. The relevant tax law is the tax law in 2014 when Evelyn died, and not in 2010 when the husband died, because it is the tax on the wife's estate that is at issue. In 2014, the state tax law was rewritten to change references to the 1998 federal tax laws (which would not include the temporary repeal) to refer to updated 2014 federal tax law. Under the federal tax law in effect for 2014, no marital deduction was allowed for decedents dying in 2010. Even under the tax prior to 2014, no federal marital deduction was allowed in the husband's estate. To be allowed as a QTIP trust, a federal QTIP election was required. No such election was made, IRC Section 2044 does not apply, the property is not included in the federal gross estate and the property is therefore not included in the state gross estate.

c. A New York Technical Services Bureau Memorandum (stating that a state QTIP election is enough to cause state inclusion) is merely the state taxing department's position and has no legal effect, does not set precedent, and is not legally binding. The memorandum cannot be used to override statutory provisions.

d. The duty of consistency, a form of estoppel, does not apply because the husband's estate did not make an error or omission and the wife's estate is not taking a contrary position. Both estates followed the law in effect at the time of death. The positions were lawful, and there is no authority that the state could have denied the state QTIP election at that time.

e. The executor can rely on the plain language of the statute, without resorting to speculation about what the legislature intended. The legislature has amended the tax law in other ways to take into account the federal changes in the eight years since 2010, but has not acted to change the effect of the repeal on QTIP property in this type of case. Tax statutes are to be strictly construed, with any doubt resolved in favor of the taxpayer.

f. As for the concerns about "opening the tax floodgates", the legislature can still amend the tax law to apply to future estates, trust property might decrease in value or be distributed, or surviving spouses might change domicile to other states.

H. *Estate of Chernowitz,* 2018 N.J. Tax Unpub. LEXIS 63 (2018). Estate failed to rebut the presumption that gift within three years of death is subject to state inheritance taxes.

1. Edith and her husband signed similar wills in 2001, leaving their estates to their surviving spouse and otherwise $500,000 to nephew Richard and the balance to charity. They did not have children. Edith's husband died in 2002, she relocated to a continuing care community closer to Richard, and she regularly attended family events held by Richard. She made annual exclusion gifts and invested heavily in tax-free municipal bonds to reduce income taxes. In 2011, she developed colon cancer, and in 2012 she was found lying in vomit in her apartment. She regularly read the New York Times and the Wall Street Journal, and in 2012 she notified Richard that the federal tax laws were changing and she discussed making a one-time $5 million gift before the end of 2012. She met with a lawyer suggested by Richard who prepared the gift paperwork (he also discussed revising her estate plan but did not sign new documents before her death).

2. On December 18, 2012, Edith signed the gift paperwork at her financial advisor's office, and then spent the balance of the day walking around Manhattan. That day she gave $2.8 million to Richard, $2 million to a trust for his family, and $300,000 to a special needs trust for another nephew that she had previously supported through annual exclusion gifting. In total, she gifted $5.1 million of her total assets that were valued at $18 million. She was 98 at the time.

3. Edith died on October 24, 2014. New Jersey sought to impose its state inheritance tax on the gifted assets as gifts made in contemplation of death. New Jersey law presumes gifts made within three years of death that are of a material part of the estate to be made in contemplation of death, but the presumption is rebuttable (with the estate having the burden of persuasion by a preponderance of the evidence, and upon consideration of factors set out by the state supreme court). On competing motions for summary judgment, the court granted summary judgment in favor of New Jersey and against the estate on the following grounds:

    a. A gift of 28% of the estate is a material part of the estate.

    b. Courts have consistently held that gifts made within three years of death by persons over age 80 are made in contemplation of death.

    c. Despite her vitality for her age, Edith's colon cancer scare, anemia, and health incidents would have been a reminder of her mortality shortly preceding the gifts. There is a natural inference that she was confronting her mortality at the time of the gifts. Gifts do not have to be in contemplation of imminent death to give rise to the tax, and the health problems that support a conclusion of contemplation of death do not have to be the actual cause of death.

    d. The fact that the gift was not a deathbed gift is favorable to the taxpayer, but that positive impact is easily eroded by the gift immediately following the cancer diagnosis that would remind any person of their mortality.

    e. At the time of the gift, the December 31, 2012 federal gift tax deadline was looming, Edith was acutely aware of the tax aspects of her financial affairs (most of her income was from investments in tax-free bonds) and the expiring gifting opportunity, she understood there was a possible $2 million federal estate tax savings from the gift, and she had a desire to evidence federal estate taxes. She had an impelling tax motive for the gift during life rather than at death, it is unclear how much weight to give to the 2001 will that she was talking about changing, and her gift fell "well within the rubric of gifts in which the decedent is more concerned with when to make the gift to a certain donee, not whether to make the gift".

    f. While her prior will only gave Richard 10% of what he received by the lifetime gift, that will predated her husband's death, her life changed afterwards, and she was planning to change that will before her death. Edith did not have a history of making substantial gifts prior to the 2012 gifts. Richard and his family were the natural objects of her bounty.

    g. While gifts made for emergency situations are usually considered gifts in contemplation of life, a change in the tax code is not an emergency situation that prompted the gift. It was merely an opportunity to avoid estate taxes.

III. Business Interests

A. *Lund v. Lund,* No. 27-CV-14-20058 (Minnesota District Court 2018). Court rejects experts and determines value of company for statutory buyout of trust interests, and removes company CEO as co-trustee following buyout under no-fault removal statute.

1. Kim is the eldest grandchild of Russell Lund, the founder (in 1939) of the grocery company Lunds, Inc. Through various trusts, Kim was the indirect owner of 25% of the family businesses (a grocery company, a food processing company, and a real estate company that rents property to the other businesses). 11% of her interest would pass to her in the future when estates had been paid and the administration of a marital trust for the benefit of her grandmother was completed. Russell started the process of transferring the businesses to trusts for his children and grandchildren in the 1960s. Kim's brother, Tres, also owned 25% of the businesses and was the only family member involved in the companies (as president, CEO, and board chairman). He also served as co-trustee of several trusts for Kim's benefit. Russell's estate planning attorney also served as co-trustee of various trusts for Kim's benefit for more than 20 years. Kim's siblings were contingent beneficiaries of the irrevocable trusts for her benefit. Kim did not have the power to choose trustees for her trusts, and a bank was named as default successor trustee (the named bank was familiar with the family and the businesses).

2. Kim sought liquidation of her business interests and financial independence for over 20 years. She sued to compel a statutory company buyout of her interests, and filed additional claims for breach of fiduciary duties, civil conspiracy, removal of trustee, and attorneys' fees. The court ordered a statutory equitable buyout of Kim's interests in the businesses, excluding the marital trust interest, but denied her claims for breach and conspiracy. The court held that it could not order buyout of her interest in the marital trust due to the outstanding estate tax obligation for that trust and the joint and several liability of the four grandchildren for that liability.

3. The parties proceeded to trial on the issue of valuation of the buyout price. Kim's expert valued her interest at $76 million. The company's expert valued Kim's interest at $21.28 million. The court discounted the valuations of both expert on the following grounds:

    a. Despite their qualifications, their zealous advocacy compromised their reliability. The income (DCF) approach is most appropriate for valuing the non-real estate businesses, and the adjusted net asset value method is appropriate for valuing the real estate business. The market (guideline public company) approach used by both experts is rejected because of the uniqueness of the Lund companies and the lack of comparable companies.

    b. Neither expert met their burden of proving value by a preponderance of the evidence. Their valuations were tailored to suit the party paying them, and this cold fact cuts against their credibility in equal measure.

    c. Kim's expert took an overly optimistic view of the grocery business and minimized market competition and disrupting forces. The company's

expert undervalued the company by improperly considering pension obligations as impacting cash flow, ignoring a hypothetical sale, improperly applying a discount of lack of liquidity (which is not allowed under state law in this setting), and ignoring the company's success and impressive history of maintaining market share even amidst enhanced competition.

d. With respect to cash flow analysis: (i) Kim's expert ignored market forces and ignored management's own projections and assumed inadequate capital expenditure; and (ii) the company's expert was more reliable but improperly took into account the pension plan obligations that were not payable on the valuation date and the payment of marital trust estate taxes (which would not be paid by a hypothetical buyer).

e. With respect to long-term growth rate: (i) Kim's expert assumed too low a capital expenditure and too high (4%) a growth rate which was not supportable in the grocery industry, either nationally or locally; and (ii) the company's 3% projected growth rate was more reasonable.

f. With respect to the discount rate, while the company had zero long-term debt (which was unusual in the industry), it was not proper to assume no debt in the valuation (which would reduce the enterprise value by $100 million). The actual capital structure, which was established as a result of the particular needs and desires of the owning family, would be as improper as using the specific capital structure of any other investor. Fair value is obtained by considering the behavior or market forces, and the value of the company to itself is not the same as the value to the marketplace. The market places a value on how it expects a company will perform in the future and expects a company to move to its optimal position in terms of debt structure. The median debt-to-capital ratios of comparable companies supports a debt-to-capital ratio of 10% debt to 90% equity, and this discount rate results in an enterprise value reduction of $45 million.

g. Kim's expert did not consider the value of the real assets in valuing the real estate company. It was appropriate to use available appraisals of those properties (even though some were three years old) because commercial properties do not fluctuate like residential real estate in a way that would meaningfully impact the valuation.

h. Under Minnesota law, it was improper for the company's expert to apply a discount for lack of marketability or control. The statutes are silent, but the state Supreme Court held that discounts in the court-ordered buyout context should only be applied in extraordinary circumstances, such as wrongdoing by the minority shareholder, the availability of other remedies, or an unfair transfer of wealth, none of which apply here. There is no unfair wealth transfer here because Kim's interest is not exponentially greater than the company net worth, the other shareholders are not being left with a company with a doubtful potential for growth, the company pays a strong dividend, and the company management are very good at what they do. The circumstances here are not extraordinary – they are expected when a family business is undergoing a court-ordered transition.

4. The court made its own determination of value and held that the fair market value of the businesses was $191.5 million, and that Kim's trusts were entitled to $45.2 million (excluding her future inheritance from the marital trust). In the interest of meeting the goal of the terms being fair to all parties, the court ordered the sale to be accomplished through a 5% cash down payment and a 20 year note at the long-term AFR rate. The deferral of principal payments allows the company to still reinvest in the business as needed.

5. Applying the UTC no-fault removal statute, the court removed Tres as co-trustee of Kim's trusts, and appointed the default bank trustee, on the following grounds:

   a. The deterioration of his relationship with Kim and her family, which included Tres not providing her with any trust information for two years, and the eradication of their ability to collaborate or rely on each other in any capacity.

   b. The sale of the company interests held in the trusts is a material change of circumstances negating any reason for involvement in the trusts.

   c. Kim's nominated successor trustees did not appear at trial or respond to the court's inquiries about their credentials. No evidence was presented of their knowledge of trusts, and there were allegations that one nominee had a conflict of interest as head of a charity to which Kim had donated. In contrast, no one contested the bank's qualification to serve.

6. The court refused to remove the settlor's attorney as co-trustee in order to maintain consistent administration across the trusts for the siblings and because he was best suited to guide Kim's trusts through the transition.

B. *Menhennick v. Menhennick*, 2018 Mich. App. LEXIS 2658 (2018). Son validly exercised option to purchase shares from trust at mother's death.

1. Upon his death in 1993, under the terms of his revocable trust Alva created a family trust for his wife's lifetime benefit, with the assets passing equally to his sons upon her death (a marital trust was not funded because the total estate was below the $600,000 exclusion amount). The trust terms provided that "at the time of distributing Grantor's trust assets", those of his children then actively involved in Harvey Oil would have the right to have Harvey Oil shares allocated to their shares, and purchase any excess, at the value finally determined for settling Alva's estate, or at estate tax values if it was necessary to file an estate tax return (which is was not). Alva stated it was his intent that the children actively involved in the company be given the option to acquire all of the company stock, and stated that "the right to acquire the shares…shall expire six months from the date of the approval of the Grantor's 706 return by the Internal Revenue Service", which never happened because no return was ever filed. At Alva's death, he owned 65 shares of Harvey Oil with a then total value of $115,635.

2. Alva's wife dies in 2014, and the one son involved in the company, Timothy, sought to exercise the allocation and purchase option, and the other three sons objected. Timothy petitioned the court to approve the option exercise, which was denied based on the trial court's holding that the option had expired. Timothy appealed.

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

   a. The option was not available until Alva's wife's death, which is when assets would actually be distributable. There was no residue to allocate shares to until that time, and the number of shares that must be purchased could not be determined until that time.

   b. The conclusion that the option did not mature until his wife's death is consistent with his statements of intent. The probate court erred by concluding that the option expired shortly after Alva's death. Because no Form 706 was filed or approved by the IRS, the option limitations period never began to run, and the trust terms contemplated that the Form 706 might not be filed.

   c. Nothing in the trust supports the argument that Alva wanted his children to acquire control after his death, rather than after his wife's death. There is nothing in the trust to suggest that Alva was concerned about capital gains on the sale, and the purchase price is fixed under the trust terms. There is nothing to support the argument that Alva was concerned that a son would not be able to obtain purchase financing after the 6 months period after Alva's death.

C. *Milliette v. Milliette,* 2018 Wisc. App. LEXIS 485 (2018). Surcharge award affirmed where trustee failed to make required trust distributions through limited partnership structure.

1. Audrey created a trust for her daughter Margarete in 1997, with her son Gary as trustee. She created a limited partnership to hold her bed and breakfast business called the "Eleven Gables Inn", located on Lake Geneva. She gifted 30% to the trust, 60% percent to Gary, and retained 10% for herself. Audrey was the initial general partner until 2003. In 2003, Gary formed a limited liability company that he owned, and leased the Inn from the partnership for 10% of the gross Inn revenues under a triple net lease (the lessee paid all of the expenses, utilities, and maintenance).

2. The trust terms provided that, upon Margarete reaching age 50, the trust was to distribute all of its income annually to her, but Gary did not distribute any income to her. The trust also provided that at age 50 the trustee annuitize the value of the trust and pay the principal out to her over her life expectancy under the IRS actuarial tables, but Gary did not distribute any principal to her. Gary also failed to maintain any trust records and did not provide her with access to the trust records or accountings as required by the trust terms. Margarete lost her home, had no health insurance, received public assistance, and could not afford rent for an apartment.

3. Audrey died in 2014 and Gary inherited her 10% interest in the partnership, and also became general partner. In 2015, Margarete petitioned to remove and surcharge Gary as trustee of her trust and terminate the trust.

4. The trial court removed Gary as trustee, surcharged him $100,000, surcharged him $10,000 for the legal fees he paid out of the trust, and ordered the termination of the trust and the distribution of all of the trust assets to Margarete. Gary appealed only the surcharge awards.

5. On appeal, the Wisconsin Court of Appeals affirmed the surcharge awards on the following grounds:

    a. Gary failed to make the required income and principal distributions under the trust terms. Gary failed to maintain trust records to support his defense that the trust did not earn income, and made no effort to try to comply with the trust distribution requirements. He didn't consult a financial advisor or attorney, or seek guidance from the court. The partnership interest was an asset that could be used for distributions. Gary participated in the creation of the LLC that diverted 90% of the partnership's income to himself through the LLC. Gary was paying only $1,000 per month in rent for his use of the Inn. By doing so, Gary clearly breached his duty of loyalty to Margarete.

    b. Even if the only income in the partnership was the lease payments from the LLC, there still should have been something distributable to Margarete's trust, where the partnership agreement required distribution of net cash flow to the partners (and under a triple net lease all expenses would be borne by the LLC). To the extent Audrey refused to distribute those funds, Gary's fiduciary duties as trustee obligated him to pursue a claim against Audrey to collect the funds owed to the trust, or at a minimum, to seek court guidance on how to comply with his duties as trustee in light of Audrey's breach of her own fiduciary duties.

    c. Gary could have annuitized the partnership interests, because the trust terms provided a mechanism for sale of interests without the consent of the general partner, and the sales proceeds could have been used to purchase an annuity for Margarete. Gary did not take any actions to explore ways to comply with the principal distribution requirements under the trust terms.

    d. If the lease terms were dictated by Audrey, Gary would have breached his duties in the transaction by failing to represent the trust's minority interests. He should have sought the advice of independent counsel concerning the lease, and instead he accepted lease terms that diverted a substantial portion of the Inn's income away from the trust and to himself. Under those circumstances, his acceptance of the lease was a clear violation of his fiduciary duties as trustee.

    e. The $100,000 measure of damages was appropriate because: (i) Gary failed to keep records, making a precise damage calculation impossible; (ii) there was factual support for the approximate award based on Inn revenues; (iii) Gary failed to account as trustee; (iv) any uncertainty in calculating damages was caused by Gary, and a party that causes the uncertainty cannot demand a more precise damages measure; (v) the court could credit Margarete's testimony about her financial hardship as a result of the breaches of duties by Gary; and (vi) the damages were compensatory in nature and not punitive damages.

    f. Surcharging Gary for the attorneys' fees he paid out of the trust was proper because the court can award fees as justice and equity may require, the trust terms that allow him to retain counsel do not preclude the court from making the award, Gary's violations were found to be egregious and blatant, and Gary failed to notify Margaret of the payment of the fees as required by state statute.

D. *Rollins v. Rollins*, 2013 Ga. App. LEXIS 332 (March 29, 2013); 20 Ga. LEXIS 179 (March 3, 2014); 329 Ga. App. LEXIS 780 (2015); 2015 Ga. LEXIS 230 (2015); 2015 Ga. LEXIS 904 (2015); 2016 Ga. App. LEXIS 453 (2016); 2017 Ga. LEXIS 286 (2017); 345 Ga. App. 832 (2018). Appellate court holds that trustees must account for corporate level activities of entities held in trust where they have the individual control over the entities, and are subject to trustee duties for their entity level actions; Georgia Supreme Court reverses. Court of appeals remands to trial court for fact finding on the fiduciary nature of each action by the defendants, but Supreme Court vacates and assigns standards of care to each claim for breach, and remands back to the Court of Appeals. On remand, the Court of Appeals finds numerous issues of fact remaining, and remands the case back to the trial court; Georgia Supreme Court denied appeal. Related claims brought by trustees of marital trust dismissed as being barred by the statute of limitations, or otherwise as claims that must be brought as a shareholder derivative suit and not individually.

1. In 1968, O. Wayne Rollins created the Rollins Children's Trust (RCT Trust) for the benefit of his nine grandchildren and his great-grandchildren. His sons, Gary and Randall, were named as trustees along with his friend Tippie. The trust terms provided for the distribution of part of the trust principal to the grandchildren at ages 25 and 30, with the remainder distributed after their deaths to Mr. Rollins's great-grandchildren. The trust was funded with stock in Rollins, Inc.

2. In the 1970s and 1980s, Mr. Rollins created several family entities to hold the trust assets primarily for the purpose of reducing taxes.

3. In 1986, again to limit tax liability, Mr. Rollins established separate Subchapter S Trusts for each of his nine grandchildren, with his son Gary as trustee of the trusts for his children and Randall as trustee of the trusts for his children. These trusts were initially funded with one of the entities created by Mr. Rollins, and the trusts later purchased additional shares of the same entity from other family entities created by Mr. Rollins. In 1988, Mr. Rollins created another family entity held within the S Trusts, again to minimize tax liability. The S Trusts required annual distribution of trust income, and required outright distribution of the trust assets upon the beneficiary reaching age 45.

4. Gary's four children sued the trustees for breaches of fiduciary duty for allegedly changing the business entities held in the trusts to shift power to themselves, making trust assets illiquid and nontransferable, and implementing a non-pro rata distribution system that is contrary to the trust terms.

5. The trial court granted summary judgment for the trustees. The trial court held that the trustees were not required to account for the entities held in the trust because the interests were minority interests, and that trustee fiduciary duties did not attach to actions taken at the entity level. The beneficiaries appealed.

6. On appeal, the Georgia Court of Appeals reversed the trial court and held that the trustees were required to account for entity level actions on the grounds that: (1) the minority interests in this case did not mean the trustees lacked control over the entity making it impossible to produce information about

entity level transactions, because the trustees are controlling members of the various family entities; (2) the trustee is obligated as fiduciary to provide beneficiaries information that is within his control; (3) a trustee with a controlling interest in an asset held in a trust is required to account for the entity.

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

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

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

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

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

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

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

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

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

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

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

11. The Georgia Supreme Court granted *certiorari* to hear appeal of the Court of Appeals decision. On appeal, the Georgia Supreme Court vacated the decision of the Court of Appeals, and remanded the case back to the Court of Appeals with directions, on the following grounds:

    a. The facts of the case do not require a jury to determine the fiduciary standard that applies to each challenged transaction, because no material fact dispute exists as to the capacity in which Gary and Randall acted in each transaction.

b. For claims arising out of transfer of corporate assets to a new entity under their control and for retention of excessive corporate earnings, the corporate fiduciary standard applies.

c. For decisions made as trustee of the trusts, the trustee standard applies, such as claims for: (i) improperly investing trust assets and S Trust assets in entities they control, and that were contrary to the outright distributions required at age 45; (ii) improperly conditioning trust distributions on a code of conduct; (iii) executing shareholder agreements on behalf of the trusts; and (iv) executing partnership agreement amendments and voting in favor of the amendments on behalf of the trusts.

d. For claims of breach of the duty owed to other partners of the partnership, the duty is one of general good faith and fair dealing owed among partners.

e. For claims about using the power as general partner to condition distributions on conduct-based criteria, the duties are determined under the amended partnership agreement that grants the managing partners sole and absolute discretion for distribution decisions and imposes liability only for willful misconduct, gross negligence, or bad faith. However, the decision to vote trust interests in favor of this amended agreement is subject to trustee fiduciary duties.

12. On remand, the Court of Appeals again reversed the trial court grant of summary judgment for the defendants, and remanded the case back to the trial court, on the following grounds***:***

a. For claims for breach as trustee arising out of amendments to the partnership agreement, there is a jury question as to whether the actions were in good faith and consistent with the trust terms and purposes, and the jury could also consider actions under the amendment and what they reveal about intent at the time of execution, statements about that intent, and the fact that in the amendment they limited their own liability. A jury could find that the trustees acted in bad faith, and even in an arbitrary or retaliatory manner, or that there were legitimate reasons for the amendments (such as tax advantages, to fulfill a charitable pledge, or to concentrate family management for their benefit). Because fact questions exist, summary judgment for the defendants was not proper.

b. For claims arising out of voting as partners in favor of the partnership amendments: (i) fact questions remain about whether the defendants acted in good faith; (ii) the trial court must determine, since the defendants as trustees have not brought claims against themselves on behalf of the trusts, whether the trustees have failed or refused to act in a way that allows the beneficiaries to bring the claims themselves; and (iii) the trial court has not addressed related statutes of limitations. Because fact questions exist, summary judgment for the defendants was not proper.

c. For claims arising out of the imposition of a family code of conduct: (i) the trial court must determine, since the defendants as trustees have not brought claims against themselves on behalf of the trusts, whether the trustees have failed or refused to act in a way that allows the beneficiaries to bring the claims themselves; and (ii) a jury could find that evidence of bad faith or self-dealing, or could find that they acted in good

faith. Because fact questions exist, summary judgment for the defendants was not proper.

d. For claims arising out of imposing a code of conduct on distribution decisions, fact questions remain and summary judgment was not proper.

e. For claims for breach as directors in locking up stock so that it would not pass free of trust to the beneficiaries at age 45, fact questions remain as to whether the actions were in bad faith, or to protect S-corporation status, to keep stock in the family, or to generate tax savings for future generations.

f. While a small portion of the balance of the trial court award of summary judgment for the defendants was allowed to stand, most other claims were remanded to the trial court in light of the many fact issues outstanding.

g. Claims arising out of the failure to generate a sufficient amount of income, the trial court made no prior rulings on this issue and remand is necessary. Similarly, in view of the decision to remand on numerous factual issues, the trial court must also reconsider its decision denying the claim to compel the defendants to render an accounting of their actions.

13. The Georgia Supreme Court unanimously denied the petition of certiorari from the decision of the Court of Appeals, without a published opinion.

14. 2018 Marital Trust Dispute.

a. In 1993, Gary transferred his lifetime interest in non-voting company stock (56,507 shares) to a newly created marital trust for the sole lifetime benefit of his wife, with his four children as trustees. The trust held 18.3% of the non-voting stock, and its only income was the dividend distributions. The trust was a grantor trust for federal income tax purposes. In 1995, Gary transferred $5.7 million from the marital trust to himself. From 2001 to 2008, a total of $8.3 million in dividends that were owed to the marital trust were used to pay taxes directly to the IRS rather than being paid to the trust. To create the trust, Gary gave the children a series of blank, unnumbered signature pages, which included only the signature line with their names followed by the designation of "trustee". The pages were later attached to the trust. This followed a custom of how Gary or the Rollins family office asked the children to sign papers. The trustees relied on Gary's representation that Gary would sign as trustee of the marital trust until his death, even though the trust named the children as current trustees. They were told their signatures were needed for administrative purposes. One son, Glen, signed the trust tax returns from 1995 until 2009 above the designation "signature of fiduciary" without asking any questions.

b. In 1994, the trustees signed the signature pages (with their names marked as trustee) for a custody agreement that provided that all communications for the trust would be sent to the company and not to the trustees. The company worked with Gary, and not the trustees, on distribution policy, and the marital trust was administered by Gary and the family office without involvement of the trustees. In 1996 and 1999, the trustees signed signature pages (with their names marked as co-trustees) to shareholder agreements that they were not allowed to review. In 2005,

the trustees signed paperwork agreeing to a preferred partnership arrangement that they did not understand, that would give Gary and Randall control over partnership distribution decisions and fix the marital trust income at $360,000 annually.

c. In 2010, Gary and Randall asked the trustees to sign documents approving a plan to restructure the various Rollins entities and trusts, demanded that they sign the papers at the meeting without any information, threatened to stop distributions to the trustees if they did not agree, and declared they would implement the plan without the consent of the trustees. The trustees, in their individual capacities brought the litigation described above, and Gary and Randall retaliated as set forth above. On December 8, 2010, the trustees were informed for the first time that they were trustees of the marital trust, and they began controlling the trust.

d. The trustees retained counsel and determined that: (i) the $360,000 annual distributions to the spouse were low in comparison to the company assets and income; (ii) Gary and Randall's claimed personal ranches were actually company assets for which they paid only nominal leasing fees; (iii) their private planes were actually company assets; and (iv) Randall's customized luxury bus was actually a company asset. The trustees sued Gary, Randall, and the company and brought claims for: (i) inspection of corporate records; (ii) failure to pay dividends; (iii) dissolution; and (iv) conversion, unjust enrichment, and breach of fiduciary duty.

e. The defendants moved for summary judgment and the trial court dismissed most of the claims as time-barred, but allowed some claims (for example, the claims related to self-dealing with the ranches, planes, and bus) to proceed as not being derivative claims. Both parties appealed.

f. On appeal, the Court of Appeals affirmed the dismissal of most of the claims as time barred, and reversed the finding that other remaining claims were not derivative, on the following grounds:

g. Claims for conversion, unjust enrichment, and breach of fiduciary duty are subject to a four-year statute of limitations. The record is devoid of any evidence that Gary and Randall prevented or deterred the trustees from discovering their status as trustees of the marital trust or obtaining information that they were legally entitled to as trustees, or that the trustees exercised any level of diligence to do so. The eldest trustee testified on deposition that he was given a copy of the marital trust and he at least skimmed it.

h. The trust clearly identifies the children as trustees, they signed several signature pages identifying them as trustees, and they should have known they were signing documents as some kind of trustees for the marital trust. Glen also signed tax returns, under penalty of perjury, above the designation "signature of fiduciary", and should have known that he and his siblings were fiduciaries of record for tax purposes. He was given dozens of tax papers annually with hundreds of pages. Regardless of whether he actually read them, he swore an oath that he did review them and it cannot be said that Gary and Randall concealed them.

i. A shareholder, like the marital trust, is not entitled to negligently refuse to acquire knowledge that was open and available through inspection of

books and records, and cannot turn a blind eye to information that is available to him. There is no evidence that the defendants prevented the trustees from obtaining information they were legally entitled to. There is therefore no evidence that the trustees committed actual fraud to deter the trustees from discovering their causes of action.

j. The trustees have failed to produce evidence that they exercised the requisite level of diligence to discover their causes of action within the limitations period. They identified no efforts to discover why they were asked to sign numerous documents, including tax returns, on behalf of the marital trust if they were not actually the trustees. As early as 1993, when Glen skimmed the trust instrument, they had actual notice of wrongdoing when Gary claimed to be the sole trustee. Any confidential relationship they had with Gary and Randall does not eliminate their duty to discover their claims. They signed papers over 15 years that stated they were the trustees. Gary's representation that the papers were for "administrative purposes" is not totally inaccurate. Where trustees make no attempt at all to obtain information they fail to exercise even the minimal due diligence to discover their claims as a matter of law.

k. The alleged breaches occurred in the mid-2000s when the dividend for the marital trust was fixed, and Gary and Randall did not take new actions, wrongful or otherwise, with respect to the distribution on a quarterly basis. The partnership changes occurred in 2002 and 2003. All of these claims are time barred.

l. The remaining claims not barred by limitations are derivative in nature and cannot be brought by the trustees individually, rather than in a shareholder derivate action (on behalf of the corporation), because the trustees cannot show a harm that is separate and distinct from the injury to the other shareholders. There are several non-party shareholders that could be prejudiced if damages are awarded to just the marital trust. Even though those shareholders consented to actions complained of, they have not consented to any successful recovery being paid to the marital trust and not to the company.

IV. Investments

A. *In re Trust of Ray D. Post,* 2018 N.J. Super. Unpub. LEXIS 1932 (2018). Trustee breached its duties by diversifying assets after passage of prudent investor act in violation of mandatory retention provision in trust.

1. Ray owned a fuel oil distribution business, was a customer of the bank, and was on the bank's board. In 1975, he created an irrevocable trust with the bank as trustee, and funded the trust with 2550 shares of AT&T, 304 shares of Exxon, and a $4500 AT&T 30-year bond, for a total funding of $157,000. The trust terms stated that "the trustee shall retain, without liability for loss or depreciation resulting from such retention, the property received from the grantor". It also provided for compensation of the trustee by a side agreement of 5% of the annual trust income. The income was paid to Ray until his death in 1989. The trust terms for the income to then be paid to his wife, Enid until her death or remarriage, and then to Ray's grandchildren Deborah and Sarah. At Ray's death the assets consisted of 1169 shares of Bell South, 520 shares of NYNEX, 1040 shares of Pacific Telesis, 780 shares of South Western Bell, 2432 shares of Exxon, and 2200 shares of AT&T, with a total value of $483,172.

2. In 1993, the bank was acquired, and the acquiring bank became trustee. The new trustee acquired assets from the prior trustee totaling $157,000, consisting of 2600 shares of AT&T, 2432 shares of Exxon, and 7000 shares of companies created as part of AT&T's divestiture. The new trustee began taking statutory commissions in addition to the 5% of trust income under the fee agreement.

3. In 2000, the trustee's in-house counsel raised the issue of diversification following the passage of the prudent investor act in 1997, and outside counsel opined that the trust terms did not relieve the trustee of the duty to diversify. Counsel advised that the trustee could notify the beneficiaries of the need to diversify and seek their consent or seek judicial authorization for a diversification plan. The trustee began diversifying in 2000 and sold 864 shares of Exxon. The trustee's counsel again advised the trustee that it should not unilaterally deviate from the trust terms and act at its own peril and should apply to the court for instructions or approval. Despite that advice, the trustee continued diversification until Enid's death in 2008, without notice to the grandchildren or seeking court approval.

4. The trustee did not send the grandchildren a copy of the trust until after Enid's death, but did send them statements that reflected the stock sales after they requested them. In 2004, the trustee sent them a letter seeking their approval of a 70% equities/30% bonds allocation, and they both approved although at that time neither had seen the trust agreement. Sarah did not recall seeing the trust agreement as part of settling Ray's estate and filing his estate tax return, and Deborah did not recall seeing the trust until she asked for information in response to the trustee's asset allocation request. None of the communications from the trustee contained information about the trust terms.

5. Enid died in 2008 and the trustee wrote to the grandchildren, sent them a copy of the trust for the first time, and informed them the trustee was preparing an accounting. According to the account synopsis, the value of the trust was $1.4 million in 2001, $1 million in 2006, and $1.2 million in 2008. Neither grandchild noticed the stock retention provision and did not become aware of it until the trustee petitioned to approve its final accounting. The trustee asked them what type of accounting they wanted, they did not respond because the trustee was not responsive to their requests for information and because they did not understand the question, and the trustee prepared an interim accounting for them. The bank's counsel asked them to waive a formal accounting and neither agreed because they did not receive information requested and felt that they were being pressured for more fees.

6. Deborah met with the trustee to complain about performance and excessive fees. She asked for the fee letter but was told there was no agreement. However, the trustee provided the fee letter a month later. In 2012 (4 years after the termination date), the trustee petitioned to approve its final accounting and to be discharged. The trustee blamed the delay on waiting to hear from the beneficiaries about the type of accounting they wanted. The final accounting stated that the trust value was $900,000 (563,000 in cash and the balance in stocks and mutual funds). Over the subject time period, the trustee took $485,000 in income commissions and $96,000 in corpus commissions. Deborah objected to the accounting. On the eve of mediation,

she read the entire trust, understood the stock retention clause, realized that the trustee should not have "sold her grandfather's good stocks", and filed claims for breach of fiduciary duty, negligence, conversion, and lack of good faith and fair dealing, all arising from violation of the retention clause, and claiming over $900,000 in damages. Sarah joined in her claims.

7. The trial court dismissed all of the claims other than breach of fiduciary duty and lack of good faith and fair dealing. The court found in favor of the beneficiaries on their breach of fiduciary duty claims, rejected the other claims, and held that the proper date for valuation of the stocks was May 2, 2008 when the trustee sent the trust agreement for the first time. The court awarded damages against the trustee in the amount of $520,000 as calculated by the trustee's expert, along with $57,000 in prejudgment interest, and denied all motions for counsel fees and the trustee's motion for corpus fees. Fees were denied after 2010 because of the court's finding that no management took place after that time, the inexplicable delay in preparing the accounting, and as a remedy for breach of trust. The court rejected claims based on failure to invest cash after 2011 for lack of proof.

8. The trustee appealed. On appeal, the court of appeals affirmed on the following grounds:

   a. The prudent investor act mandates diversification but recognizes that the grantor's intent controls. It is a default rule. The settlor clearly directed that the stock be retained and protected the trustee when doing so. Nothing in the trust terms made that provision optional. If the trustee felt it should diversify in violation of this provision, it was obligated to seek authorization from the court in advance. The act recognizes the power of the court to approve a deviation from the trust terms concerning investments.

   b. The trustee's argument that the claims were barred by laches, equitable estoppel, avoidable consequences, or ratification are "without sufficient merit to warrant discussion in a written opinion". Those defenses are also not favored because the trustee is in a position of confidence and because its own actions contributed to and caused the delay.

   c. The AT&T spinoff and the merger of Exxon and Mobile do not void the retention provision, and the trustee's contentions to the contrary are totally without merit. There was no evidence that the resulting stocks were substantially different than the original stocks placed into the trust. There was no change in the underlying businesses of the resulting stocks and no meaningful change in the portfolio from the spinoff and merger. The identity and substance of the original shares were not destroyed.

   d. The doctrine of "innocuous breach" is not available to protect the trustee because the trustee disregarded its counsel's advice without explanation.

   e. The court properly denied commissions after 2010 because no administration took place as a proper remedy for breach. The court's calculation of damages adequately compensated for the breach of trust. The court did not err in allowing the trustee corpus commissions from 1993 to 2008 because: (i) the fee letter addressed only income commissions and was silent on corpus commissions; (ii) there was no fee letter with the acquiring bank; and (iii) there was no additional finding of

breach of duty beyond the retention issue for which the damages award fully compensated the beneficiaries. Denying an award of attorneys' fees was proper because the court properly determined that the trustee did nothing to promote its own self-interest by diversifying and acted in what it believed was the best interests of the beneficiaries.

B. ***Matter of Wellington Trusts*, 2015 NY Slip Op 31294(U) (Nassau County Surrogate, 2015); 2018 N.Y. App. Div. LEXIS 6675 (2018).** Bank co-trustee did not breach duties by retaining concentrated positions in U.S. large-cap securities during a market down turn, where co-trustee refused diversification, had power to remove bank trustee, and was not clearly incapacitated, the trust terms permitted the investments, and the investments were part of a successful long-term family investment philosophy.

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

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

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

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

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

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

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

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

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

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

4. Sarah appealed. On appeal, the appellate division affirmed on the following grounds:

   a. The bank recommended to Herbert that the trust assets be diversified and recommended alternatives, but Herbert did not consent to diversification. Herbert was not a passive or lay trustee – he was a professional investment manager and his preferred strategy resulted in a 1,750% increase in the largest of the trusts.

   b. The trust terms evidence the settlor's intent that Herbert have ultimate control over investments by giving Herbert the power to remove the bank trustee at any time and without cause. The trust terms also stated that the trustees were under no obligation to diversify investments.

   c. Sarah failed to establish that the bank knew or had reason to know that Herbert was not competent after a 2001 stroke.

   d. While the court was correct in awarding the bank attorneys' fees, the court erred by not considering the required factors as to the reasonableness of the fees. On remand, the court must determine the reasonable fees that should be allowed to the bank.

C. *In re Trust of Jones,* 2018 Minn. App. Unpub. LEXIS 682 (2018). Trustee is not required to invest trust assets in silver upon demand by beneficiary.

1. Kent, acting pro se, sued the bank trustee of the trust for his benefit, alleging that: (a) the trustee breached its duty of loyalty by not investing the trust in physical assets and responding to his communications about his investment concerns; and (b) by failing to protect the trust from an economic calamity by investing in physical tangible assets. Kent argued that the trustee should be required to invest the trust in a house and silver coins and breached its duty by not yielding to his interest in "preserving the trust as he sees fit".

2. The trial court dismissed the claims and Kent appealed. On appeal, the court of appeals affirmed on the grounds that:

   a. The duty of loyalty does not require a trustee to abdicate its responsibility to exercise its discretion in determining which investments are in the best interests of the beneficiaries. The powers granted the trustee under the trust terms provide the trustee with authority to choose from a wide variety of investment types.

b. Kent's allegations that "he fully expects in his lifetime a current crash of the United States dollar that shall affect all investments in dollars" and that "only the portions of the trust invested in assets that are not based on the dollar shall withstand the economic crash" are not supported by record evidence.

c. The evidence showed that the trustee was responsive to Kent, including offering to move the trust to a more conservative asset allocation strategy in response to his concerns.

V. Distributions & Disbursements

A. *Zarske v. Reynolds*, LC No. 15-016022-TV (Unpub. Michigan Court of Appeals 2018). Land given to sons during lifetime properly taken into account in equalizing residuary trust distributions upon settlor's death.

1. In 1997, Norma signed her revocable trust agreement, which provided upon her death that: (a) "any Farm Assets [which included farmland by definition] which the Trust owns (if any)" would be distributed to her two sons; and (b) the Non-Farm Assets would be distributed to her daughters in equal shares, but only in amounts sufficient to assure that each daughter receives a share equal to the shares received by the sons; and (c) all remaining property would be divided equally among the children. Attached to the trust was a legal description of farmland. Her son Duane was named as successor trustee to serve after her death.

2. On the same day, Norma leased and quitclaim deeded the farmland (valued at approximately $700,000) to her sons, excluding mineral rights, and retained a life estate in the property. The deed was recorded the next year.

3. Norma died in 2014, and her daughters petitioned to have the farmland taken into account in the distribution of the trust assets, asserted that the trust was ambiguous on this issue, and later added claims for undue influence against the brothers. Duane as trustee excluded the farmland as a trust asset. The trial court found that the farmland was never a trust asset, but because the trust terms defined "Farm Land" as "all farmland", and by attaching the legal description of the property to the trust, Norma intended that the farmland be considered in making trust distributions even thought it was not a trust asset. Duane appealed, primarily focusing on his view that the trial court was interfering with the ownership of the farmland by the sons and that the trust was unambiguous and the court should not have considered facts outside the trust terms.

4. On appeal, the Michigan Court of Appeals affirmed the trial court on the grounds that: (a) the trial court recognized the brothers' property ownership and never ordered that the farmland be distributed to the sisters; (b) there is no authority for the argument that the court could not consider parol evidence later in the proceedings, after it first grants a motion *in limine* to exclude that evidence; and (c) the finding that Norma intended the value of the farmland to be considered in making distributions is not inconsistent with recognizing the ownership of the property by the sons.

B. *Peterson v. Peterson,* 303 Ga. 211 (2018). Priority given to widow's needs as beneficiary in trust terms is not sufficient standing alone to support summary dismissal of claims that she breached her duties as trustee.

1. Under his will, Charles created in part a bypass trust to be funded upon his death in 1994 with $600,000 for the benefit of his wife, Mary, and their children, Alex, David, and Calhoun. All four of them were named as co-trustees. The trust was funded with various stocks, including stocks in severally financially distressed companies. The trust provided for mandatory income distributions to Mary for life, discretionary principal for her support, and for the support and education of their descendants taking into account their other available means of support. After any descendant completed his education, the trustees were not required to support the descendant unless the trustees thought there was ample property to support Mary or unless the descendant could not support himself. The trust stated that the "primary desire is that my wife be supported in reasonable comfort during her lifetime and that my children be supported in reasonable comfort during their lives". Mary had a power to direct the trustees to distribute trust assets to the descendants but not to herself. At Mary's death, the trust assets were to be distributed to their sons. The will also provided that a decision of the majority of the trustees then acting would control, provided the majority included Mary while she served as co-trustee.

2. Alex and David sued Mary and Calhoun alleging that: (a) they made all the decisions as trustee without consulting them and had ignored their stated concerns about the trust administration; (b) they improperly encroached on the trust assets for Mary's benefit and disregarded the trust purpose of also supporting them; (c) wasting trust assets by continuing the operation of financially distressed companies; and (d) converting the trust assets for their own benefit. They sought support from the trust and a change of trustees.

3. The co-trustees moved for summary judgment which the trial court granted, despite the fact that Mary did not put on any evidence and did not point to any absence in the record to support the claims against her. The plaintiffs appealed. On appeal, the Georgia Supreme Court reversed the trial court and remanded the case on the following grounds:

    a. The court erred by finding that David had resigned as trustee in 1996 because there was no evidence in the record to support that finding.

    b. The testator clearly stated that one of his primary trust purposes was to support his children in reasonable comfort during their lives. The mere fact that Mary must be a part of a majority of the trustees for a decision regarding the trust to be controlling says nothing about whether she and the other trustees diligently and in good faith investigated whether the conditions precedent for the discretionary payments to the sons have been satisfied. Under the trust terms that would require considering the health of the trust assets and the ability of the sons to support themselves. The court erred by finding there was no requirement to support the sons. The settlor clearly stated that he had two primary trust purposes and one was to support his children. The court's conclusion that the primary purpose of the trust was to support Mary was clearly erroneous. Finding that one primary purpose was to support Mary does not permit the trustees to ignore the other primary purpose.

c. The fact that Mary had a limited power to appoint the trust assets to any of the descendants does not eliminate the fiduciary duties of the trustees where that power has not been exercised.

d. The power granted to the trustees to retain and carry on the business of inception trust assets does not relieve them of their fiduciary duty to not commit waste and to exercise their powers in good faith. The proper issue was not whether the trust gave the trustees the power to retain and operate the businesses, but rather whether their operation of the businesses was in accordance with their fiduciary standards.

C. *Kliman v. Mutual Wealth Management Group,* 2018 Ind. App. Unpub. LEXIS 526 (2018). Damages demand derived from denied discretionary distributions dismissed.

1. Upon his death in 2010, Dr. Kliman created a trust with a corporate trustee. The trust provided for net income to his wife, Marjorie, during her lifetime, and also allowed discretionary principal distributions for his wife and descendants for reasonable support, maintenance, health, and education. Upon the wife's death, the assets would be divided into separate trusts for the children that included distributions for a wedding and age-based principal distributions. The trust terms stated the settlor's intent that the beneficiaries not depend on the trust to defray normal living expenses, and expressed the precatory intent that a beneficiary receive only limited distributions unless the beneficiary was pursuing study that would lead to gainful employment, gainfully employed or seeking gainful employment, not employed to care for a child, supporting himself, or unable to support himself due to age or impairment. The trust also provided that the interests of the children as remaindermen were subordinate to the wife's interests as income beneficiary.

2. Dr. Kliman's oldest child Andrew (from his first marriage, and not Marjorie's child): (a) attended several colleges but had earned no degree; (b) completed a culinary program but only worked as a sous chef for a few months; (c) had unstable employment during adulthood and was home with his two children; and (d) was twice convicted of drunk driving. From 2011 to 206, the trustee made 28 discretionary distributions to Andrew from the trust, including: (a) $15,000 for a Jeep that Andrew then sold for $10,000; and (b) regular distributions to address the monthly shortfall for his living expenses. The distributions during this time exceeded $168,000.

3. In December 2015, Andrew sued the trustee for declining 55 other distribution requests totaling $92,000, and sought to have the court compel monthly distributions to him of $3,500. His challenges included: (a) requests that lacked documentation; (b) requests he had not actually ever submitted to the trustee; (c) requests to be reimbursed for expenses he later admitted he had not actually incurred; (d) requests for disbursements the trustee had actually already paid to him; and (3) a request for $10,000 for his first marriage even though that trust term did not apply until after Marjorie's death.

4. The trustee filed an accounting and Andrew admitted in a written statement filed with the court that he did not have any objection to the accounting. The trial court dismissed Andrew's claims and awarded the trust attorneys' fees payable by Andrew personally. Andrew appealed.

5. On appeal, the Indiana Court of Appeals affirmed the dismissal of the claims and the award of attorneys' fees on the following grounds:

    a. Andrew waived his right to object to the accounting.

    b. Andrew cannot make initial distribution requests by suing the trustee.

    c. His testimony about what the settlor would have wanted does not control over the trust terms.

    d. Andrew never argued to the trial court that the trustee had a duty to equalize distributions among the beneficiaries, and the trust terms did not require equal distributions.

    e. There was no proof that the trustee declined distributions because Andrew was caring for a child.

    f. The trustee did not err by refusing Andrew's request for funds for CPR training where he never actually incurred nor was he going to incur any costs for the training.

    g. There was no support for Andrew's claim that the trustee breached its duties by refusing to distribute $500 for a headboard and footboard, despite the following pleading: "Picture a room with a mattress and box springs only. No headboard and no foot board. Looks like a dorm room for a single 19-year old college student. Not many married couples with three children live like this. Trustees should not have discretion to require it".

    h. The trust terms did not provide for $10,000 for Andrew's marriage until after Marjorie's death, which had not yet occurred.

    i. There is no support for Andrew's argument that his own understanding of appropriate support should be controlling over the trustee's discretion, and that would be contrary to the trust terms, relevant authority, and cogent reasoning.

    j. Andrew had failed to even request from the trustee most of the distributions he sued the trustee for allegedly denying.

    k. The award of attorneys' fees was proper because Andrew's claims were frivolous, and the court could award the fees without inquiring into Andrew's ability to pay.

D. *In re Weitzel Trusts,* 2018 Minn. App. Unpub. LEXIS 753 (2018). Trustee did not breach duty to distribute where settlors stopped funding the trust, and trustee did not have a duty to compel the settlors to keep funding trust or protect beneficiaries from alleged abuse by settlors.

1. John and Mary created an irrevocable trust for the benefit of their daughter and grandchildren, with a bank as trustee. The trust gave the beneficiaries withdrawal rights over additions and allowed discretionary distributions to the beneficiaries by an ascertainable standard. The trust terms also allowed the trustee to make loans to a beneficiary. From 2007 to 2016, the trust assets were used to pay for private school tuition for the grandchildren. In the midst of undescribed conflict among the family, the settlors stopped making contributions to the trust and trust distributions stopped. At that time, the only assets in trust were stock with no value and a loan receivable from the daughter.

2. Their son-in-law, as representative for the one minor grandchild, sued the trustee for failure to account, failure to make distributions, failure to gather assets by failing to compel the settlors to make additional gifts to the trust, failure to provide income to the beneficiaries, intentional infliction of emotional distress on the beneficiaries, and failure to protect the grandchildren from abuse by the settlors and wrongfully allowing the settlors to retain the power to exclude trust beneficiaries from the *Crummey* withdrawal rights.

3. The son-in-law moved for emergency relief, summary judgment, and leave to amend his complaint to add a count for RICO racketeering. The trial court denied all of his claims and he appealed. On appeal, the court of appeals affirmed the trial court on the following grounds:

   a. The son-in-law cannot represent his adult child on appeal and all claims on that child's behalf are dismissed.

   b. Denial of the motion to amend to add RICO claims was proper because no proposed complaint was submitted to the trial court and there are no facts of a criminal enterprise or the trustee's involvement of a criminal enterprise, and no support for the argument that "a trustee…may commit a RICO violation by administering a trust according to its terms".

   c. The trustee complied with the trust terms in making distributions and the trust terms do not obligate the settlors, or anyone else, to make additional contributions to the trust. In the absence of contributions, the trustee is left with no funds from which to make distributions. The record shows that the trustee made regular and proper distributions until the settlors stopped funding the trust. While the trustee did loan the daughter money from the trust, the trust terms expressly allow the trustee to make loans to a beneficiary.

   d. The power retained by the settlors to exclude a beneficiary from withdrawal rights over trust additions does not make the trust a revocable trust and does not render the trust invalid, the power was never exercised, and there is no connection to that reserved power and the cessation of distributions to the grandchildren. The trust stopped making distributions because it ran out of money to do so.

   e. A trustee does not have a special relationship with a beneficiary that requires the trustee to protect the beneficiary from alleged abusive acts by the settlors, and nothing suggests that the beneficiary relies on the trustee to do so. The cessation of funding for private school by the settlors is not a form of "abuse" from which the grandchildren require protection by the trustee.

   f. The trustee complied with its duty to provide information by sending regular financial statements to the home where the grandchildren (and their father) reside, even though they were initially addressed only to the daughter. The trustee responded to all requests for information by the son-in-law, even after litigation was initiated. There is no allegation of a false statement by the trustee that would support a fraud claim.

   g. The trust terms did not require additional gifts by the settlors, and the trustee did not breach its duty to control the trust assets by not compelling additional gifts, and the trustee has no duty to interfere with

the settlors' funding decisions. The beneficiaries have suffered no harm by the trustee's retention of valueless shares gifted to the trust. There is no right to an equitable accounting because the trust is not complicated.

h. There was no proof of any intentional, reckless, or extreme and outrageous conduct by the trustee that would support a claim for intentional infliction of emotional distress. Whatever distress the grandchildren have felt by the settlors' cessation of trust funding and their not being able to continue attending private school of their choice, does not rise above the level of what people commonly encounter and endure in their lives. The focus is on the conduct of the trustee, and the court does not review here the actions of the settlors who are nonparties to the case.

VI. Estate & Trust Account Closings

A. *Restaino v. Northern Trust Company*, 2017 Ill. App. Unpub. LEXIS 2171 (2017); Second District Appellate Court 123144 (2018). Trustee did not breach duties by liquidating trust assets and retaining cash while litigation was pending and seeking dismissal of claims, and an oral contract to make a will and related claims are dismissed where both settlors expressly retained the unrestricted power to revoke their respective trusts. Illinois Supreme Court denied leave to appeal.

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

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

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

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

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

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

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

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

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

    e. Breach of contract**.** The claim for breach of contract to make a reciprocal will (that left all assets to all of the children) against Jeanette's estate was properly dismissed because: (i) the allegations of an oral agreement to make a will are vague and lacking specificity; (ii) an oral agreement to

make a will is unenforceable under Florida law; and (iii) the plain terms of the trusts show no agreement because Charles and Jeanette both reserved the unrestricted right to amend or revoke their respective trusts.

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

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

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

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

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

6. On March 21, 2018, the Illinois Supreme Court denied the petition for leave to appeal the decision of the court of appeals.

B. *Patrick v. BOKF*, N.A., 2018 Kan. App. LEXIS 204 (2018). Successor cannot sue beneficiary and prior trustee for tortious interference with the trust administration.

1. Kerry and Kay were brother and sister and beneficiaries of several trusts, and became co-trustees after their father died. Kay filed lawsuits against Kerry, and they jointly requested that the court appoint a successor trustee to wind up and distribute the trust assets. The court appointed a bank as trustee.

2. The bank accepted the role as trustee on March 16, 2015. Kerry continued to represent himself as trustee until June 1, 2015, traded trust assets at least eight times after his tenure as trustee ended, and reported trust bonds as lost then refused to disclose the location of replacement bonds. Kerry sued the bank on June 16, 2015 to remove the bank as trustee, alleging that the bank failed to act diligently in marshaling assets, making distributions, and providing information to the beneficiaries, and asserting breaches of the UTC. The bank denied the claims and counterclaimed that Kerry was tortiously interfering

with a contract, business relationship, or advantage. Kerry's own expert testified that completing the in-kind distribution of the trust assets could take at least six months to complete.

3. The trial court found Kerry liable for tortiously interfering with the trust administration and awarded the bank attorneys' fees against Kerry's trust shares in the amount of $80,000. The court held that the bank breached its duty to inform, but that no damages resulted. Kerry appealed only the tortious interference and fees decisions. On appeal, the court of appeals reversed on the following grounds:

   a. Tortious interference with a prospective business advantage or relationship requires a showing that the conduct was accomplished by a third party unrelated to the business relationship between the principal parties. The court could not find Kerry liable for the tort without implicitly finding that Kerry was a third party to the trust.

   b. Although Kerry acted as a "false trustee" this did not make him a third party to the trusts. He could not be both a stranger and a party to the trusts at the same time. As a beneficiary and removed trustee, he was a party to the trusts and could not, as a matter of law, be found liable for tortious interference with the trust administration.

   c. There was evidence he violated his duties as trustee by not expeditiously delivering the trust property to the successor, but this cannot be pursued through a tortious interference claim.

   d. On remand, the trial court should deny the bank reimbursement of its attorneys' fees for pursuing the tort counterclaim.

VII. Limitations & Other Defenses

A. *Vietor-Haight v. BNY Mellon,* N.A., 2018 Conn. Super. LEXIS 816 (2018).

Litigation over accounting after trust termination date does not toll the limitations on additional future claims under the continuing course of conduct doctrine.

1. In 1978, Charles T. Haight created a trust that he funded with commercial and residential property in Greenwich. The trust terminated in 2012. The trustee filed papers with the court to terminate the trust, and the sole income beneficiary, Ilse, objected to the trustee's accounting and alleged failures to account and prudently invest the trust assets. The income beneficiary also alleged below market rate income distributions, excessive trust tax payments and fees, and failure to collect rents. The probate court criticized the trustee and ordered the trustee to reimburse the income beneficiary in the amount of $800,000 out of the trust assets, but also held that the trustee did not act in bad faith or breach its fiduciary duties. The trust terms exonerated the trustee absent a showing of bad faith.

2. In a 2016 complaint, the income beneficiary alleged breaches of fiduciary duties, negligence, and recklessness, and sought compensatory, punitive, and treble damages, interest, and fees. The trustee moved to dismiss the claims, which the trial court granted on the following grounds:

a. The claims for breaches of fiduciary duties and negligence are duplicative. Count Two (negligence) merely repeats the allegations in Count One (breach of duty) and fail to allege a single element of a claim for negligence.

b. The beneficiary had adequate opportunity to raise her claims in the prior probate proceedings. The claims were not only raised in the prior proceedings, they were adjudicated, and are barred by *res judicata*.

c. The beneficiary is collaterally estopped from asserting breach of fiduciary duty because the probate court has already found that the trustee did not breach its fiduciary duties.

d. The probate court, however, did not previously adjudicate the claims of recklessness. Those claims, however, are barred by the statute of limitations. The claims are based on factual allegations from 1994-2012. The doctrines of continuing course of conduct and fraudulent concealment do not extend the statute of limitations on the claims. The trust terminated in 2012, and there is no evidence that the trust imposed an ongoing duty to file annual accounts or provide income distributions to income beneficiaries after the termination date. There is also no evidence that the alleged tortious acts continued to evolve well after the trust termination. There is no evidence of any knowledge or awareness that the trustee fraudulently concealed facts from the beneficiary in an attempt to avoid or limit its liability.

B. *In re Adrian Chen Trusts*, 2018 Pa. Super. Unpub. LEXIS 1144 (2018).
Surcharge not allowed where trustees reasonably relied on advice of counsel concerning tax status of trust as domestic non-grantor trust for the benefit of a citizen of Hong Kong.

1. Stella Chen, a resident of Hong Kong, hired a prominent trusts and estates attorney who drafted a trust she created in 1987, with her husband and three other individuals as co-trustees. Her husband died in 1988 and the trust was divided into sub-trusts, one of which was for the benefit of her son, Adrian (a resident and citizen of Hong Kong), and his issue ("Trust 1"). Trust 1 was a domestic non-grantor trust that minimized taxes by not subjecting to U.S. income tax any distributions of capital gains to a foreign person or foreign trust, and imposing U.S. income tax only on dividend income from a U.S. source.

2. In 1994, Adrian received a large inheritance from his father's estate but declined the attorney's advice to place those funds into a trust.

3. From 1988 to 1995, gains from Trust 1 were distributed to a foundation the father created. In 1995, the trustees liquidated the assets as part of changing investment managers and realized $2 million in capital gain. The attorney advised creating a foreign grantor trust to receive that gain and future gains, and Adrian agreed and created the new trust ("Trust 2") for the benefit of himself, his wife, and his issue, with the same trustees as Trust 1. At that time, Adrian had just graduated college, and was married but had no children. Under the law at that time, Trust 2 qualified as a foreign grantor trust. Trust 2 was funded with distributions from Trust 1. The intent of Trust 2 was to minimize Adrian's U.S. income tax liability. As a foreign grantor trust, all of the trust's income (which included funds received from Trust 1) was to be taxed

to Adrian who was not a U.S. citizen and was therefore subjected to a reduced federal tax liability. Adrian could not revoke Trust 2, but the trustees could, with court approval, amend the trust to reduce taxes so long as consistent with the trust purposes.

4. In 1996, the U.S. tax laws changed in a way that disqualified Trust 2 as a foreign grantor trust, because its income could be distributed to Adrian's children. The trustees did not know about this law change. Adrian then had children. None of Adrian, his wife, or his children were ever U.S. residents or citizens, and only Adrian received trust distributions. The trustees continued to use the same counsel that drafted the trusts, and employed an independent accounting firm. Adrian retained his own counsel who concluded that Trust 2 was no longer a foreign grantor trust because Adrian's children were beneficiaries, and the 1996 tax law change prohibited children from being beneficiaries of a foreign grantor trust. The trustee's counsel then advised that there was a qualification issue, but that the problem could be remedied. The trustees relied on the advice and continued treating the trust the same way, and tax returns were still filed the same way.

5. The trustees retained new counsel, a Harvard law graduate with expertise in domestic and international estate and tax planning and 35 years of experience, to file trust tax returns, and that counsel continued treating the trust as a foreign grantor trust.

6. In 2013, Adrian sued the trustees for treating the trust as a foreign grantor trust and not seeking advice of new counsel and for continuing to file as a foreign grantor trust, and for the "potential adverse tax consequences" flowing from the possibility that Trust 2 would lose its tax status. Adrian also asked that the court reform the trust to remove his children as beneficiaries and the trustees joined in that request so that the trust would still qualify. Even though Adrian had first asked for the modification, he then opposed the trustee's motion to amend the trust, and instead sought termination of Trust 1 and Trust 2 and outright distribution of all assets to himself. The trustees opposed the termination as inconsistent with Mrs. Chen's intent. The trustees also filed accountings, and Adrian and his children (through a guardian ad litem) objected. Adrian also added claims that the trustees overpaid withholding taxes at a rate of 30% on U.S. dividend income, even though that withholding was directed for foreign non-grantor trusts by the financial institution retained by the trustees.

7. The court reformed the trust to remove the children as beneficiaries, conditioned on receipt of a PLR from the IRS that the reformation would be respected as retroactive to inception. The court rejected the surcharge claims and rejected Adrian's objection to any professional or trustee fees being paid out of the trust (the total fees were in the amount of $7 million).

8. Adrian appealed the denial of the surcharge claims and the approval of the trustees' fees. The trustees supplemented the appellate record with a 2017 PLR from the IRS that approved the modification of Trust 2 retroactively to its inception. On appeal, the superior court affirmed on the following grounds:

a. At trial, Adrian objected to *any* trustee professional or trustee fees being paid out of the trust, based on his positon that the trustees had breached their duties. His claim on appeal that the fees were unreasonably high bears no resemblance to his claims at trial. He clearly sought to surcharge the trustees for all the fees they had paid to themselves, the lawyers, and the accountants since the inception of the trusts. He argued that none of them were ever entitled to any compensation, premised on his claim of breach of duty by the trustees. His claims are clear case of overreaching. There were no legal grounds to deny fees prior to any alleged breach, no basis to deny the fees for preparing court-ordered accounts, and no basis to find that the accountants knew or should have known that the trust was not a qualified foreign grantor trust or knowingly filed false tax returns. Adrian's challenge was to the payment of any fees at all, and not a challenge to whether they were reasonable. He failed to prove a basis for surcharge of those fees, and never specified the amount he was contesting. He made no attempt at trial or on appeal to parse out the proper fees from the allegedly improper ones.

b. The court cannot surcharge a trustee unless it finds both a breach and also that the breach caused a loss to the trust. There was no breach shown. The trust terms allowed the trustees to retain counsel and act without independent investigation of their recommendations. The trustees' original counsel was a qualified and prominent trusts and estate expert who practiced with a preeminent firm, and who was hired by Mrs. Chen. Upon learning of the trust flaw, that attorney informed the trustees he could remedy the situation with a retroactive modification and told Adrian's counsel about the solution. His advice was proven right with the issuance of the PLR. Adrian's counsel told Adrian about the proposed solution, but that lawyer never informed the trustee's counsel that Adrian would oppose the solution. The trustees had no reason to seek other counsel. Adrian never proved that there was a subspecialty in foreign grantor trusts that the original attorney should possess. That lawyer's credentials as a trusts and estates attorney were impeccable and the trustees were permitted to rely on his advice without independent investigation.

c. After this suit was filed, the trustees hired another attorney who continued the trust tax filing position. The lawyer was a Harvard law graduate with expertise in domestic and international estate and tax planning and 35 years of experience, his credentials were uncontested, and every testifying expert agreed with his expertise.

d. The grantor trust issues were too complex for the trustees to have known the issue on their own. For example, the four tax experts that testified in the case did not reach consensus. The trustees reasonably hired professionals and relied on their advice. All of the trustees advised that the trust continue filing as a foreign grantor trust, an approach that was vindicated by the PLR-approved retroactive trust modification. The trustees were never definitely told the trust did not qualify, and therefore never knowingly filed a false tax return.

e. The trustees could also reasonably rely on the advice of banking professionals on the amount of withholding required for the trust.

VIII. Arbitration

A. *Ali v. Smith,* 2018 Tex. App. LEXIS 5129 (2018). Filing claims against predecessor and receiving fees by court order do not bind successor administrator to arbitration provision under will by direct-benefits estoppel.

1. Under his will, Amjad Sultan appointed Shafqat Ali as independent executor. Ali resigned after Sultan's adult son accused him of mismanaging the estate. The trial court appointed Darlene Smith as successor administrator with the will annexed, and approved the $52,000 in fees she would receive for service. Smith sued Ali alleging mismanagement of the estate that caused financial harm to the estate in the amount of $250,000.

2. The will provided in part that disputes between or among the beneficiaries, the executor, or the trustee, or any combination of them, would be submitted to binding arbitration. Another provision defined executor to include successors. Ali moved to compel arbitration under a theory of direct-benefits estoppel arising out of Smith's filing of the claims and receiving fees from the estate. The trial court denied the motion to compel arbitration and Ali appealed.

3. On appeal, a divided Texas court of appeal, with one dissenting justice, affirmed the trial court on the following grounds:

    a. Direct-benefits estoppel may apply to bind a non-signatory to a contract to arbitrate through the filing of a claim, when the claim depends on the contract's existence and cannot stand independently and the claim must be determined by reference to it. Equity prevents a person from avoiding the arbitration clause that was part of that agreement. However, when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen but for the contract's existence. Direct-benefits estoppel will not apply if the contract benefits are either insubstantial or indirect.

    b. This case is different than *Rachal v. Reitz* where a trust beneficiary sued to enforce rights under a trust, and no case cited addresses arbitration in the context of will administration. Here, Smith's claims all derive from statutes and common law, irrespective of the terms of the will. Ali had a statutory duty to deliver assets to Smith as successor, and Smith had a statutory right to ask the court to enforce the delivery of the estate assets. Smith's fiduciary duties were also derived from statutes and common law. The substance of Smith's claims arise from general duties under statutes and the common law, and Smith did not allege that Ali violated any terms of the will, making this theory of direct-benefits estoppel inapplicable.

    c. Similarly, Smith's fees as administrator were pursuant to state law and a court order, and not under the terms of the will. Because those fees were awarded without reference to the will, the fees do not support application of direct-benefits estoppel to bind Smith to the arbitration provision in the will.

d. One dissenting justice would hold that, by accepting the appointment as administrator, Smith became a party to the arbitration provision and that it was necessary to enforce the provision to carry out the testator's intent.

IX. Mediation, Settlement, Releases & Indemnification

A. *Lambrecht v. Lambrecht*, No. 339632 (Michigan Court of Appeals, Unpublished 2018).

Location of signed trust amendment after death of settlor does not justify vacating settlement of dispute about validity of amendment during settlor's lifetime.

1. Frank Jr. executed a revocable trust in 1997 that he amended in 2007. The trust provided after his death for his assets to pass equally to his sons Frank III and David, with the share for any deceased son passing to the son's children.

2. In 2011, Frank Jr. suffered a stroke and become blind. David died in early 2012 survived by two daughters. An attorney, claiming to represent Frank Jr's guardians (although none had yet been appointed), petitioned the probate court to approve as valid an unsigned trust amendment from 2008 that would disinherit David's children and leave the entire estate to Frank III. Neither the attorney nor Frank III had located the signed amendment. The petition was signed by a successor trustee. Later in 2012, Frank III and Frank Jr.'s girlfriend were appointed as guardians for Frank Jr. The probate court entered an order approving the trust amendment.

3. In 2015, the granddaughters petitioned to vacate the order approving the trust amendment based on allegation of misrepresentation by the petitioning attorney, and the lack of signed instrument. The court (a) appointed counsel for Frank Jr. out of concern that the guardians were not acting in his best interests and (b) removed and replaced the guardians. Frank Jr.'s court-appointed counsel raised other concerns about the amendment, including the settlor's capacity and the suspicious circumstances around the petition to validate it.

4. The parties entered into mediation and settled the issue by agreeing that after the settlor's death the trust assets would pass 58% to Frank III and 42% to the granddaughters. The probate court approved the settlement.

5. Frank Jr. died in 2016. Frank III then found a signed (but not dated or notarized) trust amendment in the drawer of the desk located in Frank Jr.'s bedroom and petitioned the court for relief from the settlement on the grounds, in part, of mutual mistake of fact about the existence of the signed amendment. The probate court denied the petition and Frank III appealed.

6. On appeal, the Michigan Court of Appeals affirmed the probate court on the following grounds:

   a. Public policy favors the finality of judgments. While the presumed non-existence of a signed instrument was material to the settlement negotiations, there were also other concerns with the validity of the amendment that impacted the decision to settle.

b. The doctrine of mutual mistake does not require vacating the settlement where: (i) Frank III was aware of the possibility that a signed document existed; (ii) the parties decided to settle claims before an evidentiary hearing where the existence of the signed document might have been discovered, and to drop all factual inquiries; and (iii) there is always the possibility that questions of fact or law will be answered after settlement and one side may have buyer's remorse, but setting aside judgments under those circumstances would discourage settlements and public policy favoring the finality of judgments.

c. Frank III had to have been aware of the possibility of a signed document and entered into the settlement without searching the settlor's desk for the document (the most logical place it might be located, and where it was found). As guardian, Frank III had access to the settlor's desk and a duty to act in the settlor's interests. The settlor's counsel did not search there, but he was prohibited from doing so by one of the guardians. None of the parties could have definitively believed the signed document did not exist when they each entered into the settlement. Frank III therefore bore the risk of mistake when he entered into the settlement.

d. The settlement need not be vacated for the discovery of new evidence because Frank III did not exercise reasonable diligence to locate the signed amendment. He failed to look in the obvious starting place for the document, and his duties as guardian undermine the reasonableness of his claimed deference to his father's privacy. Frank III had access to his father's desk, whereas counsel was prohibited from accessing the desk (and counsel did not have authority to override the restrictions imposed by the guardians).

e. Statutory equitable remedies are not available where Frank III failed to use reasonable diligence to locate the document, there were other issues in the case besides the existence of a signed document (including competency and undue influence, the conduct of the guardians, and the validity of service of process on the settlor who was blind and debilitated). It was therefore not inequitable to hold Frank III to the terms of the settlement.

B. *In re Estate of Marrazzo,* 2018 N.J. Super. Unpub. LEXIS 2258 (2018). Nondisclosure of failure to file estate tax returns does not require vacating settlement agreement resolving will contest and estate litigation.

1. Francis died in 2014 and was survived by his sons, Brandon and Todd. Brandon was appointed as executor, and Todd filed a caveat against probate of the will. They settled the suit and executed a consent order. In the order, Todd had the option to purchase a house from the estate, subject to the following conditions: (a) that he pay the estate taxes he failed to pay as executor of their deceased mother's estate; (b) that he pay the outstanding tax sale certificate on the property; and (c) Todd's obtaining a firm funding commitment by a set date. If he didn't timely exercise his option, Brandon would have an option to purchase the property or it would be sold to a third party.

2. Even though the option deadline was extended by a supplemental consent order, Todd failed to obtain financing and timely exercise his option by the deadline. Two weeks after the expiration of the extended deadline, Todd

received notice from the New Jersey Division of Taxation that Brandon had not timely filed an estate tax return for Francis's estate. Brandon rejected Todd's request for an additional extension to exercise the option.

3. Todd moved to vacate the consent order, alleging that Brandon's failure to disclose that he had not filed the estate tax return was a material misrepresentation and that, without a return being filed, Todd could not obtain clear title to the property. The trial court denied the motion and Todd appealed.

4. On appeal, the superior court affirmed the denial of the motion to vacate the consent order on the following grounds:

    a. Both parties were in equal bargaining positions, and were represented by counsel, and there was no duty on Brandon to affirmatively advise as to the status of the estate tax returns. There was no allegation that Todd ever inquired into the status of the tax returns, and therefore no affirmative misrepresentation.

    b. Payment of taxes was expressly addressed in the settlement and part of the negotiations. As an accountant, tax professional, enrolled agent, and former federal revenue agent with the Treasury Department, and having served as executor of his mother's estate, Todd was presumably well versed in the tax code and its obligations.

    c. Todd's option had already lapsed by the time he learned about the estate tax returns, and the returns were not the only reasons he sought an extension, as he had also failed to obtain funding for the purchase.

C. *Kent v. Kerr*, No. 55A01-1612-ES-02907 (Indiana Supreme Court 2018). Statute authorizing settlement of estate disputes cannot be used to enforce pre-mortem estate settlement agreement.

1. Gary signed a will in 2008 dividing his assets equally among his children, Cindy and David. About a month before his death, Gary requested that his children enter into an agreement about how specifically his assets would be divided upon his death. The children signed the agreement, and Gary signed the agreement indicating it conformed to his wishes. A week later, David sent notice to Cindy purporting to rescind the agreement. A few weeks later, Gary died.

2. David, as co-personal representative, petitioned to probate the will without reference to the agreement. Cindy challenged probate of the will without incorporating the agreement as either a codicil or a settlement agreement under a state statute (the Compromise Chapter of the probate code) authorizing settlement of estate disputes. The trial court held the agreement was not a codicil and was enforceable under the state statute. Cindy appealed, the court of appeals reversed the trial court, and then David appealed.

3. On appeal, the Indiana Supreme Court, over one dissenting justice, reversed the court of appeals and held that the state statute could not be used to enforce a pre-mortem estate settlement agreement, on the following grounds:

a. The Compromise Chapter of the probate code does not unambiguously state whether it applies to only post-mortem agreements, and therefore it is open to judicial interpretation. By using the terms "decedent", "estate", "testamentary trust", and "probate" in the statute, the legislature used terms that can only apply after death. The statute does not include any language that would expressly apply to pre-mortem disputes, and therefore the legislature wrote statutes that could only apply post-mortem.

b. Applying the statute to only post-mortem agreements is consistent with the legislature's intent to compromise disputes over a decedent's estate, since there is only a decedent and an estate after death has occurred.

c. Post-mortem compromises have been part of Indiana law for at least 130 years. This agreement is a pre-mortem agreement, and Cindy cannot use the Compromise Chapter to enforce it. The door is not closed on these types of agreements – the court is only holding that this one particular method cannot be used to enforce them.

d. The issues of whether David validly rescinded the agreement, and whether it is enforceable under general contract law, should be addressed by the trial court on remand.

e. One dissenting justice would hold that state policy strongly favors freedom of contract, and that this statute should be available to enforce contracts unless the statute expressly states that it is not available to pre-mortem contracts.

X. No Contest Clauses

A. *EGW v. First Federal Savings Bank*, 2018 WY 25 (2018). Contest by father validly triggered clause disinheriting his children.

1. Allen created and funded his revocable trust in 2001 with his ranch property. He originally named his son as trustee and the trust was originally for the son's children after his death. Allen amended the trust in 2006, 2009, and 2014 to add his wife and her descendants as beneficiaries, remove the son as trustee, name a bank as trustee, and provide that his son and grandchildren should not serve as trustee. He also added a forfeiture clause that provided that "any challenge to this trust made directly by or on behalf of my son or grandchildren shall immediately terminate any interest in the trust of any descendant of mine".

2. In 2013, Allen listed the ranch for sale and the son sued Allen as trustee to block the sale and remove Allen as trustee of his own trust due to alleged incapacity and undue influence. He also alleged that Allen's wife unduly influenced Allen to amend the trust. Allen died a month later. The case went to trial and the court upheld the trust amendments. The son appealed, and the Wyoming Supreme Court affirmed the trial court. While the appeal was pending, the son filed another action on behalf of his minor children (he was later prohibited by the court from representing his own children due to conflicts of interest) to block the sale of the ranch, declare that the forfeiture clause would not apply to them, remove the bank trustee, and sue the bank for damages. The trustee moved for summary judgment on the grounds that,

as a result of the son's prior suit, the son's children were no longer trust beneficiaries by operation of the forfeiture clause. The trial court granted summary judgment for the trustee, and the grandchildren appealed.

3. On appeal, the Wyoming Supreme Court affirmed the trial court and the application of the forfeiture clause to disinherit the grandchildren on the following grounds:

   a. Contrary to the son's assertions, his prior challenge to the trust was not dismissed due to his lack of standing to contest a revocable trust. His claim that the trust amendments were the product of undue influence was tried and submitted to a jury, the jury found no undue influence, and the court held that because of that jury finding the son had no further interest in the trust. Even if he did lack standing to bring that first lawsuit, that fact did not prevent him from challenging the trust under any interpretation of the word.

   b. The enforcement of the forfeiture clause against the grandchildren as a result of the actions of their father (rather than their own actions) does not violate public policy and is valid because: (i) a testator has the right to dispose of his property as he sees fit; (ii) the Wyoming Supreme Court has rejected attempts to avoid forfeiture clauses on public policy grounds even where the challenge is made in good faith and with probable cause; (iii) the court's policy is that the testator's intent is controlling; (iv) Wyoming rejected Section 3-905 of the Uniform Probate Code and the court will not do what the legislature chose not to do; (v) while no Wyoming court has addressed a clause like this one, where the clause is enforced against beneficiaries not participating in a challenge, there is no grounds for departing from the court's precedent; and (vi) the grandchildren have no right to property by inheritance and therefore enforcement of the clause against them does not deprive them of any statutory or constitutional rights.

   c. There is no support that the son's challenge does not trigger the clause because it was brought during the settlor's lifetime. The plain language of the clause requires forfeiture regardless of the fact that the settlor chose not to remove the grandchildren as beneficiaries during his lifetime and after the son's challenge to the validity of the trust amendments.

B. *Montoya v. Connell*, 2018 Nev. LEXIS 72 (2018). Breach of fiduciary duties by trustee that was also a trust beneficiary does not trigger forfeiture under no-contest clause.

1. Eleanor was sole trustee of a 1972 trust. The trust provided for distribution of the trust income 35% to Eleanor and 65% to her daughters. The trust included a no-contest clause that would disinherit any beneficiary or any other person that asserts a claim to the trust assets or attacks or opposes the trust administration and distribution.

2. As trustee, Eleanor improperly cut off income distributions to her daughters. The daughters sued and the court: (a) ruled in their favor and held that Eleanor breached her duties as trustee; (b) ordered the trustee to account; and (c) due to concerns with the accounting, replaced Eleanor as trustee. The court found that Eleanor failed to protect the 65% interest, filed an intentionally inaccurate

accounting and false records with the successor trustee, and improperly removed $1 million from the trust before turning assets over to the successor trustee. The daughters sought surcharge and also to enforce the no-contest clause against Eleanor. The court ordered the surcharge but declined to apply the no-contest clause. The daughters appealed.

3. On appeal, the Nevada Supreme Court affirmed on the following grounds:

   a. Eleanor's actions were taken in her fiduciary capacity. While there could be instances where a no-contest clause applies to trustee-beneficiaries who abuse their trustee status as a means of presenting personal views as a beneficiary, it was not shown here that Eleanor's breaches of fiduciary duty were motivated by her own interest.

   b. The trust vests the trustee with broad administrative powers. Interpreting the no-contest clause as applying to any actions taken by a trustee-beneficiary in her trustee capacity, even if later determined that those actions were breached of duty, would conflict with the latitude afforded trustees in order to effectively manage and control the trust in the normal course of their duties. In the absence of specific language to the contrary, the trust as a whole indicates that the settlors did not intend for the no-contest clause to apply to actions taken by a beneficiary acting in her dual capacity as trustee, regardless of whether those acts benefitted or were intended to benefit the trustee in her beneficiary capacity.

   c. To the extent that the settlor's intent is unclear, this interpretation produces the most fair and reasonable result. Imposing a no-contest clause on a trustee-beneficiary for actions taken in a fiduciary capacity would not disincentivize litigation or minimize disputes. Rather, it would seem to incentivize challenges by the beneficiaries to the trustee-beneficiary's administration in order to eliminate a beneficiary. Imposing the no-contest clause in this manner also ignores the variety of remedies available for the breach of duties, including surcharge, damages, and award of attorneys' fees.

XI. Standing & Parties

A. *Gervasi v. Warner/Chappell Music,* 2018 U.S. Dist. LEXIS 76757 (M.D. Tenn. 2018). Under New York law, only personal representative may sue music publishing company for alleged missing royalties during life of the decedent.

1. Richard A. Whiting was a composer who wrote "On the Good Ship Lollipop" and "Hooray for Hollywood". In 1936, he entered into a music publishing agreement with Warner Bros. He died in California in 1938 leaving his intellectual property to his wife, Eleanore, and his daughters, Barbara and Margaret.

2. Eleanore signed a publishing deal in 1943 with Music Publishers Holding Corporation. The agreement was amended to increase her share of international licensing fees. She died living in California in 1981, leaving her rights to Barbara and Margaret. Margaret died in New York in 2011, leaving her rights to Deborah. Warner/Chappell Music, Inc. is the successor to Warner Bros. and Music Publishers Holding Corporation.

3. Starting in 2006, Deborah disputed whether full royalties were being paid. She sued the publisher in 2012 in federal court, individually and on behalf of Richard's estate, asserting diversity jurisdiction. The publisher moved to dismiss for lack of diversity based on Richard's estate and the publisher both being in California. Deborah amended her complaint to state that she was not the formal representative of Richard's estate, but was suing to vindicate the rights of his heirs. The publisher then moved for partial summary judgment on all claims that accrued before Margaret's death, on the grounds that only the lawfully appointed representative of Margaret's estate could sue for claims that accrued during Margaret's lifetime. The federal district court granted the partial summary judgment on the following grounds:

   a. Under California statutory law (which would have governed Richard's estate), a beneficiary of a decedent's estate may succeed to a cause of action. A cause of action that originally belonged to a decedent may, through ordinary laws of inheritance, come to belong to an heir, and an estate representative would not be needed to pursue the claim under California law.

   b. However, Deborah inherited her rights through her mother's estate that was administered in New York. Unlike California law, under New York statutory law a decedent's cause of action may be brought or continued by the personal representative of the decedent. The New York statute does not provide for the cause of action to pass to the heirs.

   c. Deborah has been aware of this pleading defect since 2012, but elected to amend her complaint both to salvage federal jurisdiction and to reflect the reality that she does not have the legal right to proceed on behalf of any decedent's estate. By proceeding only individually, she must accept the limitations that New York estate placed on how her mother's rights can and cannot be vindicated following her death. Accordingly, all claims that accrued prior to her mother's death are dismissed.

B. *Hartnett v. Farm Service Agency,* 2018 U.S. Dist. LEXIS 98245 (Kansas 2018). Trustee, who is not an attorney, may not sue in propria persona for a trust, notwithstanding extensive personal experience as a pro se litigant.

1. Ronald was trustee of a trust for the benefit of his relatives, Lonnie and Lex. The trust was denied Conservation Reserve Program benefits by the Department of Agriculture in 2013 and lost its administrative appeals. He then sued the Department of Agriculture and various individuals alleging a conspiracy against the trust. He sued as trustee and identified himself as "not pro se, but in propia persona, by Right of Visitation, and by his own authority, make this Special Appearance, in his natural person" and brought claims for "depriving Plaintiffs of Constitutional protected Birth Rights under color of Federal Law, in the abuse of Administrative Due Process, custom or usage, conspiracy to so deprive and/or failure, neglect and refusal to protect plaintiffs from said conspiracy in using only selective Statutes/Federal Regulations (CFR) for enforcement".

2. The defendants moved to dismiss the claims. After the court informed Ronald that he could not represent the trust in federal court, he moved the court to stay the case, explaining that he had been inflicted with the West Nile Neuroinvasive Disease, was unable to file the complaint until the limitations

period had almost run, and had difficulties of memory, motion, thinking process, reliable voice, and the ability to produce the necessary documents in this case. He also noted that in his vast experience as a pro se litigant, he has never been questioned on his ability to represent others (although no case showed that he had ever sued on behalf of another person). No licensed attorney ever made an appearance in the case to represent the trust.

3. The federal district court dismissed the claims on the following grounds:

   a. In all the courts of the United States the parties may plead and conduct their own cases personally. But where the litigant is not the beneficial owner of the claims, he is not conducting his own case personally. As only a trustee, and not also the sole beneficiary of the trust, Ronald is not the beneficial owner of the claims and is not a party conducting his own case.

   b. While Ronald has significant experience as a pro se litigant, this does not make him an attorney. Only a licensed attorney, subject to the Rules of Professional Conduct, may represent the rights and interests of others.

C. *Estate of Lee,* 2018 Tex. App. LEXIS 3771 (2018). Parties cannot confer standing to contest a will by contract.

1. Lucy signed a will in 2013 that gave the residue of her estate to a trust for son Jack, with the trust assets passing at Jack's death to her grandsons. In 2015, she signed a first codicil that replaced the grandsons as remainder beneficiaries with her niece, Mary. In 2016, she signed a second codicil that gave the residue outright to Jack and not in trust. The will included a spendthrift provision.

2. Lucy died in 2016. Her grandson, Michael, and Mary entered into a contract under which Michael agreed to contest the second codicil and if successor, Mary agreed to give Michael 40% of anything she received under the trust. Michael sued to contest the second codicil only, and Jack moved to dismiss for lack of standing. The trial court dismissed the claims for lack of standing and Michael appealed.

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

   a. Michael does not have standing individually as a trust beneficiary because, to have an interest, he would have needed to successfully challenge both codicils, yet here he only contested the second codicil. Even if he prevailed on contesting the second codicil, he would still not have an interest in the trust.

   b. Michael is not an "interested person" with statutory standing because his former remainder interest was terminated by the first codicil and he did not challenge the validity of that codicil. Standing to contest a will requires a pecuniary interest that will be directly and immediately affected by the probate or defeat of the will.

   c. Jack had the ability to question the validity of the agreement to defend against Michael's claimed standing to contest the second codicil. Subject matter jurisdiction cannot be conferred on the court by agreement of the parties or by waiver. Michael cannot establish standing by arguing that

Jack is powerless to challenge the source of his standing because he is not a party to the contract. This would amount to standing by default and would allow Michael to use the agreement as both a sword and a shield. By asserting the agreement as the basis for standing, Michael consents to the scrutiny of the agreement's validity in this litigation, even if Jack would otherwise be unable to do so.

d. The trust included a spendthrift clause, and beneficial interests in trusts cannot be assigned when they are subject to spendthrift clauses. Assuming the contest to the second codicil were successful, the trust would be an active trust with duties imposed on the trustee with respect to distributions and investments. Enforcement of the spendthrift trust does not violate public policy favoring settlement of disputes, because there was not actual apparent dispute between Michael and Mary, and the validity of the agreement is not before the court other than on the issue of whether it is effective to confer standing. Enforcement of the spendthrift clause does not violate the settlor's intent because the settlor imposed the spendthrift provision on the interests of the remainder beneficiaries.

XII. Situs, Jurisdiction & Venue

A. *In re JP Morgan Chase Bank, N.A.,* 2018 Tex. App. LEXIS 1883 (2018). Court erred by refusing to enforce trust forum selection clause.

1. James C. "J.C." Penney created a trust in 1934 for the benefit of his daughter and her descendants. The trust was executed in New York and provided that "the validity and effect of the provisions of this Agreement shall be determined by the laws of the State of New York, and the Trustee shall not be required to account in any court other than one of the courts of that state".

2. The beneficiaries asked the corporate co-trustee to resign, the corporate co-trustee petitioned New York court for permission to resign, and the beneficiaries sued the trustees in a Texas court for alleged breach of fiduciary duty. The trustee moved to enforce the trust forum selection clause and the trial court refused to enforce the clause. The trustees appealed and sought a writ of mandamus.

3. On appeal, the court of appeals reversed and granted mandamus relief on the following grounds:

   a. Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause.

   b. Forum-selection clauses are generally enforceable and presumptively valid. Failing to give effect to the clause amounts to clear harassment, injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication, and skewing settlement dynamics. A trial court abuses its discretion in refusing to enforce the clause unless: (i) enforcement would be unreasonable or unjust; (2) the clause is invalid due to fraud or overreaching; (3) enforcement would violate strong public policy where the suit was filed; or (4) the forum would be seriously inconvenient for trial.

c. The parties agree that the validity and effect of the trust is determined under New York law. At the time the trust was drafted, the word "account" as used in the trust was a verb, rather than a noun, and it was used as a verb by the phrase "to account". The term encompasses more than actions for an accounting. The phrase "required to account in" was used as a broad, unrestricted phrase and means the trustees may not be sued or otherwise required to explain alleged wrongdoing regarding the trust or its administration in any state other than New York. This conclusion is supported by the broad use of "account" elsewhere in the trust. The trust was crafted carefully and the settlor could have written the forum-selection more narrowly and chose not to.

d. The Texas statute on mandatory venue does not supersede a contractual forum-selection clause. Absent any evidence supporting the trial court's decision to refuse to enforce the clause, refusal to do so is an abuse of discretion. Mandamus relief is therefore appropriate.

B. *In re Doll Trust*, 2018 Mich. App. LEXIS 3316 (2018). Court lacks jurisdiction where trustee moved situs of trust using discretionary power in trust terms.

1. In 2001, Elizabeth Doll created a revocable trust with herself as trustee. In 2013, her daughter acting as her agent under a durable power of attorney, resigned Elizabeth as trustee and Elizabeth's daughters became co-trustees. Elizabeth tried unsuccessfully to regain her trusteeship and then died in 2014. The trust terms provided that the trust was exempt from registration in any state and gave the trustees the power to change the trust situs and governing law at any time (without any notice to the beneficiaries required). In 2015, the trustees gave the beneficiaries notice that the trust situs was moving from Michigan to Florida. Only one beneficiary, Teresa, sent a written objection, but she sent it to the wrong address and it was never received by the trustees.

2. In 2017, Teresa sued in Michigan court to remove the trustees and the trial court dismissed the suit for lack of jurisdiction. Teresa appealed. On appeal, the court of appeals affirmed the dismissal of the suit on the following grounds:

   a. By statute, the probate courts are not to hear proceedings involving trusts with a principal place of administration in another state, unless the other state could not bind the parties to the suit or justice would be seriously impaired.

   b. Because the trust terms gave the trustees discretion to change the trust situs without notice or other requirements, the requirements for changing situs and governing law under the Uniform Trust Code do not apply. The UTC provision is a default rule where the trust is silent, and here the trust was not silent. The trustees were not required to provide notice under the UTC, the situs was changed, and the suit involved a trust administered outside the state.

XIII. Disclosure & Information Access

A. *Millstein v. Millstein*, 2018 Ohio 1204 (2018); 2018 Ohio 2295 (2018). Grantor of defective grantor trust does not have right to trust information beyond grantor trust tax letter and other disclosure permitted in trust terms and cannot sue the trustee to compel the trustee to reimburse the grantor's income taxes where not authorized in the trust terms.

1. In 1987 and 1988, Norman Millstein established two irrevocable trusts for the benefit of his children and their descendants, with himself as initial trustee. He resigned in 1997 and named his son, Kevan, as sole successor trustee. The trusts were grantor trusts for federal income tax purposes with Norman as the grantor, but did not provide for reimbursement of Norman's taxes. Norman signed a 1988 letter stating his intent, separate from the trusts themselves, which included the prospect of offsetting the income attributable to Norman. The trust terms provided that the trustee must provide Norman annually with "a full financial report of the trust assets".

2. In 2010, Norman requested reimbursement of the taxes he paid on behalf of the trusts. Kevan declined, but agreed to use assets of another unrelated trust to defray Norman's tax expenses.

3. In 2013, Kevan informed his father that the other trust no longer had liquidity to offset Norman's taxes. Kevan took steps so that the trust for his own benefit would no longer be a grantor trust for federal income tax purposes, but did not take such steps for the trust for Norman's other child. Norman paid income taxes for the trusts of $6.5 million for tax years 2013-15, and remained responsible for future taxes for the trust for Kevan's sibling.

4. Norman sued the trustee to compel the trustee to provide him with a "fiduciary accounting". The trustee moved for summary judgment dismissing the claim, which the trial court granted. On appeal, the Court of Appeals affirmed the trial court's dismissal of the claim on the following grounds:

    a. The trust terms do not require the trustee to provide the grantor with a full accounting, and a "full financial report of the trust assets" is not the same as a complete fiduciary accounting as demanded by the grantor. The Uniform Trust Code requires a report to the beneficiaries, and not to the grantor, and requires a "report" and not an accounting, and does not require the full formality of a fiduciary accounting.
    b. In exchange for certain cash payments, a monthly salary for life, health insurance, and use of properties in Florida and Las Vegas, Norman signed an agreement in 2005 to waive any right to sue Kevan, including as trustee of the trusts.
    c. Federal tax laws only require that the trustee provide the grantor with an annual grantor tax letter. The tax laws do not impose any requirement that the trustee provide the grantor with additional information so that the grantor can verify the accuracy of the annual tax information provided by the trustee. If the grantor believes the trustee has not furnished the grantor with proper tax information, the grantor should contact the IRS.

5. Norman also sued the trustee for reimbursement of taxes, which the trial court dismissed. On appeal, the Court of Appeals affirmed the dismissal of the claims on the following grounds:

    a. The trust terms do not authorize the tax reimbursement. The Uniform Trust Code allows for reformation of a trust to accomplish the grantor's tax objectives. However, under the Uniform Trust Code only a trustee or a beneficiary may petition the court to reform a trust under this section. The court may not apply equitable principles to circumvent valid legislative enactments.

b. Equity will not aid a volunteer, and Norman admitted that he intentionally set up the trusts as grantor trusts, and did not allege that Kevan or any other parties took any actions that were inconsistent with the terms of the trusts that Norman created. Norman voluntarily created the situation that he now claims is inequitable.

B. *Whitehead v. Westinghouse*, 2018 Nev. Unpub. LEXIS 238 (2018). Nevada trust beneficiary does not have a right to compel a trust accounting where all interests are discretionary.

1. Keehle, a minor, was the beneficiary of Nevada trust that provided for discretionary distributions of income and principal for support, and for age-based principal distributions at ages 35, 40, and 45. The trust terms allowed a "Trust Consultant" to cause the trustee "to distribute some or all of the principal and/or undistributed income of the Trust either to the Beneficiary free of the trust or to another trust established for the primary benefit of the Beneficiary and/or her descendants". Kheele's mother asked the trustee for a trust accounting, the trustee refused, and the trustee petitioned the court. The court ordered the accounting and the trustee appealed.

2. On appeal, the Nevada Supreme Court reversed and held that the beneficiary was not entitled to an accounting, on the following grounds:

   a. Trust accountings are governed by the Nevada Uniform Trustees' Accounting Act. One exception to the duty to account under the Act is that a trustee is not required to provide an accounting to a beneficiary of an irrevocable trust while that beneficiary's only interest is a discretionary interest as defined in the statutes.

   b. The beneficiary's present interest is clearly discretionary. The beneficiary's remainder interest would, at first glance, appear to be a mandatory interest from the age-based principal distributions. However, that mandatory language is qualified by discretionary language because the Trust Consultant, at any time, can direct the trustee to make a distribution of principal and undistributed income to the beneficiary and determine the amount to be distributed. By statute, if a trust provision contains mandatory language but that is qualified by discretionary language, the interest is classified as a discretionary interest. Therefore, the remainder interest is also discretionary.

   c. Because the beneficiary's only interests are discretionary, the trustee is not required to provide an accounting under the Act.

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

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

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

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

ruling on the estate's property interest. On its own initiative, the Massachusetts Supreme Judicial Court transferred the case to its docket from the court of appeals.

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

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

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

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

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

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

that way, and because the personal representatives "should not have to spend a penny more to obtain estate property in the possession of Yahoo that they need to administer the estate".

5. On March 26, 2018, the U.S. Supreme Court denied Yahoo's petition for a Writ of Certiorari.

D. *In re Willard R. Sparks Revocable Trust 2004,* 2018 Tenn. App. LEXIS 746 (2018). Court upholds sanctions against trustee for filing false demand for accounting from trustee.

1. Willard Sparks placed his interests in several agribusinesses, with a total value of over $200 million, into a trust for his children that would manage his interests until seven years after his death, at which time the interests would be distributed to his children.

2. In 2013, due to several multi-million dollar claims against the trust, the trustees, with the concurrence of the beneficiaries, entered into an agreement to appoint a single managing trustee and to extend the trust term until the claims against the trust were resolved, and to facilitate liquidation of the trust assets.

3. In 2015, Brian, one of the co-trustees and beneficiaries sued the managing trustee and his brother, Robert, who was also a co-trustee and beneficiary, to seek a detailed trust accounting. The defendants moved to dismiss the claims and impose Rule 11 sanctions. The motion for sanctions identified numerous inaccuracies in the petition and sought payment of the attorneys' fees incurred by the trust. Brian did not amend his petition. The trial court held a six-day hearing on the sanctions motion, and imposed Rule 11 sanctions in the amount of $200,000 against Brian on the grounds that: (a) monthly financial statements and yearly audited statements were provided to the co-trustees and all beneficiaries for the past 10 years; (b) as co-trustee, Brian had access to all the information he had requested; (c) Brian falsely claimed he did not receive the information he requested; (d) Brian falsely claimed his brother had not repaid certain funds to the trust; (e) Brian objected to loans he had approved in advance in writing, falsely claimed he had not signed the approval papers, and falsely claimed the loans had not been repaid; and (f) driven by has anger against his brother, Brian had filed willful and untruthful pleadings. The managing trustee had sought sanctions in the amount of all of the trust's attorneys' fees totaling $1.9 million, but the trial court concluded that $200,000 was enough to deter petition of the conduct by Brian. Both sides appealed, and expressed displeasure with the amount of the trustee's attorneys' fees.

4. On appeal, the court of appeals affirmed on the following grounds: (a) the proper measure of sanctions is the amount necessary to deter the conduct; (b) the trial court's measure of the amount of sanctions was not clearly erroneous, and is subject to the court's discretion; (c) the trustee bears some responsibility for their selection of counsel and the litigation strategy and conduct of their counsel and cannot expect Brian to pay for it entirely; and (d) whether to award attorneys' fees in trust actions is a matter of judicial discretion and the court did not clearly abuse its discretion.

XIV. Fiduciary Privileges & Exceptions

A. *Huber v. Noonan*, 2018 Pa. Super. Unpub. LEXIS 3980 (2018). The law of the state where the decedent dies applies to determine the scope of the testamentary exception to the attorney-client privilege.

1. Susan was a Pennsylvania attorney who drafted estate planning documents for Clara when she lived in Pennsylvania. Clara discharged her when she moved in with her niece, Karen, in Florida in 2015. Clara then executed new estate planning documents that left her entire estate to Karen. Clara died the next year and her other relatives sued in Florida to contest the new Florida documents on the grounds of lack of capacity, undue influence, and tortious interference. Their lawyer subpoenaed Susan's entire estate planning file including her notes, correspondence, and other memoranda that were attorney work product.

2. Susan moved to quash in the grounds of the attorney-client privilege and the attorney work product doctrine. The court granted her motion, but then on reconsideration denied the motion on the privilege and only allowed her to withhold documents that were attorney work product. Susan appealed.

3. On appeal, the Pennsylvania Superior Court affirmed on the following grounds:

    a. Florida has a broad statutory provision that applies the fiduciary exception to the attorney-client privilege. In contrast, Pennsylvania has no appellate cases recognizing the exception and the lower court cases are much more limited than the Florida statutory rule. There is therefore a real conflict between the laws of the two states.

    b. Florida has the largest interest in the outcome of the litigation. The lawsuit is pending there, the defendants reside there, the trusts at issue have Florida situs, and the case will be decided by a Florida court. Florida law should therefore be applied to determine the scope of the fiduciary exception to the attorney-client privilege.

    c. Florida has a broad statutory exception and presumes the testator would want to have her intent known if the alternative would result in a wrongful disposition of her estate. The plaintiffs are arguing that the Pennsylvania documents should control under dependent relative revocation and require the Pennsylvania information to establish their standing to sue and also evidence of the decedent's longstanding testamentary intent. The plaintiffs also believe that the file will have evidence of undue influence, such as the cloistering of the decedent from those she trusted.

    d. Pennsylvania has no interest in the outcome of the case and is only involved due to a derivative subpoena.

B. *In re: Amendments to the Florida Evidence Code*, No. SC17-1005 (2018). Florida Supreme Court approves new evidentiary code provisions eliminating the fiduciary exception to the attorney-client privilege.

1. In Florida, new evidentiary code provisions generally require both passage by the Legislature and approval by the Florida Supreme Court (the procedural aspects of the evidence code are reserved to the courts under the state constitution).

2. In this decision, the Florida Supreme Court reversed its 2014 decision not to adopt Fl. Stat. 90.5021, which provides that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under the statutory attorney-client privilege to the same extent as if the client were not acting as a fiduciary. Florida had also amended its probate and trust codes to make it clear that the "real client" is the personal representative or trustee and not the beneficiaries, and to provide a mechanism for giving beneficiaries notice that the fiduciaries can retain counsel and assert the attorney-client privilege. See Fl. Stat. 733.212; 736.0813.

3. With this decision, the Florida Supreme Court has approved the new evidentiary code provisions eliminating the fiduciary exception to the attorney-client privilege to the extent the rule is procedural in nature, thereby resolving the uncertainty that arose from its 2014 decision.

C. *Morgan v. Superior Court,* 2018 Cal. App. LEXIS 496 (2018). Trust terms cannot eliminate the fiduciary exception to the attorney-client privilege.

1. Beverly completely restated her revocable trust in November of 2013 and named her son Thomas as sole beneficiary and successor trustee. She died in January 2014, and her daughter Nancy filed a series of claims against Thomas, including claims to invalidate the trust for lack of capacity, fraud, undue influence, claims to remove Thomas as trustee for alleged inappropriate personal use of the trust assets in the dispute with the other family members, and alleged self-dealing through millions of dollars in interest-free loans.

2. The trial court initially resisted motions to suspend Thomas as trustee, enjoined Thomas from dissipating the trust assets while litigation was pending and ordered Thomas to file an accounting. When the accounting filed was so inadequate as to be called mere "lip service" by the court, the court suspended Thomas as trustee, appointed successor co-trustees, and ordered Thomas to provide the successor trustees (but not the opposing parties) with all trust records and communications between Thomas with trust counsel (including billing statements, invoices, fee agreements, and payment history), without redactions. One of the issues in the case was whether Thomas was charging the trust for his personal costs in the dispute with the other family members about the validity of the trust.

3. At a hearing, Thomas's counsel informed the court that he would turn over the documents by July 12th, but then objected to entry of the formal order memorializing the court's minute order asserting attorney-client privilege. The terms of the trust provided as follows: "[A]ll communication (written or oral) between the Trustee and legal counsel, and all work product of legal counsel shall be privileged and confidential and shall be absolutely protected and free from any duty or right of disclosure to any successor Trustee to any

beneficiary and any duty to account". The trial court ordered Thomas's counsel to turn over the records and set a hearing to show cause for contempt against Thomas and his counsel for refusing to obey the court's order after counsel stated on the record that he would do so.

4. Thomas petitioned the California Court of Appeals for a writ of mandamus and prohibition asserting the attorney-client privilege, which the Court of Appeals denied on the following grounds:

   a. When a trustee seeks legal advice on behalf of a trust, the trustee is the client and the privilege vests in the office of the trustee and not in a particular person. The right to assert the privilege is transferred from a trustee to the successor trust.

   b. A settlor cannot totally exonerate a trustee from liability for intentional misconduct, gross negligence, or reckless indifference. The trust terms here, accordingly, only partially exonerated the trustee from liability and do not go past what is allowed by law in an exculpatory clause.

   c. The trust terms that provide that the trustee is not required to provide information to the successor trustee violates public policy.

   d. A trustee may be able to refuse to turn over to the successor trustee privileged communications in the trust files where the trustee can demonstrate that counsel was retained in a personal capacity and the trustee took affirmative steps to distinguish the purported personal advice from advice obtained in a fiduciary capacity. The trustee must distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries.

   e. If Thomas did not distinguish his interests from the trust, and used the trust assets for his own benefit, the documents cannot be protected from disclosure by the trust terms. Here Thomas did not retain separate counsel and took no action to separate his individual advice from advice for the trust itself.

   f. Consistent with public policy, the trust protects the beneficiaries from malfeasance by the trustee by placing limits on the exculpatory clauses. To maintain effective and consistent trust operations, the trust terms must be interpreted in a manner that does not allow the trustee to withhold from the successor trustee materials that reflect Thomas's communications with trust counsel while he was serving as trustee, where, as here, there is nothing to suggest Thomas distinguished his own interests from those of the beneficiaries or retained separate counsel for this purpose.

D. *United States v. Fridman,* 2018 U.S. Dist. LEXIS 197038 (S.D.N.Y. 2018). The collective entity doctrine applies to a trust and is an exception to Fifth Amendment protections.

1. The United States petitioned to enforce two IRS summonses, in part against an individual as trustee of New York trust, in connection with an IRS investigation into that individual's tax liabilities. The trustee purported to invoke his Fifth Amendment privilege against self-incrimination, including with respect to documents sought in his role as trustee.

2. With respect to the trustee requests, the U.S. District Court for the Southern District of New York held that Fifth Amendment privileges do not apply, on the following grounds:

   a. The Fifth Amendment provides that no person shall be compelled in a criminal case to be a witness against himself. In addition to testimonial communication, the act of producing evidence in response to a subpoena has communicative aspects of its own, wholly aside from the contents of the papers, and may be subject to the privilege.

   b. However, there are exceptions to the privilege, including the "collective entity doctrine". Under this doctrine, a person cannot rely on the privilege to avoid producing records of a collective entity that are in his possession in a representative capacity, even if those records incriminate him personally. A collective entity is an organization that is independent apart from its members.

   c. The First, Fifth, Eighth, and Ninth circuits have held that trusts are collective entities, but that was an open question in the Second Circuit (although the U.S. District Court for the Southern District of New York itself had already recently held that trusts are collective entities). The court followed the reasoning of those cases and held that trusts are collective entities. The trust at issue had an established identity independent of the trustee, and was held out to the world as being separate and apart from the trustee and beneficiaries. Because the trust is a collective entity, the trustee must produce all trust related documents contemplated in the document requests.

   d. The doctrine is limited to documents and not oral testimony. The trustee can be compelled to produce documents but not oral testimony. However, the trustee is required to identify and authenticate the documents for admission into evidence.

XV. Cy Pres & Charitable Trusts

A. *In re Trust of William J. Cohen*, 2018 Pa. Super. LEXIS 540 (2018). Application of cy pres appropriate to transfer trust distributions to community foundation funded with proceeds of sale of hospital to for-profit health organization.

1. Under his will and trust, William J. Cohen created a perpetual charitable trust for the equal benefit of a church in Chester, a church in Philadelphia, a church in York, and a hospital in Chester. In 1964, a non-profit medical center succeeded to the interests of the hospital. In 2016, the medical center sold its assets to a for-profit company that was ineligible to receive trust distributions and used the sales proceeds to fund a community foundation. The community foundation petitioned to be substituted as a trust beneficiary in place of the hospital by *cy pres.* The state attorney general did not oppose the petition. One of the churches opposed the petition and asserted that the hospital share should lapse and the shares for the remaining three churches should enlarge. The trial court granted the petition and the church appealed.

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

   a. The state statutes on lapsed gifts do not apply and the law of *cy pres* applies to the petition. Those statutes are limited to individuals, no reference is made to an entity that lacks a corporeal existence, and the statutes do not encompass residuary gifts to charitable entities. With respect to a charitable trust, these statutes are subjugated to the *cy pres* statutes.

   b. The fact that the community foundation is not a hospital does not preclude application of *cy pres* in its favor. While the settlors originally intended to benefit a hospital in Chester, the question is what institution he would choose to benefit if he had known the hospital had failed its charitable purpose. The community foundation's mission supports healthcare-related services in Chester and its mission is to improve the health of local residents. It has provided services related to breast cancer screenings, financial support of cancer patients, home hospice care, nutrition for mothers and infants, addiction prevention, child nutrition, and many other programs in the Chester area.

   c. Other than naming a hospital originally, there are no statements of intent that the settlor required the funds to pass to a hospital. Allowing the funds to pass to the three churches would ignore the medical component of the settlor's intention and would further violate the settlor's intent by dividing the funds in three shares rather than four. Further, the settlor did not mandate how the originally named hospital was to spend the funds received, supporting an inference that the settlor was primarily concerned with the provision of medical services rather than the functioning and maintenance of the hospital itself.

B. ***Horgan v. Cosden*, 2018 Fla. App. LEXIS 7375 (2018**). Commutation of charitable remainder trust rejected.

1. Under her revocable trust, Yvonne created a trust at her death that provided for net income distributions to her son for his lifetime, with the remainder passing to three colleges at the son's death. She named her son and her personal assistant as co-trustees. The trust was funded with approximately $3 million. In 2015, the beneficiaries entered into an agreement to commute the trust and distribute $2 million to the son outright and $1 million to the colleges. The co-trustee objected to the commutation. The son petitioned the court to approve the agreement, the co-trustee objected, and the trial court granted summary judgment approving the commutation. The co-trustee appealed.

2. On appeal, the court of appeals reversed, and awarded summary judgment rejecting the commutation, on the following grounds:

   a. The plain trust terms reflect the settlor's intent to provide the son with only incremental income distributions for life, and then give the principal to the colleges after his death. Terminating the trust would frustrate that intent and the trust purposes. The settlor could have given her son a lump sum (as she did for her personal assistant) but chose not to do so. She also included a spendthrift provision to protect the interests in the trust.

b. There has not been any waste of trust assets, proof that the trust purposes have been fulfilled, or proof that termination is in the best interests of the beneficiaries when considered in light of the settlor's intent. Trustee fees are customary, administration expenses were not unusual, and there has been no invasion of principal. Market fluctuations do not create a real risk that the settlor's intent will be thwarted. The beneficiaries simply prefer a different course than the one chosen by the settlor and want their money now. But the desire to have money now would violate the settlor's intent that the income beneficiary receive incremental distributions of income and not principal lump sum distributions.

c. The fact that the trust does not expressly prohibit early termination does not mean that the settlor did not express her intent. Many settlors decline to provide for lump sum distributions and may not want to spell out the reasons. The trial court's erroneous ruling would mean that beneficiaries could have trusts terminated simply by stating they don't want to pay trustee fees, administrative expenses, or be concerned with market fluctuations. Nothing suggests the settlor was unaware that markets fluctuate. The settlor expressly contemplated trustee fees and administration expenses by addressing them in the trust terms.

C. *Kirgan v. M&T Trust Co.,* 2018 U.S. Dist. LEXIS 203039 (E.D. Va. 2018). Allegations about charitable gift contracts and failure to take meeting minutes are not sufficient to justify removal and surcharge of corporate trustee of charitable trust.

1. Clarence Plitt established a charitable trust under his will that was funded after his death in 1976. His long-time partner, Mary, served as initial co-trustee along with a corporate co-trustee. She had previously unsuccessfully contested the will, resulting in entry of an order that the corporate trustee could only be removed for cause. Upon Mary's passing in 2004, her children Mary Anne and Robert (the "Kirgans") became individual co-trustees.

2. The trust provided for awards to educational institutions that agreed to use the funds for student loans based on financial need, and the schools must agree to use the funds for those purposes. The trust leaves selection of recipients and specific loan terms to the recipient institutions. The trust also precludes the trust from having any interest in the loan repayments and provides that the institutions should use such funds in furtherance of their educational purposes as they shall desire.

3. In the early years of the trust, Mary selected the gift recipients and the trustees worked on contracts for the schools to sign agreeing to use the funds for loans. Those contracts required the schools to use the loan repayments for additional student loans. The corporate trustee sought to make changes to the loan agreements with Mary and then the Kirgans, and the individual trustees also sought changes. Before the Kirgans become trustees, the agreements did not include terms addressing the interest rates to be charged, grace and deferment periods, preference for students with co-signed loans, or a requirement that life insurance be taken out on students who do not have a co-signer and receive loans in excess of $20,000. In 2013, Mary Anne signed an amendment to an agreement with Wellesley that added funds to the college and signed alone as alleged "primary trustee".

4. Starting in 2015, the bank trustee raised concerns that several terms of the contracts violated the terms of the will and communicated those concerns to the Kirgans. The trustees eliminated the offending language from the contracts in the 2015 agreement with Randolph-Macon. The bank trustee worked to revise any outstanding contracts that contained the offending language and maintained that the contracts had to comply with the will. The bank trustee also obtained a legal opinion about whether the contracts complied with the will. The bank also started sending payments to the schools directly, rather than sending the funds to the Kirgans for distribution. Before the Kirgans become trustees, 40 schools received trust distributions. After their appointment, only 5 received distributions (with the largest going to Randolph-Macon College and Wellesley). The Kirgans also refused to engage in a process to determine the appropriate compensation to be paid to all trustees.

5. The Kirgans responded by suing to remove and surcharge the bank trustee, alleging the bank breached its duties by failing to take meeting minutes, paying counsel out of the trust assets, sending checks directly to the schools, and not adequately communicating. The bank noted that the Kirgans were unresponsive to investment advice and refused to respond to requests to schedule meetings. The bank filed a counterclaim to prohibit contract terms that violated the will terms and to set trustee compensation.

6. The court rejected the claims to remove and surcharge the bank trustee on the following grounds:

    a. The evidence failed to show that by entering into the contracts the bank trustee violated the will, demonstrated inability to perform the duties of the office, or acted in a way that was not in the interests of the trust. While the contracts went through several iterations over the years, none demonstrated lack of fitness by the bank trustee.

    b. The lack of meeting minutes cannot support the claims because meeting minutes never existed for the trust and were not required by the terms of the will or trust law, and the Kirgans refusal to meet with the bank would hardly give rise to minutes.

    c. While the trustees did not agree on the contract revisions, this is not a breach of the duties of good faith or loyalty, and the bank's actions were not outside the bounds of protecting the trust.

    d. The bank obtained an opinion of counsel about compliance with the will and worked to revised contracts to bring them into compliance. The terms suggested by the Kirgans gave rise to the concerns, and the Kirgans suggested contract terms that went outside the terms of the will. The Kirgans' failure to meet with the bank made it more difficult for the bank to perform its duties, but the bank performed them regardless.

    e. The trust may not require the lending schools to use loan repayments to make additional student loans.

    f. A compensation analysis should be done to set the compensation of all trustees and all trustees must set a meeting schedule and meet to conduct trust business.

XVI. Revocable Trusts

A. ***Rhea Brody Living Trust v. Deutchman*, 2017 Mich. App. LEXIS 1430 (2017); No. 330871 (Mich. App. 2018).** Court of appeals holds that contingent remainder beneficiary of revocable trust may sue trustee, despite settlor being alive and regardless of any finding that the settlor is incapacitated and that the trust is irrevocable. Michigan Supreme Court vacates the decision and remands the case, and on remand the Court of Appeals affirms its prior decision.

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

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

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

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

   b. As a contingent remainder beneficiary of the revocable trust, Cathy had standing to bring her claims regardless of whether Rhea had capacity and the trust was revocable. A court may intervene in a trust administration to the extent its jurisdiction is invoked by an interested person. Interested persons includes beneficiaries. Cathy has a future contingent beneficial interest in the trust, and will receive Rhea's clothing and jewelry at her death, and a sub-trust with 50% of the trust assets after both of her parents die. The court declined to adopt the approach of UTC jurisdictions in holding that a contingent beneficiary lacks standing to challenge the administration of a revocable trust, because those cases involve statutory

language that does not control here. It is unnecessary to determine whether Rhea was disabled under the trust terms or whether the trust is revocable to resolve the issue of Cathy's standing.

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

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

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

4. The Michigan Supreme Court vacated the Court of Appeals decision on Cathy's standing to sue and remanded the case to the Court of Appeals to reconsider its standing decision and take into account the arguments made by the Probate and Estate Planning Section of the Michigan State Bar. On remand, the Court of Appeals affirmed its prior conclusion that Cathy had standing to bring the claims on the following grounds:

a. MCL 700.1105(c) defines "interested person" in relevant part as a "child…, and beneficiary and any other person that has a property right in or claim against a trust estate". Applying rules of statutory construction, the phrase "and any other person that has a property right in or claim against a trust estate" does not modify or impose qualifications on the inclusion of a "child" or "beneficiary" as an interested person. The following sentence of that statute provides that the identification of interested persons may vary from time to time and shall be determined

according to the particular purposes of, and matter involved in, a proceeding, and by the Supreme Court rules. MCR 5.125 of the rules provides additional guidance on interested persons in trust matters and shows that the interested person inquiry is flexible and fact-specific. Read together, whether a child or beneficiary has standing in a trust matter is dependent on the purposes and matter involved in the proceeding under the facts at the time, and not whether the child or beneficiary has a property right or claim against the trust estate at that time.

b. Cathy qualified as an interested person because she would be a qualified beneficiary entitled to notice if the settlor was deceased, and she had a reasonable basis to believe the settlor was incapacitated. When Robert accepted the role as trustee, he had reason to believe his mother was incapacitated as a result of her dementia.

c. The court was dismissive of the State Bar's concern that a child could be included as having standing in trust matters even though the child was not included as a beneficiary, or for a revocable trust, where the settlor was alive and had capacity and the trust was funded for privacy and probate planning purposes.

XVII. Directed Trusts, Protectors & Special Fiduciaries

A. *Minassian v. Rachins*, No. 4D13-2241 (December 3, 2014); 251 So. 3d 919 (Florida Court of Appeals 2018). Drafting lawyer appointed as trust protector could validly amend trust to clarify settlor's intent in the middle of litigation between beneficiaries over ambiguous provisions. Children who are beneficiaries of new trusts that receive remainder of trust assets at death of spouse have standing to challenge distributions from trust during spouse's lifetime.

1. Zaven Minassian created a revocable trust with himself and his wife as trustees, for the primary purpose of taking care of himself and his wife. He died in 2010, and because of the one-year repeal of the estate tax in 2010, only the family trust was funded at his death pursuant to the trust terms. Wife served as trustee of the family trust, which provided the wife with discretionary income and principal by a standard and directed that the primary concern was the care of the wife, and not preservation of corpus. The trust provided that the family trust would terminate at the wife's death, and that Zaven did not desire to create a common trust for his beneficiaries. After the wife's death, the trust assets would pass to separate trust shares for Zaven's children by a prior marriage, with a bank as trustee. His lawyer (who was later named as trust protector), testified that Zaven wanted to provide his wife with the lifestyle of horse racing and legal gambling that they enjoyed together, did not want to create a common trust for his wife and children, and was concerned that his estranged children would challenge his wife's use of the trust assets.

2. The children sued the wife for breach of duty, the wife moved to dismiss on the grounds that the children were not beneficiaries of the family trust, but rather of new trusts that were not yet created. The court denied the motion, finding that the use of the term "trust shares" meant the children likely had standing to bring their claims.

3. The wife, under the trust terms, then appointed the husband's drafting lawyer as trust protector with the power to amend the trust. The trust protector then amended the trust terms to clarify that a new trust would be created at the wife's death, and that the children were not beneficiaries of the family trust.

4. The children challenged the validity of the amendments, both parties moved for summary judgment on the issue, and the trial court granted the children summary judgment and found the amendment was improper for favoring the wife and not leaving the children with the ability to question the wife's actions as trustee, and the wife appealed.

5. On appeal, the court of appeals reversed on the grounds that: (1) the Florida Uniform Trust Code (Section 808) allows the settlor to give a non-trustee the power to modify the trust; (2) this section overrides any conflicting common law principles of non-delegation, and permit the appointment of a trust protector with the power to modify the trust terms; (3) the trust was ambiguous as to husband's intent as to whether a new trust was created at wife's death; (4) the trial court's "single trust" interpretation is not unambiguously supported in the trust terms; (5) the trust protector's affidavit showed that the amendments were made to carry out the settlor's intent and were therefore within his powers; and (6) removing the authority from the trust protector and assigning it to the court would violate the settlor's intent.

6. On remand, the children filed an amended complaint alleging that the wife dissipated the trust assets due to a gambling problem. The complaint added the trust protector and his law firm as defendants, but the children did not serve the protector with the suit papers before his death. The wife and the law firm moved to dismiss the claims on the basis that the children lacked standing because they were not beneficiaries of the trust, and rather were beneficiaries of another trust that would only be funded upon the wife's death. The trial court entered summary judgment dismissing certain claims on this basis and the children appealed. On appeal the court of appeals reversed on the following grounds:

   a. The children are both beneficiaries and qualified beneficiaries of the trust because they have a future beneficial interest in the trust assets remaining at the wife's death, since the assets will be disbursed to a new trust for the children's benefit at that time. At a minimum the children have an equitable interest in any trust assets remaining at that time.

   b. The fact that the remaining trust principal would flow into a new trust, as opposed to being distributed to them outright, does not preclude the children from being statutory beneficiaries of the trust under the UTC definitions.

   c. The fact that the trust terminates upon the wife's death does not preclude the children from having a beneficial interest in the trust. By definition, a remainder interest in a trust refers to the right to receive property when the trust terminates.

   d. While in the prior appeal the court was hesitant to refer to the children's interest as a remainder, the court nevertheless recognized that the children had an interest in the trust. The UTC definition of "qualified beneficiaries" also includes the children, even though the trust terminates at the wife's death and the children receive assets in trust rather than

outright. While the husband may have intended to prevent the children from challenging the manner in which the wife spent the money during her lifetime, the children are qualified beneficiaries and are entitled to the corresponding protections afforded to qualified beneficiaries under the UTC.

e. The wife's unlimited power to invade the trust is subject to implied limitations to protect the beneficiaries with an interest in the trust assets that remain at the wife's death. Because the children are qualified beneficiaries with standing to challenge the trust administration, the trial court erred by dismissing the claims for lack of standing.

B. *Carberry v. Kaltschmid*, 2018 Cal. App. Unpub. LEXIS 3900 (2018). Trust protector does not have standing to compel trustees to account.

1. George created a trust for his widow and six children that became irrevocable upon his death in 2014. Two of his children were named as trustees. The original trust protector resigned in 2015 and he named Shaun (who was not related to any of the beneficiaries) as his successor.

2. The trust terms provided that: (a) the protector acted in a fiduciary capacity; (b) the protector had the powers to amend or modify the trust (but not to expand its own powers), construe the trust in the event of an ambiguity, the power to sign documents to exercise its powers, the power to appoint a special trustee, the power to appoint successor trustees if there is a vacancy not filled by other trust terms, the power to terminate an uneconomical trust, and the power to change the trust situs and governing law; (c) the protector had no duty to investigate the trustee's actions or inactions, audit the trust books, or evaluate portfolio performance; and (d) the protector was entitled to compensation.

3. In January 2016, the protector wrote the trustee to inquire about a trust loan and the status of an ongoing dispute among the trustees and requested an accounting. Counsel for a trustee advised that the parties were working on a settlement. In February, the protector wrote another letter asking for the settlement agreement and stated that "as Trust Protector, I have a fiduciary duty to keep myself informed of the condition of the administration of the Trust". Counsel for a trustee responded that trusts and estates counsel were working with the family to resolve the disputes, and that counsel for the trustees and the beneficiaries agreed that the protector would not be accused of not fulfilling his duties if he placed his work on hold while the family worked on resolution.

4. In September, the protector sued to compel the trustees to account and provide information (although the only "information" sought other that the accounting was a copy of the settlement agreement). The protector made allegations that the trust was delinquent with tax filings and had incurred high legal fees. He also sought confirmation of his ability to appoint a special trustee. A trustee opposed, arguing that: (a) the protector lacked standing to demand an accounting; (b) the high fees were the fees of the prior protector which were part of the dispute; (c) the parties were in mediation to resolve the trust disputes; and (d) that accountings had been provided to the beneficiaries.

5. The trial court dismissed the protector's claim for lack of standing and the protector appealed. On appeal, the court of appeals affirmed on the following grounds:

   a. The probate code provides that a trustee is to provide accountings to beneficiaries and that a trustee or a beneficiary has standing to compel a trustee to account. The protector is not a beneficiary and there is no authority giving a non-beneficiary protector standing to compel an accounting.

   b. The trust terms do not entitle the protector to compel an accounting. The trust terms require the trustee to account to the beneficiaries only. None of the powers granted to the protector include the power to compel an accounting.

   c. The trial court was not required to grant an amorphous request that the court compel the trustees to communicate generally with the protector when no specific information was identified.

   d. A concurring opinion noted that: (1) a law review article concluding that a trustee who has the power to remove a trustee has a duty to stay informed about the trust is irrelevant because this protector did not have the power to remove trustees; and (2) the authority granted the protector does not render the protector the functional equivalent of a trustee.

C. *In re Quintanilla Trust*, 2018 Tex. App. LEXIS 8223 (2018). Trustee could merge trusts into new trusts to remove trust protector.

1. In 2014, Oscar created separate irrevocable trusts for his three children, with Paul as trustee and Andrew as trust protector. The trust protector had the power to remove and replace the trustee. The trust terms expressly authorized the trustee to merge the trusts with new trusts for the same beneficiaries with substantially the same terms, if the trustee found the action desirable in is discretion.

2. Oscar and Andrew had a falling out in 2016 and severed their business relationship. As protector, Andrew requested accountings for the trusts and advised Oscar that he was considering removing Paul as trustee and appointing a bank as trustee. Oscar created new irrevocable trusts that were identical to the 2014 trusts but excluded Andrew as trust protector. His children, all of whom were adults, consented to the merger and waived formal notice of the merger.

3. The trustee then petitioned for a declaration that the 2014 trusts no longer existed and that the trust protector was not an interested person and had no right to demand an accounting of any of the trusts and seeking payment of its attorneys' fees from the trust. The trust protector counterclaimed to void the merger, demand an accounting, and for a declaration that he had fulfilled his duties as trust protector. The trial court granted the trustee partial summary judgment that the 2016 trusts were validly established and that the trust protector was not entitled to notice of the merger. The court then granted the trustee summary judgment on the balance of the claims and the court awarded the payment of the trustee's attorneys' fees out of the trusts. The trust protector appealed.

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

   a. The trustee met the burden of proving the valid formation of the trusts by the trust instruments and the schedule reciting the funding of the trusts with $5,000, without the need to put on additional evidence of the transfer of the cash.

   b. The trust terms expressly allow the merger of the trusts in the discretion of the trustee and the merger documents state that the trustee determined that the merger will not impair the rights of the beneficiaries or impair the trust purposes. There is scant authority as to when a merger impairs the rights of the beneficiaries or impairs the trust purposes. Here, the trust is silent on the removal of the trust protector and the merger to remove the trust protector does not circumvent other methods provided in the trust for removal of the protector. In contrast, the trust terms expressly allowed the merger.

   c. Neither the trust terms nor the trust code merger provision require giving notice of the merger to the protector. The beneficiaries waived notice and consent to the mergers.

   d. A person who does not manage trust assets or have a beneficial interest in the trust is not generally an interested person with respect to a trust. There is little authority on the role of trust protectors, which the trust code only recognized in 2015. A trust protector only has those powers granted under the trust terms. Here the trust terms only give the trustee the power to remove and replace trustees. The trust terms do not give the protector the right to manage any aspect of the trust, demand an accounting, inherit any assets, or even receive compensation. The trust protector is therefore not affected by the trust administration in a way that makes him an interested person with the right to seek an accounting.

   e. The court could properly order payment of the trustee's attorneys' fees from the trust where the trustee submitted an attorney affidavit in support of the fees and the protector did not put on proof that the fees were unreasonable.

XVIII. Decanting

A. *Ferri v. Powell-Ferri*, 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161 (Ct. Supreme Court, 2015); SJC-12070 (Mass. 2017); 2017 Conn. LEXIS 234 (2017); 2018 Conn. Super. LEXIS 2148 (2018). Applying Massachusetts law, court invalidated decanting of trust to take away vested rights over trust assets and thereby protect trust assets from claims of divorcing spouse, where trust terms did not grant trustee absolute discretion over trust distributions and the beneficiary had right to withdraw 75% of the trust assets at the time of the decanting. The state Supreme Court refused to impose duty on beneficiary to oppose decanting and protect marital assets. On certification by the Connecticut Supreme Court, the Massachusetts Supreme Judicial Court held that the broad discretion granted the trustees included by inference the power to decant, even though not expressly granted, and the court could consider the affidavit of the settlor in making the determination of intent to allow a decanting power. The beneficiary's claims against his spouse's counsel for vexatious litigation were dismissed.

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

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

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

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

5. Nancy separately sued Paul for breaching the alleged duty to preserve marital assets by failing to take affirmative steps to stop the decanting, which the trial court dismissed, and the state supreme court affirmed in a case of first impression, on the following grounds: (a) Nancy was asking the court to require a party to a marital dissolution action to take affirmative steps to recover marital assets taken by a third party; (b) Paul had no role in the decanting, and most courts require affirmative action before finding dissipation of marital assets; (c) the cause of action alleged does not exist in any state, and the court would not recognize a new cause of action where

state statutes and automatic orders address the obligations of spouses while divorce is pending, and reflect a public policy of preserving the status quo, and not imposing affirmative duties; and (d) adequate remedies are available through judicial sanctions for wrongful conduct.

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

   a. The trust did not expressly permit or deny the authority to decant and the state does not have a decanting statute. However, under *Morse v. Kraft, 466 Mass. 92 (2013)*, it is possible that the broad powers of the trustee in a particular trust may provide a trustee with the power to decant. The intent of the settlor is the paramount determination, and the power need not be expressly stated and may be inferred from the trust language as a whole and other relevant evidence of the settlor's intent. The language used by the settlor is viewed in light of the rule of law in effect at the time the powers in question were created.

   b. The trust terms, read as a whole, demonstrated the settlor's intent to permit decanting by: (1) granting the trustees the broad discretion to distribute trust income and principal as desirable for the beneficiary's benefit; (2) allowing the trustees to apply the income and principal for the benefit of the beneficiary rather than paying directly; (3) granting the trustees the discretionary full power to take any action with the trust assets the trustees deem necessary or proper without order or license of any court; and (4) allowing the trustees to "segregate irrevocably" the trust assets for later payment to the beneficiary as the trustees deem desirable for the beneficiary's benefit (and decanting is one way to segregate assets irrevocably).

   c. The trust's anti-alienation provision evidences the settlor's intent to protect trust assets from the beneficiary's creditors, and evidences the settlor's intent that the trustees have the means to protect the trust assets consistent with fiduciary duties.

   d. The beneficiary's right to withdraw 75% of the trust assets at the time of decanting (which later became a right to withdraw 100%) does not negate the trustees' power to decant, because the trust must be read as a whole to give effect to all of its provisions, and if the trustee could not decant the assets subject to withdrawal, the trustee would lose the ability to exercise fiduciary duties (including the duty to invest) over the assets subject to the withdrawal right, and would be without a role. So long as the assets were not withdrawn by the beneficiary, the trust assets remain subject to the trustee's authority and stewardship. Therefore, the mechanism for the beneficiary's withdrawal of trust assets does not limit the trustee's decanting authority, especially here where the power to segregate assets irrevocably under the trust terms extends for "so long as the beneficiary is living" meaning both before and after the vesting of withdrawal rights. Reading the trust terms as a whole and in harmony

requires finding that, until the trust assets are actually distributed in response to a withdrawal request, the trustees could exercise the power to decant if the trustees determined it was in the beneficiary's best interest.

e. The court could in this case properly consider the affidavit of the settlor (stating his intent that the trustees have all powers necessary to protect the trust assets) because extrinsic evidence is permitted to resolve a question of ambiguity. Because the trust did not expressly permit or bar decanting, the affidavit does not contradict plan trust language or attempt to vary the trust terms.

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

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

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

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

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

9. Paul sued Nancy and her lawyers for common law and statutory vexatious litigation, and all parties moved for summary judgment. The trial court granted summary judgment dismissing the vexatious litigation claims against Nancy's counsel on the grounds that: (a) the claims were filed to advance Nancy's interests in the trust assets as marital assets and they acted within relevant ethical bounds: (b) the claims were made in good faith, and were non-frivolous arguments in support of an extension of existing law; (c) an attorney familiar with Connecticut law could reasonably believe that probable cause existed to initiate and prosecute the claims and appeals, and it was not frivolous to seek to have the courts extend the duties that divorcing spouses owe one another;

(d) the claims were not based on false premises; (e) the fact that no other jurisdiction had recognized the legal theory advanced does not, in itself, render its pursuit without probable cause – such a position could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law, and the vitality of the common law system depends on the freedom of lawyers to pursue novel, although potentially unsuccessful, legal theories. The summary judgment motions by Nancy and Paul were denied.

XIX. Amendment, Revocation, Reformation, Modification & Termination Of Non-Charitable Trusts

A. ***In re Trust of Shire,* 299 Neb. 25 (2018).** Where court appointed attorney for unidentified beneficiaries objects, trust cannot be modified by consent under the Uniform Trust Code to increase distributions to the current beneficiary.

1. Jennie created a trust under her 1947 will for the benefit of her daughter, Ruth, with a corporate trustee. The trust was funded with $125,000 and provided only for the payment of $500 monthly to Ruth, and after Ruth's death to Ruth's daughter, Shirley. Upon Shirley's death, the trust assets were to be distributed to various parties identified in the residuary estate. Shirley began receiving the payments in 1983. By 2016, the trust assets had grown to $1 million. Shirley's total income excluding the $500 trust distributions was only $600. The trustee was able to identify 12 potential remainder trust beneficiaries, but the determination was incomplete.

2. The trustee petitioned the court for modification of the trust to increase the trust distributions to Shirley, pursuant to the modification by consent statute that was the Nebraska version of UTC Section 411. Six of the identified remainder beneficiaries consented. The rest of the identified remainder beneficiaries, including the state attorney general, did not object but did not affirmatively consent to the modification. At the trustee's request, the court appointed an attorney for the unknown and undiscovered remainder beneficiaries. The attorney objected to the modification. The trial court rejected the modification and Shirley appealed.

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

   a. The Nebraska version of UTC 411 provides that a noncharitable irrevocable trust may be modified upon consent of all the beneficiaries, if the court finds that the modification is not inconsistent with a material trust purpose. Modification under this provision requires unanimous consent of the beneficiaries. The unanimous consent requirement is not met simply because no known beneficiary has affirmatively objected after notice (affirmative consent is required, not mere negative consent). While virtual representation might otherwise have been available to satisfy the consent of the unidentified beneficiaries, here the trustee opted instead for court-appointed counsel, and that counsel objected.

   b. A later provision under the Nebraska version of UTC 411 provides for modification without unanimous consent of all beneficiaries, provided the interests of a beneficiary who does not consent "will be adequately protected". The trustee failed to meet the burden of proving this

protection and showing that such beneficiaries would not be negatively impacted or prejudiced by the modification. The phrase "adequately protected" in this UTC provision incorporates the safeguards discussed in the Restatements of Trusts to prevent prejudice to the nonconsenting beneficiaries. A court can also modify the trust under this section if it determines that it will not likely harm nonconsenting beneficiaries' interests, with or without safeguards. The court cannot force a modification on beneficiaries that will harm their interests. The court has leeway to fashion an appropriate order protecting the interests of nonconsenting beneficiaries.

c. Interpreting the phrase "adequately protected" to mean that a nonconsenting beneficiaries' interests are not harmed too significantly would create a lessened burden for modifying trusts that is not focused on the cardinal rule of carrying out the settlor's intent. To use this statute to modify a trust, the court must determine that modification will not affect the interests of nonconsenting beneficiaries and impose safeguards to prevent them from being affected, when deemed necessary. Here, the modifications would increase the distributions to Shirley at the direct expense of the remainder beneficiaries, and the modification cannot meet this test.

d. The trustee could have sought modification under other UTC provisions that do not require unanimous beneficiary consent, and that require proof other than adequate protection of the nonconsenting beneficiaries. For example, a trust can be modified on a showing that, due to circumstances not anticipated by the settlor, the modification would further the trust purposes.

e. A concurring justice commented that adequate protection might be arranged among the known beneficiaries if they pledged part of their remainder interest to make any known beneficiaries whole for the modest increase in distributions to Shirley (and indemnify the trustee), if any such beneficiaries were to ever actually materialize.

B. *Keybank v. Thalman,* 2016 Ohio 2832 (Ohio Court of Appeals 2016); 2018 Ohio App. LEXIS 3639 (2018). Claims that trustee breached duties by recombining trusts that had been previously divided survived summary dismissal. On remand, trial court cannot disregard court of appeals finding that the trust had been divided by the trustee.

1. Howard Couse was an attorney that authored several law textbooks. He created a trust for his children and grandchildren from the proceeds of the sales of textbooks. Thereafter, the trust income beneficiaries were his granddaughter, Jeanne Clough, and his grandson, Dr. Howard Schlitt. From 1957 until 2006, the trust was administered without incident. In 2006, Schlitt wrote to the trustee calling the income "pathetic and totally inadequate" and threatening to change trustee. Clough did not want the trust administration modified or a trustee change, and was focused on long-term asset growth.

2. In response, the trustee proposed division of the trust into Clough and Schlitt shares. The trust division was completed 2 years later, and 5 weeks after Clough's death. The trustee informed the beneficiaries (now including Clough's children) about the division, the assets were divided, and from that point forward the trusts were separately administered for all purposes

(including access to information). Several letters from the trustee confirmed the separation. The trustee informed the Clough remainder heirs that upon Schlitt's death they would receive the assets in the Clough trust, and the Schlitt remainder heirs that upon Schlitt's death they would receive the assets in the Schlitt trust.

3. Three days after Schlitt's death, the trustee informed the Clough heirs that they were preparing to distribute the Clough trust to them. The trustee informed the Schlitt heirs that they would receive the Schlitt trust assets, but they threatened to report the trustee to the FINRA and the SEC. The trustee then changed the final distribution, and informed all of the heirs that the two trusts would be combined and then re-divided before distribution, with the result being that the Clough trust heirs would receive $237,000 less. The Clough heirs objected, the trustee sued for instructions and the Clough heirs counterclaimed for damages, and the trial court summarily dismissed all of their claims and ordered equal division of the combined assets. The Clough heirs appealed.

4. On appeal, the court of appeals reversed and remanded the case back to the trial court on the following grounds:

   a. The trustee argued that the trust terms did not allow the division, which if correct would mean that the trustee induced the families to believe in a false division. This created an issue of material fact as to whether the trustee managed the trust in good faith.

   b. The UTC allows division of the trust that does not substantially impair the rights of the beneficiaries or materially adversely affect the trust purposes. Splitting the trust did not materially impair Clough or Schlitt. Both wanted to use the trust for different purposes, one wanting to benefit the remainder beneficiaries, and the other to finance his living expenses. As noted in the UTC comments, division of trusts is often beneficial and almost routine. Although splitting the trusts was not detrimental, combining them was, and the result substantially impaired the Clough heirs. Genuine material fact issues exist as to prejudice to the Clough heirs. There is a material fact issue as well concerning the trustee's argument that the trust was not actually divided, and whether the trustee breached its duty by communicating that it was and only sending statements to each family for their respective share of the trust.

   c. The $237,000 reduction of the share for the Clough heirs is adequate to satisfy the pleading of damages requirement.

5. On remand, the trial seemingly disregarded the holdings of the court of appeals, proceeded to trial (over the objections of the Clough heirs), and held that: (a) the trustee did not have the power to divide the trust under the trust terms and the trust was never actually divided into separate trusts, but rather only into sub-accounts of one trust; (b) the creation of mere sub-accounts was not a breach of trust; (c) the trustee did not breach its duties by making additional distributions to Schlitt for his "ease"; and (d) the Clough heirs failed to prove they suffered any damages from the division or the unclear correspondence sent by the trustee. The trial court ordered the Clough heirs to pall all of the trustee's attorneys' fees.

6. On another appeal, the court of appeals again reversed the trial court on the following grounds:

   a. The prior decision of the court of appeals, which was not appealed to the Ohio Supreme Court, is the law of the case, and the trial court cannot disregard the decision of the court of appeals that the trustee had actually divided the trust into separate trusts. The conclusions of the court of appeals were final and binding on the trial court. There was no room for the trial court to disagree with the decision of the court of appeals, and it was reversible error to do so.

   b. Upon division of the trust, only the Clough heirs were entitled to the assets in the Clough trust. Trial on remand was not necessary or required, and resolution of the Clough heir's claims for the assets of the Clough trust should have been perfunctory. The trustee is required to disburse the funds in the Clough trust to the Clough heirs only, and to distribute the Schlitt trust assets to the Schlitt heirs.

   c. The award of payment of the trustee's attorneys' fees is reversed, because the award was based on the trial court's erroneous disregarding of the prior decision of the court of appeals. The award of fees to the Schlitt heirs is reversed for the same reasons. The trustee was ordered to pay the appellate costs.

C. *Estate of Sukenik*, 2016 N.Y. Misc. LEXIS 2378 (2016); 75 N.Y.S.3d 422 (2018). Surrogate holds that trust and IRA beneficiary designation cannot be reformed to correct poor income tax planning. Appellate division reverses.

1. Charles Sukenik died in 2013. Under his 2004 will and revocable trust, he gave the residue of his estate and trust to The Charles and Vivian Sukenik Philanthropic Fund. In 2009, Charles signed a beneficiary designation form leaving his $3.2 million IRA to his wife Vivian. Vivian alleged that Charles's estate planning lawyer suggested leaving the IRA to charity and leaving other assets to Vivian, but that shortly thereafter Charles become too ill to make those changes.

2. Vivian asked the court to reform the trust to add a $3.2 million pecuniary bequest to her, and to reform the IRA beneficiary designation to name the charity as recipient, so that she would avoid receiving assets with a built-in income tax liability. Neither the charity nor the state attorney general opposed the relief sought.

3. Surrogate Nora Anderson rejected the petition on the following grounds: (a) there is no allegation of a drafting error or change in the law justifying the reformation; (b) decedent himself thwarted the tax efficiency of his own estate plan, and nothing in the record indicates why he did not take steps to cure the unfavorable tax consequences of his choice of IRA beneficiary (the court found allegations of his illness after receiving legal advice to "leave too much to conjecture); (c) the presumption that a testator intends to minimize taxes as a basis for reformation usually applies to drafting errors or changes in the law where there is also clear intent by the testator to secure a specific tax advantage; (d) there is no authority to justify reforming clear instruments in order to remedy the adverse tax consequences of poor estate planning; (e) nothing in the will or trust indicates an intent to minimize income taxes, and

both instruments contradict that intent by giving the fiduciaries power to distribute assets without regard to income tax basis; and (f) reforming instruments only on the presumption that one who executed testamentary instrument intends to minimize taxes would expand the reformation doctrine beyond recognition and would open the flood gates to reformation proceedings aimed at curing all kinds of inefficient tax planning.

4. On appeal, the appellate division unanimously reversed the surrogate on the law, stating as follows for the entire opinion: "The petition should have been granted. Decedent's intent to minimize taxes and provide for his wife of 39 years was apparent in the donative instruments. The Will and Trust agreements demonstrated his intent to take full advantage of all deductions and exemptions provided by law. For example, Article One, paragraph C of the Trust agreement specifically stated that the Trust funds could be transferred to the philanthropic fund only if it was a tax-exempt entity, and Article Three authorized the trustee to sell assets in order to minimize taxes payable by beneficiaries. Article Eleventh of the Will also permitted the executor to make certain elections in order to reduce taxes. Furthermore, the presumption that testators intend to take full advantage of tax deductions and exemptions, the lack of opposition, including by the State of New York, and the presumption in favor of widows, all favor petitioner's requested reformation.

XX. Spendthrift & Asset Protection Trusts

A. *Toni Trust v. Wacker*, No. 7228 (Alaska Supreme Court 2018). Alaska statute cannot deprive Montana State and federal courts of jurisdiction over fraudulent transfer action involving an Alaska self-settled asset protection trust.

1. Donald sued Mr. and Mrs. Wacker in Montana state court and they counterclaimed against Donald, his wife, his mother in law, and several trusts and businesses owned or run by Donald's family. Several default judgments were entered against Donald and his family. In 2010, before the last judgment was issued, Donald's wife and mother in law transferred land into an Alaska self-settled asset protection trust. The Wackers filed a fraudulent transfer action under Montana law in Montana state court, and the court entered default judgments against then. Before the Wackers could completely satisfy their judgments through sheriff's sales, Donald's mother in law filed for bankruptcy in Alaska and her interest in the trust became subject to the federal bankruptcy court jurisdiction. Donald, as trustee of the Alaska trust, sued the Wackers and the bankruptcy trustee in the bankruptcy court, alleging that service on the trust was defective. The bankruptcy trustee brought a fraudulent transfer action against Donald as trustee under the federal bankruptcy fraudulent transfer statute and obtained a default judgment (and the appeals were dismissed).

2. Donald then sued in Alaska state court alleging that an Alaska statute provides that only Alaska state courts have exclusive subject matter jurisdiction over fraudulent transfer actions against an Alaska self-settled assets protection trust, and therefore all of the various default judgments were issued without subject matter jurisdiction and are void. The trial court dismissed the suit and Donald appealed.

3. On appeal, the Alaska Supreme Court affirmed the dismissal of Donald's claims on the following grounds:

    a. More than a century ago, the U.S. Supreme Court held that each state may, subject to constitutional limits, determine the jurisdictional limits of its own courts and how far it will extend jurisdiction over transitory actions that arose outside their borders, and states are not constitutionally compelled to acquiesce to sister states' attempts to circumscribe their jurisdiction over such transitory actions. *St. Louis Iron Mountain Ry. Co. v. Taylor, 210 U.S. 281 (1908); Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914).* The Full Faith and Credit clause does not require states to go that far.

    b. The Alaska statute crosses the *Tennessee Coal* limit by purporting to grant Alaska courts exclusive jurisdiction over a transitory fraudulent action against an Alaska trust, and the statute cannot deprive Montana courts of jurisdiction over cases arising under Montana law. While Alaska's statute is not unique, and some sister states have concluded that such a statute can be effective, they rely on other types of reasoning. For example, some states have relied on principles of comity to give effect to another state's rule, but that is not a rule of law but an elective form of deference that is not mandatory or compelled. The court agreed with the reasoning in *IMO Daniel Kloiber Dynasty Trust, 98 A.3d 924 (2014)* that one state cannot unilaterally preclude a sister state from hearing claims under that sister state's own laws. The principles of *Tennessee Coal* have not changed in a century and the Alaska statute's assertion of exclusive jurisdiction does not render a fraudulent transfer judgment against an Alaska trust from a Montana court void for lack of subject matter jurisdiction.

    c. Similarly, the statute cannot deprive a federal court of jurisdiction. In *Marshall v. Marshall, 547 U.S. 293 (2006),* the U.S. Supreme Court held that state efforts to limit federal jurisdiction were invalid even though the state created the right of action giving rise to the suit. If the Alaska statute were interpreted to deny parties access to federal courts without their consent, the statute may also run afoul of the Supremacy Clause, which precludes state courts from limiting federal jurisdiction.

    d. Because the Alaska statute purports to grant Alaska courts exclusive jurisdiction over all fraudulent transfer claims against Alaska trusts, and because a federal statute grants federal courts jurisdiction over these claims, Alaska conflicts with and must yield to federal law.

B. *Olson v. Marshack*, 2018 WL 2059648 (C.D. California 2018). Bankruptcy court erred by approving settlement approving domestication of 80% of assets of Cook Islands trust.

1. Passport Management, LLC served Jana with a lawsuit. A month later, she transferred her interest in her self-settled Cook Islands trust from herself to her two minor children by gift. Jana then filed her bankruptcy petition. Jana agreed and entered into a consent order to repatriate the trust assets, but then disobeyed the bankruptcy court's order, sabotaged the repatriation by a letter to the Cook Islands trustee saying she signed the order by duress, and was sent to jail for civil contempt where she remained in custody for more than a year (she was also previously jailed for other incidents of contempt of court).

2. The trustee worked with Jana's father, as guardian for the minors, on an agreement to repatriate the money. The father agreed with the bankruptcy trustee to repatriate the money with 80% going to the bankruptcy estate and 20% going to a California trust to support the minor children. After the funds were repatriated, the bankruptcy trustee moved for approval of the compromise, and the creditor objected. The bankruptcy court approved the compromise on the grounds that 80% was better than nothing and it would be inequitable to reject the settlement after the funds were already repatriated in reliance on the settlement. At no point was a finding made that the trust assets were assets of the bankruptcy estate (i.e. through a fraudulent transfer action and finding). The creditor appealed.

3. On appeal, the federal district court reversed the approval of the compromise on the following grounds:

    a. The bankruptcy court stated that "I think somebody in the Cook Islands probably decided that they weren't going to corner the world's market of coconuts…and instead… they would create...a unique debtor's haven. Whereby the laws are tilted so heavily in favor of debtors that no matter how righteous [creditor's] claim may be, and how seemingly powerful this building with its mahogany slabs and so forth and a gold eagle up there, how fearsome that might be they can simply go 'Come and get it'. And a lot of people seem to find that protection is attractive. So much so, that they give them billions of dollars".

    b. The bankruptcy court could not approve the settlement without determining whether the Cook Islands money was part of the estate. The assets were not part of the estate at the time of the petition. While the facts present a strong case for avoidance of the transfers, the transfers were never formally avoided. Without a judgment avoiding the transfers, the funds were not part of the estate.

    c. The court erred by considering inappropriate and irrelevant factors in approving the settlement. The court did not have an equitable duty to approve the settlement because the funds had already been repatriated. The court was not bound by the expectations and reliance of the parties and should not have minimized its role. The parties cannot neutralize the court by taking actions in reliance on the settlement, where the court and the creditor were not parties to the deal or privy to the discussions. The court did not cause repatriation and had no obligation to honor it. The settlement contemplated that the court might not approve the deal and the debtor took the risk that the agreement would fall through after funds were repatriated. The debtor has done no equity here and it was erroneous for the court to be concerned with doing equity for them. Debtor has no legitimate right to hide assets in the Cook Islands and defy court orders to return the funds and it would be inequitable to allow her to profit from her actions. While ease of collection can be a factor in approving a settlement, that is only one consideration of many.

    d. A benefit to the debtor's minor children is an indirect benefit to the debtor. The concern that others may not cooperate in repatriating money from difficult to reach places is a minor concern because of the other ways a court may incentivize cooperation. Only a small number of debtors

would be willing to sit in jail for over a year, and she would have sat longer if it were this court's prerogative. The court need not be concerned for the minor beneficiaries because the claims were against the trustee and the trust and not its innocent minor beneficiaries.

C. *In re Will of David F. King v. King,* 2018 ore. App. LEXIS 1547 (2018). Choice of law provision prevails over fiduciary powers clause, and spendthrift provision in Nevada trust does not preclude court from applying trustee-beneficiary's income distributions towards satisfaction of surcharge award owed to the trust.

1. Under his will, David exercised his power of appointment over a trust created by his father, and appointed the trust assets to a Nevada trust (David was a Nevada resident) that paid income only (but not principal) to his wife for life, with the remainder passing at her death to David's children from a prior relationship. The trust terms provided that "the laws of the State of Nevada shall govern all questions which may arise with respect to the interpretation of this Will or the administration of any trust established hereunder". The trust terms also granted the trustees all of the powers provided under Minnesota trust law (the drafting lawyer was in Minnesota). By 2011, David's wife, Sandra, was acting as sole trustee.

2. In 2011, David's children sued Sandra for breach of trust and sought her removal and surcharge. The trial court held that: (a) Nevada law governed the trust; (b) Sandra improperly treated certain trust receipts and undistributed earnings as income rather than principal; (c) Sandra treated the trust assets as her own and entered into poorly secured or unsecured transactions that were per se breaches of trust; (d) Sandra failed to account and generally ignored her fiduciary duties as trustee. Sandra loaned $1 million to herself to buy and remodel a home, loaned $950,000 to her son James for a home, and loaned $180,000 to a winery in which she had an interest. The court removed her as trustee, appointed a corporate trustee, surcharged Sandra $913,000, and awarded the children their attorneys' fees. Sandra appealed.

3. While the first appeal was pending, the corporate trustee petitioned for instructions on how to make trust distributions in view of the surcharge award and attorneys' fees award. The trial court held that Nevada spendthrift law prohibited the trustee from applying Sandra's income distributions towards the judgment against her. The children appealed that decision.

4. On appeal of both decisions, the Oregon Court of Appeals (applying Nevada law) affirmed the surcharge award, but reversed the trial court spendthrift ruling and held that the income distributions could be applied to satisfy the judgment, on the following grounds:

    a. David executed the will while living in Nevada and the will provided that "the laws of the State of Nevada shall govern all questions which may arise with respect to the interpretation of this Will or the administration of any trust established hereunder". A Nevada statute provides that a noncorporate trustee cannot lend funds to herself, her family members, or her business associates, and that provision of state law is mandatory and is not subject to override in the trust instrument. The trust terms also granted the trustees all of the powers provided under Minnesota trust law (the drafting lawyer was in Minnesota), but the lawyer testified that not

much thought was put into how those provisions would interplay. The court refused to apply Oregon law to the trust just because Sandra resided there and many of the trust assets were located there, because the trust terms expressed the intent that Nevada law apply. Because Nevada statutory law prohibits the loans, the loans were statutory breaches of trust regardless of the trust terms granting broad fiduciary powers.

b. The argument that the choice-of-law provision is only a gap filler is untenable and overlooks the fact that, while a settlor has considerable latitude, the trust operates within and has effect only to the extent that it complies with the trust law of some jurisdiction. The trust does not have independent legal meaning separate and apart from the law of any jurisdiction, and the law does not operate only interstitially. The trust text cannot answer any question except against the backdrop of the law of some jurisdiction. The settlor chose Nevada law unambiguously to govern the trust administration, and Nevada law prohibited the loans regardless of the fiduciary powers under the trust terms.

c. While the trust is a spendthrift trust, the trial court erred by applying Nevada's spendthrift statute to prohibit the trustee from applying Sandra's income interest in the trust to compensate the trust for the losses resulting from her breaches as trustee. Under Nevada law, a breach of the statutory loan prohibition is a breach of trust. The court may compel redress of a breach of trust using its full equitable powers, and those powers historically included the power to apply a beaching trustee-beneficiary's interest in the trust to compensate the trust and other beneficiaries for losses caused by the breach (Restatement 2nd of Trusts Section 257). That principle applied with equal force to spendthrift trusts and the Nevada Supreme Court recently indicated its adherence to that approach in *Montoya v. Ahearn, 426 P3d 599 (Nev. 2018).*

d. Although Nevada's statutory spendthrift protection is worded broadly, it is written in terms of creditors and proceedings that are external to trust affairs. Breach of trust proceedings differ in that they are internal and it is not clear that the statute is intended to apply to them. All three restatements of the law of trusts recognize that a spendthrift provision does not prevent application of the rule that a breaching trustee-beneficiary's interest can be applied to compensate other beneficiaries for losses incurred because of the breach of trust. Since at least 1941, Nevada's law of testamentary trusts has incorporated the trust common law. The Nevada legislature did not intend its spendthrift statute to prohibit surcharge of a breaching trustee-beneficiary and the Nevada Supreme Court would not apply the statute that way. If the legislature had intended that statute to abrogate well-established common law, it would have said so explicitly. Nevada's spendthrift statute does not displace the trustee's duty to treat all beneficiaries equally and does not require the trustee to direct payments to one beneficiary at the expense of the others. The Nevada statute does not prohibit the trustee from applying Sandra's interest in the trust to compensate the trust for losses that the trial court found were caused by her breaches of trust.

D. *Lvb-Ogden Mktg., LLC v. Bingham*, 2018 U.S. Dist. LEXIS 207154 (W.D. Washington 2018). Assets transferred by beneficiary to trust as repayment of trust loan are self-settled assets subject to seizure by creditors.

1. In 2007, Frances created a spendthrift trust for her daughter, Sharon. Sharon and her husband defaulted on tens of millions of dollars of loans related to the 2008 mortgage crisis. The trustee paid millions of dollars out of the trust to settle claims made by Sharon's creditors.

2. The trustee also made secured loans from the trust to Sharon totaling $2 million. Sharon defaulted on the loans, and the trustee agreed to take certain stock, an interest in a ship, household furniture and fixtures, and Sharon's wedding ring, that were put up as collateral for the trust loan, as payment in satisfaction of the loan (the "disputed assets")

3. In 2010, the plaintiff obtained a $70 million judgment against Sharon and sought to collect against the disputed assets and the trustee opposed. The court allowed the creditor to recover against the disputed assets on the following grounds:

    a. The disputed assets were placed into the trust by Sharon and are subject to seizure. Once the trustee loaned money to Sharon, the assets no longer had spendthrift protection under Washington law. The disputed assets were subject to seizure before being placed into the trust, and nothing changed with the transfer to the trust. There is no exception in the statute for transfers into trusts where consideration is exchanged.

    b. No case law supports the novel position advanced by the trustee that a debtor can protect its assets from seizure by taking out loans from a spendthrift trust and then transferring other assets back into the trust. Once assets leave the shelter of the spendthrift trust, the creditors may claim them under Washington state law.

    c. Likewise, any assets transferred into a spendthrift trust by the beneficiary are subject to seizure. The disputed assets are self-settled and entitled to seizure by creditors. The fact that consideration was exchanged is immaterial to the question of whether the assets are self-settled.

XXI. Creditor Claims & Debts

A. *In re Marriage of Larocque,* 2018 IL App (2d) 160973 (2018). Large trusts funded through complex estate planning before breakdown in marriage excluded from the marital estate on divorce.

1. John and Janet married in 1985 and John amassed substantial wealth during the marriage as an investor. Janet was a stay-at-home mother to their four children. The marriage deteriorated during the serious illness and death of their eldest child and Janet petitioned for divorce in 2014.

2. Starting around 2005, John engaged estate planning counsel and John (in part with Janet's signature on various papers and tax returns) engaged in extensive and effective estate planning, including: (a) gifts by John and Janet to irrevocable trusts; (b) grantor trust status for income tax purposes; (c) loans to the trusts (John also took some loans from the trusts but repaid them with interest and they all had written notes); (g) a GRAT program; and (h) sales to the trusts. John's counsel and the trustees of the various trusts submitted affidavits describing all of the transactions and the primary goal of minimizing

federal and state estate taxes. For the trusts created by John, Janet lost her rights as a beneficiary upon divorce, and John similarly lost rights under trusts with Janet as the settlor.

3. During the divorce proceedings, Janet argued that the trust assets should be part of the marital estate to be considered in the 50/50 property division. Janet claimed: (a) John did not involve her in the process and she did not know the details; (b) she blindly signed the documents based on John's representations; and (c) John was really engaged in "divorce planning" and not estate planning. The trial court granted summary judgment excluding the trusts from the marital estate, and Janet appealed. Janet was awarded 50% of a $21 million marital estate and $30,000 per month in permanent maintenance.

4. On appeal, the Illinois Court of Appeals affirmed the trial court on the following grounds:

    a. There was support for the finding that February 1, 2014 was the date that the marriage began its irretrievable breakdown, despite the fact that each spouse had consulted with divorce counsel earlier.

    b. John met the burden of proving that the trusts were valid and funded with donative intent by the affidavits by counsel and the trustees with extensive supporting documentation. The trusts were funded as part of a comprehensive estate plan designed to provide for an orderly passing of assets and minimize exposure to estate taxation. Janet never disputed that the trusts were valid and distinct legal entities. The trusts were irrevocable, were not illusory or colorable or tantamount to a fraud. Janet produced no expert testimony on the legitimacy of the trusts or the transfers.

    c. Janet's failure to read documents before signing them, and professing ignorance of them, is not a defense. John's representations that the documents were "just business", "nothing to worry about", "for the children", and "for tax purposes" were not palpably untrue or even misleading, and the estate planning process was put into place 6 years before Janet claimed the marriage started to break down and 9 years before she petitioned for divorce.

    d. John's counsel testified that it is not unusual to deal with one spouse for purposes of estate planning for a couple. No cases support that a trust term disinheriting a spouse incident to divorce renders a trust illusory, and the provision applied to both spouses. Janet did not demonstrate that it was unusual for John to name a friend or his brother as trustee of trusts and there was no evidence that any trustee breached fiduciary duties.

    e. The trusts were separate and distinct legal entities and there was no evidence that John lacked donative intent or that he improperly retained control over the trust assets.

    f. The court's decision did not preclude Janet from subsequently arguing at trial that, by funding the trusts, John committed dissipation or depletion of the marital estate. The court's decision does not undermine the ability of a court to set aside a transfer that is proven to be fraudulent. Janet could not argue depletion of the marital estate for transfers before

February 1, 2014. The depletion claims were unpersuasive because she signed the gift tax returns and her claims of lack of knowledge were not credible, and she failed to prove breach of fiduciary duty. The trusts were managed properly.

B. ***Embassy Healthcare v. Bell,* 2018 Ohio 4912 (2018).** Nursing home must file claim with estate before making a claim against decedent's spouse for payment under state necessaries statute.

1. Robert stayed at a nursing home before his death. His contract with the home made him responsible for payment. His wife, Cora, also signed the agreement as a responsible party, but only to the extent she had control over Robert's assets, and not with individual contractual liability.

2. Six months and three days after Robert's death (and three days after the expiration of the limitations period on claims against his estate), the home sent Robert's estate (care of his wife) notice of its claim for $1,678 against Robert's estate. The letter stated that Cora was not individually liable for the debt. No estate had been opened at that time, and the home did not exercise its right as creditor to open the estate and appoint an administrator.

3. The next year, the home sued Cora for payment of the debt under the Ohio necessaries statute. That statute codifies the common law doctrine (originally developed as a response to a married woman's inability to contract under coveture) and provides that "each married person must support the person's self and spouse out of the person's property or by the person's labor. If a married person is unable to do so, the spouse of the married person must assist in the support so far as the spouse is able". The necessaries statute also provides that "if a married person neglects to provide the required support, any other person may supply the spouse with necessaries and recover the reasonable value of the necessaries supplied from the married person who neglected to support the spouse, unless the spouse abandoned that person without cause".

4. The magistrate dismissed the complaint on summary judgment in favor of Cora. The trial court granted summary judgment for Cora on different grounds than the magistrate. A divided Twelfth District Court of Appeals reversed and Cora appealed.

5. On appeal, a divided Ohio Supreme Court, with one dissenting justice, reversed the court of appeals, affirmed the trial court, and dismissed the claims against Cora on the following grounds:

   a. The plain language of the necessaries statute provides that Robert as the debtor spouse retains primary liability for his unpaid debt. The home must therefore first seek satisfaction of its claim from Robert's income and assets. Each married person retains primary responsibility for supporting himself or herself from his or her own income and property. The non-debtor spouse is liable only if the debtor spouse does not have the income or assets to pay for his or her necessaries. A creditor must therefore first seek satisfaction of its claim from the assets of the spouse who incurred the debt.

b. The claim arises from an agreement with Robert that made Robert the payor, and that agreement expressly excludes making Cora personally liable for the debt. The home was required to seek recourse first against Robert's estate before seeking payment from Cora. The home's demand for payment falls squarely within the type of claims that must be presented to the decedent's estate by the statute providing that " all creditors having claims against an estate, including claims arising out of contract…shall present their claims" in accordance with the statute. Upon his death, Robert's obligation became estate obligations. The home should have presented its claim to the estate in accordance with the statute.

c. The six-month deadline to present its claims to the estate expired three days before the home presented its claim. The home could have opened an estate but did not seek appointment of an administrator before the expiration of the limitations period. If a creditor fails through indifference, delay, or lack of diligence to procure the appointment of an administrator, the law should not come to the creditor's aid. Because the home sat on its rights, its claims arising from Robert's obligations under the contract are forever barred as to all parties, including Cora.

d. The six-month limitation statute pertains to all claims against an estate, and not just to creditors that seek actual payment from an estate.

e. The home was required to timely present its claim for unpaid necessaries to the estate before it could pursue a claim individually against the surviving spouse under the necessaries statute. Because the home failed to timely present the claim or seek appointment of an administrator, Cora was entitled to summary judgment.

XXII. Spousal Rights & Claims

A. *Sveen v. Melin,* 584 U.S. ___ (2018). United States Supreme Court holds that application of Minnesota's revocation on divorce statute to life insurance policy obtained before statutory enactment does not violate the Contracts Clause.

1. Before addressing the facts of the case, the majority opinion authored by Justice Kagan opened with this: "All good trust-and-estate lawyers know that death is not the end; there remains the litigation over the estate (from the Collected Works of Ambrose Bierce). That epigram, beyond presaging this case, helps explain the statute at its center".

2. Mark and Kaye married in 1997. In 1998, Mark obtained life insurance and named his wife as primary beneficiary, with his children from a prior marriage as contingent beneficiaries. In 2002, Minnesota passed a new revocation-on-divorce statute that followed the model of the Uniform Probate Code and revoked not just testamentary bequests but also beneficiary designations to a former spouse. They divorced in 2007 and the divorce decree did not address the insurance. Mark did not make any changes to the beneficiary designations after the divorce. Mark died in 2011 and Kaye and the children made competing claims to the insurance proceeds. The trial court rejected Kaye's argument that retroactive application of the statute would violate the Contracts Clause of the United States Constitution (Article I, Section 10, Clause 1). The Eight Circuit Court of Appeals reversed, and the children appealed. The Supreme Court granted certiorari to resolve a split of judicial authority on the issue.

3. On appeal, the United States Supreme Court, with one dissenting opinion by Justice Gorsuch, reversed the Eighth Circuit and upheld the application of the statute on the following grounds:

   a. Not all laws affecting pre-existing contracts violate the Contracts Clause. The threshold issue is whether state law operated as a substantial impairment of a contractual relationship. The court considers the extent to which the law undermines the bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. The statute odes not substantially impair pre-existing contractual arrangements.

   b. While the law, by revoking a beneficiary designation, makes a significant change, the law did not severely impair Mark's contract. The law is intended to reflect the owner's presumed intent (and the typical intent in most cases) and support, rather than impair, the contractual scheme. Laws have long made judgments about a decedent's likely intent after life changes such as marriage, birth, or divorce, and legislatures have long enacted statutes that revoked earlier made wills by operation of law. Legislative presumptions about divorce are prevalent and accurately reflect the intent of most divorcing parties. Most divorcees do not aspire to enrich their former partners. The failure to change the beneficiary designation after divorce is more likely the result of neglect rather than choice and the statute honors, not undermines, the intent of the contracting party.

   c. An insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce. Divorce courts have wide discretion to divided property when a marriage ends, and that extends to life insurance. While not part of this decree, the policy could have been. The fact of any reasonable reliance cuts against providing protection under the Contracts Clause.

   d. A policyholder can reverse the effect of the statute with the stroke of a pen. The law puts in place a presumption that the owner may overthrow (or, if he wants to commit himself forever like Ulysses binding himself to the mast, he may agree in the divorce settlement to continue the spouse's beneficiary status). The statute therefore reduces to a mere paperwork requirement, and a fairly painless one. File a form and the default rule gives way. Laws that impose minimal paperwork burdens to not violate the Contracts Clause.

B. *Blalock v. Sutphin*, CV-17-900084 (Alabama Supreme Court 2018). Alabama law applies to life insurance policy obtained by Alabama domiciliary despite being formed in Tennessee, and application of Alabama's revocation on divorce statute to life insurance policy obtained before statutory enactment does not violate the state constitution.

1. In 2011, Lloyd obtained a $250,000 whole life insurance policy. The contract was formed and delivered at his workplace in Tennessee but listed his Alabama home address. He named his daughter as sole beneficiary. In 2012, Lloyd married Kimberly and changed the beneficiary designation to give 50% to her. In 2015, Alabama passed the Uniform Probate Code provision extending its revocation-on-divorce statute to include will substitutes such as life insurance and retirement plan beneficiary designations. In 2016, Lloyd and

Kimberly divorced. The life insurance was not addressed in the divorce decree and Lloyd didn't change the beneficiary designation form. Lloyd died later that year. His daughter petitioned for a judgment that she was entitled to all of the insurance proceeds and Kimberly opposed. The trial court held that the daughter was entitled to all of the insurance proceeds and Kimberly appealed.

2. On appeal, the Alabama Supreme Court affirmed the trial court on the following grounds:

   a. Kimberly' argument that Tennessee law should apply does not deprive the court of subject matter jurisdiction; it only goes to the choice of law. Alabama generally follows the *lex loci contractus* rule which would result in the application of Tennessee law. The policy does not provide for choice of law. Here, although an Alabama resident, Lloyd applied for the policy and the policy was delivered in Tennessee. However, the application of Tennessee law would violate the public policy of Alabama. Tennessee has not expanded its revocation-on-divorce statute to apply to will substitutes like life insurance. Alabama determined that the Uniform Probate Code approach reflected the better presumed intent of its domiciliaries. Lloyd lived in Alabama at all times, was divorced in Alabama, and died in Alabama. The policy listed his address in Alabama and he received correspondence about the policy in Alabama. It is therefore appropriate to apply Alabama law to determine the beneficiaries and the impact of his divorce on the policy terms.

   b. In keeping with the reasoning in U.S. Supreme Court decision in *Sveen v. Melin*, it was not unconstitutional to apply the statute to this insurance contract that was formed before the statute was enacted.

   c. The trial court did not commit clear error by finding that there was not a valid common law marriage that resuscitated the beneficiary designation in Kimberly's favor. Beneficiary designations revoked by divorce can be resuscitated by remarriage. Until January 1, 2017, common law marriage was recognized in Alabama. Lloyd and Kimberly reunited and lived together for two months before Lloyd's death. Witnesses could not tell the difference between their relationship before and after the divorce. However, the court found that they planned to be remarried in a future ceremony and Lloyd had repurchased their original wedding rings (they had been sold after the divorce). Because they intended to remarry formally, the court could find that they did not intend to be married at common law. The intent to enter into marriage a question of fact and the appellate court cannot here substitute its judgment for the trial court where the trial court decision had supporting evidence.

C. *Gordon v. Fishman*, No. 2D17-1488 (Florida 2nd District Court of Appeals 2018). Statute disinheriting spouse incident to divorce does not apply where will is signed prior to marriage.

1. Ron signed a will in 2005 that gave property to his then fiancée, Sylvia, and if she predeceased, to her children. They married two years later, divorced six years after that, and then Ron died two years after the divorce. Ron's father (through his guardian) asserted that the divorce revoked the provisions in favor of Sylvia. The trial court agreed and held that Sylvia's children should receive the property. Sylvia appealed.

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

   a. The statute provides that "any provision of a will executed by a *married person* that affects the spouse of that person shall become void upon the divorce of that person". The statute only applies when the marriage predates the will. Here Ron did not marry Sylvia until 15 months after he executed the will.

   b. The statute does not address a will made in contemplation of marriage. If that language is to be added to the statute, the legislature must do it. The court will hew to the statute's language and will construe the statute that extends its express terms and that abrogates legislative power.

D. *King v. Nash*, 2016 Mich. App. LEXIS 911 (2016); 2018 Mich. LEXIS 1570 (2018). Physical separation alone does not establish willful abandonment that bars intestate inheritance.

1. James and Maggie were married in 1968. They did not live together after 1976 and Maggie petitioned for spousal and child support. In 2010, they jointly sued General Motors for breach of contract, and in their complaint alleged that Maggie's life was irreplaceable for James. Maggie was also named as beneficiary of James's life insurance.

2. James died intestate, survived by six children from his first marriage and four children from his marriage to Maggie. Maggie sought the intestate rights of a surviving spouse, which the trial court allowed, finding that Maggie was not willfully absent from James for inheritance purposes. James's child from a prior marriage, Beatrice, appealed and asserted that physical separation was enough on its own to prove willful absence that eliminated inheritance rights.

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

   a. The "willful absence" required to cause a loss of inheritance includes some intent - physical separation alone is not sufficient. All of the facts and circumstances, including physical separation, should be considered, and physical separation does not necessarily preclude a spouse from inheriting.

   b. This approach solves practical concerns about physical absence in other circumstances, such as: for employment; for education or family situations; to assist an elder parent; to seek medical treatment; or to avoid taking children out of schooling.

   c. While the record is sparse, there is some evidence in the record that the physical separation did not completely foreclose continued emotional intimacy in this case.

4. On further appeal, the Michigan Supreme Court, with one concurring and one dissenting justice, affirmed the court of appeals on the following grounds:

   a. The state statute, read in its statutory context and considering commonly used definitions of the words used in the statute, and other rules of statutory construction, cannot refer solely to physical absence as a basis for loss of spousal rights.

b. The term "willfully absent" cannot be defined exclusively by physical separation and there must be something more than mere physical distance. There are countless situations where spouses choose to be physically separated but do not want to interrupt or weaken their marriage, such as for work or military deployment. A committed spouse should not forfeit inheritance based on the erroneous assumption that physical distance prevented the pursuit of a loving relationship. If two married people decide to live apart but maintain an element of emotional support and contact, courts have no business second-guessing that life decision.

c. Willful absence requires consideration of the totality of the circumstances, and presents this factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage. Although an intentional physical absence is necessary to a finding of willful absence, without additional indicia of a complete absence in terms of emotional support and contact, courts should conclude that the marriage endured and allow the surviving spouse to retain spousal status.

d. The plain language of the statute does not require that an individual intend to abandon marital rights before being excluded as a surviving spouse, and the court cannot ignore this omission. The only intent that a spouse must have is to be absent, and a party seeking to establish that a spouse should be excluded does not need to show that the spouse intended to dissolve the marriage, only that the spouse intended to be absent from the decedent spouse.

E. *In re Estate of Sharpe,* 2018 N.C. App. LEXIS 326 (2018). Premarital agreement bars claim for elective share despite lack of specific elective share provision in agreement.

1. Thomas and Alma signed a premarital agreement on November 4, 2009. He was 86 at the time and she was 75. Both had been married before and had adult children from prior marriages. The marital agreement: (a) identified each other's property as separate property; (b) preserved for each of them the exclusive right to control their respective separate property and the right to dispose of it by deed, will, or otherwise; and (c) was expressly binding on their heirs, executors, successors, and assigns. The agreement did not otherwise expressly address the elective share. They married on November 21, 2009. Thereafter, each of them executed estate planning documents leaving their respective separate property to their own children, and nothing to each other. Alma's will stated she was doing so pursuant to the terms of the premarital agreement.

2. Thomas died in 2016. Alma's son, as her agent under a power of attorney, filed an elective share claim for Alma against Thomas's estate. The clerk allowed the claim, the estate appealed, and the superior court reversed the clerk and held that the elective share was barred by the marital agreement. Alma died during the appeal and her son was substituted as a party in her place as her personal representative. Alma's estate appealed.

3. On appeal, the Court of Appeals affirmed the rejection of the elective share claim on the following grounds:

a. The agreement was voluntarily executed after full disclosure.

b. The unambiguous language of the agreement plainly establishes the intent of the parties that Alma waive any rights to Thomas's separate property, that Thomas had the right to dispose of his property as if he were unmarried, and that each party "specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have to the other's separate property under the laws of the state". The only logical reading of this waiver is to include the right to an elective share. The agreement also provided that it was binding on successors, and this refutes the argument that Alma intended to retain any rights in her husband's estate. Although the agreement does not expressly mention the elective share, the plain and unambiguous language cannot be read to mean they intended to waive only lifetime rights and not rights upon death.

c. Alma's estate cannot show how the court was prejudiced by taking judicial notice of the fact that Alma left her own assets to her children, and nothing to Thomas "pursuant to the premarital agreement executed by us on November 4, 2009".

F. *Estate of Heil v. Heil,* 2018 Mo. App. LEXIS 91 (2018). Consensual separation does not preclude a finding of spousal abandonment that bars elective share claim.

1. John and Marilyn were married in 1968. In the 1990s, John started spending much of his time at his parents' farm and then lived there full-time after he inherited the property. He refused to return to the marital home. Marilyn moved to the farm in 1999, they did not have a positive relationship but John's treatment of Marilyn was not to a level where she could no longer be reasonably expected to live with him. She returned to the marital home the next year. John did not request the move but agreed to it. She visited him infrequently (only to talk business or bring the grandchildren around) and they did not provide each other with domestic, financial, or emotional support. She did not help care for him through several illnesses, including falls, heart attacks, and Alzheimer's. When his son sough her help with care, she gave him a phone number for a caregiver. Neither took steps to terminate the marriage or separate, and neither committed adultery or marital misconduct. She made no additional efforts to pursue a marital relationship.

2. John died in 2014. His will left his entire estate to his son. His widow, Marilyn, claimed an elective share in the estate. The son objected and the trial court held that Marilyn had abandoned John and lost the right to an elective share. Marilyn appealed.

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

   a. A finding of marital misconduct is not a condition of disqualifying a spouse from the right to an elective share. The court could find both a lack of marital misconduct and also abandonment that caused the loss of the elective share right.

   b. Separation alone does not cause abandonment. There was here also a showing that Marilyn intended to give up the marital relationship with no intention of resuming it.

c. The fact that separation was consensual does not preclude a finding of abandonment. While this may be relevant to the award of pendente lite temporary maintenance after spousal abandonment, this is not part of the determination with respect to the elective share. Consensual separation is a relevant fact, but is not dispositive, in determining whether a spouse has abandoned her spouse for elective share purposes. Though consensual separation may weigh against an inference that a spouse intended to completely give up on the marital relationship without cause, it does not foreclose the inference. It was possible here for the court to find that both spouses abandoned each other, rendering each disqualified from enforcing inheritance rights against the other's estate.

G. *Acosta-Santana v. Santana,* 2018 N.J. Super. Unpub. LEXIS 2667 (2018). Divorce proceedings abated upon death of one spouse.

1. Husband and wife married in 1990. In 2015, wife sued for divorce. In 2016, husband executed a will leaving his assets to their children, and then died a few months later before the divorce litigation was completed. Most of husband's assets passed to wife by title or beneficiary designation that husband did not change while the divorce was pending. Husband's executor moved to intervene in and continue the divorce proceedings, with the goal of obtaining an equitable property division award from spouse that would generate assets to pass under husband's estate plan to the children. The trial court denied interpleader and held that the divorce proceedings abated on the husband's death. The executor appealed.

2. On appeal, the appellate division affirmed on the following grounds:

   a. Divorce proceedings and equitable distribution abate when one party died before entry of a final divorce order unless (i) the facts were fully adjudicated before the death so that a decree could or should have been rendered or (ii) there are highly unusual circumstances such as fraud or unjust enrichment.

   b. There are no exceptional circumstances in this case to justify avoidance of abatement. The interpleader was not brought to protect an innocent living spouse, but rather to enrich a deceased spouse's estate to the detriment of the living spouse. While wife received a benefit by being the beneficiary of the husband's insurance policies, retirement accounts, and house, there was no argument that those benefits were unjust, and there was no allegation that wife committed fraud or misconduct to obtain those benefits. There was nothing to justify equitable relief from the general rule of abatement.

XXIII. Fiduciary Appointment & Succession

A. *Bank of America v. Evangelista,* 2018 R.I. Super. LEXIS 8 (2018). Trust provision that allows removal of corporate trustee "any time" does not require a showing of fault before removal.

1. In 1950, George Metcalf created an irrevocable trust for the benefit of his son and his grandchildren. Rhode Island Hospital Trust Company was named as initial trustee, and its corporate successor Bank of America eventually succeeded to the trusteeship under the trust terms. In 2013, the court divided

the trust into three separate trusts, one for each of the grandchildren, including a trust for the benefit of granddaughter Hannah. Two individual co-trustees served with the corporate trustee.

2. The trust terms provided that the co-trustees could remove the corporate trustee "at any time" by a signed written instrument, provided there were three trustees then serving, the trustee removal was assented to in writing by a majority of the settlor's then living adult issue, and at least one adult living issue was alive to assent to the removal. In 2017, the individual co-trustees exercised their power of removal with the written assets of a majority of the settlor's adult issue. No claims or allegations of fault against the corporate trustee were asserted.

3. Bank of America petitioned the court for instructions on the validity of the removal, and asserted that, because the trust terms did not include the language "without cause", "for any reason" or "controlled discretion" (which appeared elsewhere in the trust with respect to trust distributions), the removal would not be valid without a showing of fault.

4. The court held that the individual co-trustees validly exercised the power to remove the corporate trustee on the following grounds:

   a. The trust terms provide that the trustee could be removed "at any time". The settlor, however, imposed a series of other conditions to be satisfied before a trustee could be removed. The plain language imposes restrictions on the power to remove but does not impose any requirement of cause or fault before removal can be effectuated.

   b. The inclusion of the phrases "for any reason" and "uncontrolled discretion" elsewhere in the trust with respect to distributions, but not with respect to trustee removal, does not require a conclusion that a trustee could only be removed for cause. The settlor imposed criteria for removal and could have imposed a "for cause" requirement, but he chose not to protect the trustee from removal unless there was a showing of cause. The court will not rewrite or read nonexistent terms into the document.

   c. Injecting a cause requirement for removal of a trustee would be likely to disrupt the settlor's intent. The court dismissed the trustee's argument that allowing no-fault removal of a trustee would lead to a trustee ignoring its fiduciary responsibilities and bending to the will of the beneficiaries or co-trustees.

B. ***Matter of Sinzheimer*, 2017 NY Slip Op 31379 (2017); 2018 N. Y. App. Div. LEXIS 3069 (2018).** Corporate trustee acted properly when, after its removal, it refused to turn over trust assets to individual co-trustee that intended to terminate the trust, where trust terms clearly required appointment of successor corporate co-trustee.

1. Ronald Sinzheimer and his wife Marsha created an irrevocable trust in 1997. Ronald died and the trust provided for discretionary distributions for Marsha's lifetime benefit by an ascertainable standard, with the assets retained in trust for remainder beneficiaries upon her death. The co-trustees were an individual and a bank trustee. Ronald and Marsha's son Andrew and Marsha requested a

discretionary distribution to Marsha of all of the trust assets. A bank trust officer asked them to provide a tax return and budget for Marsha, which they refused to provide. Andrew's predecessor individual trustee removed the bank trustee (which was authorized under the trust terms) without appointing a successor bank, and then resigned as co-trustee and appointed Andrew as his successor. Andrew demanded the transfer of all trust assets to him, and announced his intention to distribute the assets to Marsha and terminate the trust.

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

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

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

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

4. On appeal, the Appellate Division affirmed the Surrogate on the grounds that: (a) the trust terms clearly require a corporate co-trustee; (b) the decision allows the flexibility to move the court for further relief if it is actually true that no corporate trustee will accept the trusteeship; (c) retention of trust assets until a proper successor co-trustee was appointed is not conversion; and (d) no facts were proven to support a claim for punitive damages.

C. *In re Estate of Mickels,* 2018 Mo. LEXIS 2 (2018). Widow may not petition for appointment as personal representative after statutory deadline, despite state supreme court recognition of cause of action after expiration of deadline.

1. After Joseph Mickels died, his family brought a wrongful death action against his doctor who had failed to diagnose his brain tumor. The trial court granted summary judgment for the doctor because the tumor was incurable and the family could not prove that the doctor caused death. On appeal, the Missouri Supreme Court held that the missed opportunity to delay death by six months stated a negligence action that would have been actionable as a survivorship personal injury claim allowed under state statue if brought by the personal representative.

2. His widow, Ruth, then petitioned to be appointed as personal representative to bring the claim recognized by the state supreme court. By that time, Joseph had been dead for seven years and the probate statutes provided that a petition to appoint a personal representative must be filed within one year after death. The trial court denied the petition and Ruth appealed.

3. On appeal, a divided Missouri Supreme Court affirmed the dismissal of the petition on the following grounds:

    a. The decision of the state supreme court in the wrongful death litigation did not recognize a new cause of action for "deprivation of the opportunity to delay death". A survivorship personal injury action has been available under state law since 1907, and the current statute tracks the original statute almost verbatim. The court simply articulated how this missed opportunity is indeed an actionable personal injury under a century-old statute.

    b. The court has consistently rejected equitable exceptions to clear statutes under principles of legislative deference. Equity should not be used to clearly contravene the intent and language of the legislature, particularly with respect to statutory causes of action. The court cannot create an equitable exception, no matter how compelling the argument or how narrowly tailored the exception. To do so would be to usurp the lawmaking authority of the legislature. The statute is clear and the petition had to have been brought within one year of death.

    c. One dissenting justice would hold that probate division has complete and unrestricted equitable powers in probate matters, and that such power is broad enough to afford an aggrieved party relief from the rigid enforcement of the statute of limitations where this court announces that a party has a cognizable cause of action after the running of the limitations period.

D. ***Matter of Hettrick*, 2018 N.Y. Misc. LEXIS 5367 (2018).** Surrogate refuses to move trust situs to facilitate appointment of out of state private trust company selected by beneficiary as trustee.

1. Suzanne died in New York. Under her will, she created a supplemental needs trust for the benefit of her son Andrew, who received SSDI and Medicare benefits. She named her other children, David and Elizabeth, as trustees and they were also the presumptive remainder beneficiaries. Andrew lived in Massachusetts at the time of Suzanne's death and then later moved to Virginia. The trust terms did not address the trust situs.

2. The trust protector (Andrew's cousin) removed the trustees and appointed a Virginia private trust company as successor, contingent upon the New York surrogate entering an order releasing jurisdiction over the trust. Andrew and the trust protector petitioned the surrogate to transfer the trust situs to Virginia and the trustees objected. On cross motions for summary judgment, the surrogate refused to transfer the situs to Virginia on the following grounds:

   a. The court has authority to change trust situs if shown to have a beneficial effect, but not merely because the parties request it. The lack of a trust term prohibiting a situs change is not reason enough to authorize a change.

   b. The trust terms do not require the trustees to physically check up on the beneficiary and be nearby to do so, and Andrew has expressly rejected such visits. While Andrew claimed to want a trustee with whom he could have face-to-face contact, he is tech savvy and could use his computer and cell phone to have contact with the trustees, as he had done in the past.

   c. Andrew's apparent desire for a trustee that would never question or evaluate his distribution requests is at odds with the responsibilities of the trustee. A corporate trustee might actually be less sensitive and more stringent in evaluating his requests, and there is no suggestion that the current trustees ever breached their duties as trustee. The current trustees used the trust assets for Andrew's benefit, and there was no suggestion that they ever put their own interests as remainder beneficiaries ahead of Andrew's interests.

   d. A blanket rule prohibiting all relatives who are remainder persons from serving as trustees would violate New York's public policy of appointing relatives rather than strangers to administer a disabled person's assets.

   e. The fact that the successor trustee selected by the trust protector does not have New York trust powers, and that the intent was to apply Virginia law to the trust upon the change of trustee, militate against a transfer of jurisdiction in view of the will provisions that suggest New York law was to apply to the trust.

   f. Andrew resided outside of New York when the trust was created and the settlor was aware that Andrew's place of residence should not be a factor in the trust situs and governing law. The petitioners advanced no compelling reason to warrant transfer of the trust situs.

XXIV. Capacity, Undue Influence & Contests

A. *In re Estate of Danford,* 2018 Tex. App. LEXIS 3045 (2018). Signing of durable power of attorney on the same day of the will raises a presumption of undue influence that precludes no evidence summary judgment in favor of validity of the will.

1. Annie was unmarried and had no children. In 2010, she signed a self-proving will leaving her estate to Robert and naming him as executor. On the same day, she signed a durable general power of attorney naming Robert as agent. Robert brought two witnesses and a notary to Annie's house to witness the

documents. The witnesses described her as alert, without signs of mental confusion, looking nice, and carrying on normal conversation. However, the witnesses did not know Annie before the signing, none could verify that she knew she was signing a will, and it was not announced at the signing that the document was a will. Annie's former foster son testified that Annie began experiencing confusion as far back as 2008, she kept over 70 raccoons, a peacock, cats and other stray animals at her home, and her home was covered in animal feces and was in great disrepair. Annie frequently called 911 at all hours, distraught and confused. By 2009, she was homebound in a wheel chair.

2. Shortly thereafter, the nephews discovered the papers, asked Annie about the papers, and said that Annie got upset, denied knowledge of the will and said that Robert gave her papers and demanded that she sign them. She immediately revoked the power of attorney. There was evidence she had memory problems around that time. She signed a criminal trespass warning against Robert but rescinded it within the year.

3. Annie died in 2016. Robert applied to probate the will and the nephews opposed, asserting lack of capacity and undue influence. The trial court granted summary judgment in Robert's favor and the nephews appealed.

4. On appeal, the court of appeals reversed the summary judgment in Robert's favor on the following grounds:

    a. Robert failed to present evidence that Annie understood she was making a will. Even if his initial burden was met by the self-proving affidavit, the evidence raises genuine issues of material fact about whether Annie understood she was making a will and had the capacity to do so.

    b. A power of attorney creates an agency relationship that is fiduciary in nature as a matter of law. There was some evidence that, at the time of signing the will, Robert was in a fiduciary relationship to Annie, giving rise to a presumption of undue influence that precludes summary judgment.

B. *Estate of Luce,* 2018 Tex. App. LEXIS 9341 (2018). Will executed by quadriplegic through "blinking system" valid.

1. Michael and GayeLynne met in 1987. Both had children from prior marriages. In 1998, Michael signed a will naming his wife as executor and giving her his entire estate, and later adopted two of her adult sons. His relationship with his own twin daughters was distant. Their relationship was volatile, and separated four times over 26 years, and GayeLynne had filed for divorce twice. They separated again in June of 2015 and she filed for divorce again.

2. In October of 2015, Michael was in an ATV accident that left him a quadriplegic. When admitted to the hospital, he told the staff he was getting divorced, wanted his daughters to make his medical decisions if he was unable, and that he did not want his wife making any decisions for him. A week later he went into respiratory failure, was intubated, and became unable to speak. The entire time he was alert to person, place, and time.

3. A week later, Michael met alone with an estate planning lawyer in the ICU to discuss a new will. The lawyer determined Michael's wishes through using a blinking system to indicate "yes" or "no" to a series of leading questions

posed by the lawyer. The lawyer determined through this system that Michael wanted to revoke his prior wills and leave his estate to his daughters. The lawyer went to his office and drafted the new will. He returned to the hospital and read the new will to Michael first privately, and then in the presence of a notary and two witnesses. The notary signed the will on Michael's behalf, in the presence of the witnesses, and the witnesses signed in Michael's presence, and the will was notarized. No one else was present in the hospital room.

4. Michael died a month later. His wife offered the old will for probate, and his daughter offered the new will for probate. GayeLynne contested the new will and a jury unanimously found that the new will was validly executed, Michael had testamentary capacity, the will was not a product of undue influence, and GayeLynne did not bring her suit in good faith. The trial judge admitted the will to probate and then lost reelection shortly thereafter. The newly seated replacement judge vacated the lack of good faith finding and awarded GayeLynne her attorneys' fees from the estate. Both sides appealed.

5. On appeal, the court of appeals affirmed the validity of the will, but reversed the replacement judges' decision to vacate the jury finding that GayeLynne brought her contest in bad faith, on the following grounds:

    a. A Texas statute allows a notary to sign for a person who is physically unable to sign if directed to do so by that individual. Michael used the blinking system to confirm that he understood the execution process and that he was requesting the notary to sign for him. While the lawyer, notary, and witnesses could not remember whether one blink meant "yes" or "no", all testified that Michael made his wishes clear through the use of the blinking system. There was, therefore, evidence to support the jury's finding.

    b. The medical records showed that Michael did not suffer a head or brain injury and expressed his concerns about his wife and his divorce upon admission. The lawyer testified that Michael had full testamentary capacity. Two days after the execution, a doctor examined Michael again and confirmed that Michael was fully competent and had mental capacity at the time of the execution as well. While he was severely physically injured and could not speak due to intubation, be was alert and lucid and had full mental capacity.

    c. Testimony about Michael's relationship with his children was properly excluded as irrelevant to the issue of his capacity. While it may have been relevant to the claim of undue influence, it cannot be shown that its exclusion led to an improper judgment, in view of the fact that Michael expressed a preference for his daughters upon his hospital admission and confirmed his intent to his lawyer through the blinking system.

    d. Michael's physical distress was not the same as the mental distress that could make him susceptible to undue influence. Michael's isolation from GayeLynne and her sons prior to death is not altogether surprising given that Michael and GayeLynne were in the middle of a contested divorce at the time. And while Michael's daughter contacted the lawyer and provided some basic information to the lawyer, she was not involved in the will's preparation and execution in any way.

e. The new judge erred by vacating the jury finding that GayeLynne brought her contest in bad faith and awarding her attorneys' fees, because there was evidence to support the jury finding, and GayeLynne knew before trial Michael had told the hospital staff he was getting divorced and did not want his wife involved in any way and that the medical records confirmed he did not suffer any brain or head injuries.

XXV. Wills, Probate & Administration

A. ***Guardianship & Alternatives, Inc. v. Jones*, 2018 Mich. App. LEXIS 2813 (2018).** Electronic note on smart phone admitted to probate as a will.

1. Before he committed suicide at age 21, Duane left an updated handwritten journal entry saying: "My final note, my farewell is on my phone. The app should be open. If not look on Evernote". The journal provided an email address and password for Evernote.

2. On his phone, there was a typed electronic document with his full name at the bottom. The document included apologies and personal sentiments, religious comments about the afterlife, requests for funeral arrangements, and the following paragraph concerning disposition of his property (in informal lay person language): (a) gift of his stuff from his father and grandmother to his uncle; (b) gift of his car to Jody; (c) gift of his trust fund to his half-sister, and not to his mother; and (d) gift of the rest of his property 10% to the church, 50% to his half-sister, and the remaining 40% to "do whatever you want with". In another paragraph, he asked his uncle to give anything he didn't want to keep to two other people, and gave "all of his money" to his half-sister.

3. His court appointed guardian petitioned to probate the electronic document as Duane's will, his mother objected to probate and claimed to be his sole intestate heir, and the trial court admitted the electronic document to probate as Duane's will. His mother appealed.

4. On appeal, the Michigan Court of Appeals affirmed the trial court on the following grounds:

   a. By statute, a document or writing that is not executed with the requisite will formalities, and is also not holographic will, may be admitted to probate if the proponent proves by clear and convincing evidence that the decedent intended the document to be a will. No specific formalities are required under the statute.

   b. The document expresses Duane's testamentary intent and was written with his death in mind, by directing the disposition of his assets, stating his intent that his mother not receive the trust fund, and addressing funeral arrangements.

   c. Extrinsic evidence supporting probate includes the journal directing the reader to his final "farewell", and that he left the journal in his room with his phone, and then left home to commit suicide. Testimony about Duane's strained relationship with his mother supports the conclusion that he intended the document to be a will to ensure that his mother, who would otherwise be his heir, would not inherit from him.

B. ***Passarelli v. Dalpe,* LC No. 16-005565-DE (Unpub. Michigan Court of Appeals 2018).** Unsigned draft will not admitted to probate.

1. Alan was involved in a romantic relationship with Linda and he had two children from a prior marriage. Alan visited a lawyer to prepare his estate plan, wanted more time to consider the complex estate plan prepared for him, and signed a "stopgap" simple will leaving all of his assets to Linda if she survived. He died shortly after signing the simple will and before considering the more complex plan prepared for him.

2. After Alan's death, the same lawyer met with Linda twice to discuss the estate and also Linda's plan. He took handwritten notes that stated Linda wanted a plan like Alan's and wanted to leave all of her assets (which would almost entirely be the property inherited from Alan) to Alan's children. He prepared a rough draft will and final will for her, but it was not clear that she ever reviewed the drafts and Linda died shortly after the second meeting.

3. Alan's children petitioned the court to admit the unsigned draft to probate, which the trial court denied. On appeal, the Michigan Court of Appeals affirmed the trial court on the following grounds:

   a. By statute, a document or writing that is not executed with the requisite will formalities, and is also not holographic will, may be admitted to probate if the proponent proves by clear and convincing evidence that the decedent intended the document to be a will. No specific formalities are required under the statute.

   b. Evidence supported the trial court finding that Linda was not very savvy and would not have been clear about what happened at the meetings with the lawyer. She did not know what an estate plan was and had only a ninth-grade education.

   c. There was undisputed testimony that Linda had an argument with Alan's children after his death, said shew wouldn't sign anything, threw them out of her house, and had no further contact with them. Linda did not see the rough draft or the final draft, never reviewed the final draft with the lawyer to confirm it carried out her intent, and it was doubtful she even knew it existed.

   d. Linda was close with her and lived with her sister (who was also her intestate heir), and her sister testified that Linda did not want to leave her property to Alan's children, with whom she did not have a good relationship. Linda's sister also challenged the lawyer's account of the discussion at the two meetings and recalled that only Alan's estate was discussed and not Linda's estate plan.

   e. Alan's children failed to meet the burden of proving by clear and convincing evidence that the unsigned document was intended by Linda to be her will.

C. ***Matter of Will of E. Warren Bradway,* No. A-4535-16T3 (New Jersey Appellate Division 2018).** Codicil written in testator's own blood admitted to probate.

1. Warren was in a relationship with Marc from 1997 to 2004. The lived together, filed documents with the Philadelphia Commission on Human Relations

recognizing their status as life partners, and operated a bed and breakfast together. In 2001, Warren executed a formal attested will leaving his estate to Marc. Their relationship ended in 2004, Warren moved out of their shared home, and a court resolved the business dispute by ordering Marc to pay Warren $95,500 for this share of the business. Warren started a relationship with Kirsten at that time.

2. In 2006, Warren filed papers severing his life partner status with Marc. That same day he drafted a one-page handwritten codicil to his will that named Kirsten as beneficiary, directed that all references in his will to Marc be replaced with Kirsten, and directed that half of Marc's business debt to Warren be forgiven. He told Kirsten he was keeping the codicil in his file cabinet. He moved in with Kirsten and died unexpectedly in 2016. Kirsten found the will and codicil in the file cabinet that had been moved into her home when Warren moved in with her in 2011.

3. Kirsten moved to probate the will and codicil and Marc contested the codicil. The trial court approved probate of the codicil and denied Kirsten's attempt to impose sanctions on Marc for bringing frivolous litigation. The court also entered judgment without allowing Marc to call witnesses to testify that the will was not signed at Warren's death. The court of appeals affirmed the trial court on the following grounds:

    a. The DNA experts at trial agreed that the body of the codicil, excluding the signature, was written in the decedent's own blood (due to lack of a sample from Warren, they actually tested Warren's brothers and concluded that the blood was a 99.999% probability of coming from a full-sibling of the brothers).

    b. Both handwriting experts opined that the body of the codicil was written in Warren's handwriting.

    c. By statute, New Jersey allows probate of a document without a signature where there is clear and convincing evidence of an intent to make a codicil to a will. The court accepted Marc's position that the codicil was not signed and approved the codicil under this statute. Therefore, it was not error to enter judgment without allowing Marc to call witnesses that would testify that the codicil was not signed.

    d. The language of the codicil, by using the term "codicil", stating the intent to amend the will, providing a revised testamentary disposition, referring to Marc as a former partner, and forgiving part of Marc's debts, showed a clear intent to make a codicil. The fact that Warren wrote the codicil in his own blood adds support to other clear and convincing evidence that Warren intended to alter his will. Because a signature is not required under the statute relied on by the court, and the court accepted Marc's position that the codicil was not signed, the unresolved dispute about the validity of the signature does not undermine the court's decision.

D. *Estate of Ehrlich*, 427 N.J. Super.64 (2012); 2018 N.J. Super. Unpub. LEXIS 1043 (2018). Uniform Probate Code in New Jersey allows probate of unsigned copy of will. Prevailing party at trial cannot sue his attorney for attorney malpractice because the other side had the right to appeal his victory.

1. N.J.S.A.3B:3-3, is virtually identical to Section 2-503 of the Uniform Probate Code, and states: "Although a document or writing added upon a document was not executed in compliance with Section 5–502, 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 (i) the decedent's will".

2. The purpose of the statute is to avoid harmless errors in the formalities of Will execution. The majority applied the statute to save an unsigned, unwitnessed, copy of a document labeled Last Will and Testament. The opinion recites these facts:

   a. Richard Ehrlich, a trust and estates attorney who practiced in Burlington County for over fifty years, died on September 21, 2009. His only next of kin were his deceased brother's children — Todd and Jonathan Ehrlich and Pamela Venuto. The decedent had not seen or had any contact with Todd or Pamela in over twenty years. He did, however, maintain a relationship with Jonathan, who, he had told his closest friends as late as 2008, was the person to contact if he became ill or died, and to whom he would leave his estate.

   b. Jonathan learned of his uncle's death nearly two months after the passing. An extensive search for a Will followed. As a result, Jonathan located a copy of a purported Will in a drawer near the rear entrance of decedent's home, which, like his office, was full of clutter and a mess. Thereafter, on December 17, 2009, Jonathan filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, filed an answer, objecting. The court appointed a temporary administrator, Dennis P. McInerney, Esquire, who had been previously named as Trustee of decedent's law practice, and by order of June 23, 2010, directed, among other things, an inspection of decedent's home. Pursuant to that order, on July 8, 2010, Jonathan, Todd and Pamela, along with counsel and McInerney, accessed and viewed the contents of decedent's home and law office. No other document purporting to be decedent's Will was ever located.

   c. The document proffered by Jonathan is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, however, include, in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H.W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.

   d. In relevant part, the purported Will provides a specific bequest of $50,000 to Pamela and $75,000 to Todd. Twenty-five percent of the residuary estate is to pass to a trust for the benefit of a friend, Kathryn Harris, who is to receive periodic payments therefrom. Seventy-five percent of the residuary estate is to pass to Jonathan.

e. It is undisputed that the document was prepared by decedent and just before he was to undergo life-threatening surgery. On the same day this purported Will was drafted—May 20, 2000—decedent also executed a Power of Attorney and Living Will, both witnessed by the same individual, who was the Burlington County Surrogate. As with the purported Will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page.

f. Jonathan is named the alternate agent to make health care decisions in the event his uncle became incapacitated and the primary agent was unavailable.

g. Years after drafting these documents, decedent acknowledged to others that he had a Will and wished to delete the bequest to his former friend, Kathryn Harris, with whom he apparently had a falling out. Despite his stated intention, decedent never effectuated any change or modification to his Will as no such document ever surfaced, even after the extensive search conducted of his home and law office after his death.

3. In applying the statute, the court concluded the document was simply a copy of the decedent's Will:

a. "Clearly, decedent's handwritten notation on its cover page evidencing that the original was sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates—the "Last Will and Testament" of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, "[e]ven if the original for some reason was not signed by him, through some oversight or negligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament.""

b. "Lest there be any doubt, in the years following the drafting of this document, and as late as 2008, decedent repeatedly orally acknowledged and confirmed the contents therein to those closest to him in life. The unrefuted proof is that decedent intended Jonathan to be the primary, if not exclusive, beneficiary of his estate, an objective the purported Will effectively accomplishes. Indeed, the evidence strongly suggests that this remained decedent's testamentary intent throughout the remainder of his life."

c. "Moreover, decedent acknowledged the existence of the Will to others to whom he expressed an intention to change one or more of the testamentary dispositions therein. As the wife of decedent's closest friend recounted: "And [Richard] has to change [the Will] because there is another person that he gave, I don't know how you say it, annuities every month ... in case he passed away, and he wants to take her off the [W]ill. And by that time Richard could barely write or sign, so I'm not surprised he didn't sign his [W]ill." Although there is no evidence whatsoever that decedent ever pursued this intention, the very fact that he admitted to such a document is compelling proof not only of its existence but of decedent's belief that it was valid and of his intention that it serve as his final testamentary disposition."

d. "Given these circumstances, we are satisfied there is clear and convincing evidence that the unexecuted document challenged by appellants was reviewed and assented to by decedent and accurately reflects his final testamentary wishes. As such, it was properly admitted to probate as his Last Will and Testament."

e. "The fact that the document is only a copy of the original sent to decedent's executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in Section 3 that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged."

4. A dissent argued that this was not a harmless error case at all but rather a lost Will case: "Despite Jonathan Ehrlich's reliance upon *N.J.S.A.* 3B:3–3 in seeking to probate the unexecuted copy of the decedent's will found after his death, Jonathan does not appear to claim that the decedent actually intended that document to be his will, as required for probate under *N.J.S.A.* 3B:3–3. Instead, Jonathan's claim appears to be that the will found in the decedent's home was an unexecuted copy of an original executed will, which the decedent sent to his executor Van Sciver, and that the original was lost by Van Sciver or Van Sciver's estate after his death. For the reasons previously discussed, *N.J.S.A.* 3B:3–3 does not address such a claim. In my view, Jonathan is entitled to prevail only if he can show, in conformity with the common law authority dealing with lost wills, that the unexecuted will found in the decedent's home is a copy of an original executed will sent to Van Sciver, which was lost and not revoked by the decedent. However, because this case was presented solely under *N.J.S.A.* 3B:3–3, the trial court did not make any findings of fact regarding these issues. Indeed, the trial court concluded that the copy of the will found in the decedent's home could be admitted to probate under *N.J.S.A.* 3B:3–3 "[e]ven if the original ... was not signed by [the decedent]." Therefore, I would remand to the trial court to make such findings. I would not preclude the parties from moving to supplement the record to present additional evidence on the question whether the unexecuted copy of the will found in the decedent's home may be admitted to probate as a copy of the alleged executed original sent to Van Sciver."

5. Because there was a dissenting opinion, there was a right for the losing side to appeal to the state supreme court. Jonathan fired the counsel that prevailed below, hired new counsel, and had his new counsel settle the case to avoid protracted appellate litigation. Jonathan then sued his prior attorney for legal malpractice, alleging that his counsel should have argued that the will was a lost will, and if he had, there would not have been a dissenting opinion and he would not have had to settle with his siblings. The trial court granted summary judgment dismissing the malpractice action and Jonathan appealed. On appeal, the superior court affirmed on the following grounds:

a. The lost will theory requires the proponent of the will to overcome a rebuttable presumption that the testator revoked his will. There is nothing in the facts of the case that would have overcome the rebuttable presumption that his uncle destroyed the will. The trial court reasonably accepted expert opinion of the difficulties of proof in a lost will theory.

b. As a matter of law, a jury could not determine that one theory of the case was better than the other. Even if Jonathan had prevailed on another theory, nothing would have prevented an appeal by his siblings. He might have been presented with precisely the same quandary if a dissent was filed. That rank speculation is no different than the rank speculation he engages in by asserting he could have prevailed on a lost will theory, that his siblings would not have appealed, and if they had appealed, appellate review would have resulted in a unanimous decision. Any damages from the alleged malpractice were unforeseeable – mainly Jonathan's decision to retain new counsel, pay that attorney's fees, and settle the matter.

c. Jonathan could not have proven his cause of action before a jury and therefore summary judgment was proper.

E. *In re Estate of Starkey,* 2018 Tenn. App. LEXIS 154 (2018). Allegation that unnamed person tricked testatrix into destroying document other than will is adequate to state a challenge to a will disinheriting children in favor of charity.

1. Wanda's husband predeceased her. In 1991, she signed a will leaving her estate to her children. In 2009, she signed a new will that revoked all prior wills and left her estate to the Leukemia and Lymphoma Society of Middle Tennessee ("LLS"). Wanda died in 2013. Wanda's daughter, Drema, petitioned to probate the 1991 will and alleged that there were no later wills. When LLS petitioned to probate the 2009 will, the court revoked the letters of administration granted to Drema, and an administrator *cum testamento annexo* was appointed. The original 2009 will was placed on file with the court. Drema then contested the 2009 will, claiming to have information that Wanda tried to destroy the 2009 will, and believed that it had been destroyed in her presence, causing intestacy or resuscitation of the 1991 will. Drema then filed an amended pleading claiming that Wanda instructed an unnamed person to destroy the 2009 will, but that unnamed person destroyed another document, thereby tricking Wanda. The circuit court dismissed the contest as a matter of law and Wanda appealed.

2. On appeal, the Court of Appeals revised the dismissal of the claim as a matter of law on the following grounds:

a. As far back as 1846, the Tennessee Supreme Court has recognized that, where a testator has the apparent intention to revoke a will, an act of destruction does carry out that effect, even though the will was not literally destroyed, so long as the testator completed the act he intended to work the revocation. For example, if the testator attempts to burn the will and believes he has done so, but by the fraud of another person a different paper is burned, it will be a revocation if the testator intended it to be one and honestly believed it was.

b. The 1985 enactment of legislation codifying the means of revoking a will (which includes destruction with the intent and purpose of revocation by the testator or another person in the testator's presence and by his direction) does not abrogate the common law, because the intent to do so was not sufficiently clear. The phrase "no change of circumstances other than as described in this section revokes a will" in the statute refers only to marriage, the birth of a child, divorce, or annulment, and does not abrogate the common law rule that fraud will not defeat an attempt to revoke a will.

c. Drema alleges sufficient facts in support of her claim that would warrant relief under the common law. She alleged that Wanda, with the intent and for the purpose of revoking her 2009 will, had a document she mistakenly believed to be her 2009 will destroyed in her presence, and that the mistaken belief was due to the trickery of another.

F. *Fenstermaker v. PNC Bank*, 2018 U.S. Dist. LEXIS 49198 (Conn. 2018). Disinherited son lacks standing to challenge estate plan, compel an accounting, or bring other tort claims before father's death.

1. Scott was an experienced trial lawyer who administered his uncle's estate in 2012. He claimed that his sister, Martha, demanded that he make improper estate distributions until Scott hired counsel and threated legal action. Scott claimed that Martha's anger led her to begin taking steps to undermine Scott's relationship with their father, Lloyd, and to interfere with his expected inheritance. Soon after this family dispute, Lloyd removed Scott as executor under his will. Lloyd's health deteriorated and Martha provided his care and managed his affairs. Scott blamed Martha for his lack of communication with his father. Scott also believed his father wanted to punish him with disinheritance because Scott defended certain alleged terrorists, and in his defense of those persons and while running for the U.S. Congress, Scott was quoted as believing the 9/11 attack on the World Trade Center was "deserved" and "one of the greatest events in human history".

2. In 2016, Lloyd amended his estate plan multiple times, finally concluding with a pour over will to a revocable trust with a bank trustee that disinherited Scott's share of the $1.5 million estate and left that share to Scott's ex-wife, Linda. At some point during the estate planning process, Lloyd fell and fractured his hip and received treatment in Delaware, and had some diminished or impaired capacity. Scott was given notice pursuant to Delaware law to bring a pre-death legal challenge to the will and trust in January of 2017. However, in December of 2016, Lloyd moved from Delaware to Connecticut near his daughter, and suffered three stokes and remained hospitalized.

3. Scott sued *pro se* to invalidate his father's will and trust and to compel an accounting of his father's assets, and alleged: (a) tortious interference with expected inheritance against Martha; and (b) intentional infliction of emotional distress for $2 million against Martha and Lloyd. He alleged that the activities of his father and sister exacerbated his anxiety condition (for which he had received treatment since the 1980s), caused him to double the dosage of his mediation and be hospitalized, caused his divorce, damaged his relationship with his brother, and hindered his ability to work effectively thereby costing him income.

4. The federal court granted dismissal of all of the claims on the following grounds:

   a. Because Scott is an experienced trial lawyer, he is not entitled to have his pleadings construed liberally as an ordinary *pro se* litigant.

   b. Scott has not suffered an injury-in-fact, and his case is not ripe for adjudication, because while his father is alive he is no more than a theoretical beneficiary and has suffered no actual injury. He is not entitled to any property while his father is alive.

c. The fact that Delaware law prescribes a pre-mortem procedure to challenge a will or trust in state court does not mean that there is constitutional standing to allow such a challenge in federal court. Federal courts are courts of limited jurisdiction and state courts are courts of general jurisdiction. Even if Scott had standing, Lloyd has moved out of Delaware and it is highly doubtful that the Delaware statute would apply now that Lloyd lives in Connecticut (and Connecticut does not have a pre-death validation statute).

d. Scott cannot make First or Fourteenth Amendment constitutional claims that his father impaired his free speech rights because those amendments only apply to government actors, and there are no constitutional dimensions to a testator's or settlor's choice of beneficiaries. Equal protection does not require that all children be treated equally.

e. Scott has no right to an accounting of his father's assets during the father's lifetime. Even if Connecticut would recognize the tort of interference with an expected inheritance, Scott does not have standing to bring the claims at this time due to lack of any cognizable injury before his father's death. Scott has not plausibly alleged that one who disinherits a child, or one who convinces a parent to disinherit a child, has committed the kind of outrageous conduct that is required to sustain an intentional infliction of emotional distress claim.

f. Plaintiff may be upset at being excluded from his father's estate, but that does not transform his father's lawful conduct into a tort.

G. *Gulledge v. Sullivan,* 2018 Conn. Super. LEXIS 2604 (2018). Estate can sue for wrongful death damages for lost use of motorcycle.

1. The court held that an estate could, as part of a wrongful death claim, sue for damages for the lost use of the decedent's motorcycle on the grounds that the estate could assert any claims the decedent could have asserted had he lived.

2. The court concluded that the estate lost the use of the motorcycle for the period from October 8, 2016 through February 26, 2017 while the police were investigating the accident and deciding to charge the person that caused the accident. After that point, photographs and other secondary evidence would be permissible to prosecute the criminal case and use would be restored. At a rate of $50 per day, the court valued the claim at $7,100.

H. *Hofmann v. Estate of Hoffman,* 2018 Conn. Super LEXIUS 3195 (New Britain Superior Court 2018). Ademption of bequest by extinction is not grounds to deny probate of will.

1. Timothy died testate in 2017. Under his will, he left any motor vehicles owned at the time of his demise to his son Brian. At the time he signed the will, he owned a Mercury Mountaineer with a value of $30,000. At the time of his death, he did not own a vehicle. The court admitted the will to probate and Brian appealed the probate order, alleging only that he was not left with any bequest from his father's estate.

2. The court dismissed the suit as a matter of law on the grounds that the allegations of ademption of the bequest by extinction are not grounds for appealing the probate of a will, and because the decedent did not own a vehicle at his death, the will has been followed and there is no relief, equitable or otherwise, that can be given.

I. *In re Estate of Abbott,* 2018 Tenn. App. LEXIS 445 (2018). Probate of will signed by two interested witnesses allowed.

1. Joe signed his will in 2016 and the will was witnessed by his children, and was also notarized. His will left his assets equally to his children. His daughter, Marce, probated the will and qualified as executor. She then settled a claim against the U.S. Department of Veterans Affairs for $135,000. The check was made payable to the estate but addressed to the court. The court required posting of bond before the check could be distributed to the heirs, Marce tried unsuccessfully to disqualify the probate judge, and the probate court rescinded the order of probate and held that the will failed to comply with state law requirements for due execution because both witnesses were interested and other grounds. Marce appealed. The court of appeals reversed the probate court and admitted the will to probate on the following grounds:

   a. The probate court erred by rejecting probate based on the witnesses being interested because by statute no will is invalidated because it is attested by an interested witness.

   b. The will did not fail to state that the witnesses were competent because the will provided a statement by the witnesses that they are "of sound mind and proper age to witness a will".

   c. The will did not fail to state that the testator signed in the presence of two witnesses who signed in each other's presence and in the testator's presence, because the will stated that the testator signed in the presence of both witnesses who signed in each other's presence and in the testator's presence.

   d. The will is not invalid for failure to include a self-proving affidavit because that is an option under the law and not a requirement.

J. *In re Estate of William,* 2018 Ohio App. LECXIS 1206 (2018). Court properly rejected second disinterment of corpse.

1. William died in 2016 survived by his wife, Charlene. Pursuant to his wishes, his body was buried on December 19th on the family burial site at Arcadia Cemetery. A month later, William's sister Linda sent a letter to Charlene's attorney informing Charlene that the deed to the burial site was being changed to be in the name of a family trust and that the trust terms would prohibit Charlene from being later buried with her husband (Linda later claimed that their father's will, by which the lot passed, prohibited spousal burials, but that was not part of the letter).

2. After consulting with the funeral home and her attorney, she had William's remains disinterred in August 2017 and reburied at another cemetery where she could later be buried with him. That month Linda petitioned the court to again disinter the remains and have them reinterred at Arcadia Cemetery. The court denied the petition and Linda appealed.

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

   a. Well-established public and legal policy has been that a person, once buried, should not be exhumed except for the most compelling reasons. Good cause must be shown and the evidence supported the trial court's application of the factors for the determination of lack of good cause.

   b. Charlene's relationship with William was entitled to more weight than Linda's, as there was no evidence of a strained marriage or that they were on bad marital terms at his death.

   c. William strongly desired to be buried next to Charlene.

   d. Linda's letter left no doubt that Charlene would not be buried with William. While Linda testified that she had since resolved the issue by titling the lot into a trust that allowed the burial of spouses, her letter stated that the titling in the name of the trust was the reason why Charlene could not be buried there. The court could find that Linda's professed change of heart at trial, and withdrawal of her objection to Charlene's burial at Arcadia, was disingenuous and that her objection only softened in the face of litigation. Linda's attempt to block Charlene from being buried at Arcadia weighs against disinterment.

   e. Charlene undertook a good faith effort to comply with the statutory requirements by consulting with the funeral home and acting on advice of counsel. The statutes do not require a spouse to inform anyone else about their plans to disinter the remains of a deceased spouse.

   f. Her initial consent to burial at Acadia is not a waiver of her right to object to additional disinterment to return the body there. If the consent to burial was based on the understanding that the site would be maintained so that the surviving spouse could also be buried there, and later events make it impractical to carry out that understanding, the consent to the original site may be vitiated. Linda's letter nullified Charlene's earlier consent. Charlene did not act outside the bounds of acceptable conduct.

K. *In re Estate of Field,* 2018 Kan. App. LEXIS 9 (2018). Proof adequate to sustain trial court finding that codicil was a forgery.

1. Earl O. Field had no children and his wife, Nonie, died in 2009 after 70 years of marriage to Earl. In 2010, Earl signed a will that left a life estate for the family that had farmed Earl's family land in Kansas, gave a small monetary gift to his brother in law, and left the balance of his $20 million estate to Fort Hays State University (where he and Nonie graduated) to fund music and athletic scholarships. The will was prepared by his long-time attorney who had prepared all of his prior estate planning documents, and was reviewed by the college.

2. Earl met Wanda when she worked for his local bank and she later worked for his accountants. He later offered Wanda a job as his part-time bookkeeper from 2008 until his death in 2013. Earl was depressed after Nonie's death and spent more time with Wanda. She had access to his bank accounts, was listed as survivor on some of them, had access to his papers, and had the ability to sign checks on his accounts. She received hundreds of thousands of dollars from his accounts before and after his death. Earl was admitted to the

hospital on January 28, 2013 where he was admitted as a patient, and diagnosed with cancer. Three days later he was admitted to a rest home where he received hospice care. Earl died on February 19, 2013.

3. Wanda claimed that she went to his office that night and found two typewritten letters dated January 23, 2013, one to Wanda and one to Earl's attorney, purportedly signed by Earl, both of which said that half of his estate should go to Wanda and half should be divided between the attorney and the college. The letters did not have witness signatures. The next day, the attorney told her the letters did not pass property because they were not witnessed, and her own attorney said the same thing. She called her friend Kathy, and Kathy told her own husband Steve that the letters were not valid to pass property for lack of witness signatures. Five days later, Wanda visited the car dealership where Steve worked to have her car serviced, and while she was there Steve called the attorney and told him that he and Kathy had witnessed Earl sign a purported codicil, and signed it as witnesses at Steve's office on January 22nd (the day before the date of the letters), but had not told Wanda because Earl wanted it to be a surprise. Wanda had also called Kathy before and after Steve's call to the attorney. Kathy and Steve went to Wanda's house that night, and Wanda claimed that was the first she learned of a witnessed document. The next day, Wanda went to Earl's office and claimed that she found the purported signed and witnessed codicil dated January 22. Copies of that document were shredded (and lacked witness signatures) and Wanda made copies at the local bank (which did have the witness signatures).

4. Wanda attempted to probate the codicil and the college objected. After a nine-day trial with 30 witnesses and 300 exhibits, the trial court denied probate of the codicil, but awarded Wanda $1 million in attorneys' fees and costs. At the time of trial, Steve and Kathy were dead from a murder-suicide immediately after their house was searched by the FBI. They had been served with subpoenas by a grand jury. Their testimony was admitted by video depositions.

5. Both sides appealed. On appeal, the court of appeals affirmed the rejection of the codicil, but reversed the award of attorneys' fees, on the following grounds:

    a. Wanda met her burden to make a prima facie showing that the purported codicil was a valid instrument. Earl's capacity was not questioned, Steve and Kathy submitted affidavits that they had witnessed the execution and signed the codicil at Steve's office at Earl's request. The attorney testified that the signature appeared to be Earl's. Nothing on the face of the instrument raises the suspicion of a forgery, and therefore the burden of proof shifted to the contestant to show the invalidity of the document.

    b. Clear and convincing evidence supported the trial court determination that the codicil was not signed by Earl.

    c. Experts testified that: (i) the typewriter used was not the same one Earl used before he stopped typing; (ii) the second half of the January 23 letters was sharply darker than the first half, showing that a ribbon had been changed, but the purported January 22 codicil was dark throughout, suggesting it was drafted after the ribbon change, and not before it as the

dates suggest, and all the codicil was clearly typed with the same ribbon as the second half of the letters; (iii) the shredded photocopy of the codicil was identical to the final codicil but did not have witness signatures (which could not be explained if it was a photocopy); and (iv) Earl's signature was suspect because letters were retraced, the signatures on the letters and codicil were identical whereas that it impossible for people to do because of natural variations, the signatures were made with a degree of fluidity Earl did not possess, Earl always crossed the letter "F" from left to right, but here it was crossed from right to left, and the experts concluded through this and 10 other material differences from this signature and known other signatures that this was not Earl's signature.

d. The formatting was inconsistent with Earl's known historic drafting style in the punctuation, construction, salutation, margins, spacing, closing, date placement, and signature placement.

e. The court could discount Wanda's expert who only opined that Early "probably" signed the document, as that is a weak standard by expert parlance.

f. Steve and Kathy's testimony was impeached by the totality of the circumstances. They gave conflicting testimony about whether Wanda discussed the estate plan with them, service records from the dealership show that Wanda was there when Steve called the attorney to mention the codicil, and Kathy texted Wanda "good luck" before she met with the attorney. There was a reasonable inference that the grand jury subpoena left with them on the morning they died was related to this case.

g. The court could reasonably find that Wanda's testimony lacked credibility because: (i) she gave inconsistent testimony about her contact with Steve and Kathy; (ii) she claimed to have no idea that Earl intended to include her in his estate plan, but claimed that Earl had dictated to her the letter to the attorney (despite never having given dictation before); (iii) she changed her story and denied lawyers had told her the letters were not valid for want of witness signatures; (iv) she denied talking to Steve while at the car dealership; (v) the lack of witness signatures on what she claimed were shredded copies of the codicil (which were reclaimed from the shredder and reassembled by court order); (vi) there was a handwritten draft of the codicil also in the shredder in her own handwriting; (vii) she gave inconsistent testimony about the ribbon changing on the typewriter; (viii) her theory of the case was unbelievable as to the actions of an elderly and sick man who was no longer typing, and her speculation does not refute the clear picture of a forgery that was painted consistently by those who knew both Earl and Wanda; (ix) Wanda was fired from the bank for writing herself checks out of a client's custodial account; and (x) Wanda admitted stealing funds as treasurer for her class reunion.

h. Earl remained close with the family to whom he wanted to give the life estate. He was also close with the president of the college. Earl's accountant and close friends testified that he did not worry about estate tax planning because he had planned to give his assets to the college, he hated paying taxes and invested in tax-free bonds to avoid them, and that he would be "rolling over in his grave" if his assets passed to Wanda and

his estate had to pay $4 million in estate taxes. Earl's lawyer testified that Earl had always had counsel prepare his estate planning documents, and that the gift to the college had been in his documents signed in 1987, 1994, 1996, 1998, 2003, 2005, 2009, and 2010.

i. The codicil contradicted Earl's long-time estate plan and there was no evidence that Early expressed a change in attitude about the individuals he intended to benefit, that he was willing to pay estate taxes, or that he no longer wanted to be remembered through the large gift to the college. Unbeknownst to Wanda, Earl told the college president *after* the date of the alleged codicil that his attorney had his will and that he was leaving more money, and not less, to the college.

j. The trial court erred by awarding Wanda attorneys' fees because the evidence does not support a finding that Wanda acted in good faith and with just cause.

L. *Andelson v. Neptune Mgmt. Corp.*, 2018 Cal. App. Unpub. LEXIS 42 (2018). Funeral company did not commit actionable error by following instructions from agent under power of attorney that were different than instructions under will.

1. In November 2008, Arvin entered into an agreement for pre-arranged funeral services. The agreement provided that the company would provide cremation services or arrange for the services if death happened outside the company's service area. In the instructions for disposition of the ashes, Arvin instructed that his ashes be disposed of by burial at sea three miles off the coast of Los Angeles County. Arvin told his son about the arrangements and that he did not want a memorial service when he died. In 2010, he gave his son a copy of this will which left his estate to his son (and specifically excluded his brother, Robert, as a beneficiary), named his son as executor, and named his son to handle arrangements for disposition of the ashes. Neither Arvin nor his son gave a copy of the will to the funeral home.

2. In July of 2012, Arvin signed an Advance Health Care Directive and Power of Attorney for health care, naming his brother, Robert, as his agent, and authorizing Robert to direct the disposition of his remains. Arvin entered hospice care the next month and asked the hospice to communicate with Robert first. In September of 2012, a hospice worker sent the son a copy of the directive, but Robert was unaware of the document. Arvin died that month. The hospice provided the funeral company with a copy of the directive. No one gave the funeral company a copy of Arvin's will. The next day, the funeral company contacted Robert and informed him of the directive. The company obtained a death certificate and obtained a permit to dispose of the remains off the coast of Los Angeles County. The son emailed the will to Robert and instructed him not to make any decisions about Arvin or his estate. The son called the funeral home, but an employee said that they would only deal with Robert. When the son stated he was the executor and that there was a will, the employee hung up on him. The son did not contact the company again. Less than 20 minutes after the call, Robert emailed the son, informed the son he was aware of his call to the company, and stated that anything related to the ashes must be arranged through Robert, Robert was already making arrangements to recover the ashes, that Robert's wishes would be respected, and that Robert was arranging a proper memorial as Arvin had instructed him.

3. Arvin was cremated on October 1, 2012. The death certificate states that remains were disposed of that day off the coast of Los Angeles County. In actuality, the company released the remains to Robert on October 9, 2012 for scattering off the coast of Los Angeles County. Robert discussed a change with the company and the company obtained a new permit to dispose of the remains off the coast of Orange County. A few weeks later, Robert had a memorial service that the son did not attend because he felt it was against Arvin's wishes. He then learned that the ashes were displayed at the service. Robert then scattered the remains off the coast of Orange County. The son became upset, developed anxiety and sleep problems, and began avoiding social interaction.

4. The son sued the funeral companies (Arvin died outside the original company's territory and pursuant to the contract the company arranged services by another provider) for breach of contract, fraud, negligence, intentional violation of various statutes, and breach of fiduciary duty. He sought $5 million in actual damages, $5 million in punitive damages, and statutory double and triple damages. The trial court granted summary judgment in favor of the companies and the son appealed.

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

   a. The Uniform Health-Care Decisions Act permits an adult with capacity to execute a power of attorney for health care. By statute, a decedent may direct in writing the disposition of his remains. Unless the power of attorney for health care directs otherwise, an agent may make decisions that may be effective after the principal's death including directing the disposition of remains.

   b. A person who provides written authorization for cremation represents the truthfulness of his authorization and is personally liable for damage resulting from his breach of warranty. A crematory is not liable for disposition of remains pursuant to that authorization unless it has actual notice that the representation is untrue.

   c. Upon the principal's death, the agent under a power of attorney for health care may direct the disposition of the remains, unless the power of attorney specifies otherwise. Arvin expressly granted Robert the right to control disposition of the remains. Arvin did not revoke the power of attorney. Even though he signed forms in hospice, where he did not check the box saying he had a power of attorney, that alone was not enough to evidence an intent to revoke his power of attorney. Even if those forms could be a revocation, the forms did not address burial arrangements and would not have revoked that part of the power of attorney. The fact that hospice sent the power of attorney to the company indicates that hospice did not view the forms as revoking the power of attorney.

   d. A decedent's last written directions concerning the disposition of his remains are to be carried out at his death. The power of attorney was signed after the will and therefore contained Arvin's last written directions concerning his remains and controlled over the conflicting provisions of his will and pre-need arrangements. It is not legally correct that a will also contains the final instructions concerning the remains.

e. Because the power of attorney authorized Robert to have control, the company committed no misconduct in arranging with Robert for their disposition. Robert's lack of awareness of the power of attorney did not negate its validity. The son did nothing to assert that his authority trumped Robert's or stop the company from giving the remains to Robert during the two-week period from Arvin's death to the delivery of the remains to Robert. The company was fully justified in releasing the ashes to Robert based on the power of attorney and Robert's representations. The company was bound to follow the power of attorney as Arvin's last written directions and therefore was not contractually bound to follow the pre-need agreement.

f. While the death certificate included inaccurate information about the place of disposition, the company was not aware at the time it was prepared that Robert would scatter the ashes off of Orange County rather than Los Angeles County. Because the power of attorney was signed after the forms with the company, it was not unusual that Robert's name would be added to the forms later, and there was no proof that the company created false documents to give Robert authority. Robert's authority was granted by Arvin under the power of attorney and not through the company's internal forms.

g. Because the company followed Robert's directions and acted in accordance with the power of attorney and applicable law, the company did not show disrespect to Arvin's remains. There is no evidence that the company misrepresented or concealed any material facts upon which the son relied to his detriment.

XXVI. Construction & Conditions

A. *In re Craig Living Trust,* 2018 N.H. LEXIS 163 (New Hampshire Supreme Court 2018). Trust code provisions applying rules of will construction to trusts do not incorporate pretermitted heirs statute into trusts.

1. Teresa died in 2016. Her son Michael predeceased her leaving two surviving children. Her other son Sebastian survived. Her 2012 will and revocable trust agreement did not mention Michael's children, and left all assets to Sebastian. The will (but not the revocable trust) provided that Teresa, except as otherwise expressly provided, made no provisions for her descendants intentionally and not as the result of any accident, mistake, or inadvertence.

2. Michael's children petitioned to be included as heirs, alleging that the pretermitted heir statute should be applied to the trust agreement as a result of the Uniform Trust Code provision that "the rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property". While the suit was pending, the legislature amended the pretermitted heir statute to expressly state it did not apply to any trust. The issue was certified to the New Hampshire Supreme Court, which rejected the claim on the following grounds:

a. The pretermitted heir statute refers only to the "testator", the "will", and the devisees and legatees under a will, and does not refer to the settlor or the trust. In 2001, the New Hampshire Supreme Court declined to apply the statute to a trust absent an express legislative intent to do so (consistent with cases from other jurisdictions).

b. The adoption of the UTC in 2004, and its provision that "the rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property", does not cause the pretermitted heir statute to be applied to a trust. The pretermitted heir statute is not a rule of construction, it is a rule of law - it does not merely provide guidance relative to construction and interpretation which the decision maker is free to accept or reject based on the circumstances. Rather, the statute states a conclusive rule that a child or descendant of a deceased child, that is not mentioned in a will and not included as a devisee or legatee will, is still a taker under the will unless there is evidence in the will itself that the omission is intentional. The court will not conclude that the legislature intended to abrogate the 2001 decision of the New Hampshire Supreme Court because it never stated such an intention, and is presumed to be aware of the common law.

XXVII. Issue, Beneficiaries, Paternity & Adoption

A. *Simms v. Estate of Blake,* 2018 Ky. App. LEXIS 132 (2018). Payment of court-ordered child support is not enough to avoid disinheritance of father from son's estate under Mandy Jo's Law due to willful abandonment.

1. Melanie and Bobby were never married and never cohabitated. They had a son, Brandon, in 1989 while Bobby was married to another woman. No father was listed on the birth certificate and Bobby did not take any steps to establish paternity or obtain visitation rights. Bobby provided minimal support and rarely saw or communicated with his son. When Brandon was 7, Melanie petitioned for and was ordered monthly child support of $281 from Bobby. The next year, Melanie and Brandon moved an hour away, after which Bobby only saw Brandon twice before his death (the last time when Brandon was 9 years old). In 2000, Melanie married Derek who acted in all respects as Brandon's father. Bobby claimed that Melanie asked him to stay away from Brandon, and he complied because he felt Derek was a good influence on Brandon.

2. Brandon died in a car accident in 2014, intestate, unmarried, and without descendants. At Melanie's request, Bobby did not attend the funeral. Derek and Melanie successfully sought appointment as administrators and falsely listed Derek as Brandon's father. Bobby was not notified at that time but, the next day Bobby's counsel contacted the estate counsel (who also brought a wrongful death action). The lawyers remained in contact while the wrongful death action was pursued. The total value of Brandon's estate was $12,500 and the wrongful death recovery (after payment of the one-third commission) was $100,000.

3. Bobby sued to assert a right to 50% of the estate and wrongful death proceeds, alleged that Melanie swore a false affidavit to allow her to settle the wrongful death claims and exclude Bobby, and brought claims for breach of duty, negligence, and fraud. He sought compensatory and punitive damages. The circuit court found that Bobby had abandoned the care and maintenance of his son and was foreclosed by Mandy Jo's Law from receiving a distribution from Brandon's estate or any wrongful death proceeds. Bobby appealed.

4. On appeal, a divided court of appeals affirmed (over one dissenting opinion) on the following grounds:

    a. Mandy Jo's Law provides that a parent who willfully abandons the care and maintenance of a child shall not have right to intestate inheritance or wrongful death proceeds, unless (i) care and maintenance is resumed at least one year before death or (ii) the parent was deprived of custody under a court order and complied with all court orders for support payments.

    b. Melanie made the initial error of failing to list Bobby on the probate papers, but the court cannot ignore the fact that Bobby received notice immediately after the appointment, did not object for several months, only took action after the Mandy Jo Law was raised as an issue, and by that time the court could not take any action to remedy the notice deficiency.

    c. The estate has the burden of proof of the application of Mandy Jo's Law. The law does not expressly state the standard of proof. As a matter of first impression in Kentucky, a preponderance of the evidence standard is appropriate because the case is a civil case and only money is at issue between the parties. The claims are not similar to a termination of parental rights claim where a higher standard is justified. The preponderance standard is consistent with North Carolina which has a similar law. No constitutional rights are at issue and the state is not involved, and the default civil standard of proof is appropriately applied to Mandy Jo's Law.

    d. It was proper for Melanie's personal counsel, and not the estate, to present proof supporting the application of Mandy Jo's Law because the estate is not the beneficiary of wrongful death proceeds (they are paid directly to the heirs even though the estate has standing to sue), and a state statute allows intestate heirs to bring and pursue claims.

    e. The lack of an order granting Bobby custody or visitation rights does not preclude application of the law. A court can restrict visitation rights, and if done, Mandy Jo's Law cannot be applied to prevent inheritance so long as the parent has paid court ordered support. This does not mean, however, that a parent has no obligation to provide love and support until a court enters an order – that obligation arises on birth, and while a court order is required to remove it, it is not necessary to create it. Bobby could have established paternity at any time and sought visitation but he did not do so. He took no action to assert his parental rights. The fact that he did not exercise his constitutional rights to visit his son did not relieve him of his parental obligation of care, and he cannot rely on the absence of an order he voluntarily chose not to request to escape Mandy Jo's Law.

f. The determination of abandonment is not based on a single factor, it is based on the total circumstances, including displays of affection and financial support. The mere payment of court-ordered child support is not dispositive. The words "care and maintenance" must be combined to define the parental responsibilities. A parent cannot avoid the law by abandoning the "care" while just paying the "maintenance". Bobby had no role in his child's life other than paying court-ordered support. There were 6,570 days between Brandon's birth and his 18th birthday, and Bobby could only recall seeing Brandon on a few of those days, and he was content to have Derek serve as the parent.

g. Melanie's request that Bobby not visit with Brandon does not give rise to estoppel that precludes Melanie from asserting Mandy Jo's Law, because she did not make a material misrepresentation.

h. One dissenting justice would bar Melanie from recovering under the doctrine of unclean hands as a result of her false statement on the probate papers.

B. *Hall v. Hall,* 2018 W. Va. LEXIS 345 (2018). Divided West Virginia Supreme Court holds that child may not inherit from biological parent who dies intestate after his or her parental rights to the child have been either voluntarily relinquished or involuntarily terminated.

1. Michael abused his daughter, Michaelin, and the Department of Health and Human Services filed a complaint against him. He voluntarily relinquished his parental rights, a court order terminated them as well, he was sentenced to a lengthy prison term for abusing his daughter, and his wife divorced him. He died in 2011, intestate, unmarried, and without issue other than Michaelin, but survived by his parents. Michaelin petitioned for the right to inherit the entire estate, Michael's parents objected, and the trial court awarded summary judgment in favor of the parents. Michaelin appealed.

2. On appeal, a divided West Virginia Supreme Court affirmed the trial court on the grounds that:

a. The Child Welfare Act, and the court, recognize that while termination may completely sever a parent's rights, certain of the child's rights persist, such as the right to continuing support. For example, a parent cannot voluntarily relinquish parental rights to avoid the child's right to support from a parent. Several states have adopted legislation to extend this principle to the right of inheritance through intestacy, but West Virginia has not done so.

b. Because Michaelin is seeking the right to inherit through intestacy, the Child Welfare Act is not controlling. The term descendant in the intestacy statute is defined with reference to the definition of "child and parent" contained elsewhere in the code – and both definitions, child and parent, must be met in order to inherit. The term child is not defined in the intestacy statutes. The term parent, however, is defined to include "any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from a child whose relationship is in question". A parent whose rights have been terminated does not meet this definition, because termination of parental rights terminated all rights of the parent and such a parent could not inherit the instate estate of the child.

c. A child may not inherit through intestacy from a biological parent who dies intestate after his or her parental rights to the child have been either voluntarily relinquished or involuntarily terminated. Any change in this law must be enacted by the legislature.

d. Two dissenting justices would hold that, while Michael's rights were terminated, Michaelin's rights were not terminated and remain intact, and remarked that the majority's disturbing decision piles even more hardship on a child whose life was already severely damaged by parental abuse and neglect. The court noted that the state provision was drawn from the Uniform Probate Code and that the majority was deviating from its understood meaning.

XXVIII. Disclaimers & Powers

A. *Estate of John O'Connor*, 2018 Cal. App. LEXIS 774 (2018). Will language is adequate to make specific reference to power of attorney and validly exercise the power, without naming the instrument creating the power.

1. Arthur and Hildis created a joint revocable trust agreement that was funded with an interest in a limited partnership that owned an apartment complex in San Diego. Arthur also created an insurance trust. Their planning (after various amendments) resulted, in part, in the creation of trusts for their son John. Under one trust, the trustees were required to make $1,000 monthly payments to John, and John had a testamentary general power of appointment. Under the other, the trustees had discretion to make distributions to John, but John did not have a power of appointment. The trust provision granting John the power of appointment provided for the distribution over the trust assets "as he shall appoint by a will specifically referring to and exercising this general testamentary power of appointment". The power was a general power only by allowing him to appoint to the creditors of his estate (otherwise he was required to appoint among the settlors' descendants other than himself). In default of the exercise of the power, and because he died without issue, the trust assets would pass to trusts for his siblings.

2. John died in 2014 survived by his wife but no descendants. Under his will dated two weeks before his death, he provided as follows: "I exercise any Power of Appointment which I may have over that portion of the trust or trusts established by my parents for my benefit or any other trusts for which I have Power of Appointment I exercise in favor of my brother Kevin O'Connor". His lawyer had drafted another will that referred to the instruments creating the power more specifically, but he did not sign that version of the will due to his final illness.

3. Kevin petitioned to probate the will and validate the exercise of the power of appointment in his favor. The other siblings objected and argued that the exercise of the power was invalid for failure to specifically reference the instrument creating the power. The trial court held that the exercise of the power was valid, and the siblings appealed. On appeal, the court of appeals affirmed the trial court on the following grounds:

   a. Under the California Powers of Appointment Act, a power can only be exercised by complying with any requirements about the manner, time, and conditions of the exercise specified in the creating instrument. If the

creating instrument directs that a power be exercised by specific reference to the power of the instrument creating the power, the exercise of the power must have the required reference. A required reference in the creating instrument precludes the use of form wills with blanket exercises of powers. A court cannot excuse compliance with a donor's specific reference requirement and the exercise of a power must reflect manifestation of the powerholder's intent to exercise the power.

b. John's will complied with the specific reference requirement of the trust, even though it did not name the instrument that created the trust. The trust terms did not require John to make specific reference to the trust instrument creating the power. The trust merely required reference to the power itself, and the court rejected outright the argument that John was required to identify the creating trust by name when the settlors did not impose this requirement. To hold otherwise would fail to recognize a distinction between a required reference to the instrument creating a power and a reference to the power itself, which is a distinction expressly made in the governing statute.

c. The trust does not define what amounts to a "specific reference" to the power. The objective is to ensure that the donee consciously exercised a particular power. The will supports an inference that John consciously and deliberately exercised the power granted by the trust terms. The will recites the existence of the power, the trust, and the donors. Because of these specific references, the will cannot be reasonably read as a blanket exercise of the power that presents a risk of John inadvertently or unintentionally exercising the power. The fact that John's exercise could apply to multiple trusts, where as a result of amendments by Arthur there was only one trust over which John had a power, does not require a different result.

d. John's attorney's testimony did not support an inference that the exercise of the power was a mistake or boilerplate. John exercised the power in favor of a permissible recipient, and the trust did not limit his ability to exercise in favor of his brother, and there is no legal reason not to give effect to his exercise.

B. *In re Trust FBO Samuel Frances DuPont,* C.A. No. 12904-MG (Delaware Chancery Court 2018; Master's Report). Divorce property agreement incorporated into a court order, in which husband agrees to exercise his limited power of appointment in favor of the children from the marriage, is not binding on a Delaware trust.

1. Ernest DuPont created a trust for the benefit of his son, Sam, in 1936. The trust terms gave Sam a testamentary limited power of appointment over the trust assets, with the assets not appointed passing to Sam's issue, *per stirpes*. The trust included a spendthrift clause.

2. Sam had three children from his first marriage to Helen DuPont. They divorced in 1962, and the trust did not participate in the divorce proceedings. A Nevada court approved the property settlement agreement in which Sam agreed to exercise his limited power of appointment over the trust assets in favor of their three children, and incorporated the report into its final order. That same

day, Sam executed a will exercising the power in the manner agreed. Also that same day, Sam married Jan Jeffries. He then adopted her children from a prior marriage. They remained married until Jan's death in 2010.

3. Sam desired to exercise his power of appointment so that trust assets could be used to preserve the family farm where he lived with Jan, and to benefit Jan's descendants, and did not want the assets to pass to the duPont children from his first marriage who were extremely wealthy by inheriting through their mother. Sam approached the individual co-trustee, who was also Sam's personal estate planning lawyer, about preparing a new will. On the lawyer's advice, Sam obtained a legal opinion from another attorney that the settlement agreement was not enforceable against the trust (but that his duPont children might have a claim against his estate if he breached the settlement agreement).

4. In March of 2015, Sam executed a will that exercised the power of appointment in favor of Jan's granddaughter in a trust that also allowed the use of trust assets to maintain Sam's family farm. His three duPont children were listed only as remote contingent beneficiaries. Sam died 5 months later.

5. After Sam's death, the trustees petitioned the court for instructions about the validity of the divorce settlement agreement and Sam's exercise of the power of appointment. Jan's granddaughter and the duPont children asserted competing claims to the funds, and all parties moved for judgment on the pleadings.

6. The Master issued a final report finding that the settlement agreement incorporated into the Nevada divorce decree did not bind the trust, or represent a partial release of Sam's power of appointment, and it was not appropriate to impose a constructive trust over the assets, on the following grounds:

   a. A contract to exercise a testamentary power of appoint is not valid in Delaware (as was also held in the 2016 case of *Estate of Tigani*). The donor of a testamentary power of appointment, or any power that is not presently exercisable, intends that the selection of the appointees be made in light of future circumstances, and the donor requires the donee to "wait and see" and account for later facts before exercising the power. Contracting away that power defeats the donor's intent by eliminating the ability to change the appointment any time before death, and in Delaware the donor's intent controls.

   b. A contract to exercise a testamentary power of appointment also involves property interests to which the donee has no claim, and therefore cannot dispose of during lifetime. The trust property remained the donors, and Sam had no property interest he could bargain away. Sam's exercise of the power of appointment in the settlement agreement was legally ineffective because the property was not his to encumber. Accordingly, Sam's exercise of the power under his will controls.

   c. Sam, however, breached the settlement agreement and the duPont children could seek restitution from Sam or his estate. However, they failed to bring a claim against the estate within the statute of limitations.

d. The Nevada order is not entitled to full, faith, and credit, and *res judicata* and collateral estoppel do not apply, because under the law of Nevada as the rendering state and similarly under Delaware law: (i) the trustee and the trust were not parties or in privity with the parties to the divorce action; (ii) the Nevada court did not have jurisdiction over the trust, trustees, and contingent beneficiaries; (iii) Sam was not in privity with the trust and their interests were not aligned at that time; and (iv) the settlor's intent was in direct conflict with the settlement agreement.

e. This suit was not a collateral attack on the Nevada judgment. The trust is not barred by laches or unclean hands from challenging the validity of the settlement agreement due to the 50 year delay in raising the issue, because: (i) nothing that could have been done earlier could affect the primacy of the donor's intent and the agreement was invalid under longstanding Delaware law; (ii) the defenses of laches and unclean hands were not asserted in the responsive pleadings and were waived; and (iii) it would be premature for the trustee to file this petition before Sam's death because the exercise of the power of appointment did not take effect until that time.

f. The settlement agreement was not a partial release of Sam's power of appointment because the agreement on its plain language was clearly a contract to appoint and not a release, and the plain language makes it impossible to view it as a release.

g. The conduct of the trustee (who was also Sam's personal estate planning lawyer) was not inequitable such that it would cause a different result by imposition of a constructive trust because: (i) while Sam breached the settlement agreement, that is a claim against Sam and his property and does not give rise to claim against the trust or the trust property; (ii) the trustee was not required to share the information he learned about Sam's estate planning, in the capacity as his planning counsel, with the trust beneficiaries; (ii) even if he could share that information, Sam could have changed his plan at any time and it is not reasonable to expect that the beneficiaries would be notified any time Sam changed his estate plan; and (iii) he did not violate his duty of impartiality because any information he shared with Sam's granddaughter was done in his capacity as counsel, and not as trustee, and was done at Sam's direction.

h. The trustee did not breach his duties and his attorneys' fees should be paid from the trust. Because all parties had reasonable positions and the suit resolved ambiguities that facilitated trust administration, the fees of all other parties should also be paid out of the trust.

C. *Matter of Bruce*, 2017 NY Slip Op 30967(U)(2017); 2018 N.Y. App. Div. LEXIS 3871 (2018). Trial court applies rules of construction to cure flagrant fraud on a power of appointment. Appellate division affirms.

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

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

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

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

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

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

3. On appeal, the appellate division affirmed the surrogate's decision as carrying out the decedent's intent as gleaned from a sympathetic reading of the will as an entirety and in view of all of the circumstances.

XXIX. Insurance

A. ***Whisenant v. McKamie,* 2018 Ark. App. 87 (2018).** In Arkansas, a will can change the beneficiary of a life insurance policy.

1. Sam and Kindell were married in 2010. Sam's brother took him to see an insurance agent and Sam purchased life insurance in 2012. His brother gave him money for the payment of the premiums. Sam and Kindell divorced in 2014 (and without having children). Sam asked the agent to change the beneficiary of the policy to be his father and filled out the form, but the agent never sent the form to the company headquarters. Sam, however, signed a new will in 2015 that gave his father "any proceeds from any life insurance", stated his intent that his ex-wife not receive the proceeds, and that he intended his will to prevail over any beneficiary designations made in favor of Kindell. He also made specific reference to the policy "purchased by" his brother, although the policy showed Sam as the purchaser and the evidence was that the brother provided Sam with money around the time of the purchase.

2. Sam died in 2016, the insurance company interpleaded the proceeds, and the estate and Kindell made competing claims to the funds. The trial court granted summary judgment in favor of the estate and Kindell appealed. On appeal, the court of appeals affirmed on the following grounds:

a. The general rule is that an insurance beneficiary is to be changed in the manner provided in the policy and attempted changes by will are ineffectual. However, since 1937 by case law, Arkansas allows a will to change the beneficiary of a life insurance policy if the will sufficiently identifies the policy and states an intent to change the beneficiary.

b. Kindell admitted that Sam intended to change the beneficiary of the policy.

c. Sam adequately identified the policy by stating it was on his life, that it named Kindell as beneficiary, and that it was purchased on his brother, because it was not disputed that Sam only obtained one policy on his life, and he intended to change the beneficiary of any policy. There is no allegation that Sam could have been referring to another policy.

B. *Feola v. Morello,* No. 340008 (Mich. App. Unpub. 2018). Claims that trustee of ILIT should have stopped paying insurance premiums earlier dismissed as based on speculation.

1. In the mid-90s, Jeannine created an ILIT that was implemented by her attorney as independent trustee. The beneficiaries were her nieces and nephews, and her niece Feola served as family trustee. The annual premium payments on the $500,000 were $15,000. In 2014, the trust funds were in danger of depletion and Palazzo and the trustee decided to cash out the insurance policy for a cash value of $36,000. Jeannine died unexpectedly a few days after cashing out the policy.

2. Feola filed an objection to the trustee's accounting, alleged that the trustee failed to properly monitor the funds, and alleged that the failure to provide progress reports and other information to the beneficiaries (such as the cost and risks of the policy) for 18 years led to a loss for the beneficiaries. She did not object to the creation of the ILIT. She admitted that Jeannine and the trustee made the decision to cancel the policy after considering other options, but argued that the trustee put them into a position of needing to cancel the policy because the trust had fallen into bad financial shape. The trustee moved for summary dismissal which the trial court granted on the grounds that the claims were based on pure speculation. Feola appealed.

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

   a. Even assuming the trustee should have provided more information to the beneficiaries, there is insufficient evidence about what would have been done differently had he done so. Feola admitted it was speculation that the beneficiaries would have had the settlor stop paying policy premiums. While an accountant called by Feola said "obvious modifications" could have been made to the policy, he did not provide any specifics and admitted his conclusions were based on speculation. He later stated that the trustee should have renegotiated the premiums or looked for a better deal with another carrier, but provided no specifics about whether such actions would have been successful. Their testimony did not rise above the level of speculations.

b. The estate planning lawyer called by Feola testified that the trustee deprived the beneficiaries of the opportunity to take corrective action to protect their interests, such as exploring with their aunt other options for investing that $15,000 annual premium. She also averred that the beneficiaries would not have allowed their aunt to continue to pay the premiums. However, she did not state when the trust assets became devalued such that premiums were no longer "worth it", and suggested that damages be awarded for all premiums paid for the policy even though Jeannine willingly paid the premiums when initially establishing the trust. She also provided no basis for her testimony that the beneficiaries would have not allowed the aunt to pay premiums, and no evidence that they could stop her from doing. She admitted that it was merely speculation that the policy would have been cancelled if the family had received updates from the trustee about the financial status of the trust assets.

c. While the timing of events was unfortunate, Feola failed to provide evidence how the ultimate circumstances would have differed even if the trustee had been more proactive in obtaining and distributing information about the trust.

C. *Jo Ann Howard & Associates v. Cassity*, 2017 U.S. App. LEXUS 15621 (8th Cir. 2017); 2018 U.S. Dist. LEXIS 197542 (2018). Trustee of preneed funeral insurance trusts owes duties to funeral homes and consumers who have standing to sue, and claims against the trustee arise under trust law, are tried to the court and not a jury, and the damage measure is determined by trust law. Claims for aiding and abetting a fraud are rejected as not having been recognized under Missouri law. On remand following appeal, the trial court largely rejected attempts to narrow the court's discretion to award damages through summary judgment motions.

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

2. A bank became trustee of the NPS trusts in 1998. At that time, NPS had already appointed Wulf Bates & Murphy (Wulf) as investment advisor, and Wulf remained as advisor for the duration of the bank's trusteeship. Wulf used the trust assets to purchase life insurance on the lives of NPS's preneed consumers so that when one died (and NPS would have to pay for funeral services), the life insurance companies also owned by the Cassity family would pay life insurance proceeds into the NPS trusts. The bank was acquired

by a larger national bank that did not want to become trustee of the NPS trusts, so the trusteeship was assigned to another bank that assumed duties in 2004. At the time the national bank acquired the trustee bank, the trusts held $122.9 million in deposits and $159.8 million in insurance coverage. In 2009, yet another large national bank acquired the prior national bank, and the acquiring national bank's liability in this case was derived solely from its acquisition of the prior national bank that had acquired the liability of the original bank trustee.

3. In 2007, insurance regulators discovered that NPS had engaged in a massive national fraud for serval years in which: (a) the insurance company issued loans to NPS without trustee approval and despite the fact that loans should only have been issued to the trusts, depleting the trust assets; (b) NPS manipulated the payment amounts on policy applications allowing it to retain most of the money that should have been sent to the trust (i.e. where a consumer paid $1500, NPS changed the amount to $5, send $5 in, and keep the balance). As a result of the fraud, a Texas court placed NPS and the insurance companies into receivership, which triggered coverage by the state guaranty associations that made sure the obligations to consumers to pay funeral expenses were met. The entities agreed to a liquidation plan as well.

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

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

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

    a. The trust beneficiaries are NPS, consumers in Missouri, and the funeral homes that were to provide services to those consumers under the preneed contracts, because: (i) a beneficiary is a person who benefits from a trust, is intended to benefit from the trust, or who has a right or expectancy in a trust; (ii) under the statutory scheme, trust principal was distributed only to NPS, but the whole purpose of the trusts was to ensure funding for funeral services, 80% of the contract sales were placed in the trusts to guarantee that money would be available to pay for funerals, and funeral homes would likely not agree to perform services without a guarantee of funds for payment; (iii) if NPS failed to make any payments, the consumers and funeral homes were entitled to a trust

distribution in an amount equal to all deposits made for the preneed contract, making the consumers and funeral homes more than mere "incidental beneficiaries"; (iv) if NPS were both settlor and sole beneficiary, NPS could unilaterally compel trust termination contrary to the trust purposes; and (v) any defense that the trustee's actions were authorized by a beneficiary does not apply to the consumers and funeral homes, and was properly rejected by the district court.

b. The bank cannot escape liability because of the involvement of an investment advisor because: (i) the statutes also provide that control of investments shall not be divested from the trustee and investments must not be beyond the authority of a reasonable prudent trustee to invest in; and (ii) the bank could not be relieved of all investment responsibility because that would not give effect to the statutory requirements, and a trustee has a duty to ensure the trust assets are prudently invested, regardless whether the trustee is investing or monitoring the investment decisions of the investment advisor, and the trustee is only relieved of liability where Wulf invested the assets in the manner of a prudent trustee.

c. The claims against the trustee were trust law claims, and should have been tried to the court rather than to a jury. There is an exception for a claim of indebtedness where a trustee has a duty to pay money or property immediately and without conditions to a beneficiary and fails to do so, but that does not apply here, and a breach of trust claim does not become an indebtedness claim merely because the trust has since terminated. Prior cases that allow jury trials arising from "deeds of trust" are irrelevant because a deed of trust is a mortgage and not an actual trust.

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

7. On remand the district court resolved competing motions for summary judgment as follows:

a. The court rejected the bank's assertion that it is shielded from liability if the investment advisor invested in investments that were within the authority granted under the trust agreement. The court held that the bank's position was an overbroad interpretation of the 8th Circuit decision and would completely eviscerate the trustee's duties to ensure prudent investments were made. Simply ensuring the types of investments are within the authority granted in the trust agreement is not enough to relieve the trustee of liability, although the trustee is not required to check every single investment made by the advisor. The court declined to determine on summary judgment whether the advisor was independent because of a dispute over material facts.

b. The awarding of prejudgment interest is within the equitable discretion of the court and the court denied summary judgment on the issue.

c. Because the evidence related to breaches of trust was in dispute, the court declined to award summary judgment on the issue of the availability of damages for losses to the trust or disgorgement of profits, but noted that while those remedies may be mutually exclusive when applied to a single incident of breach, where multiple breaches are proven the court would have discretion to apply different remedies to each proven incident of breach.

d. The court may be permitted to order disgorgement of profits as a remedy for breach, whether or not improper use or disposition of trust assets occurred in connection with the breach. Restatement (Second) of Trusts Section 205 does not define "profits". The alleged premium paid to shareholders for their bank stock when sold to another bank (over the value that would have been paid if the liabilities were known at the time of sale) is not a "profit" to the bank because corporations are distinct form their shareholders, there have been no allegations to support piercing the corporate veil, and therefore the stock price premium paid to the shareholders is not recoverable in this action.

XXX. Torts, Slayers, & Bad Actors

A. *Archer v. Anderson,* 2018 Tex. LEXIS 611 (2018). Texas Supreme Court refused to recognize tort of intentional interference with inheritance.

1. Jack Archer executed a 1991 will that left his $7.5 million estate to his brother, other than gifts of $90,000 to 12 Christian charities. In 1998, after a stroke, his capacity sharply declined. Shortly thereafter, Jack's longtime friend (who was an attorney) prepared and had Jack sign documents naming him as Jack's agent, even though the medical records showed significant delusion and confusion on the date they were signed. The agent then tried to compel Jack to sell his ranch and Jack objected. The agent then hired attorneys to draft new estate planning documents for Jack (the planning lawyers never met with Jack and took their instructions only from the agent). The brother filed guardianship proceedings for Jack, Jack's new lawyers consented to the appointment of temporary guardians (and stated that new estate planning would need to wait due to incapacity), the agent fired the lawyers from the guardianship action and hired new counsel that withdrew from the guardianship, and the agent had Jack sign new estate planning documents that disinherited the brother and left the entire estate to the charities.

2. The brother refiled the guardianship action and the court appointed a guardian over the agent's objection. The brother contested the new estate planning documents while Jack was still alive and settled the case with the charities by agreeing that the new documents would not be respected or probated and that the charities would receive only Jack's coin collection with a value of $600,000. The brother then sued the agent on Jack's behalf for breach of duty, intentional infliction of emotional distress, and legal malpractice. The brother also successfully sued others on Jack's behalf and settled those claims for hundreds of thousands of dollars.

3. The agent died in 2006 and Jack died a month later. The brother received the bequest under the 1991 will. In 2007, the brother sued the agent's estate for intentional interference with inheritance to try to recover the $600,000 they

paid to settle claims with the charities and their $3 million in attorneys' fees in the litigation. The jury found in the brother's favor but awarded only $2 million in damages. The trial court entered judgment on the verdict and added back an additional $600,000 in damages. Both sides appealed.

4. On appeal, a divided Texas Supreme Court reversed and held that Texas would not recognize the tort of intentional interference with inheritance on the following grounds:

    a. The Texas Supreme Court has never recognized the tort, and the lower courts should not recognize it in the first instance. There is a split in the courts of appeals as to whether the cause of action exists under Texas law. Existing remedies are not inadequate merely because they do not provide the relief a tort would. The fundamental difficulty with the tort is that it claims for the judiciary the authority to supplant or augment probate law and settled remedies and principles whenever they are perceived to be unfair. The waste of public and private resources should be avoided by answering the unresolved question and holding that the tort is not recognized in Texas.

    b. The probate law protects a donor's freedom of testation. The tort gives the beneficiary his own right that he does not otherwise have. That right may or may not protect the donor's right of testation. A beneficiary's interests and motives and those of his donor may be consistent, but they may also conflict. Family relationships and feelings change. An expectancy is powerful motivation to ignore reality and misperceive a donor's true intent. A prospective beneficiary has no right to fairness, he gets only what the donor chooses to give, fairly or unfairly. Probate law protects that choice. Tort law is ill-suited to posthumous reconstruction of a decedent's intent. A donor may not wish to disclose his true intentions during life and risk offending family and friends. Probate law has special doctrines and procedures to derive the true intent. These carefully developed doctrines take into account the context of nuanced family dynamics and customs that are often inaccessible to outsiders. The evidentiary rules and procedures in probate law strike a balance between honoring a testator's actions and addressing situations where actions were wrongfully taken. These provisions were enacted by the legislature and should be respected. It is not prudent for the court to recognize a new tort simply because the probate procedures sometimes present hardships or even bar a recovery. A new tort should only be available where the court lacks the power to provide redress. But limits on the probate court's power are among the limits and procedures of probate law with which the tort is not meant to interfere. Given probate law's extensive and thorough provisions to protect freedom of testation, the lack of further remedies must be viewed not as legislative oversight but legislative choice.

c. The argument that the tort is a necessary gap-filler is not compelling. The laws of probate and restitution thoroughly govern inheritance and provide remedies for unfairness, such as through imposition of a constructive trust. Restitution law is itself a gap-filler that is sensitive to the rules of procedure, standards of proof, and limitations periods of probate law, such that it cannot be used to circumvent probate procedures. Suits on established torts, such as fraud, conversion, theft, and breach of duty, and also suits for declaratory judgment, may also be available. The court is not persuaded that all of these causes of action are inadequate in providing remedies.

d. The fact that a plaintiff estate may not recover attorneys' fees under probate law (and that the fees diminish the interest of the heirs) does not require recognizing a new tort. The rule that the costs of a good faith contest are paid by the estate is established by probate law. While good policy arguments might be made that the rule punishes the innocent and does not deter wrongdoing, this does not make the probate law inadequate or allow courts to circumvent legislative policy. If standing is not allowed under probate law (despite its notable breadth), or relief is lacking, the reason is legislative choice and probate proceedings should not be retried in a tort action. The limits of restitution simply recognize that not every wrong can be remedied.

e. In settling the probate action, the brother chose not to seek attorneys' fees against the charities and to pay the charities' attorneys' fees. The law also provided the brother with multiple causes of action against the agent. The brother's desire for a probate process that differs from the one created by the legislature on the issue of attorneys' fees does not justify creating a new tort.

f. The tort is invoked in a great many cases and the bench, the bar, and the public deserve a straight and clear answer. The court is concerned about elder financial abuse, but the state's extensive probate laws and legislative improvements to guardianship law to redress abuse are the right path to address that concern, and not a judicial expansion of tort law. Any expansion of tort law in this respect should be left to the legislature. Tort law should not provide a remedy that disregards the limits of statutory probate law. The tort of intentional interference with inheritance is not recognized in Texas and the decision of the courts of appeals to the contrary are overruled.

B. *Mulvey v. Stephens,* 2018 Fla. App. LEXIS 9093 (2018). Absence of wrongful conduct precludes claim for tortious interference with expectancy.

1. While married to his first wife, Jack created a revocable trust to hold property in St. Lucie County that the family called the "ranch". After his first wife died, Jack married Thelma. They did not combine their finances. Jack tried unsuccessfully to sell the ranch, sometimes with the help of his daughter Sheila. Eventually, Jack pulled the ranch out of the revocable trust and sold it to his friends for a $500,000 note. In 2010, Jack signed a new will that revoked his 2005 pour-over will (that would leave property to a trust that benefitted his children) and left all of his residuary assets outright to Thelma.

2. Jack died in 2011, Sheila contested the new will on the grounds of lack of capacity and undue influence, and the court held that the will was valid and

that there was no evidence of mental impairment. Sheila then sued Thelma alleging tortious interference with expectancy. The trial jury found in Sheila's favor and awarded her damages in the amount of $60,000. Thelma appealed.

3. On appeal, the court of appeals reversed and held that the trial court should have granted Thelma's motion for judgment notwithstanding the verdict on the following grounds:

   a. Sheila admitted that there was no direct evidence of intentional interference. Merely changing a document such as a will or trust is insufficient because there must be a showing of improper actions by the alleged tortfeasor. Here there was no evidence of an independent tort.

   b. There was no evidence that Thelma interfered with Jack's property. Jack removed the ranch from the trust and placed it in his and his wife's names as a way of paying her back for large loans she had made to him. There was also no evidence that Thelma lied to Jack. Even if she said that Jack's children hoped he died so they could inherit and complained about the care she provided him when he needed extraordinary assistance, those statement came after he had already removed the ranch from the trust and sold it. There was also no clear evidence that Thelma interfered with his relationship with his son who was in prison.

C. *McKay v. Thomas,* 2018 Ohio App. LEXIS 4469 (2018). Tearing up draft pour-over will is not sufficient to support claim for intentional interference with expectancy.

1. William and Clara were married in 1991. In 2010, William executed a will and revocable trust that left his land and tangibles to Clara outright, and established a trust for her benefit with the balance of the assets (over which Clara had a withdrawal right). In 2014, William discussed a new will and revocable trust with his counsel. That month, the lawyer brought a draft new will to William at the hospital, but due to quarantine he was not allowed to see him. He asked the nurse to give the draft will to him. He had not yet drafted the new trust. Clara reviewed the draft will and destroyed it, stating it contained factual inaccuracies. William died the next month and Clara probated the 2010 will, transferred the assets to the 2010 revocable trust for her benefit, and pursuant to the trust terms withdrew the trust assets.

2. The disappointed heirs (William's great niece, great-great nephew, and great-great niece) sued Clara for intentional interference with expectancy (and additional claims they conceded were derivative to this claim). Clara moved for summary dismissal which the trial court granted. The disappointed heirs appealed. On appeal, the court of appeals affirmed on the following grounds:

   a. Ohio does recognize the tort of intentional interference with expectancy.

   b. The will that Clara destroyed was a pour-over will to a new revocable trust that had not yet been drafted by counsel. There was no allegation that Clara interfered with the drafting, review, or execution of a new revocable trust. It was conceded that the new trust was never drafted. Any suggestion of a new oral trust by William failed because of the requirement that trusts receiving a pour-over bequest be in writing and executed simultaneously with or prior to the will with the pour-over clause.

c. Because the residue could not be poured-over to the new trust, if the will had been signed the residue would descend to Williams's next of kin by intestacy, and Clara was the intestate next of kin. Because even if the will had been signed the assets would have passed to Clara, it cannot be proven to a reasonable degree of certainty that the expectancy of inheritance would have been realized but for Clara's interference.

XXXI. Third Party Liability

A. *Cortese v. Sherwood,* 2018 Cal. App. LEXIS 746 (2018). Third-party claim against attorney for aiding a trustee in a breach of trust must comply with pre-filing requirements for conspiracy claims against attorneys.

1. Over their 23-year marriage, Francesca and Robert acquired significant wealth in excess of $2 billion. Their long-time attorney handled all of their legal matters including estate planning. The attorney drafted Francesca's will that left her $2 million estate to her daughter from a prior relationship, Christina.

2. Christina claimed that, after mother's death in 1997, she did not challenge the modest size of her mother's estate because Robert and the attorney assured her that she would be wealthy when she inherited through Robert's estate plan. Christina alleged that Robert said he intended to include her equally as a child in his estate plan, and leave her a golf course in Marbella, Spain. When the value of her mother's estate (then in a marital trust for Robert) dropped from $31 million to $16 million, she claimed she was induced not to act on her concerns about Robert's management of the trust by the promises of future inheritance by Robert and the attorney. In 2008, Robert and the attorney proposed commuting the trust, Christina had questions about the relatively modest value of the trust as part of the overall marital wealth. She alleged she was induced not to assert the issue by the repeated promises of a large future inheritance.

3. Robert died in 2016, and the trustees of Robert's trust (one of whom was the attorney) informed Christina that she was not a beneficiary of Robert's estate.

4. Christina sued the attorney for breach of fiduciary duty as trustee of Robert's trust, for third party liability for breach of trust. The attorney demurred to the claim for third party liability for Robert's breach of trust because the claim did not comply with the statutory pre-filing requirements for conspiracy claims against attorneys. The trial court rejected the demurrer and the attorney appealed.

5. On appeal, the court of appeals reversed and ordered the trial court to sustain the demurrer to the third-party claim on the following grounds:

    a. By statute, a party must establish a reasonable probability of prevailing before pursuing a cause of action against an attorney for a civil conspiracy with his client arising from any attempt to contest or compromise a claim or dispute. That section does not apply where the attorney had an independent legal duty to the plaintiff or the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial

gain. The statute was enacted to combat the use of frivolous conspiracy claims brought as a tactical ploy to disrupt the attorney-client relationship. The exceptions to the statute mirror prior case law.

b. The second cause of action are based on the allegations that the attorney conspired with Robert to attempt to contest or compromise a claim or dispute. She claimed that the attorney induced her not to challenge Robert's actions as executor and trustee of his wife's estate and trust, by representing she would receive a large inheritance from Robert's estate. The court cannot conceive how the attorney could have participated in Robert's alleged breaches of fiduciary duty without an implied agreement to do so. If the allegations are taken as trustee, there must have been an agreement between Robert and the attorney to effectuate a common plan or design. While state law recognizes a cause of action for participation in a breach of trust, the tort is dependent on the trustee's breach of duty. While there may be a third-party cause of action that does not involve a claim of conspiracy, this is not the case here. Here the allegations imply an agreement between Robert and his attorney, and the claims are that the attorney participated in and assisted Robert in his breaches.

c. The pre-filing requirements apply to conduct that arises from an attempt to contest or compromise a claim or dispute. The dispute did not need to mature into actual litigation for the pre-filing requirement to apply.

d. The statutory exceptions do not apply because: (i) there is no allegation that the attorney represented Christina, he represented only Robert, the client here was Robert as fiduciary alone and not the beneficiaries; (ii) there is no allegation that the attorney's statements to Christina were false when made in 1997 and 2009, and Robert could have changed his estate planning documents after that time, and therefore there is not a sufficient allegation of fraud; (iii) there is not allegation of conduct by the attorney that was beyond his work for his client and, as Robert's attorney, the attorney had no duty to protect Christina or advocate for her benefit; (iv) there is no allegation that the attorney was negligent in providing advice to Christina; (v) the allegations were that the attorney was following his client's instructions; (vi) there is no duty by the attorney to ensure that Robert kept his promises to Christina; (vii) there is no allegation that the attorney personally gained from the actions; (viii) allegations that the attorney was paid for legal work are not adequate; and (ix) allegations that the attorney's son was employed by one of Robert's companies are not enough because the alleged wrongful conduct occurred after the son was employed and therefore the attorney's conduct could not have been motivated by a desire to obtain a benefit for his son.