BESSEMER TRUST

The Past Year's Most Significant, Curious, or Downright Fascinating Fiduciary Cases (2020 Edition) *

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

Updated December 31, 2020

Dana G. Fitzsimons Jr.

Managing Director and Senior Fiduciary Counsel
Bessemer Trust
3455 Peachtree Road, N.E., Suite 850,
Atlanta, Georgia 30326-3257
Phone: (404) 965-9318
fitzsimons@bessemer.com
www.bessemer.com

Table of Contents

1. Guardianship, Special Needs & Agency 1

a. *In re L.N.,* 2020 NH LEXIS 17 (New Hampshire Supreme Court 2020). Guardian has power to remove life support from ward without court approval 1

b. *In re Joyce C. Dalton Trust*, 2020 U.S. Dist. LEXIS 104412 (E.D. Missouri 2020). Individual co-trustee lacks standing due to conflict of interest to sue bank co-trustee over alleged negligence in not seeking public benefits qualification for trust beneficiary. 2

2. Taxes & Tax Planning 3

a. *In re Peter & Lois,* 2020 Mich. App. LEXIS 3341 (2020). Failure to send *Crummey* notices does not justify termination of life insurance trust. 3

b. *Shaffer v. Commissioner of Revenue,* SJC-12812 (Massachusetts Supreme Judicial Court July 10, 2020). Massachusetts state death tax applies to assets of New York QTIP trust upon death of Massachusetts lifetime beneficiary 4

3. Wills, Probate & Estate Administration 5

a. *Kiknadze v. Ellis,* 2020 Md. App. LEXIS 842 (2020). Writing executed with same formality as a will does not revoke will 5

b. *St. Jude Children's Research Hospital v. Scheide,* 2020 Nev. LEXIS 89 (2020). Lost will may be probated despite only one witness testifying as to its contents. 5

c. *Grenz v. Grenz, 2020 ND 189 (2020).* North Dakota recognizes the doctrine of partial invalidity. 7

4. Amendment, Revocation, Reformation, Modification & Termination of Non-Charitable Trusts 7

a. *Demircan v. Mikhaylov,* No. 3D18-2054 (3rd Dist. Florida Court of Appeals 2020). Common law modification still valid after enactment of Florida UTC 7

b. *Garland v. Miller,* 2020 Ky. App. LEXIS 90 (2020). Modification by consent of all beneficiaries permitted where trust served no material purpose due to lack of dispositive provisions. 8

c. *In re Quigley Trust*, 2020 Phila Ct. Comm. Pl. LEXIS 5 (2020). Allegations about rule against perpetuities do not support modification of trust by consent under UTC 9

d. *Roth v. Jelley,* 45 Cal. App. 5th 655 (2020). Settlement agreement and court order modifying trust void for failure to give notice to contingent remainder beneficiary 9

e. *Keybank v. Thalman*, 2016 Ohio 2832 (Ohio Court of Appeals 2016); 2018 Ohio App. LEXIS 3639 (2018); *KeyBank National Association v. Thalman,* 2020 Ohio 660 (2020). 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. Correct execution of the directives of the court of appeals precludes further pursuit of counterclaims against trustee. 10

5. Decanting 12

a. *Matter of Niki and Darren Irrevocable Trust,* C.A. No. 2019-0302-SG (Delaware Chancery Court 2020). Petition by trustee to invalidate prior decanting barred by doctrine of unclean hands. 12

b. *Hodges v. Johnson,* No. 2016-0130 (New Hampshire Supreme Court December 12, 2017); 2020 N.H. LEXIS 157 (2020). New Hampshire Supreme Court affirms voiding of trust decanting on the grounds that the trustees violated their UTC duty of impartiality by not properly considering the interests of the beneficiaries removed by the decanting. Trustees are not entitled to have their attorneys' fees and costs for defending the decanting paid out of the trust. 13

6. Powers of Appointment 16

a. *Tubbs v. Berkowitz*, 47 Cal. App. 5th 548 (2020). Donee of general power of appointment, who also serves as trustee, may exercise power without regard to fiduciary duties as trustee. 16

b. *Estate of Eimers*, 2020 Cal. App. LEXIS 420 (2020). Court cannot reform will to correct defective exercise of power of appointment. 17

7. Fiduciary Appointment & Succession 17
a. *Cleary v. Cleary,* 2020 Md. App. LEXIS 1209 (2020). Trust modified to remove named successor trustee who started company to directly compete with company held in trust. 17

8. Beneficiaries 19
a. *Paris v. Ballantine,* 2020 Ala. LEXIS 141 (2020). Adopted adult excluded as trust beneficiary. 19
b. *Estate of Small v. Small,* 2020 Pa. LEXIS 3847 (2020). Father entitled to inherit as intestate heir of son. 19

9. Marriage 20
a. *Crawford v. Crawford,* 2020 Ind. App. Unpub. LEXIS 598 (2020). Joint revocable trust amended and revoked premarital agreement. 20

10. Forfeiture Clauses 20
a. *Hunter v. Hunter,* 2020 Va. LEXIS 20 (Virginia Supreme Court 2020). Action to construe disclosure waiver in trust terms does not violate forfeiture clause. 20
b. *Ferguson v. Ferguson,* 2020 Ida. LEXIS 186 (Idaho Supreme Court 2020). Signing of will exercising power of appointment gives beneficiary by its exercise rights to information as trust beneficiary. No-contest clauses are enforceable in Idaho subject to certain limitations. 22

11. Privileges, Discovery & Disclosure 23
a. *Holiday v. Horst,* No. 77964 (Nevada Supreme Court December 31, 2020). Notice that fails to include a trust amendment is ineffective to run the 120-day limitations period on trust contest. 23
b. *Matter of Short Revocable Living Trust Agreement,* SCWC-15-0000960 (Hawaii Supreme Court, June 18, 2020). Trust terms do not override statutory right of trust beneficiaries to reasonable trust information. 24
c. *Ferguson v. Ferguson,* 2020 Ida. LEXIS 139 (Idaho Supreme Court 2020). Signing of will exercising power of appointment gives beneficiary by its exercise rights to information as trust beneficiary. No-contest clauses are enforceable in Idaho subject to certain limitations. 25
d. *Wyman v. Wyman,* 2020 U.S. Dist. LEXIS 241504 (Dist. Colorado 2020). Estate planning discussions and document are privileged while the testator is alive. 26
e. *Fiduciary Trust International v. Klein,* 2017 Cal. App. LEXIS 245 (2017); 2017 Cal. App. Unpub. LEXIS 5406 (2017); 2017 Cal. App. Unpub. LEXIS 5404 (2017); 2020 Cal. App. Unpub. LEXIS 425 (2020). Where a removed trustee seeks to withhold legal communications from the successor trustee, it is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the prior trustee's personal liability, that is dispositive under California privilege law; rather it is whether, at the time the advice was sought, the purpose of the advice was protection against personal liability; and the prior trustee is required to take affirmative steps, such as retaining separate counsel and paying personally for the advice, at the time of the advice to establish the privilege. Court reverses beneficiary appointment of corporate successor trustee and orders appointment of successors named in document. Court affirms probate court order compelling removed trustees to disclose communications with attorneys to successor trustee. 27

12. Construction & Conditions 30
a. *Ackers v. Comerica Bank & Trust, N.A.,* 2020 Tex. App. LEXIS 10442 (2020). Identifying remainder beneficiaries is not ripe for judicial determination during life of income beneficiary. 30
b. *Rallo v. O'Brian,* B290526 (Second District California Court of Appeals 2020). General disinheritance clause effective to disinherit alleged pretermitted heirs born before execution of trust. 30
c. *Wilburn v. Mangano,* No. 191443 (Virginia Supreme Court 2020). Term "fair market value" determined on date of death is too vague to support compelling specific performance of exercised purchase option under will. 31
d. *Murphy v. Trustee of Star Financial Bank,* 2020 Ind. App. LEXIS 8 (2020). Use of term "surviving" in conjunction with "per stirpes" created ambiguity in will. 32

13. Distributions 33
a. *In re Raggio Family Trust,* 2020 Nev. LEXIS 21 (Nevada Supreme Court 2020). Trustee not required to consider beneficiary's outside resources before making distributions. 33
b. *Cooper Falls Wing v. Goldman Sachs Trust Co.,* 202 N.C. App. LEIS 738 (2020). Distributions to pay beneficiary's attorneys' fees should be frozen during litigation about identity of proper beneficiaries and validity of trust amendments. 34

14. Settlement & Dispute Resolution 35
a. *In re Estate of Atkinson,* 2020 Pa. Super LEXIS 288 (2020). Claims by trust beneficiary and successor trustee against agent for prior trustee are subject to mandatory arbitration under agent agreements. 35

15. Fees 36
a. *Jo Ann Howard & Associates v. Cassity*, 2017 U.S. App. LEXUS 15621 (8th Cir. 2017); 2018 U.S. Dist. LEXIS 197542 (2018); 2020 U.S. Dist. LEXIS 29932 (2020). 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. Following a bench trial, the court found in favor of the plaintiffs and also ordered the trustee to pay attorneys' fees. 36

16. Directed Trusts, Protectors & Special Fiduciaries 39
a. *Ron v. Ron*, 202 U.S. Dist. LEXIS 52507 (S.D. Texas 2020). Trust protector does not owe fiduciary duties to settlor. 39
b. *Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 143644 (Charleston, South Carolina Division, October 9, 2014); *Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 1528 (January 7, 2014); 2014 U.S. Dist. LEXIS 172610 (December 15, 2014); No. 2:13-cv-3595-DCN (February 11, 2015); 2016 U.S. Dist. LEXIS 5139 (2016); 2016 U.S. Dist. LEXIS 135604 (2016); 2017 U.S. Dist. LEXIS 48612, 48613, 48616 (2017); 828 S.E. 2d 767 (S.C. Court of Appeals 2019); 2019 U.S. Dist. LEXIS 182222 (2019); see additional federal court decisions in 2018-2019; 2020 U.S. Dist. LEXIS 2900 (Dist. S.C. 2020). South Dakota trust code provision giving court power to enter preliminary orders in trust cases does not eliminate general requirements for issuance of preliminary injunction. Trustee appointed by trust protector substituted as plaintiff because beneficiaries' removal of trust protector without appointing a successor protector for three months violated the trust terms and did not bar protector from appointing trustee. Trust protector validly amended trust terms that prevented beneficiaries from removing him from office. Fiduciaries were not entitled to a preliminary injunction awarding their fees, where they could not show harm and the settlor contracted to advance the costs. Grandchild who provided affidavit in support of beneficiaries is entitled to protection of certain of her communications with counsel. State court erred by ordering trustees to distribute $50 million to conservatorship estate. Federal court resolved multiple contested discovery disputes in ongoing litigation over propriety of actions of trustees in distributing assets of irrevocable trust. Claims to invalidate 2009 transactions barred by statute of limitations. 40

17. Creditor Claims & Spendthrift Trusts 45
a. *De Prins v. Michaels,* 2020 Mass. LEXIS 650 (Massachusetts Supreme Court 2020). Assets of self-settled spendthrift trust reachable by settlor's creditors after settlor's death. 45

18. Torts, Slayers & Claims Against Third Parties 46
a. *Youngblut v. Youngblut,* 2020 Iowa Sup. LEXIS 71 (2020). Divided Iowa Supreme Court holds that claim for tortious interference with inheritance must be joined with a timely will contest. 46
b. *Gomez v. Smith,* 2020 Cal. App. LEXIS 888 (2020). Daughter who blocked lawyer from meeting with client to sign new trust agreement committed tortious interference with expected inheritance. 48

c. *Rambo v. Nogan,* 2020 U.S. Dist. LEXIS 36711 (New Jersey 2020). Allegations that slayer statute violates the constitution do not support granting petition for a writ of habeas corpus from criminal murder conviction. 49

19. Charities 50

a. *AG v. Sanford*, 2020 ME 19 (2020). Discretionary charitable distributee of charitable trust has standing under the Uniform Trust Code to sue the trustee of charitable trust for breach. 50

20. Trial Practice & Procedure 51

a. *Barefoot v. Jennings,* 2020 Cal. LEXIS 293 (California Supreme Court 2020). Trust beneficiary disinherited by amendment has standing to challenge the validity of the amendment in probate court. 51

b. *Trust of Ashton*, 2020 Pa. Super. LEXIS 453 (2020). Trust beneficiary entitled to fixed annuity has standing to challenge trust division, but not bring other claims, challenge a trustee fee request, or seek appointment of a co-trustee. 52

21. Odds & Ends 52

a. *Aghaian v. Minassian,* 2020 Cal. App. LEXIS 1249 (2020). The trustees and beneficiaries of a trust sued Shahen for $105 million in damages for actions Shahen took with respect to certain trust properties located in Iran. To try to avoid the possible judgment (the plaintiffs later were awarded $34 million in damages) reaching Shahen's homes, Shahen's son, who was an attorney and lived in one of the homes, arranged a plan with his parents whereby: (1) the son was appointed a guardian ad litem for his father due to the claimed incapacity of the father; (2) the parents divorced after being married since 1964; and (3) in the divorce settlement, the homes were titled to the mother with the father taking on the sole burden of any judgment. The plaintiffs in the underlying action sued Shahen and his wife for fraudulent transfer of assets and the son for aiding and abetting the transfers. The trial court sustained demurrers to the claims, but the court of appeals reversed. Despite the claimed divorce, Shahen and his wife lived together continuously as husband and wife, and despite the alleged incapacity Shahen testified during the twelve-day trial in the underlying action without showing any signs of incapacity. 52

b. *In re Trust of Dona v. Drury*, 202 Ariz. App. Unpub. LEXIS 1409 (2020). The trust terms gave Dona's three adopted children the power to appoint a successor trustee when the named trustees declined to serve. The children's adoptive father, Thomas, claimed to have been validly appointed as successor trustee after Dona's death. The court held that the appointment was not valid where: (1) there was no writing evidencing the appointment; and (2) the sole support for the claimed appointment was a summer meeting convened by the Thomas at which he declared that he was the trustee, but one child said she was not asked at the meeting whether she wanted Thomas to be trustee and another didn't attend the meeting because he had other things to do. 53

c. *Cigler Trust v. Hanson,* 2020 U.S. Dist. LEXIS 237350 (New Mexico 2020). The trustee of a trust, proceeding *pro se*, had his claims against an individual dismissed on the following grounds: (1) the trustee could not proceed without counsel under the court rules, despite the fact that he claimed the trust was actually a church (the local rule required counsel unless the party was a natural person); (2) several of the twenty-six causes of action failed because they were claims of civil liability based on criminal statutes, and criminal statutes do not provide private civil causes of action; and (3) the remaining claims alleged violations of various sections of the Internal Revenue Code and sought a full refund with interest of all monies taken, but the trustee did not allege that he filed a timely refund claim with the IRS, which is a perquisite to maintaining a tax refund suit. The court granted leave to amend, but somewhat casually mentioned that the amended complaint must comply with Rule 11 or the court could impose sanctions. 53

d. *Kelley v. Russell,* 2020 U.S. Dist. LEXIS 189989 (New Hampshire 2020). Karyn tried to sue Charles as trustee of her revocable trust, *pro se* and without counsel. The suit was dismissed because the trust had other beneficiaries thereby requiring counsel to represent the trust. Karyn failed to retain counsel and instead amended the trust to make herself the sole beneficiary. The court then dismissed her claims because under state law, where the same person is trustee and sole beneficiary, the trust terminated under the doctrine of merger. 53

e. *Estate of Clawson,* 2020 Pa. Super. Unpub. LEXIS 3946 (2020). Mark was unsuccessful in petitioning the court to reform Edward's trust after Edward's death to remove the Diocese of Greenburg as beneficiary and name himself to receive all the trust assets. At that time, he was under investigation by the Westmoreland County Area Agency for the Aging for his handling of Edward's finances during his incapacity, and the basis for his claim that the trust was ambiguous or the product of scrivener's error was the presence of an asterisk in the trust before the word "shares" (which was not deleted or filled in, likely because the remainder passed to a single named person and was not divided into shares; that person predeceased Edward causing the assets to pass to charity)..... 53

f. *McDonald v. McDonald,* 2020 IL App (2d) 191113-U (2020). On May 30, 2017, the court appointed Shawn as plenary guardian of the person and estate of his brother, John, due to John's bipolar disorder, depressive episodes, and severe alcohol use. John did not participate in the proceedings, but later obtained counsel and objected to the appointment but did not pursue trial to reverse the order. About seven weeks later after the appointment, John participated in a wedding ceremony with Elizabeth in their home, with their friend as the officiant (after completing a five-minute online ministry certification course). No other witnesses were present for the wedding. They later participated in a Ketubah signing ceremony. After John's death, Shawn was appointed as estate administrator and then Elizbeth sought appointment as administrator and status as intestate heir as John's spouse. The trial court dismissed her claims as a matter of law. The court of appeals reversed and remanded on the grounds that: (1) there is a genuine issue of material fact as to Elizabeth's status as surviving spouse and sole heir; and (2) while the Illinois Probate Act provides that a court may direct a guardian to consent to marriage on behalf of the ward, the act does not require prior approval by the court before a ward can marry of his or her own accord, and the appointment of a guardian is not sufficient, in and of itself, to show that a person was incompetent to consent to marriage. 53

g. *Prizant v. Abbott,* 2020 U.S. Dist. LEXIS 199279 (S.D. California 2020). The court imposed a temporary restraining order freezing all of the assets of the trustee of a life insurance trust who: (1) let the policy lapse in 2015; (2) from 2015 until 2019 (when the insured died) continued to request and receive $500,000 for premium payments that were not made; (3) provided allegedly forged documents to show the policy was still in effect; (4) after the death of the insured, justified the delay in paying the death benefit to the trust beneficiary by blaming the delays on paperwork, delays by the insurance company, falsely stating the claim was approved for payment; (5) saying the check was in the mail and then lost in the mail; and (6) promising to advance the funds personally over time in exchange for assignment of the policy, then failing to make the installment payments and providing a forged Deutsche Bank wire confirmation as proof of ability to pay. 54

h. *Hatcher v. Hatcher,* 2020 IL App (3d) 180096 (2020). Claims that a trustee breached his duties by making excessive principal distributions to his wife as trust beneficiary were dismissed where: (1) the trust terms provided that the trustee could distribute principle "for the benefit of any one or more of the beneficiaries of the trust as in his sole discretion he shall determine, whether because of sickness, accident or otherwise, and for educational purposes"; (2) the lack of the serial or Oxford comma did not mean that the word "otherwise" did not limit that word as being related to the word "accident"; and (3) it is common in American English for the final item in a list to not be preceded by a comma, and while the use of a serial comma can aid in interpretation, caution should be exercised in utilizing it as a controlling interpretive tool for the reason that its use is entirely optional and not universal. 54

i. *Ostrosky v. Permann,* 2020 Cal. App. Unpub. LEXIS 5903 (2020). Under his trust, Walter gave a specific gift to Eileen if she was employed by Walter's wire and cable distribution company at the deaths of Walter and his wife. The court held that Eileen did not meet the conditions for the gift because: (a) she retired for medical reasons before Walter's death; (2) the subsequent sale of the company was not the reason she left employment and therefore employment was not impossible, and she did not seek to return to company employment before the company was sold; and (3) her subsequent thirty hours of under-the-table work for Walter's model train store, spread out over a few years, did not create an employer-employee relationship with Walter because it was odd job work at Walter's hobby shop. 54

j. *In re Collier,* 2020 Mich. App. LEXIS 1036 (2020). Robert's statements, while testifying in a hearing to determine whether to appoint a conservator for him, did not create an oral trust that disturbed his will under which is gave $1 to his daughter and the rest of his assets to his son. His statements included: "And when I'm gone, I would like for them to have equal parts from my inheritance, if there's anything left. I may be fortunate enough to use up the last two little bits I've got"..... 54

k. *In re Estate of Worley,* 2020 N. C. App. LEXIS 297 (2020). The court of appeals reversed the trial court's rejection of a holographic writing as a possible will and remanded. The entire text of the handwritten document, which favored the decedent's alleged partner for the past thirty-six years of his life, read as follows: "I want Pat to have the power of attorney of all that I own. That means land, cars, money, guns, clothing and anything else! I don't want Grace Price Worley to have none. Signed March 13, 2001 9:00pm Paul Worley"..... 54

l. *Lavacot v. Richards,* 2020 Cal. App. Unpub. LEXIS 2045 (2020). The trust terms provided that no distributions would be made to Larry while he was in custody, not gainfully employed, or suffering from alcoholism. Larry was serving a twenty-one-years-to-life sentence for second degree murder and forgery. Larry signed a purported disclaimer of his interest in the trust (with the goal of ending the trust and passing the assets out to his two children) and a power of attorney naming his daughter as agent. The children demanded distributions and sought to remove the trustee, and the trustee sought instructions. Eventually the court validated the disclaimer and appointed a new trustee. The successor trustee, the children, and the daughter as agent for the father signed a global settlement, the claims against the prior trustee were dismissed, and the children each received $216,000 from the trust. The next year, the children moved to set aside the settlement agreement, in part, because the father was not a party to the settlement agreement, which the court rejected because: (1) the father disclaimed his interest; and (2) the daughter signed on his behalf under a durable power of attorney. The appellate court noted that the trial court did not abuse its discretion in rejecting what plainly appeared to be legally frivolous arguments. 54

m. *In re Benjamin Trust,* 2020 Mich. App. LEXIS 3130 (2020). The court rejected a will and trust amendment where: (1) the documents favored one of the decedent's daughters and the daughter's spouse; (2) the documents were dated the same day that the decedent signed documents prepared and witnessed by attorneys for the decedent through U.A.W. legal services; (3) the daughter claimed to have found the documents under the decedent's mattress; (4) the daughter attached the signature pages from the UAW documents to the alleged new documents, and then after copies of the UAW documents were founds the daughter claimed to find the signature pages for the new documents; (5) the alleged witnesses to the new documents were close to the daughter and some received financial compensation through the new documents; and (6) a handwriting expert testified that the signatures on the documents were not decedent's. 55

n. *Catley v Boles,* 2020 Ohio 240 (2020). In a dispute about conflicting provisions in a trust concerning the disposition of trust assets after the death of the surviving spouse, the Ohio Court of Appeals stated: "This case presents the frequent unintended consequences of the so-called 'trust mill' living trusts, which are most times unnecessary to accomplish the goals of a simple estate plan and unfortunately contain traps for those clients and attorneys alike, who are not well-versed in the intricacies of trust law. The case exemplifies the pitfalls of a 'one size fits all' 'cookie-cutter' trust document, exacerbated by sloppy blank-filling that inserts a misspelled name of a beneficiary. The evidence before us indicates that but for this mistake in properly identifying [one of the trustee-beneficiaries], the deed meant to distribute real estate from the trust to the beneficiaries would have been signed by both trustees and recorded, thus avoiding a costly lawsuit"..... 55

All rights reserved.

Copyright © 2021 Bessemer Trust Company, N.A.

Important Information Regarding This Summary

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

The Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (2020 Edition) *

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

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

Updated as of December 31, 2020

1. Guardianship, Special Needs & Agency

a. ***In re L.N.,* 2020 NH LEXIS 17 (New Hampshire Supreme Court 2020).** Guardian has power to remove life support from ward without court approval.

(1) L.N. was found unresponsive in her home, at age 69, after a major stroke. She was on a ventilator and received food and water from a tube. She did not have a living will or power of attorney. Her long-time friend and former employer was appointed as guardian. The trial court held that the guardian did not have the power to remove life-sustaining treatment, and that a further hearing would be held, and a further order issued. At the later hearing, the court heard testimony that: (a) L.N. did not show higher mental function, there was no realistic possibility of recovery, and the best case scenario was a persistent vegetative state; (b) she did not react in any way to her environment and her brain damage was irreversible; and (c) the guardian believed based on their long friendship and conversations that she would want to be allowed to have a natural death. The court also requested and received medical records and an opinion from the hospital's ethics committee.

(2) The trial court held that the guardian's statutory authority does not include the power to remove life support without court approval. After receiving additional medical reports, the court held that L.N. would have presumed to sustain her life, that proof that recovery was impossible was not clear and convincing, and that in cases of doubt the court must assume that the patient would choose to defend life. The guardian appealed.

(3) On appeal, the New Hampshire Supreme Court (with one justice dissenting in part) reversed on the following grounds:

(a) By statute, a guardian has broad powers to act without advance court approval in medical decisions, except as limited by the court order or as set forth in four statutory exceptions that require advance court approval (psychosurgery, electro-convulsive therapy, sterilization, or experimental treatment). The trial court erred by holding that under the statutory regime a guardian must obtain advance court approval before removing life support. The statutes do not contemplate a separate and specific court approval for removing life support; the guardian has the general authority to make health care decisions for the ward (absent a specific limitation imposed by the court on a finding of what is in the best interests of the ward). The general authority of the guardian includes the authority to terminate life support. The statutes do not distinguish between minor and major decisions. The fact that a ward's express directives on life sustaining treatment are binding on the guardian implies that the guardian has the power to make those decisions for the ward.

(b) Courts are not the proper place to resolve the agonizing personal problems that underlie these cases, and the legal process is a cumbersome mechanism for resolving end-of-life decisions. Under the plain statutory language judicial involvement is not required. Requiring prior court approval for these decisions would impermissibly add words to the statute that the legislature did not see fit to include.

(c) The court does not in this case need to decide the standard that might apply in a case where a guardian's decision is challenged, and court involvement is warranted, because in this case no person opposed the removal of life support. A guardian stands in a fiduciary relationship to the ward and must act in her benefit and in good faith.

(d) While other courts have done so to address potential constitutional due process challenges, because the legislature did not do so the court declines to impose limitations other courts have imposed, such as requiring a statement of two or more physicians that the ward is in a persistent vegetative state and has no reasonable chance of recovery. Also, constitutional issues were not raised or briefed in the case and the medical testimony showed that L.N. met those conditions. A guardian's decision would require implementation by medical personnel who operate under their own legal, professional, and ethical constraints. Recourse to the probate division may be had, and judicial intervention warranted, if a disagreement arose among the patient, family, guardian, or doctors, or there is evidence of improper motives or malpractice. Where there was no disagreement among the guardian, attorney, or hospital about the proper course of action, the court's involvement in the decision was not necessary or appropriate.

(e) The court granted the guardian the full statutory powers, which includes the power to withdraw life support. The trial court did not have a hearing or receive evidence to determine whether withdrawing life support was in the best interests of the ward, and never made that finding of fact. Therefore, the court's limitation of the guardian's powers was not supported by the statutorily required factual finding and is therefore vacated.

(f) The guardian must act in good faith, but ultimate decision-making authority resides in the guardian and, absent a challenge, no further judicial involvement is necessary. It is not necessary to consider whether the trial court's factual determinations about the ward's prognosis were clearly erroneous because the guardian will consider current medical information when making any decision to withdraw life support.

b. ***In re Joyce C. Dalton Trust,*** **2020 U.S. Dist. LEXIS 104412 (E.D. Missouri 2020).** Individual co-trustee lacks standing due to conflict of interest to sue bank co-trustee over alleged negligence in not seeking public benefits qualification for trust beneficiary.

(1) Bank and settlor's lawyer served as co-trustees of a discretionary lifetime trust for settlor's daughter, Andrea. The trust terms gave priority to Andrea's needs, noting that she is mentally and physically deficient and residing in a special care facility, and also noting that she qualifies to receive government assistance and that it would be appropriate for the trustees to make distributions in a manner that would not disqualify her for benefits, unless the disinterested trustee determines that for her overall benefit additional income and principal should be paid out for her benefit.

(2) The trust was created in 1998. The bank resigned as trustee in 2018. The lawyer claimed he only learned in 2014 that the bank was paying for Andrea's housing and medical care out of the trust and disputed the payments as disqualifying her for benefits. The lawyer also claimed he received incomplete trust information from the bank. In 2015, the lawyer began the process of seeking additional benefits, the effort was successful, and the lawyer claimed he saved the trust between $60,000 to $350,000 annually.

(3) In 2017, the bank provided notice of its intention to resign and petitioned to approve its accounts. The lawyer filed counterclaims against the bank, and the bank dismissed its petition. In 2020, the lawyer sued the bank and alleged, in part, negligence for using trust assets to pay for Andrea's living arrangements instead of obtaining state benefits.

(4) The bank removed the case to federal court under diversity jurisdiction and moved to dismiss the claims on the grounds that: (a) no duty exists for a trustee to seek benefits for a trust beneficiary; and (b) even if the duty existed, the lawyer is equally as culpable for failing to seek assistance and cannot act in the interests of the trust beneficiaries due to a conflict of interest. The federal district court granted the motion to dismiss on the following grounds:

(a) Assuming *arguendo* the duty exists, the lawyer cannot represent the trust beneficiaries because of an untenable conflict of interest. The lawyer therefore lacks standing to bring the claims.

(b) The evidence could uncover evidence of negligence by the lawyer, and the evidence shows that the lawyer was informed in 2006 of Andrea's support plan, that she was "private pay", and her expenses were paid out of the trust and she did not receive public benefits. The lawyer did not seek benefits for Andrea from 1998 to 2015, despite the trust stating she qualified for benefits.

(c) The lawyer, therefore, cannot act as advocate for the trust beneficiaries due to a potential conflict, in that the lawyer may resist the introduction of incriminating evidence concerning his own actions. Despite having constitutional standing, prudential limitations in the doctrine of *jus tertii* require denying standing and dismissing his claims.

2. Taxes & Tax Planning

a. ***In re Peter & Lois,* 2020 Mich. App. LEXIS 3341 (2020).** Failure to send *Crummey* notices does not justify termination of life insurance trust.

(1) In 1996, settlor created an ILIT for his nine children, and funded the trust with a second-to-die policy on the lives of settlor and settlor's wife. Two of the children served as co-trustees of the ILIT. When settlor made monthly premium payments on the policy, he didn't send *Crummey* withdrawal notices to the trust beneficiaries to inform them of their right to withdraw additions to the trust.

(2) The trustees alleged that the failure to send the notices would cause the gifts to fail to qualify for the annual gift tax exclusion, the IRS would argue that no gift occurred, no trust was created, and the settlor retained incidents of ownership over the policy, and the IRS would cause the entire trust to be included in the settlor's estate for estate tax purposes. They petitioned the court to terminate the trust under the UTC, and distribute the policy to the settlor, because the tax purposes of the trust had been thwarted. The settlor wanted to receive the policy back, cash out the policy, and invest the proceeds in a negative value business interest partially owned by eight of the nine children.

(3) The probate court ruled that the tax consequences were hypothetical, the children would still receive net insurance proceeds even if there was tax owed, and therefore they failed to meet the proof required to terminate a trust. The trustees appealed.

(4) On appeal, the Michigan Court of Appeals affirmed the denial of trust termination on the following grounds:

(a) State law governs whether a trust was created. The trust terms, the gifts to pay premiums, and the settlor's filing of gift tax returns for gifts to the trust all support the finding that the settlor made a valid gift and created the trust. When the life insurance company demutualized, it incorrectly sent money to the settlor. The settlor paid that money to the trust with interest, giving further support to the finding of a valid trust. The policy remains valid and in effect as a trust asset. That the trustees could have been more proactive in managing the trust does not somehow establish that no funded, legal trust was ever created.

(b) It is not clear why the trustees argued that the trust would be included in the settlor's estate under IRC Section 2035 (inclusion of certain assets transferred within three years of death) when the trust was created in 1996 and the settlor was still alive at the time of trial in 2018.

(c) The trust terms, and the settlor's handling of the demutualization event, support the finding that there also would not be estate tax inclusion under IRC Section 2042.

(d) The trust terms provide that a beneficiary has withdrawal rights only where the donor makes a designation prior to or simultaneous to the gift. If the premium payments are retroactively taxed based on the lack of present interest gifts, this still does not justify termination of the

trust. Any actual tax is hypothetical because the gift and estate tax exclusion would be applied. Also, a trust purpose was to leave the insurance proceeds to the children, and the insurance proceeds in the ILIT are outside the taxable estate of the settlor. There will still be some tax advantage from the trust where it shields the death benefit from estate tax.

(e) The trial court did not err in denying the settlor standing. The UTC provides that a trustee or beneficiary may commence an action to terminate the trust, and the settlor had no retained property right in the trust.

b. ***Shaffer v. Commissioner of Revenue,* SJC-12812 (Massachusetts Supreme Judicial Court July 10, 2020).** Massachusetts state death tax applies to assets of New York QTIP trust upon death of Massachusetts lifetime beneficiary.

(1) Robert died in 1993 while domiciled in New York. Under his will, he created a trust for his wife, Adelaide. The trust made federal and New York QTIP elections and was funded with intangible property. Adelaide did not have a power of appointment over the trust. Adelaide died in 2011 while domiciled in Massachusetts. Her estate included the trust on her federal estate tax return but excluded it on the Massachusetts estate tax return (and did not file a New York estate tax return or pay New York estate taxes). The commissioner of revenue assessed additional state estate tax of $1.8 million. The commissioner denied abatement, and the Appellate Tax Board affirmed the commissioner. The estate appealed to the state supreme court.

(2) On appeal, the Massachusetts Supreme Judicial Court affirmed on the following grounds:

(a) Massachusetts has a "pickup" or "sponge" state estate tax in the amount of the federal credit for state death taxes that would have allowable to a decedent's estate in 2000. The tax is imposed on the transfer of the estate of each person dying while a resident of Massachusetts.

(b) The Massachusetts state estate tax does not violate the due process clause of the Fourteenth Amendment and Article 10. States may impose an estate tax on tangible property such as real estate located in the state. Because the trust was funded only with intangibles, the state may also impose its estate tax if there was taxable transfer at the spouse's death for estate tax purposes. The estate tax is not limited to literal transfers at death but also extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of the property. A sovereign may tax the transmutation of legal rights in property occasioned by death. What matters is whether the death was the generating source of changes in the legal and economic relationships to the property taxed.

(c) The federal QTIP rules create fictional transfers with the property first passing from the predeceasing spouse, and then passing from the surviving spouse. The spouse's death created a change in the legal relationship among the QTIP assets, the decedent, and the beneficiaries. The change is a transfer for estate tax purposes that brings the QTIP assets within the Massachusetts taxable estate. Domicile in the state at the time of the second transfer provides a connection to the state that allows imposition of tax on the QTIP assets.

(d) The state estate tax is not based on the "Massachusetts gross estate" but rather the federal credit for state death taxes that would have been allowable to a decedent's estate in 2000. The state QTIP statute does use that term but does not apply to this issue. That statute applies only where the predeceasing spouse makes a Massachusetts QTIP election for property that is included in the Massachusetts gross estate of the predeceasing spouse. Here, Robert's estate did not make a Massachusetts QTIP election for the trust, and therefore that statute does not apply. The applicable statute looks to the inclusion of all assets that the estate reported in the federal gross estate. Therefore, the QTIP assets were includable in the estate for purposes of the state estate tax.

3. Wills, Probate & Estate Administration

a. ***Kiknadze v. Ellis,* 2020 Md. App. LEXIS 842 (2020).** Writing executed with same formality as a will does not revoke will.

(1) In 1998, Nadya signed a will that left her estate to her son. In 2002, Nadya signed a new will prepared by her counsel that expressly revoked her prior will, with the only change being that she returned to using her maiden name. Three months later she was divorced from her husband. Nadya struck out each page of the 1998 will and wrote revoked on each page and signed each page.

(2) Nadya married Melvud. She brought a domestic violence proceeding against him, but later withdrew it. Melvud's attorneys, who were adverse to Nadya in the domestic proceedings, drafted and witnessed a document signed by Nadya in 2016. That document was titled "Revocation of Will" and purported to expressly revoke all prior wills, expressly including the 1998 will (but not mentioning the 2002 will) and was signed in the presence of two witnesses and a notary. She died three months later.

(3) Nadya died in March 2017. Melvud petitioned to open an intestate estate for Nadya. The son later delivered the 2002 will to the court and petitioned for probate. He also challenged the revocation document and a deed transferring Nadya's property to her and her husband as tenants by the entireties on the grounds that they were procured by undue influence, fraud, and duress. The trial court admitted the 2002 will to probate and held that the revocation document was ineffective. Melvud appealed.

(4) On appeal, the Maryland Court of Special Appeals affirmed the trial court on the following grounds:

(a) By statute, a will may be revoked by either a later valid will or by "burning, cancelling, tearing, or obliterating" the will. By statute, a will is a written instrument that is executed with the requisite statutory formalities. There are no Maryland cases that address whether an instrument executed with the same formality of a will that merely revoked a prior will may operate as a will. However, it is universally accepted law that in order to be a will, the paper must be a disposition of one's own property to take effect at death. The revocation instrument was not a will because it did not dispose of property, was intended to take effect immediately and not at death, and by its title and text failed to express the intent to make a will. The revocation instrument was not a will that could validly revoke a prior will.

(b) The revocation instrument also failed to "cancel" the 2002 will as that term is used in the revocation statute. That term contemplates a physical act performed on the will.

b. ***St. Jude Children's Research Hospital v. Scheide,* 2020 Nev. LEXIS 89 (2020).** Lost will may be probated despite only one witness testifying as to its contents.

(1) Theodore signed a will leaving his estate to a charity that he had donated substantial sums to during his lifetime. He had been estranged from his son for more than twenty years and expressly disinherited his son and his son's descendants in the will. His attorneys retained that original will. Four months later he signed a new will solely to change executors and took the new will with him. After his life partner died, Theodore spoke with his counsel and said he did not want to locate his son and wanted his estate to pass to charity.

(2) Theodore struggled to care for himself and moved into a group home, at which time most of his possessions were sold. His attorney visited him, and he told his attorney he kept his will with him in a bag or box with other important papers. A guardian was appointed for him, and the guardian moved him into a nursing home and put his papers and possessions into storage. The guardian saw a copy of the second will on which Theodore had written "October 2, 2012 UP-DATED", noted that he was an organ donor, and signed at the top. The guardian returned the documents to Theodore. He became unstable and angry and then died leaving a multi-million-dollar estate. The guardian retrieved his possessions, could not locate the original second will (either in his papers or in his safety deposit box), and delivered the copy with the writing on it to the attorney.

(3) The guardian was appointed as estate administrator and recommended to the court that the estate pass to the son. She then petitioned to distribute the assets to the charity, but when the son objected withdrew the petition and instead petitioned to probate the lost will. The attorney and notary as witnesses to the will filed affidavits of proof of the lost will stating that Theodore signed the will in their presence and that he had not intentionally destroyed or revoked it. The son submitted a declaration that Theodore had attempted to reconcile with him before his death. The notary could not recall the will provisions and could not testify to the contents of the will. The district court denied the petition to admit the lost will, speculated that Theodore's erratic behavior before death meant that he might have destroyed the will, and held that the notary's inability to recall the contents of the will meant the statutory requirements for proof of lost will were not met.

(4) The charity appealed and the court of appeals affirmed. On further appeal, the Nevada Supreme Court reversed and allowed probate of the lost will on the following grounds:

(a) A lost will may be probated where the proponent can prove, by a preponderance of the evidence, that the testator did not revoke the lost or destroyed will during his lifetime. The court has never addressed how the proponent of a lost will meets its burden of proof to show the will was in legal existence (even if not still in physical existence) at the testator's death. Legal existence may be proven by evidence that the testator's wishes remained unchanged after execution of the will. The district court correctly applied the presumption that will was revoked, but the record supports that the will was in legal existence at death. The original first will and the copy of the second will show the intent to disinherit the son and leave the estate to the charity, and that his intent remained unchanged. The lifetime gifts to charity, including in the year before death and after signing the wills, further evidence this intent. Theodore also reiterated his intent several times and did not change the beneficiary designation on the copy of the will he marked as "UP-DATED". The evidence that Theodore changed his intent and wanted to favor his son was highly questionable and the guardian admitted was entirely speculation. While his erratic behavior before death provides a theory why the will was not in physical existence, it does not support that the will was not in legal existence at death.

(b) The Nevada statute requires that the provisions of the lost will be clearly and distinctly proved by at least two credible witnesses. The two-witness requirement protects against the probate of spurious wills. The copy of the will proves its contents and the parties here do not contest the will's contents. Other courts have read the two-witness requirement more fluidly where other evidence in the case exists, such as a copy of the will, that lessens the necessity for both witnesses to testify to the will's contents, particularly where one witness is the drafting attorney who testified to the contents. This approach is not without opposition and historically the two-witness requirement has required both witnesses to have knowledge of the contents of the will. But exceptions to this requirement do exist and some jurisdictions allow a copy to provide the will's contents where a witness can testify to the authenticity of the copy.

(c) The plain language of the statute requires that the will provisions be proved by two credible witnesses. Where no copy of the will exists and the only proof comes from the witnesses, the two witnesses must have personal knowledge of the contents. However, requiring this where an accurate copy of the will exists and the drafting attorney can testify to the contents would create an absurd result of putting an unnecessary and onerous burden on the second witness and the proponent. When an accurate will copy is available, a more liberal construction comports with the statute and its legislative history of desiring to make it easier to prove a lost will where it is obvious it was not intended to have been revoked. Where an accurate will copy exists and one of the witnesses testifies to the contents, the second witness may satisfy the statutory two-witness requirement by testifying to the testator's signature on the copy. The second witness's testimony that the signature is accurate, combined circumstantially with the testimony of the other witness and the accurate copy of

the will, confirms the witness was present when the will was signed and proves the second witness's knowledge of the will.

(d) Here the son does not contest the contents of the will or the accuracy of the copy and the attorney had a distinct recollection of the will contents. The proponent therefore met the burden of proving the lost will.

c. ***Grenz v. Grenz, 2020 ND 189 (2020).*** North Dakota recognizes the doctrine of partial invalidity.

(1) Leo died testate survived by his second wife, Sally (they were married for forty years), their son, Kelly, and Leo's two sons and daughter from a prior marriage. Under his will, Leo gave all his assets to his wife if she survived. The will provided in part that, if the wife did not survive, his shares in a ranch would go to his three sons, his daughter would receive $10,000, and the residue would go to Kelly and Kelly's wife, Kelley. Kelly probated the will and was appointed as personal representative, and two other sons objected and alleged undue influence.

(2) The trial court found that Leo was suffering from Parkinson's and declining memory, that Sally and Kelly isolated Leo, were involved in the preparation of the will, and unduly influenced Leo with respect to giving the ranch shares to Sally. The court invalidated the gift of the ranch shares to Sally and Kelly and directed the distribution of the ranch shares to Leo's other sons. The result of the order was that Sally would receive $250,000 and the sons would receive $4.5 million. Kelly did not challenge the undue influence finding on appeal, but rather argued that the shares should pass under intestacy.

(3) On appeal, the North Dakota Supreme Court, with one dissenting justice, affirmed the trial court on the following grounds:

(a) The doctrine of partial invalidity was recognized under state common law before enactment of the uniform probate code and allows a court to separate a portion of a will that is the product of undue influence from other portions of the will that are valid. The doctrine is not available to defeat the manifest intent of the testator, interfere with the general distribution scheme, or work an injustice to the other heirs. The probate code does not address the doctrine and therefore does not supplant the common law rule. The North Dakota courts have broad equitable powers to fashion remedies.

(b) A state statute provides that a part of an estate not disposed of by will passes by intestate succession. However, there is a strong presumption that a testator did not intend intestacy. Here the trial court gave effect to part of the distribution clause that gave ranch shares to two of his sons. Because the court gave effect to part of the will, the will did not fail to dispose of the shares and the laws of intestacy do not apply here. A finding of undue influence is analogous to that of the murder of the testator. Whether a beneficiary whose undue influence invalidated a will may still claim an intestate share is a question not answered, and need not be answered here, because the court gave effect to another provision of the will.

(4) One dissenting justice commented that the finding of undue influence in the case was questionable and would find that the court improperly rewrote the will and should have applied the law of intestacy.

4. Amendment, Revocation, Reformation, Modification & Termination of Non-Charitable Trusts

a. ***Demircan v. Mikhaylov,*** **No. 3D18-2054 (3rd Dist. Florida Court of Appeals 2020).** Common law modification still valid after enactment of Florida UTC.

(1) Igor created an irrevocable trust to invest in a shopping mall development and benefit his children, with an individual trustee and another individual, Anatoly, having the power to remove and replace the trustee. After several business disagreements about the development among Igor, the trustee, and Anatoly, Igor halted funding the trust which saddled the development with debts and liens by contractors. Igor and the beneficiaries petitioned to strip Anatoly of his powers and remove the successor trustee appointed by him during the dispute. The trial court granted

the petition to modify the trust to strip Anatoly of his powers under *Preston v. National Bank of Miami (1974)* but denied trustee removal.

(2) On appeal, the court of appeals affirmed the trust modification on the following grounds:

(a) The current trustee has standing to appeal the trust modification. Where the trust terms and state law grant the trustee standing to seek modification or declare he cannot be removed, the trustee necessarily has standing to oppose modification on appeal, despite being successful below on the issue of removal.

(b) Generally, the only indispensable parties to a trust action are the trustee, the settlor, and the beneficiaries. The trial court did not err by failing to join Anatoly as a party.

(c) The court did not err by applying *Preston* (common law modification where the settlor and all beneficiaries consent). Common law modification under *Preston* is neither abrogated nor controlled by the Florida UTC. Judicial modifications at common law are different from, and have so far survived, judicial modification under the Florida UTC. Once a court is presented with a complaint seeking modification through the joint agreement of the settlor and all beneficiaries, it may allow it without the need to make findings under the Florida UTC. The Florida UTC provides that "the common law of trusts and principles of equity supplement" the Florida UTC. The Florida UTC provision on judicial trust modifications provides that "the provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts". The Florida UTC does not provide the exclusive means to modify trusts.

(d) The trust terms under which the settlor waived the right to revoke or amend the trust do not bar modification because, under *Preston*, where a settlor and all beneficiaries consent the trustee has no reason in law or equity to successfully oppose the modification.

b. ***Garland v. Miller,* 2020 Ky. App. LEXIS 90 (2020).** Modification by consent of all beneficiaries permitted where trust served no material purpose due to lack of dispositive provisions.

(1) Upon his death in 2009, Jerry left his oil company to his three children. His daughter placed her one-third interest into an irrevocable trust with Jerry's son, who managed the company, as trustee. The trust terms provided that the trust was being created to conveniently administer the daughter's interest without the need for court supervision during incapacity or upon her death.

(2) The settlor and all the beneficiaries petitioned to terminate the trust and distribute the trust assets to the daughter under the Kentucky UTC modification by consent statute. The trustee objected. The district court approved the termination and the circuit court affirmed. The trustee appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) Unlike the NCCUSL and all other state versions of the UTC modification by consent statute, the Kentucky version provides that modification by consent of the settlor and all beneficiaries is only available "except as otherwise provided in the terms of the trust". The trustee is correct that termination on consent of the settlor and all beneficiaries is not available. There is no clear guidance as to what was intended by the "except as otherwise provided" clause. Even before the Kentucky UTC, a trust could be terminated on the consent of the settlor and all beneficiaries. Therefore, by adding this clause the general assembly clearly wanted to allow a settlor to preclude or restrict their own ability to terminate with the consent of the beneficiaries. The trust provides that the settlor does not reserve the right to revoke or amend the trust, and that the settlor retains no right or power to terminate the trust. That unambiguous language reflects that the settlor intended to waive her ability to participate in the trust termination. Because the settlor surrendered the right to participate in termination, termination under that provision of the Kentucky UTC was not available.

(b) However, trust termination on consent of all beneficiaries was available because the trust served no material purpose. The only stated trust purposes were to provide for administration during incapacity or death of the settlor. The court will construe the trust on its terms, and not consider the trustee's argument that there were trust purposes not stated in the trust

itself (such as protecting the settlor from future divorce or maintaining family control of the company). The only material trust purposes are the ones unambiguously stated. The trust terms state that distributions after death are to be made in the manner set forth in the trust exhibits. However, those exhibits were left totally blank. Whether by design or inartful drafting, the trust deferred to the settlor's will for distribution on her death, and continuation of the trust was not necessary to achieve the material trust purpose.

c. ***In re Quigley Trust,* 2020 Phila Ct. Comm. Pl. LEXIS 5 (2020).** Allegations about rule against perpetuities do not support modification of trust by consent under UTC.

(1) Under his will, John created a trust to pay the income for life to a long succession of family members. The trust provided that after the death of all income beneficiaries the trust assets would be distributed outright to the Archdiocese of Philadelphia. The last of the lives in being at the creation of the trust died in 2015, and at that time there was a closed class of eight income beneficiaries (the great grandchildren of the settlor's sister).

(2) The income beneficiaries petitioned to terminate the trust under the Pennsylvania UTC upon consent of the income beneficiaries and the Archdiocese. The beneficiaries and the Archdiocese agreed to distribute $25,000 to the Archdiocese and the balance of the $2.2 million in trust assets to the income beneficiaries. They justified the petition by alleging the concern that the remainder interest was contingent and may not vest within the period of the rule against perpetuities, and termination was the only way to ensure the Archdiocese received anything. The trustee objected to the termination.

(3) The trial court rejected the termination by consent petition on the following grounds:

(a) The remainder interest of the Archdiocese is vested. A clause that only postpones possession and not vesting does not create a contingent future interest. The law presumes an interest is vested unless the settlor plainly expressed the intent to create a contingent interest. The death of the last eight income beneficiaries is a certainty and not a contingency.

(b) Even if the interest were contingent, termination would not be appropriate. Contingent future interests are subject to the rule against perpetuities, which "reads like English translated into Sanskrit back into English". Pennsylvania has adopted the "wait and see approach" to the rule by common law and statute. Violation of the rule is determined by actual and not possible events. Termination now would be based on a possibility not an actuality, which flouts the wait and see approach of state law.

d. ***Roth v. Jelley,* 45 Cal. App. 5th 655 (2020).** Settlement agreement and court order modifying trust void for failure to give notice to contingent remainder beneficiary.

(1) Marion died in 1966, and her husband, McKie, served as trustee of the trust created at her death. They had three children, McKie Jr., Diane, and Joanne. McKie married Yvonne who had one child, James, from a prior marriage. McKie died in 1988 and created a trust for the lifetime benefit of Yvonne, with his attorney as trustee. Yvonne had a testamentary limited power of appointment over the trust, and the assets not appointed passed to McKie's three children and James, or their descendants *per stirpes*.

(2) McKie's attorney and trustee probated McKie's will and served notice on the trust remainder beneficiaries, but did not include McKie Jr.'s son, Mark, who was an adult at that time. Notice was also published. As successor trustee of Marion's trust, McKie Jr. filed claims against his father's estate and the attorney-trustee. The attorney, McKie's children, and Yvonne settled the claims and signed a settlement agreement that included: (a) payment out of McKie's estate of $2.25 million; and (b) McKie's children disclaiming and renouncing all interests in McKie's trust, for themselves and their successors and assigns. The probate court approved the settlement, but Mark was not served with the order. The attorney petitioned to settle his accountings as McKie's executor and approve distribution of the assets under the will and as modified by the settlement agreement. Mark was not served with the petition. The probate court approved the accounting and ordered distribution pursuant to the settlement agreement. The settlement agreement stated

the amended terms of McKie's trust, which modified the takers in default of Yvonne's power of appointment to now include only her son James or his issue (and none of McKie's descendants). The order was not served on Mark.

(3) Fourteen years later, Yvonne signed a document declining the right to exercise her power of appointment. McKie Jr. died leaving Mark as his sole issue. Yvonne then died without exercising her power. Mark petitioned to be recognized as a beneficiary of McKie's trust. The probate court denied his petition and Mark appealed. On appeal, the court of appeals reversed the probate court and declared the settlement agreement was void on the following grounds:

(a) Due process requires reasonable notice of any proceeding adversely affecting a property interest. The trust came into existence at McKie's death and Mark's future interest as contingent remainder beneficiary also came into existence at that time. His interest was contingent and subject to the conditions precedent that his father predecease Yvonne, that he survives Yvonne, and that there be assets remaining. But he had more than a unilateral expectancy. He had an actual property interest that was contingent and subject to divestiture if Yvonne exercised her power. A contingent future interest is property no matter how improbable the contingency. A contingent remainder is more than an expectancy. The interest of a taker in default is property even though subject to divestment. Mark had a cognizable property interest.

(b) The decree approving settlement of McKie's estate adversely affected Mark's property interest by extinguishing his interest in McKie's trust. The settlement agreement did not modify the will and could not bind Mark because he was not a party to the agreement. McKie Jr. could only disclaim his own trust interest, and the settlement agreement could not "vest" McKie Jr.'s remainder interest early so as to extinguish Mark's interest. Mark had nothing to do with the claims that were settled, which had nothing to do with McKie's trust.

(c) Because the decree adversely affected Mark's interest, he was entitled to notice and an opportunity to be heard if his name and address were reasonably ascertainable. Mark was an adult at the time of the decree and the attorney only had to ask McKie Jr. for the address in order to be able to mail notice to Mark. It was uncontested that Mark's existence and whereabout were known or reasonably ascertainable at the time. Notice requirements apply to future property interests where the holder is reasonably ascertainable. Holders of future property interests, even remote interests, are entitled to notice as a matter of due process. No claim is made here that Mark was given even constructive notice by publication.

(d) Following the statutory notice requirements for probate proceedings does not automatically satisfy federal due process. The executor used the probate proceeding as a vehicle to change the trust terms in a way that eliminated Mark's property interest. If a reasonably ascertainable person has a property interest in a testamentary trust, it is not unreasonable or onerous to require the executor to give notice to that person when seeking a court order that would change the trust terms in a manner that adversely affects that person's property interest.

(e) The decree is void for failure of notice to known remaindermen, where Mark did not receive notice and had no opportunity to object to the elimination of his property interest. A void judgment may be attacked anywhere, directly or collaterally.

e. ***Keybank v. Thalman,* 2016 Ohio 2832 (Ohio Court of Appeals 2016); 2018 Ohio App. LEXIS 3639 (2018); *KeyBank National Association v. Thalman,* 2020 Ohio 660 (2020).** 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. Correct execution of the directives of the court of appeals precludes further pursuit of counterclaims against 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 court 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 pay 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.

(7) On remand, the Clough heirs moved for judgment on their counterclaims against the trustee and for a hearing on punitive damages, costs, and attorneys' fees. The trustee opposed the motion and the trial court denied the motion. The Clough heirs appealed. On appeal, the court of appeals affirmed the trial court on the following grounds: (a) the trial court order complied fully with the express directives of the court of appeals; (b) the court of appeals did not instruct the trial court to enter judgment for the Clough heirs on their counterclaims and the court of appeals found those counterclaims to be perfunctory; (c) the mandate of the court of appeals made a full disposition of the case and left nothing else to decide; (d) the issues of damages sought by the Clough heirs were presented and considered by the court in the prior appeal, and the court of appeals held that the court's order vitiated the counterclaims for breach of trust; (e) the prior order of the court of appeals constitutes the law of the case; and (f) while the Clough heirs may disagree with parts of the prior decision of the court of appeals, they did not appeal that decision and the court of appeals will not untimely reconsider its ruling.

5. Decanting

a. ***Matter of Niki and Darren Irrevocable Trust,* C.A. No. 2019-0302-SG (Delaware Chancery Court 2020).** Petition by trustee to invalidate prior decanting barred by doctrine of unclean hands.

(1) Ildiko created an irrevocable California trust in 2012, with herself as trustee and sole life beneficiary. The trust provided for income only, and not principal, to her as she requested. On her death, the trust would divide into shares – 55% for her daughter Niki and 45% for Niki's husband, Darren. In 2014, Ildiko moved the trust to Delaware, changed the governing law to Delaware, and appointed a Delaware bank as co-trustee. Ildiko settled a new Delaware trust with the bank as sole trustee, and then Ildiko and the bank decanted the first trust assets into the second trust. The trustees signed the decanting resolution and all three beneficiaries signed statements of non-objection to the decanting. The second trust allowed principal distributions to Ildiko and also provided that, upon divorce from Niki, Darren's share (which was increased to 50%) would immediately vest, rather than vesting be delayed until Ildiko's death as in the first trust.

(2) Niki and Darren divorced. In 2019, the bank petitioned to declare the decanting void. Ildiko moved for a safe harbor declaration because of the no-contest clause in the trust, and the court held that the no-contest clause did not apply to the petition and Ildiko's participation in it. Ildiko and Niki supported the petition. Darren opposed the petition and claimed the bank breached its duties, that Ildiko aided and abetted the breach, and that they were involved in a civil conspiracy. The bank moved for judgment on the pleadings that Ildiko and Niki joined.

(3) The court held the petition was barred by the doctrine of unclean hands on the following grounds:

(a) The doctrine of unclean hands is unique to equity and its purpose is protection of the reputation of equity itself and the equity courts. A wrongdoer with respect to the transaction at issue may not invoke equitable relief. The defense belongs to the court and not to the

litigants. The court is not required to be involved in the inequitable acts the petitioner seeks to vindicate.

(b) Ildiko, with the bank, seeks to void the decanting as noncompliant with the decanting statute (because the first trust did not allow principal distributions, and also alleging the second trust differed too greatly from the first) four years later – a decanting that Ildiko and the bank executed themselves as trustees of the first trust. She is asking the court to void her own action that now appears to be to her and her daughter's detriment, in what is an attack of late-onset settlor's remorse. Ildiko enjoyed the benefits of the decanting, including presumably principal distributions, for several years, and only when conditions made her regret her action did she and the bank then decide to attack the legitimacy of their own actions. To invoke equity as a remedy for those actions is offensive to equity. Having previously acted in a fiduciary capacity to decant through what she now asserts were illegal means, Ildiko cannot evoke equity for relief in her own self-interest – relief that would be to the detriment of a beneficiary to whom she owes fiduciary duties. Nothing prevents Niki from pursuing Ildiko or the bank for breach of trust with respect to the decanting, and there is no alleged wrongdoing on Darren's part.

(c) The fact that the bank is sponsoring the petition does not impede the court from applying the doctrine. The bank was co-trustee of the first trust and had a duty to ensure the assets were not decanted in violation of the decanting statute. Having failed in that duty, it cannot now, four years later, invoke equity to correct its mistakes in a way to benefit one beneficiary to the detriment of another, in light of Ildiko's actions.

b. ***Hodges v. Johnson,*** **No. 2016-0130 (New Hampshire Supreme Court December 12, 2017); 2020 N.H. LEXIS 157 (2020).** New Hampshire Supreme Court affirms voiding of trust decanting on the grounds that the trustees violated their UTC duty of impartiality by not properly considering the interests of the beneficiaries removed by the decanting. Trustees are not entitled to have their attorneys' fees and costs for defending the decanting paid out of the trust.

(1) Trust creation. David Hodges Sr. created a large and successful real estate holding and development company. In 2004, David Sr. created, through decanting that was not challenged, an irrevocable GST exempt trust and an irrevocable GST non-exempt trust with a long-time non-family employee, Alan, as sole trustee. A lawyer that represented David Sr. and the company, William, was added as a co-trustee. The trusts were funded with all of the company non-voting stock (representing 98% of the total company interests). David Sr. retained the 2% voting stock.

(2) Trust terms. The trusts were for the benefit of David Sr.'s wife, Joanne, his three children, his two step-children, and their descendants. The paramount trust purposes were the continuation of the company and avoiding estate taxes. The trusts gave the beneficiaries "Crummey" withdrawal rights that were not a factor in the court's analysis. All trust distributions were subject to the trustees' discretion, and the permissible distributees were Joanne, the five children and their descendants, or "any trust established by the settlor under another trust instrument for the benefit of any one or more, but not necessarily all, of the members of such group". Upon the death of both the settlor and Joanne, the trust assets would be divided into separate trusts for the five children (also with fully discretionary distributions). The trust terms also included guidance to the trustee on making distributions that was "not intended to limit or direct the exercise of the trustee's discretion in any way", including: (a) that there was no duty to equalize among the beneficiaries; and (b) that Joanne should be the primary and paramount beneficiary during her lifetime. The trusts also included a forfeiture clause in the event of a contest.

(3) Business interests. With respect to the company interests, the trust terms appointed a committee of advisors with the exclusive power, after the settlor's death or incapacity, to make all business decisions for the company. The settlor had the power to change committee members and modify the terms, and in 2012, David Sr. exercised his right to: (a) name Alan, David Sr.'s personal attorney Joseph, William, his daughter Nancy, and Diane Benoit as members; and (b) name his other daughter Janice to have the sole power to vote any voting interests (but not be involved in company management). The trust terms also stated: (a) David

Sr.'s desire that the business interests be retained in trust and not distributed to any beneficiary, and a direction that a distribution of interests to a beneficiary could only be made on approval of the committee; and (b) his desire that the businesses retain enough cash to reinvest in the company and preserve it.

(4) First decanting. In 2009, David Sr. retained his personal attorney Joseph to assist with estate planning, and he was reconsidering his prior generosity to his son Barry and daughter Patricia. The attorney advised that the trusts could be decanted by the trustees to remove those two children as beneficiaries, the attorney advised the trustees of their power to decant, and offered to draft the new trusts and serve as decanting trustee. In October 2010: (a) Alan resigned as co-trustee and the attorney was appointed; (b) William delegated his decanting power to the attorney; (c) the attorney as trustee decanted the trusts; (d) the attorney resigned as trustee; and (e) Alan was reappointed as co-trustee. Under the decanting, Barry and Patricia were removed as trust beneficiaries. The assets were not moved at the time because the decanting documents provided that assets should be moved only after the settlor's death.

(5) Family friction. David's son Barry worked in the company for 36 years before he was terminated in 2012 following friction with his father about his underemployment. David's son David Jr. also worked in the company, but was fired in 2012 after family friction following his being passed over for president in favor of Alan. In the course of that family friction, David Sr. moved out of the family home and divorced Joanne, Barry had a heart attack, and David and Alan hired armed guards for their protection from David Jr. and Barry. David Sr.'s daughter Patricia never worked in the company, but as of 2015 had not spoken with her father in several years.

(6) Second and third decanting. In 2012, following David Sr.'s request, the same decanting process was used to also remove David Jr. as a trust beneficiary. In 2013, following David Sr.'s request, the same decanting process was used to also remove Joanne as a trust beneficiary. The assets were not moved at the time because the decanting documents provided that assets should be moved only after the settlor's death. (The parties agreed that the decantings took place in the year the papers were signed and that the failure to transfer assets did not render the decantings void).

(7) Litigation and trial court decision. In April of 2014, David Jr., Barry, and Patricia (but not Joanne) petitioned the court to void the decantings and to remove the trustees. The trial court granted the petition and declared the decantings void and removed the trustees on the following grounds:

   (a) Their personal and harsh nature, along with the attorneys' testimony, suggests that the decantings were undertaken and completed at the request, with the blessing, and at the direction of David Sr.

   (b) The decantings were accomplished without considering the beneficial interests of David Jr., Barry, and Patricia. David Sr. died in August of 2015 (citing to the UTC duty of the trustees to act in good faith, in according with the trust terms and purposes, and in the interests of the beneficiaries); the trial court construed the UTC phrase "interests of the beneficiaries" as meaning the statutory and common law duties of impartiality.

   (c) To consider their interests, the trustees had to give due regard for the diverse beneficial interest created by the trust terms.

   (d) Giving due regard required the trustees to consider the effect of the decantings on the interests of the beneficiaries, and specifically their financial interests, and to adjust their actions as to how to modify those interests.

   (e) While the trustees gave consideration to the trusts' business purposes, they did not give due consideration to the interests of the beneficiaries.

(8) Appeal to the New Hampshire Supreme Court. On appeal, the New Hampshire Supreme Court, over one dissenting justice, affirmed the trial court on the following grounds:

(a) The trial court erred by construing the UTC phrase "interests of the beneficiaries" as meaning the statutory and common law duties of impartiality. As used in the New Hampshire UTC section that requires the trustee to act in accordance with the "interests of beneficiaries", the trustee is only required to act in accordance with the trust provisions that define those interests. That same UTC statute, by requiring the trustee to act in accordance with the UTC, also incorporated the UTC statutory duty of impartiality. Therefore, the trial court's ruling will be construed as a ruling that the trustees violated the statutory duty of impartiality when they decanted the trusts. The trial court's phrase "due regard for the diverse beneficial interests created by the terms of the trust" denotes the duty of impartiality.

(b) The duty of impartiality requires equitable, but not necessarily equal, treatment. The trust code allows unequal distributions among beneficiaries and permits a trust decanting that could exclude a beneficiary. The exercise of these powers did not necessarily violate the trust code's statutory duty of impartiality. To rule otherwise would render the grant of trustee distribution and decanting powers superfluous. A trustee, who makes unequal distributions among beneficiaries and/or eliminates a beneficiary's non-vested interests in an irrevocable trust through decanting violates the statutory duty of impartiality only when the trustee fails to treat the beneficiaries equitably in light of the purposes and terms of the trust. (Note – the UTC duty of impartiality is a duty that is subject to override in the governing instrument).

(c) While the trusts were created to preserve the company and save taxes, another "evident purpose" of the trusts (from the presence of withdrawal rights and distribution provisions) was to support the beneficiaries. The trial court's finding that the trustees failed to consider this trust purpose was supported by the record, including the attorney-trustee's agreement that he did not consider the financial interests of the beneficiaries. Also, the record does not include any consideration of alternatives to complete disenfranchisement of the beneficiaries.

(d) The contingent or non-vested nature of the interests of the beneficiaries is not dispositive of whether the trustees complied with their statutory duty of impartiality, because the statutory duty is owed to all beneficiaries.

(e) The trial court was not required to believe the assertions that eliminating the beneficiaries was needed to eliminate family conflict and protect the company, because: (i) the company was controlled by the committee and the beneficiaries were excluded by the settlor from serving on the committee; (ii) by eliminating the beneficiaries through decanting, the risk of litigation was increased not decreased; and (iii) by eliminating the beneficiaries, the trust forfeiture clause could no longer serve as a check against possible disputes (since the beneficiaries would have nothing to lose by litigating).

(f) The trial court did not abuse its discretion by removing the trustees because the court could have reasonably concluded that the trustees committed a serious breach of trust when they violated their duty of impartiality.

(9) Dissenting opinion. One dissenting justice would have vacated the trial court and remanded the cases on the following grounds: (a) the majority affirmed the trial court on alternate grounds that the trial court did not reach and the parties did not brief (the statutory duty of impartiality): (b) the trial court never held that the trustees violated the statutory duty of impartiality; (c) deciding issues that have not been briefed undermines adversary process and increases the possibility of error; (d) as a case of first impression, the court should have proceeded with caution, and the court has undermined the goal of the legislature to make New Hampshire the best and most attractive legal environment for trusts and fiduciary services; and (e) without briefing, the court could not properly hold that the duty of impartiality was actually breached, and the majority ignored the primary trust purposes of company preservation in favor of an "evident purpose" selected by the court.

(10) Litigation over fees. The former trustees moved for attorneys' fees and costs, seeking reimbursement for the fees and costs of defending the decantings. The successor trustees moved to force the former trustees to repay $90,000 in fees back to the trust. The trial court

denied the motion of the former trustees and granted the motion of the successor trustees. The former trustees appealed. The New Hampshire Supreme Court affirmed the fee decisions on the following grounds:

(a) A trustee is not ordinarily entitled to attorneys' fees and expenses if it is determined that the trustee breached the trust. The trustees were found to have committed a serious breach of trust justifying their removal and the voiding of the decantings. The breach was found to be egregious.

(b) The trustees had no fiduciary duty, as they claim, to defend the decantings and their misconduct. They cannot rely on the conflict that, by decanting, they created between the interests of the beneficiaries to obtain reimbursement for their fees. Had the trustees not decanted, there would have been no conflict among the beneficiaries.

(c) The absence of case law on decanting and fiduciary duties does not justify reimbursement. Rather than decanting, the trustees could have obtained an independent legal opinion or petitioned the court for instructions. The circumstances of this case should have caused the trustees to have reasonable doubt as to whether the decantings were proper.

(d) Where a trustee is found to have committed a breach, indemnification is ordinarily unavailable. The breach is also adequate grounds to order the trustees to reimburse the trust for attorneys' fees paid out of the trust.

6. Powers of Appointment

a. ***Tubbs v. Berkowitz*, 47 Cal. App. 5th 548 (2020).** Donee of general power of appointment, who also serves as trustee, may exercise power without regard to fiduciary duties as trustee.

(1) Harry and his wife created a joint revocable trust. His wife died and the trust terms provided that the trust assets would be divided into a survivor's trust and a marital trust with Harry as sole trustee and current beneficiary of both trusts, and with their daughter as remainder beneficiary. The trust terms also provided Harry with a presently exercisable general power to appoint the trust assets to himself during his lifetime. Harry petitioned to approve his planned allocation of assets among the two trusts, his daughter objected, and Harry exercised his general powers of appointment to distribute the trust assets to himself outright.

(2) The daughter petitioned to object to the exercise of the powers on the grounds that the powers should be limited by Harry's fiduciary duties as trustee. The trial court dismissed the petition on summary judgment and the daughter appealed. On appeal, the California Court of Appeals affirmed on the following grounds:

(a) Harry possesses a general power of appointment as the donee of the power and could appoint the trust assets in his own favor. This gave Harry the same freedom of disposition that he would have over his own property. The donee of a general power has the ability to act in a nonfiduciary capacity, unlike a trustee. The holder of a presently exercisable general power of appointment has the rights of a person holding the power to revoke a trust. There is no authority showing that a donee cannot exercise a general power of appointment in his favor if he is also the trustee of an irrevocable trust.

(b) The power does not make the trust invalid and illusory or extinguishment of the trust by the doctrine of merger. The power did not effect a merger because, until the power was exercised, the daughter retained contingent rights as beneficiaries. The exercise of the power did not render the trust invalid or illusory, it merely implemented a right given to the spouse under the trust terms.

(c) Language requiring a trustee to exercise all powers in a fiduciary capacity does not impose restrictions on the separate role of a donee who exercises a general power of appointment. A general power can clearly be exercised to the detriment of other beneficiaries. Harry, as trustee, could not breach his duties because he was required under the trust terms to distribute assets in the manner directed by the exercise of the power.

(d) There would have been no objection if Harry had resigned as trustee immediately before exercising the power, and there is no reason why the result should be different where Harry was both donee and a trustee with no discretion but to follow the terms of the appointment.

b. ***Estate of Eimers,* 2020 Cal. App. LEXIS 420 (2020).** Court cannot reform will to correct defective exercise of power of appointment.

(1) Norbert created a trust for the lifetime benefit of his son Timothy, with the remainder passing at Timothy's death to his issue (of if none to other of Norbert's descendants). The trust gave Timothy a testamentary general power of appointment that could be exercised "by will specifically referring to and exercising this power of appointment".

(2) Timothy signed a holographic will that provided: "To Charles…and Caryn…I hereby leave my shares of the Norbert Theodore Elmers Family Trust. I also leave all my other property and any funds I have". He died four months later. His will was admitted to probate. The trustee petitioned for instructions on whether the exercise of the power of appointment was valid. The trial court held that the will did not validly exercise the power, Charles and Caryn appealed, and the court of appeals affirmed.

(3) Charles and Caryn petitioned to reform the will to correct the exercise of the power of appointment. The trustee demurred and the trial court sustained the demurrer. Charles and Caryn appealed, and the court of appeals affirmed on the following grounds:

(a) The probate code provides that, if the creating instrument specified requirement as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements. The probate code also provides that if the creating instrument expressly requires specific reference to the power or the instrument that creates the power, the power can only be exercised by an instrument containing the required reference. Another probate code section allows the court to excuse compliance with some requirements for exercise, but not the requirement for specific reference.

(b) A court has the power to reform a will to conform to the testator's intent. Here, however, the issue is not Timothy's intent which is clear. The issue is whether the court may amend or reform a will to excuse the testator's failure to comply with a probate code section that expressly prohibits the court from validating gifts that require a specific reference to the power of appointment. The reformation sought eviscerates the statutory requirement of a specific reference. Creating a reference based on extrinsic evidence is nothing more than nullification of the statutory requirement of an express reference. Donor's intent alone cannot trump the requirements of the law.

(c) The creating trust instrument requires specific reference to the power of appointment and specifically invalidates gifts that fail to make that reference. The specific reference condition places the trust outside the statute under which the court has the ability to excuse a failure to properly exercise the power. Where there is a specific reference requirement, the legislature intended noncompliance to be inexcusable. Reformation here would be contrary to the clear legislative directive.

(d) The reference to the trust does not qualify as reference to the power. The probate code distinguishes between references to the trust and references to the power. A creating instrument may require either or both. If the creating instrument requires specific reference to the power of appointment, only a reference to the power will suffice. A refence to the trust is not an adequate refence to the power.

7. Fiduciary Appointment & Succession

a. ***Cleary v. Cleary,* 2020 Md. App. LEXIS 1209 (2020).** Trust modified to remove named successor trustee who started company to directly compete with company held in trust.

(1) Upon his death, Vincent funded trusts for the benefit of his wife and children. The trusts were funded with interests in Vincent's packaging and shipping company and his wife served as sole

trustee. His son, Vincent Jr., was named as first successor trustee and his son, William, was named as second successor trustee.

(2) In 2018, Jr. tried to force Shirley to sell her shares in the company to him, and if she refused threatened to take employees, form a competing company, and destroy his father's company. Shirley dismissed Jr. from the company. Jr. then formed his own company to perform the same business and directly compete with the trust-owned company and took several employees with him. Shirley sued Jr. and the employees for breach of restrictive employment covenants, misappropriation of trade secrets, and other claims. Jr. counterclaimed against the company for $300,000 in back pay.

(3) Shirley petitioned to modify the trust to remove Jr. as first successor trustee, which the trial court granted. Jr. appealed. On appeal, the Maryland Court of Special Appeals affirmed on the following grounds:

(a) Under the Maryland Uniform Trust Code (MUTC), the court may modify a trust if, because of circumstances not anticipated by the settlor, the modification will further the trust purposes and, to the extent practicable, is made in accordance with the settlor's probable intention.

(b) The case is ripe for adjudication despite the fact that the employment litigation was still ongoing. Ripeness is not tied to the outcome of that litigation but rather the fact that the litigation exists. The existence of that litigation among the parties was a proper basis for the court to determine that circumstances not anticipated by the settlor existed, the litigation was a sufficient change in circumstances to support trust modification, and the MUTC also provides that litigation can allow for removal of a trustee.

(c) The trial court decision was based on the present strife between two competing companies, which was not contemplated by the settlor. There is not requirement of present wrongdoing by a named successor trustee before a trust can be modified. The trial court properly found that the modification further the trust purposes, that the settlor did not anticipate the present circumstances, and that the modification was consistent with the settlor's probable intention. A purpose of the trust was to grow the trust assets for all the beneficiaries, and not just Jr. The modification benefitted all the beneficiaries. Jr. started a company that would directly compete with the trust-owned company, and the existence of that competing company is material evidence supporting the trial court decision.

(d) The competing companies were not contemplated by the settlor, and the strife between Shirley and Jr. did not arise until after the settlor's death. Until the settlor's death, Jr. worked at the company without any conflict. The modification was consistent with settlor's probable intention because the settlor wanted the trust assets to grow, Jr.'s company directly competed with the trust-owned company, trust assets spent on the litigation are not available for the beneficiaries, and the company formed by Jr. and the litigation support modification to remove him as named successor trustee.

(e) An actual conflict by a trustee is not required where the conditions for trust modification are met. The court could properly consider conflicts that may occur. Removing a successor trustee through trust modification due to a potential conflict of interest does not run afoul of state law. The trial court's decision was not based on hypotheticals, but rather on extant facts about the strife between the family members and corporate entities.

(f) The trial court was not required to expressly speculate that the settlor wanted his son to carry on the family business, especially where the claimed heir apparent started a rival company to destroy the settlor's company. Jr. should not remain as first successor trustee when he established a rival company that puts the trust in danger of failing by intentionally trying to ruin the trust's main asset. The outcome of the employment litigation is irrelevant – the existence of that litigation justifies the modification. A serious conflict exists where Jr., should he succeed to the trusteeship, would be in charge of managing the trust with the company as its main assets while he is simultaneously managing its competitor.

8. Beneficiaries

a. ***Paris v. Ballantine,* 2020 Ala. LEXIS 141 (2020).** Adopted adult excluded as trust beneficiary.

(1) In 1971, Porter and Phyllis Schutt created an irrevocable trust for the benefit of their children and their children's lineal descendants. The trust terms permitted distributions among the issue of their children and the issue's lineal descendants. The trust defined lineal descendants as "those hereafter born, either before or after trustor's death, as well as those now in existence. A child *en ventre sa mere* shall be deemed to be living". The trust was divided by court order into separate trusts for the three children. One of the separate trusts was further divided into separate trusts for a child's four children, including Aimee. The court's division order stated that the separate trusts would be in the same form and terms of the 1971 trust, and that if a trust had no remaining beneficiaries, the assets would be divided among the trusts for the other siblings.

(2) Aimee appointed her husband and two other individuals as trustee of her separate trusts, and the trustees appointed a corporate co-trustee. In 2016, after learning she had a terminal illness, Aimee adopted her adult stepchild by order of a Charleston, South Carolina court. She died four months later. The bank petitioned to settle the accounts for Aimee's trust. Her siblings claimed that their trusts were entitled to the trust assets because Aimee died without biological issue. The probate court granted summary judgment for the siblings and the stepson appealed.

(3) On appeal, a divided Alabama Supreme Court affirmed the probate court on the following grounds:

(a) The public policy of Alabama is that adopted children are treated the same as natural children unless a desire to exclude them is clearly indicated by the testator. Prior cases including adopted children as heirs are distinguishable. The instruments in those prior cases did not use the specific term "born" which was used in the 1971 trust.

(b) Also, in those cases a state statute specifically addressed adopted children. Here the stepson was adopted as an adult. At the time the 1971 trust was executed, there was no provision in the law authorizing adoption of adults. The first Alabama act allowing adult adoption was enacted two years after creation of the trust. The law at the time of trust creation did not allow adult adoption, and therefore his adoption in 2016 did not make him a lineal descendant as defined in the 1971 trust.

(4) One dissenting justice would reverse the probate court under full-faith-and credit principles and because the trust did not evidence a clear intent to exclude adopted children.

b. ***Estate of Small v. Small,* 2020 Pa. LEXIS 3847 (2020).** Father entitled to inherit as intestate heir of son.

(1) Son was eighteen when he sustained gunshot wounds that rendered him paraplegic. Mother provided the son with assistance and some financial support until the son's paramour later assumed those duties. They both agreed that son was mostly self-sufficient but needed assistance with certain tasks, like dealing with a colostomy bag or obtaining medications. Son received Social Security disability benefits. Father was absent and did not provide care or support for the son during the last few years of his life. Son was never adjudicated as incapacitated.

(2) The son died intestate at age 37, and without a spouse or descendants. The sole estate asset was a $90,000 wrongful death award recovered by the mother as administrator. Under Pennsylvania intestacy law, the son's estate passes to the parents. The mother petitioned for an order that the father should not inherit under a statutory exception where, for one year or more prior to the death of the parent's minor or dependent child, the parent failed to perform the duty to support the minor or dependent child or, for one year, deserted the minor or dependent child. The probate code did not define "dependent child".

(3) The orphan's court denied the petition. The mother appealed and the superior court affirmed. The mother appealed, and the Pennsylvania Supreme Court affirmed on the following grounds:

(a) The probate code does not define "dependent child" nor does the statutory construction act. The statute however requires any dependency on the child's part to be one that gives rise to a duty of support on the part of the parent. The use of the phrase "the duty" leaves no room for an interpretation whereby the child was dependent, in some sense of the word, but there was no corresponding duty on the part of the parent to provide support. A child cannot have been dependent unless the parent had a support duty.

(b) It would be tenuous to suggest the statute refers to a social, moral, or ethical duty arising apart from the law in relation to an adult child who, in some sense, depending on others for assistance with many of life's daily undertakings. The mother's claim of a duty is not tethered to any particular legal foundation. It is doubtful that the general assembly was intending to refer to such an imprecise concept without standards the court could apply.

(c) The forfeiture statute does not support the mother's position that the father's duty should be understood in an informal, social, moral, or colloquial sense. The duty under that statute must arise from some legally recognized source, such as common law, a statute, a contract, or a court order. The court rejects the mother's argument that dependency and a duty of support used in this statute should reflect some beneficial social policy unconnected to some anchor in the law.

(d) Mother failed to show that the son was dependent on the father under legal principles extrinsic to the forfeiture provision, and that father owed him a duty of support. Decedent was an adult when he died. While a parent may have a duty to support into adulthood a child that becomes disabled while a minor, that does not apply here because the son became disabled as an adult.

9. Marriage

a. ***Crawford v. Crawford,*** **2020 Ind. App. Unpub. LEXIS 598 (2020).** Joint revocable trust amended and revoked premarital agreement.

(1) A day before their wedding, and while wife was seven months pregnant and working at husband's dental office, husband instructed wife to go to his lawyer's office and sign a premarital agreement. Wife sold her house and deposited the proceedings into husband's dental practice account. The rest of her assets, consisting of a tanning bed and furniture, were lost in a fire. Twelve years later, they executed a joint revocable trust with themselves as trustees and beneficiaries and funded the trust with all their assets.

(2) They separated three years later, and husband sued for divorce and sought to enforce the marital agreement. Wife claimed the agreement was unconscionable and that the trust revoked the marital agreement. The trial court held that the trust revoked the marital agreement and the husband appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) By statute, a marital agreement can be amended by a later agreement signed by both parties.

(b) While the trust did not specifically reference the marital agreement, or indicate it was an amendment to it, the trust was contrary to the philosophy and intent of the marital agreement, which was to preserve premarital assets during marriage, divorce, or death. The trust pulled the separate assets into the trust and provided the parties with joint and equal control over all trust assets. The trust is therefore a separate later jointly signed writing that unilaterally disavowed the marital agreement.

10. Forfeiture Clauses

a. ***Hunter v. Hunter,*** **2020 Va. LEXIS 20 (Virginia Supreme Court 2020).** Action to construe disclosure waiver in trust terms does not violate forfeiture clause.

(1) Theresa executed a revocable trust that provided, after her death, that her son would receive one-third of the trust assets, reduced by certain loans to him, with the balance of the trust assets passing to her daughter and granddaughter. The trust named the daughter as successor trustee

upon Theresa's incapacity. The trust terms waived the "formal requirements to inform and report" under the Virginia Uniform Trust Code. The trusts terms noted lifetime gifts and loans and children, expressed the desire that descendants not expend resources disputing lifetime loans and gifts, and provided a forfeiture clause that would apply to actions to invalidate, nullify, or set aside the trust. The trust provided an exception to forfeiture for an action in good faith seeking trust interpretation that is not objected to by the trustee.

(2) After Theresa died, the son received a brokerage statement from the daughter as trustee that allegedly showed a $3 million decline in the trust assets during a time of rising markets. The son asked for additional information and the trustee's counsel refused, based on the disclosure waiver provision in the trust.

(3) The son filed a declaratory judgment action that: (a) first sought a determination that the suit would not violate the forfeiture clause; and (b) if allowed without forfeiture, sought to construe the disclosure waiver as applying only to certain VUTC provisions and not on any freestanding duty of the trustee to report to beneficiaries under other code provisions or common law. The suit expressly sought a firewall protecting the first count from premature consideration of the second count, following the approach in *Virginia Foundation of Independent Colleges v. Goodrich, 246 Va. 435 (1993).* The trustee counterclaimed that the son had violated the forfeiture clause. The son added an alternative argument that, if the court determined the waiver applied to all trustee disclosure duties, then the waiver was void as against public policy. The trial court granted the trustee summary judgment and declared that the son's interest in the trust was revoked and ordered the son to pay the trustee's attorneys' fees. The son appealed.

(4) On appeal, the Virginia Supreme Court reversed and remanded on the following grounds:

(a) Virginia honors the societal benefit of deterring bitter will contests, but also respects the ancient maxim that equity abhors forfeitures. Therefore no-contest provisions are both strictly enforced and strictly construed. The court will not wince in enforcing the clauses so long as the settlor clearly intended the forfeiture. The language must be express and not an inference. No-contest clauses are also prima facie valid in trusts, although the court has not yet addressed, and declines to do so here, how the unique attributes of trust should factor into the legal analysis or how to consider the fact that trusts differ from wills in their duration and the fiduciary duties of the trustee.

(b) In *Goodrich,* the court implicitly approved the alternatively pleaded complaint approach used by the son here, and the court now expressly approves that pleading model. That pleading model has the virtue of conforming to the traditional view that the complainant is the master of the complaint and is pragmatic in permitting a declaratory judgment action to gauge the cost-benefit ratio of continuing litigation. Here, the suit sought an initial determination of the scope of the no-contest provision prior to a resolution of the merits and asserted that it did not seek to contest, but rather interpret, the trust terms in view of the trustee duties under other code sections or common law. Even if the second count violated the no-contest clause, the trial court erred by disregarding the pleading approach and reading the complaint.

(c) The second count did not violate the no-contest clause. The count does not meet the trust terms defining a contest subject to forfeiture. Construing a legal document and contesting it are two different things. The distinction may be fine, but it is a sharp one. A successful construction can eliminate the need for a contest. The complaint here sought the former and eschewed the latter. The circuit court erred by implicitly accepting the trustee's interpretation of the disclosure waiver and rejecting the son's interpretation. The son could seek a judicial interpretation of a disputed provision without the risk of the request for interpretation being characterized as an attempt to invalidate the provision. What is true in wills is also true in trusts – seeking court guidance to interpret a disputed provision is not a contest that actuates a forfeiture clause. The suit is intended to determine, rather than oppose, and implement rather than impede, the settlor's intent.

(d) The exception to the clause where the trustee approves the petition does not mean that the trustee's objection to the petition causes forfeiture. The court has never addressed, much less approved, a provision that seeks to seal the courthouse doors to a beneficiary seeking an interpretation of a trust or will. Several courts have criticized such an effort as impermissible overreach. Here, however, the trustee's argument relies on implication and not an express intent of the settlor, and in this area of legal draftsmanship, mere implications will not suffice. Strictly construed, this no-contest provision does not equate a request for interpretation with a contest. The verbs "invalidate, nullify, set aside, render unenforceable, and avoid the effect of" are not synonyms for "interpret". One does not need an exception to a rule to do something the rule does not prohibit.

b. ***Ferguson v. Ferguson,*** **2020 Ida. LEXIS 186 (Idaho Supreme Court 2020).** Signing of will exercising power of appointment gives beneficiary by its exercise rights to information as trust beneficiary. No-contest clauses are enforceable in Idaho subject to certain limitations.

(1) Roger and Sybil created a joint revocable trust agreement under which they served as trustees during their lives. The trust excluded their son, Michael, as a beneficiary. Roger died in 2012 and pursuant to the trust terms (a) Roger's assets and half the community assets funded a family trust and marital trust and (b) Sybil's assets and half the community assets funded the survivor's trust.

(2) The next year, Sybil signed a new will under which she exercised her power of appointment to add Michael as a beneficiary of the survivor's trust after her death. The survivor's trust provided that the trustee could distribute principal to Sybil for any purpose, and as much principal as Sybil may request for any reason. The trust agreement also included a no-contest that would result in forfeiture of the share of any beneficiary who filed a suit on a creditor's claim in the probate of the estate of either grantor.

(3) Sybil died in 2015 and three of her other children became personal representatives of her estate and trustees of the trusts. Michael requested information about the original trust before his father died and all the sub-trusts created going back to his father's death. He petitioned for an accounting and information about the funding of the sub-trusts because "to know what comes out at the bottom of the hopper we have to know what went in at the top". The trustees provided some information but refused to provide information from before Sybil's death. Michael filed a claim against Sybil's estate alleging that as trustee she breached various duties she owed to him and moved to stay the claims. The trustees asserted that Michael's claim triggered the no-contest clause. Michael moved to compel discovery.

(4) The magistrate court refused to enforce the forfeiture clause but granted the trustees summary judgment on their other affirmative defenses and held that Michael did not become a beneficiary of the survivor's trust until Sybil's death, and that he lacked standing to seek information about the other trusts.

(5) The intermediate court of appeals held that (a) Michael became a beneficiary of the survivor's trust when Sybil signed her will exercising her power of appointment, (b) the magistrate erred by refusing the apply the forfeiture clause, (c) Sybil owed no duty to Michael because she was not required to preserve assets for remainder beneficiaries under the trust terms and had broad discretion with respect to distributions she could make to herself, and (d) therefore Michael did not have probable cause for his probate claims.

(6) On appeal, the Idaho Supreme Court reversed the remanded on the following grounds:

(a) The trusts became irrevocable at Roger's death. Sybil's broad discretion to make distributions as trustee did not eliminate her fiduciary duties to Michael. Even the broadest grant of discretion still requires a trustee to act in good faith. Her fiduciary duties extended beyond the trust terms to those also imposed under Idaho trust law.

(b) Michael had the right to enforce his rights from before Sybil's death. The appellate court held that Michael become a beneficiary when Sybil signed her will exercising her power of

appointment and was therefore a beneficiary for eighteen months before Sybil's death. He had the same rights to trust information as other beneficiaries during this time. Because he was a beneficiary on the signing of the will, the appellate court erred by failing to address whether he was entitled to relevant records from before Sybil's death. Michael needed information about the funding of the trusts at his father's death to verify his interest in the survivor's trust was fully funded. The fact that the information predates the signing of the will is of no consequence because Idaho trust law does not place temporal limitations on the information a beneficiary is owed, so long as the information is relevant. Michael was entitled to relevant information about the allocations made at his father's death.

(c) The appellate court erred in enforcing the forfeiture clause before addressing whether the trustees breached their duties by denying information to Michael.

(d) As a matter of first impression, no-contest provisions are enforceable in Idaho. Consistent with the Uniform Probate Code, a no-contest clause in a trust agreement is unenforceable if probable cause exists for the proceedings. Also, no-contest clauses shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust, or punish a demand for or challenge to an accounting, and are construed narrowly consistent with their terms (adopting the position of the Restatement (Third) of Trusts). The forfeiture clause here is not enforceable because it interferes with the proper administration of the survivor's trust by preventing Michael from obtaining records he was entitled to as a trust beneficiary. A trustee has a duty to keep a beneficiary informed and respond to reasonable requests for information. The trustees are attempting to use forfeiture to penalize Michael for seeking information about the trust, and that result interferes with the trust administration and his rights as a beneficiary.

(e) The trust term relieving the trustees of liability for Sybil's actions as trustee does not relieve them of their current duty to provide relevant information to a trust beneficiary. Because the forfeiture clause interferes with trust administration, the court declines to consider whether Michael had probable cause to bring his claim against his mother's estate. Michael stayed his probate action and merely attempted to preserve his probate rights pending his litigation over information rights. A mere paper that is intended solely to procure time to ascertain facts should not be construed as instituting a contest. Based on the trustee's refusal to provide any information about the sub-trust allocations and the stay, the court will not consider the probable cause issue on appeal.

(f) On remand, if Michael is provided adequate records about the allocations and, within a reasonable time, does not withdraw his claim against his mother's estate, the court can take up the issue whether Michael has probable cause to pursue that claim without being bound by the court's determination.

11. Privileges, Discovery & Disclosure

a. ***Holiday v. Horst,*** **No. 77964 (Nevada Supreme Court December 31, 2020).** Notice that fails to include a trust amendment is ineffective to run the 120-day limitations period on trust contest.

(1) Ella created a revocable trust. After moving in with her daughter, Patricia, Ella purportedly signed second, third, and fourth amendments that named Patricia as successor trustee and that each added a specific gift of real property to Patricia.

(2) Ella died. Patricia as successor trustee sent notice to the beneficiaries to run the 120-day limitations on trust contests, and included the trust and the first three amendments, but not the fourth amendment. No beneficiary objected. The next year, Patricia petitioned the court to confirm the fourth amendment. Her son objected to the second, third, and fourth amendments on the grounds of undue influence. The trial court held that his objections to the second and third amendments were barred by the 120-day limitations period. The son appealed.

(3) On appeal, the Nevada Supreme Court reversed on the following grounds:

(a) The statute requires that the notice include "any provision of the trust instrument which pertains to the beneficiary". The term "any" is ambiguous. The legislature is presumed to have the word "any" have the same meaning each time it is used in the statute. Elsewhere in the statute "any" means "all", and therefore rules of statutory construction support applying that meaning. The word "any" in a procedural statute usually means "any and all". Also, the term "any" here modifies a singular noun in an affirmative context, which suggests that the legislature intended it to mean "all". The legislative history supports construing "any" to mean "all" because the purpose of the statute was to avoid a trust having contests years after the fact. A trustee has discretion whether to send the statutory notice but does not have discretion to confirm trust instruments in a piecemeal fashion. This would frustrate the legislature's desire for efficiency in trust contests.

(b) The statute requires strict compliance because the statute uses mandatory language and only complete disclosure of all provisions of a trust instrument pertaining to a beneficiary will further the legislature's goals and give the beneficiary all information needed to decide whether to contest a trust.

(c) Patricia's notice did not include the fourth amendment and therefore did not trigger the 120-day limitations period on a trust contest.

b. ***Matter of Short Revocable Living Trust Agreement,* SCWC-15-0000960 (Hawaii Supreme Court, June 18, 2020).** Trust terms do not override statutory right of trust beneficiaries to reasonable trust information.

(1) Under her revocable trust agreement, Elaine created a fully discretionary trust for her son, David, that provided for discretionary distributions of net income, but not principal, to David for his lifetime. Because David had no descendants, the presumptive remainder beneficiaries were Elaine's nieces and nephews. The trust terms also provided as follows: "The [t]rustee…shall deliver regular accounts…all adult beneficiaries then entitled to receive income principal of the trust estate".

(2) The corporate trustee petitioned the court for permission to distribute trust principal to David. The nieces and nephews objected, and through counsel asked the trustee for information about the trust assets, income, and distributions. The trustee objected, asserted that under the trust terms the remainder beneficiaries were not entitled to accountings, and asked the trial court for instructions. The trial court held that the trustee was not required to provide financial information to the reminder beneficiaries. The intermediate court of appeals affirmed on the grounds that the settlor can override the Hawaii trustee disclosure statute.

(3) On appeal, the Hawaii Supreme Court reversed on the following grounds:

(a) When construing a trust, the intentions of the settlor prevails unless inconsistent with a positive rule of law. Positive law includes statutes. Under the trust terms, only David is entitled to "regular accounts", and the remainder beneficiaries are not entitled to account information unless there is a positive law that overrides Elaine's intent.

(b) HRS Section 560:7-303 imposes an affirmative duty on the trustee to keep the trust beneficiaries reasonably informed, and on request, a duty to provide certain information about the trust terms, assets, and an account statement annually, on trust termination, and on any trustee change. Following the trustee's failure to provide information, the remainder beneficiaries by statute were entitled upon request to receive trust information within reasonable limits determined by the probate court.

(c) The trial court erred by failing to consider the reasonableness of the request and holding the statute imposed no duty on the trustee. The intermediate court of appeals erred by holding that the settlor could override the statute. While the statute does not expressly prohibit override by the settlor, there is nothing in the statute that suggests providing such information is optional or non-mandatory.

(d) In any event, a trust provision relieving the trustee of the duty to keep formal accounts does not abrogate the statutory duty to account to beneficiaries in the probate court.

(e) HRS Section 560:7-201(b) is a jurisdictional statute that allows a trust to be administered without court supervision but cannot be read as a broad grant for a settlor to ignore positive law. Even if this statute conflicted with the trustee disclosure statute, the specific statute would trump the general statute. HRS Section 560:7-303 is positive law that cannot be modified by the trust terms, and the trust terms are an impermissible infringement on the statute. On remand, the trial court must consider the scope of information the remainder beneficiaries are entitled to under a "reasonable request" standard.

c. ***Ferguson v. Ferguson,* 2020 Ida. LEXIS 139 (Idaho Supreme Court 2020).** Signing of will exercising power of appointment gives beneficiary by its exercise rights to information as trust beneficiary. No-contest clauses are enforceable in Idaho subject to certain limitations.

(1) Roger and Sybil created a joint revocable trust agreement under which they served as trustees during their lives. The trust excluded their son, Michael, as a beneficiary. Roger died in 2012 and pursuant to the trust terms (a) Roger's assets and half the community assets funded a family trust and marital trust and (b) Sybil's assets and half the community assets funded the survivor's trust.

(2) The next year, Sybil signed a new will under which she exercised her power of appointment to add Michael as a beneficiary of the survivor's trust after her death. The survivor's trust provided that the trustee could distribute principal to Sybil for any purpose, and as much principal as Sybil may request for any reason. The trust agreement also included a no-contest that would result in forfeiture of the share of any beneficiary who filed a suit on a creditor's claim in the probate of the estate of either grantor.

(3) Sybil died in 2015 and three of her other children became personal representatives of her estate and trustees of the trusts. Michael requested information about the original trust before his father died and all the sub-trusts created going back to his father's death. He petitioned for an accounting and information about the funding of the sub-trusts because "to know what comes out at the bottom of the hopper we have to know what went in at the top". The trustees provided some information but refused to provide information from before Sybil's death. Michel filed a claim against Sybil's estate alleging that as trustee she breached various duties she owed to him and moved to stay the claims. The trustees asserted that Michael's claim triggered the no-contest clause. Michael moved to compel discovery.

(4) The magistrate court refused to enforce the forfeiture clause but granted the trustees summary judgment on their other affirmative defenses and held that Michael did not become a beneficiary of the survivor's trust until Sybil's death, and that he lacked standing to seek information about the other trusts.

(5) The intermediate court of appeals held that (a) Michael became a beneficiary of the survivor's trust when Sybil signed her will exercising her power of appointment, (b) the magistrate erred by refusing the apply the forfeiture clause, (c) Sybil owed no duty to Michael because she was not required to preserve assets for remainder beneficiaries under the trust terms and had broad discretion with respect to distributions she could make to herself, and (d) therefore Michael did not have probable cause for his probate claims.

(6) On appeal, the Idaho Supreme Court reversed the remanded on the following grounds:

(a) Sybil's broad discretion to make distributions as trustee did not eliminate her fiduciary duties to Michael. Even the broadest grant of discretion still requires a trustee to act in good faith. Her fiduciary duties extended beyond the trust terms to those also imposed under Idaho trust law.

(b) Michael had the right to enforce his rights from before Sybil's death. The appellate court held that Michael become a beneficiary when Sybil signed her will exercising her power of appointment and was therefore a beneficiary for eighteen months before Sybil's death. He

had the same rights to trust information as other beneficiaries during this time. Because he was a beneficiary on the signing of the will, the appellate court erred by failing to address whether he was entitled to relevant records from before Sybil's death. Michael needed information about the funding of the trusts at his father's death to verify his interest in the survivor's trust was fully funded. The fact that the information predates the signing of the will is of no consequence because Idaho trust law does not place temporal limitations on the information a beneficiary is owed, so long as the information is relevant. Michael was entitled to relevant information about the allocations made at his father's death.

(c) The appellate court erred in enforcing the forfeiture clause before addressing whether the trustees breached their duties by denying information to Michael.

(d) As a matter of first impression, no-contest provisions are enforceable in Idaho. Consistent with the Uniform Probate Code, a no-contest clause in a trust agreement is unenforceable if probable cause exists for the proceedings. Also, no-contest clauses shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust, or punish a demand for or challenge to an accounting, and are construed narrowly consistent with their terms (adopting the position of the Restatement (Third) of Trusts). The forfeiture clause here is not enforceable because it interferes with the proper administration of the survivor's trust by preventing Michael from obtaining records he was entitled to as a trust beneficiary. A trustee has duty to keep a beneficiary informed and respond to reasonable requests for information. The trustees are attempting to use forfeiture to penalize Michael for seeking information about the trust, and that result interferes with the trust administration and his rights as a beneficiary.

(e) The trust term relieving the trustees of liability for Sybil's actions as trustee does not relieve them of their current duty to provide relevant information to a trust beneficiary. Because the forfeiture clause interferes with trust administration, the court declines to consider whether Michael had probable cause to bring his claim against his mother's estate. Michael stayed his probate action and merely attempted to preserve his probate rights pending his litigation over information rights. A mere paper that is intended solely to procure time to ascertain facts should not be construed as instituting a contest. Based on the trustee's refusal to provide any information about the sub-trust allocations and the stay, the court will not consider the probable cause issue on appeal.

(f) On remand, if Michael is provided adequate records about the allocations and, within a reasonable time, does not withdraw his claim against his mother's estate, the court can take up the issue whether Michael has probable cause to pursue that claim without being bound by the court's determination.

d. ***Wyman v. Wyman,* 2020 U.S. Dist. LEXIS 241504 (Dist. Colorado 2020).** Estate planning discussions and document are privileged while the testator is alive.

(1) Son sued father alleging that father breached his contractual promise to revise his estate plan to leave one-tenth of his estate (including a $5 million life insurance policy) to son, in exchange for the son forgiving a promissory note owed by the father. The son subpoenaed the father's law firm seeking all documents relating to the father's will, trusts, and estate plan.

(2) The father moved to quash the subpoena, which the district court granted on the following grounds:

(a) The law firm's failure to respond to the subpoena did not waive the privilege. The privilege belongs to the client and can be waived only by the client.

(b) There are few communications more confidential than those relating to the preparation, contents, and execution of a will, when made within the attorney-client relationship, not in the presence of a stranger, and not made with the intention that the attorney communicate the contents to someone else. The drafting of estate planning documents is an act undertaken in confidence, and seldom is the client's dependence on, and trust in, his

attorney greater than when contemplating his own mortality. These discussions are among the most private, and the client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children, or next of kin.

(c) The execution and contents of wills are impliedly desired by the client to be kept secret during his lifetime and are part of confidential communications. Where a will is prepared by an attorney, its contents are protected by the attorney-client privilege during the testator's lifetime. While the testator lives, the attorney would not be allowed, without the testator's consent, to testify to communications about the will or the contents of the will itself.

(d) Defendant is alive and his communications with counsel about his will and trust, while perhaps relevant, remain privileged and not discoverable. The father produced all non-privileged documents.

e. ***Fiduciary Trust International v. Klein,* 2017 Cal. App. LEXIS 245 (2017); 2017 Cal. App. Unpub. LEXIS 5406 (2017); 2017 Cal. App. Unpub. LEXIS 5404 (2017); 2020 Cal. App. Unpub. LEXIS 425 (2020).** Where a removed trustee seeks to withhold legal communications from the successor trustee, it is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the prior trustee's personal liability, that is dispositive under California privilege law; rather it is whether, at the time the advice was sought, the purpose of the advice was protection against personal liability; and the prior trustee is required to take affirmative steps, such as retaining separate counsel and paying personally for the advice, at the time of the advice to establish the privilege. Court reverses beneficiary appointment of corporate successor trustee and orders appointment of successors named in document. Court affirms probate court order compelling removed trustees to disclose communications with attorneys to successor trustee.

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

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

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

(a) Where a trustee asserts the privilege, the client is the office of trustee rather than the particular trustee, as a consequence of the unique relationship between a trustee and beneficiary and the trustee's duty to provide information to the beneficiaries. There is a narrow exception where a trustee seeks or obtains legal advice in its personal capacity under *Moeller v. Superior Court, 16 Cal. 4th 1124 (1997).* Under that case, a distinction is made

between fiduciary advice for guidance in trust administration (which the trustee must turn over to the successor trustee because the successor trustee holds the privilege) and personal legal advice out of a genuine concern for possible future charges of breach of fiduciary duty (where the prior trustee may be able to withhold the advice by hiring separate counsel and paying for the advice out of its personal funds). This distinction is derived from the facts that the trustee powers are not personal to the trustee but belong to the office and a successor trustee assumes all of the powers of the office including the power to assert the privilege.

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

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

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

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

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

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

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

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

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

(5) The former trustees resisted the successor trustee's demand for trust records, claiming attorney-client privilege. The probate court ordered production of the documents, and two of the former trustees appealed the 2018 order directing them to produce their communications with certain law firms. On appeal, the Court of Appeals affirmed the probate court on the following grounds:

(a) On remand after the 2017 decision of the Court of Appeals, the former trustees did not attempt to make the required showing to support their privilege claims. Rather, they just turned over the 45 documents at issue in that ruling. The successor trustee then asked the probate court to turn over more than 3,000 additional documents over which the former trustees asserted attorney-client privilege.

(b) The successor trustee withdrew the demand for documents from firm where the engagement letter was with the former trustees individually with respect to the surcharge

action, and they signed the letter individually and not as trustees. With respect to the other 1,245 documents from three other law firms:

i. The probate court applied the correct legal standard.

ii. The retention agreements showed that the former trustees did not retain the firms to represent them in their personal capacities. They signed the agreements as trustees and the letters said they would be represented in trust matters.

iii. The fees were paid out of the trust, and, if they were personal charges, there was no required authorization for the trust to pay their personal charges.

iv. There was no evidence that the firms disclosed potential conflicts that could have arisen if the firms represented them in both their fiduciary and personal capacities, or obtained consent to the conflicts, which would have been required.

v. There was no evidence that the former trustees took affirmative steps to distinguish the purported personal advice from fiduciary advice that was contemporaneous with the seeking or receiving of the advice.

vi. There are no due process concerns. That a predecessor trustee's confidential communications with an attorney about trust administration may someday be disclosed to a successor trustee is not unfair in light of the nature of a trust and the trustee's duties. The *Fiduciary Trust* standards are essentially restatements of the *Moeller* standards from 1997, several years before the representation here.

12. Construction & Conditions

a. ***Ackers v. Comerica Bank & Trust, N.A.,* 2020 Tex. App. LEXIS 10442 (2020).** Identifying remainder beneficiaries is not ripe for judicial determination during life of income beneficiary.

(1) Dale created a trust under his will for the sole lifetime benefit of his son, with the remainder passing at his death to his then living descendants, *per stirpes*. The son had three biological children, but relinquished rights to two of them who were then adopted by other families. One of the adopted children died leaving two children of her own.

(2) The son filed a petition requesting the court to construe the term "then living descendants" to determine whether the adopted children are excluded. The trustee moved for summary dismissal of the suit alleging that the case was not ripe for review. The son wanted the determination so he could identify the necessary parties to a nonjudicial settlement agreement to terminate the trust early. The trial court granted summary dismissal and the son appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) The Uniform Declaratory Judgments Act does not permit courts to render advisory opinions.

(b) The claim involves making a determination of class membership of a gift made to a class. The son acknowledged the class gift and that his descendants are contingent non-vested beneficiaries. The time for determining who will receive trust corpus is at the son's death and not before. Until then the issue is not ripe for determination because it is based on an event that has not yet come to pass.

(c) The will contains a spendthrift clause that would render any agreement to terminate the trust early void. A void agreement can be the basis for a justiciable controversy.

b. ***Rallo v. O'Brian,* B290526 (Second District California Court of Appeals 2020).** General disinheritance clause effective to disinherit alleged pretermitted heirs born before execution of trust.

(1) Hugh O'Brian, an actor best known for his role as Wyatt Earp, died in 2016 survived by his longtime girlfriend, Virginia Barber, whom he married in 2006 when he was 81 years old. Under his revocable trust, Hugh gave specific gifts to various friends and family members (but no descendants) and the Motion Picture and Television Fund and left the residue in trust for Virginia for life with the remainder passing at her death to the O'Brian Charitable Foundation. The trust

terms also provided: "I have no children, living or deceased. I am intentionally not providing for [four named individuals], any of their descendants, and any other person who claims to be a descendant or heir of mine under any circumstances of without regard to the nature of any evidence which may indicate status as a descendant or heir"; and "I have intentionally and with full knowledge omitted to provide for….any of my heirs who may be living at the date of my death".

(2) Hugh dated Kimberly's mother, Carol, for a year starting in 1962. Hugh's agent gave Carol money and instructions to terminate her pregnancy in Tijuana, but Carol did not comply. Carol married another man before Kimberly was born and that man was listed as the father on Kimberly's birth certificate, but Hugh was the biological father. Another person named Adam alleged that he was the biological child of Hugh.

(3) Kimberly and Adam brought claims seeking to receive intestate shares of the estate as pretermitted heirs. They alleged that Hugh did not know they existed. Virginia, as trustee, demurred to the petitions, which the trial court sustained. The children appealed. On appeal, the court of appeals affirmed the trial court on the following grounds:

(a) For a child born before the decedent's execution of his testamentary instruments, the California Probate Code provides a right of recovery for an omitted child to receive an intestate share if the child proves that the decedent failed to provide for the child solely because the decedent mistakenly believed the child to be dead or was unaware of the birth of the child.

(b) Nothing in the statute or elsewhere prevents a trustor from expressing his intent to disinherit potential heirs living at the time – even if unknown to the trustor – by including a general disinheritance clause in the trust. The statute does not preclude the application of a general disinheritance clause to an unknown child claiming relief as a pretermitted heir.

(c) A general disinheritance clause bears on the trustor's intent. If the trustor had an intent to exclude potential children, even those known to him, then the decedent did not fail to provide for an unknown child solely because he was unaware of the child's birth. It would be absurd to ignore the trustor's intent on this issue and the trial court could properly consider the clause.

(d) Unlike after-born children, the law does not presume living children were unintentionally omitted because they were unknown. Hugh unambiguously expressed his intent to disinherit any heir not provided for, even those he was not aware of. Had Hugh intended to limit disinheritance to only the named individuals, he would not have included the additional language disinheriting "any other person who claims to be a descendant or heir" and "any of my heirs".

(e) Kimberly and Adam did not allege facts demonstrating that Hugh would not have disinherited them had he been aware of their births. The fact that Hugh specifically disinherited other individuals that he knew claimed to be his sons supports the conclusion that he would have specifically disinherited them if he knew they existed. There is no evidence he would have acted differently to Kimberly and Adam than he did to other claimed children. Hugh's gifts to other family members does not indicate he would have provided for children with whom he had no relationship had he been aware of their existence at the time he signed his trust at age 80.

c. ***Wilburn v. Mangano,*** **No. 191443 (Virginia Supreme Court 2020).** Term "fair market value" determined on date of death is too vague to support compelling specific performance of exercised purchase option under will.

(1) Jeanne signed a will giving her residence to her daughters but giving her son the option to purchase the property from his sisters for an amount equal to the tax assessed value in the year of Jeanne's death. A month before she died, Jeanne signed a codicil that revised the option purchase price to "an amount equal to the fair market value at the time of my death".

(2) Shortly after Jeanne's death, her son sent his sisters written legal notice of his intent to exercise the option under the terms of the will or codicil, "whichever the court/judge upholds". He then sued to set aside the codicil. The jury found the codicil was valid. The sisters then sued to compel the son to purchase the property under his exercise of the option and offered to settle by selling at the mean price between two appraisals. The son demurred and the circuit court sustained the demurrer. The sisters appealed.

(3) On appeal, the Virginia Supreme Court affirmed on the following grounds:

(a) An option contract becomes a contract of sale once the holder gives notice of his desire to exercise the option. A contract for sale of land that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced by a court in equity. Price is a material term and must be either fixed by the agreement itself or the agreement must provide a mode for ascertaining it with certainty for a court to enforce specific performance. An option contract that does not provide a fixed price, or provides a specific mode of fixing the price that still requires subsequent agreement between the parties, is incomplete.

(b) The term "fair market value" on the date of death is not sufficient to permit a court to compel specific performance of a contract for the sale of real estate. The usual meaning of fair market value is the price the seller is willing to accept, and the buyer is willing to pay on the open market in an arm's-length transaction. Even in other contexts in which courts have determined the fair market value of real property - taxation, eminent domain, and family law - fair market value is defined in the same manner as its usual, ordinary, and popular meaning. Reading the usual, ordinary, and popular meaning into the codicil, it appears that Jeanne gave the son the option to purchase the property at a price his sisters are willing to accept and the son is willing to pay on the open market and in an arm's-length transaction. There is no single fixed approach to determine fair market value as applied by appraisers or Virginia courts. Virginia courts recognize many valuation approaches, such as cost, income, sales, development cost, and comparable sales approaches.

(c) Absent a more precise specification of approach, the codicil does not provide the price, or a means of ascertaining the price with certainty, without subsequent agreement between the parties, and the codicil lacks the precision to allow a court in equity to compel specific performance.

d. ***Murphy v. Trustee of Star Financial Bank,* 2020 Ind. App. LEXIS 8 (2020).** Use of term "surviving" in conjunction with "per stirpes" created ambiguity in will.

(1) Under her revocable trust signed in 1990, Janice provided upon her death for her sister-in-law to have a lifetime income interest in the trust assets, with the remainder passing at her death "in equal shares, share and share alike, to [Janice's brother and sister], and if either is not then living, to their surviving children, per stirpes". At that time, her brother had five children and her sister had six children (of which five were surviving), in addition to many grandchildren in both families.

(2) Three years later, an attorney drafted new documents for Janice but she did not sign them. Those documents would have given the residue of Janice's estate outright to her brother and sister, or the surviving children, per stirpes, or a deceased sibling.

(3) Janice died in 1997. Her sister-in-law died in 2018. At that time, both Janice's brother and sister had died, two of her brother's daughters had died, and all her sister's children had died. Three of her brother's grandchildren (whose parents were deceased) survived. Thirteen of her sister's grandchildren survived.

(4) The trustee petitioned to determine heirship. The bother's three surviving children moved for summary judgment alleging that all of the trust assets were distributable to them to the exclusion of all of the grandchildren. The grandchildren filed a competing motion for summary judgment. The trial court granted summary judgment in favor of the grandchildren. The children appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) When a gift is to a group of individuals sharing the same relationship to the settlor, the words "share and share alike" denotes a per capita distribution rather than a per stirpes distribution.

(b) Under a per stirpes distribution, there can be no condition of survival affecting the vesting of an interest because one's descendants will represent the predeceased ancestor to take the ancestor's place and share. If the representation inherent in per stirpes is ignored, and "surviving" is treated as creating contingent remainders, the trust may be construed as suggested by the children by creating vested interests in only the children who survived the sister-in-law. If, however, "surviving" is interpreted as describing the timing of enjoyment of the interests, rather than as a condition of the gift, the trust may be interpreted as establishing vested interests in the deceased children that may be inherited by the grandchildren whose parents predeceased the sister-in-law through the process of representation inherent in per stirpes distribution. With both interpretations being equally logical and reasonable, there is an apparent ambiguity between the surviving condition and the per stirpes term and the court must look to extrinsic evidence.

(c) There is no conflict between the per capita and per stirpes distributions at the first- and second-generation levels of beneficiaries, respectively. The distribution provision is ambiguous because the terms "surviving" and "per stirpes", both used within the second-generation class of beneficiaries, are irreconcilable. If children must survive the sister-in-law to advance an interest in the trust, there can be no per stirpes distribution because the condition of survival negates the right of representation inherent in a per stirpes distribution.

(d) The trial court reflected a preference for early vesting by instituting a per capita distribution at the first generation and a per stirpes distribution at the second generation, in order to carry out Janice's intent to give equal gifts to the families of both her siblings. The evidence includes that, three years after signing the trust, Janice contacted an attorney with a perceived intent to amend her estate provisions, and the attorney at that time noted Janice's intent that her assets pass equally among the family lines of her siblings. Even though Janice did not sign the documents, it is evidence of Janice's intent.

(e) Consistent with evidence of Janice's intent, the trial court correctly concluded that the term "surviving" was mere surplusage that had been carelessly used. No genuine issue of material fact exists that Janice intended a per capita division of the trust corpus between her siblings with a per stirpes division among the descendants of her siblings.

13. Distributions

a. ***In re Raggio Family Trust,* 2020 Nev. LEXIS 21 (Nevada Supreme Court 2020).** Trustee not required to consider beneficiary's outside resources before making distributions.

(1) William created a revocable trust that divided on his death in 2015 into (a) a marital trust for the benefit of his second wife, Dale, during her lifetime with the remainder passing to his children and (b) a credit shelter trust also for Dale's lifetime benefit with the remainder passing to Dale's grandchildren. Dale was named a trustee. The marital trust provided for discretionary principal distributions to Dale "as the trustee, in the trustee's discretion, shall deem necessary for [Dale's] proper support, care, and maintenance".

(2) William's daughters sued Dale for breach of trust, alleging she improperly depleted the marital trust to preserve the assets of the credit shelter trust for his own grandchildren, and for making excess distributions. The daughters sought discovery on the assets and distributions from the creditor shelter trust. Dale objected and moved for summary judgment. The district court denied summary judgment, and granted the daughters' motion to compel discovery, and held that the daughters needed the information to determine whether marital trust distributions were necessary and proper. Dale petitioned the Nevada Supreme Court for a writ of prohibition or mandamus.

(3) The Nevada Supreme Court granted the writ and reversed the district court on the following grounds:

(a) The petition for extraordinary relief is appropriate because the discovery order would cause irreparable harm to Dale's privacy interests and a later appeal would not effectively remedy an improper disclosure of information.

(b) The Nevada Code provides that a trustee is not required to consider a beneficiary's assets or resources in determining whether to make trust distributions, except as otherwise provided in the trust terms. The use of the terms "necessary" and "proper" in the distribution standard do not trigger the trust term exception to the statute. The district court erred by concluding that "necessary" creates a threshold of financial need before a distribution can be made. William did not require that Dale consider her other assets before making distributions. The trust terms provide that Dale as trustee should be given the greatest latitude discretion where the trust terms are inconsistent with default state law. William could have required considering other resources but did not do so for the marital trust. In contrast, he expressly required it for the future trusts for Dale's grandchildren, showing that he understood how to restrict the authority of a trustee where he intended to do so. Construing the trust as a whole, it is clear that William did not intend to require consideration of other resources for marital trust distributions.

(c) The district court should have started its analysis from the position that Dale was not required to consider other resources before making distributions. If a settlor wants trustees to consider other assets, the settlor must so state in the trust terms. There is no exception by the mere use of the terms "necessary" and "proper" in the trust, as those terms appear frequently in trusts with their meaning dependent on the circumstances and text of the trust. It must be clear from the trust as a whole that the settlor intended the trustee to consider the beneficiary's other assets, and William did not express that intent here.

b. ***Cooper Falls Wing v. Goldman Sachs Trust Co.,*** **202 N.C. App. LEXIS 738 (2020).** Distributions to pay beneficiary's attorneys' fees should be frozen during litigation about identity of proper beneficiaries and validity of trust amendments.

(1) Ralph created a revocable trust in 2011. The trust provided for distribution after his death to two of his children and two grandchildren, but excluded his other daughter, Louise. Ralph signed a will prepared by a different attorney in 2012, just before surgery to remove brain tumors. In that will, he expressed the desire that his property be divided equally among his children. After surgery, he suffered serious physical and mental health problems and for the rest of his life relapsed into heavy drinking, depression, mania, and complications from bipolar disorder.

(2) After removal of the tumors and from 2012 until 2014, Ralph signed six trust amendments. The first amendment added his girlfriend, Diane, as successor trustee, changed which child was disinherited, and increased the shares for grandchildren. The second amendment changed successor trustees for grandchildren's shares. The third amendment named a bank as successor trustee, reduced the children's shares, and increased the grandchildren's shares. The fourth amendment retained the bank as successor trustee, increased Louise's share to 35% (and added her husband to that share), gave Louise's daughters 20% each, gave 25% to Diane, and excluded the other children and grandchildren. The fifth amendment gave Diane and Louise the power to remove the bank as trustee. The sixth amendment, which was titled "Fifth Amendment", was signed on the day Ralph and Diane married. That amendment gave 25% to Diane, 35% to Louise and her husband, and 20% to each of Louise's children.

(3) Ralph died in 2015. The bank paid distributions to Diane and Louise under the Fifth Amendment. In 2016, the other children sued to challenge the validity of the amendments and gave notice to the bank. The bank continued making distributions. Diane and Louise moved to pay their attorneys' fees out of the trust, and the other children moved to freeze the trust assets or pay the fees for all purported beneficiaries and not just Diane and Louise. The bank did not seek court instructions or file for interpleader.

(4) The trial court granted Diane and Louise's motion and denied the motion to freeze. The other children appealed. On appeal, the North Carolina Court of Appeals reversed the trial court on the following grounds:

(a) Interlocutory appeal is appropriate because the bank distributed over $2 million for Diane's and Louise's attorneys' fees in opposing the claims of the other children, that amount is not insignificant, the payments affected substantial rights, and the payment may affect interests in the disbursed and depleted trust assets. Deprivation of immediate appellate review could work injury on equitable trust interests. If Ralph lacked capacity to execute the trust amendments, the amendments are void, Diane and Louise take nothing from the trust, and the bank breached the duty to preserve trust assets. The rightful beneficiaries are in dispute and substantial rights are affected by large trust distributions. The order also fails to define the liability of the bank, creating the possibility of multiple trials on claims involving overlapping issues and inconsistent verdicts.

(b) By North Carolina statute, the rules of construction that apply to wills also apply to trusts. In a caveat to a will, the clerk must enter an order freezing distributions to beneficiaries while the suit is pending. The statutes require that wills and trust should be interpreted consistently. The trust contest is comparable to a caveat. The statutes require freezing the assets when there is a caveat.

(c) The issue of a trustee's duty of and liability for distribution to disputed beneficiaries during pending litigation is an issue of first impression in North Carolina. The trustee does not have a duty to defend the amendments because the children are not challenging the validity of the trust itself. Where the dispute relates to the benefits of the trust, and not the trust itself, there is no basis for the trustee to have taken other than a neutral position in the contest. Where the dispute determines the rightful taker, such that the trust itself is not negatively affected, the trustee does not have a duty to take either position. Here, the trust does not need defending because there is no contest to the validity of the trust. The dispute is between rightful beneficiaries and the trust is not in peril. The bank has breached the duty of neutrality by deciding who the rightful beneficiaries are before litigation has resolved that issue. A trustee has a duty to remain neutral regarding competing claims between putative beneficiaries. Where the trustee is merely a stakeholder, he has neither a duty nor a right to participate. A trustee must act impartially towards all purported beneficiaries, and here the trust does not need defending. The trustee is not required to pay attorneys' fees unless the trust assets are in peril.

(d) The children's rights are affected by large sums distributed to competing beneficiaries that could belong to those children, and they would have no way to recover the wrongful payments. The trial court order created the risk of multiple trials on overlapping issues and inconsistent verdicts. The trust beneficiaries are in dispute, there is no final determination of the proper beneficiaries, and the trial court should have frozen trust distributions until a resolution of the competing claims. The trial court erred by not freezing the assets, and by ordering distributions to some putative beneficiaries but not others during pending litigation.

14. Settlement & Dispute Resolution

a. ***In re Estate of Atkinson,* 2020 Pa. Super LEXIS 288 (2020).** Claims by trust beneficiary and successor trustee against agent for prior trustee are subject to mandatory arbitration under agent agreements.

(1) Brady was the beneficiary of a trust created by his father, with an individual as trustee. The trustee opened brokerage and checking accounts for the trust and executed the account paperwork as trustee. The account agreement stated in bold all cap lettering above the signature line that the agreement contained a mandatory arbitration provision and incorporated by reference two additional account agreements that also contained mandatory arbitration agreements. The arbitration provisions applied to all transactions under the agreements. The agreements also provided that they would inure to the benefit of the bank's successors.

(2) The bank was acquired by another bank. The trustee filed to settle his accountings for the trust. Brady objected and alleged that the trustee breached his duties by charging excessive fees and allowing the bank to charge excessive fees, and by failing to supervise the bank. Brady petitioned to join the bank as an additional party and assert claims against the bank for mismanagement of the account and charging excessive fees. The bank objected to the claims on the grounds that: (1) the bank was not subject to the court's jurisdiction; (2) the bank had not accepted a delegation of duties from the trustee; and (3) the claims were subject to mandatory arbitration. The trustee resigned and a successor trustee was appointed. The successor trustee joined in Brady's claims against the bank. The trial court overruled the bank's objections and held that the bank's objection to standing was moot because the successor trustee joined in Brady's claims. The court stated it would reconsider the arbitration clauses pending a determination at trial about delegation. The bank appealed.

(3) On appeal, the superior court reversed the trial court and enforced the arbitration agreements on the following grounds:

(a) The trial court order is an appealable interlocutory order as an order that overruled objections that sought to compel arbitration. The order did not defer ruling. It denied arbitration and required the bank to litigate until the time of trial in a non-arbitration forum and is appealable of right.

(b) State and federal law have a strong public policy in favor of arbitration.

(c) The trust entered into a valid agreement to arbitrate disputes. The claims against the bank are for mismanagement of the trust account and for fees charged to the trust account, plainly concern the account agreements, and are within the scope of the arbitration agreements. The signed account agreement specifically identified and expressly incorporated by reference the other agreements containing arbitration provisions. The account agreement also advised the trustee in bold, right above his signature, that he was agreeing to arbitration of disputes.

(d) The fact that Brady did not sign the agreements is irrelevant. The owner of the account was the trust, and not Brady, and the trustee had the power to enter into the agreements. Brady's rights are subject to the contract terms to which the trustee agreed, including the arbitration terms.

(e) The statutes that give the court personal jurisdiction over persons who accept a delegation of a Pennsylvania trustee's fiduciary duties do not undermine the arbitration provisions. Those statutes do not state that the jurisdiction of the trial court is exclusive or that claims against agents cannot be resolved by arbitration or any other form of alternative dispute resolution. Jurisdictional language is not inconsistent with arbitration and is effective to define where an action to enforce arbitration may be brought.

(f) The fiduciaries code recognizes that claims involving trusts may be subject to arbitration and expressly includes arbitration among the powers that a trustee has.

(g) A construction of the fiduciaries code as requiring that claims against a trustee's agent be resolved by a court rather than by arbitration would be preempted by federal law and the Federal Arbitration Act. That Act requires state courts to compel arbitration of claims that are subject to a valid arbitration agreement. State laws that prohibit arbitration of particular types of claims conflict with and are preempted by the Act and are invalid under the Supremacy Clause of the U.S. Constitution. Even if the fiduciaries code were interpreted to require court resolution of claims against an agent that has accepted a delegation from a trustee, the court would be compelled to reject that interpretation.

15. Fees

a. ***Jo Ann Howard & Associates v. Cassity,* 2017 U.S. App. LEXUS 15621 (8th Cir. 2017); 2018 U.S. Dist. LEXIS 197542 (2018); 2020 U.S. Dist. LEXIS 29932 (2020).** 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. Following a bench trial, the court found in favor of the plaintiffs and also ordered the trustee to pay attorneys' fees.

(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 several 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, sent $5 in, and kept 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 and 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 from 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.

(8) The district court held a bench trial, found the bank liable for breach of fiduciary duty, and entered judgment against the bank in the amount of $99.5 million. Plaintiffs then moved for an award of costs of $3.1 million and attorneys' fees of $13.2 million. The bank opposed the amounts, and also argued that the court lacked discretion to award attorneys' fees in equity.

(a) The district court awarded plaintiffs costs in the amount of $139,000 (and not $3.1 million) on the following grounds: (i) plaintiffs sought post-remand expert witness fees and contract employee fees exclusively under 28 U.S.C. Section 1920; (ii) this section, and not the UTC, governs the award of costs and fees in this case because federal procedural law governs the taxation of costs, and plaintiffs unambiguously moved for these fees and costs under the federal statute; (iii) the plaintiffs did not move for these costs under the UTC; (iv) the UTC section on fees is discretionary and not tantamount to an express statutory mandate sufficient to override the limits of the federal statute; and (v) these types of fees are not allowed under the federal statute.

(b) The district court awarded the plaintiffs attorneys' fees in the amount of $7 million (and not $13.2 million) on the following grounds: (i) the UTC does not apply because it took effect after the bank's tenure as trustee and the UTC is expressly not retroactive; (ii) Missouri recognizes an intentional misconduct exception to the American Rule on fees in non-declaratory judgment actions when the party against whom the fees were awarded engaged in intentional conduct that was spiteful, fraudulent, or groundless; (iii) the court's findings of facts and conclusions of law ruling the bank's actions willful, malicious, and reckless support a finding of special circumstances allowing an award of attorneys' fees to the plaintiffs; and (iv) limiting the fee award to only post remand attorneys' fees ensures that plaintiffs will not benefit from pursuing claims under a tort theory prior to the remand by the Eighth Circuit.

16. Directed Trusts, Protectors & Special Fiduciaries

a. ***Ron v. Ron,* 202 U.S. Dist. LEXIS 52507 (S.D. Texas 2020).** Trust protector does not owe fiduciary duties to settlor.

(1) Suzanne and Avi married in 1994. In 2012, Suzanne created an irrevocable trust with their children as lifetime beneficiaries (Avi also created a trust). Suzanne appointed Avi as trustee and Gary as trust protector. The trust terms provided that the trust protector acted as a fiduciary and had the power to direct the trustee in certain trust matters and assist in achieving Suzanne's objectives, and specifically gave the protector the power to add as a trust beneficiary any descendant of Avi's parents, their spouses (other than Suzanne), or any charity.

(2) Suzanne and Avi divorced in 2017. Suzanne alleged that, before the divorce was finalized, the protector assisted Avi in transferring large amount of community property into the trust. In 2017, the protector added Avi as a trust beneficiary. Suzanne alleged that Avi fraudulently disposed of community property pre-divorce by transferring into the trust, and then post-divorce (but during related arbitration) by transferring $4 million of those assets through the trust either to himself or to purchase real estate in Israel.

(3) Suzanne sued the trust protector for civil conspiracy based on conversion, civil conspiracy to violate the Texas Uniform Fraudulent Transfer Act, and breach of fiduciary duty. The protector moved to dismiss all of the claims which the federal district court granted on the following grounds:

(a) Liability for civil conspiracy depends on participation in an underlying tort. Under its common law, Texas bars tort claims against a third party where a spouse has wrongfully transferred community assets. There is no independent tort for wrongful disposition by a spouse of community assets. The sole method for adjudicating such a claim is in the division of community property upon divorce.

(b) The precursor to TUFTA did not allow recovery from a party who was not a direct or indirect transferee of a fraudulent transfer. TUFTA does not create personal liability on the part of a co-conspirator for fraudulent conveyances beyond the property that the co-conspirator received or has an interest in. Suanne did not allege that the protector was a transferee of any assets. The trust therefore is the only proper defendant under TUFTA.

(c) There is little authority on trust protectors. Under Texas law, the protector only has the power granted under the trust, and the protector may or may not be a fiduciary. Under this trust, the protector is expressly a fiduciary. However, the mere existence of a fiduciary capacity does not create duties to or a fiduciary relationship with the settlor. The trust terms do not create that relationship, and the fact that the protector is directed to carry out the settlor's objectives does not create a duty to the settlor. Literally every provision of a trust is expressly intended to carry out the settlor's objectives. This does not mean that every individual implicated by a trust provision has entered a fiduciary relationship with the settlor. Here the settlor is not a beneficiary or an interested party with standing to sue to compel the protector to act. A settlor that is not a beneficiary and who does not manage any aspect of the trust does not have standing as an interested person to bring trust proceedings. The Texas trust code does not create a fiduciary relationship between the settlor and the protector, and rather suggests that the fiduciary relationship is either with the trust or the trustee. The settlor also failed to allege some other special relationship with the protector that would give rise to fiduciary duties.

b. ***Schwartz v. Wellin,*** **2014 U.S. Dist. LEXIS 143644 (Charleston, South Carolina Division, October 9, 2014);** ***Schwartz v. Wellin,*** **2014 U.S. Dist. LEXIS 1528 (January 7, 2014); 2014 U.S. Dist. LEXIS 172610 (December 15, 2014); No. 2:13-cv-3595-DCN (February 11, 2015); 2016 U.S. Dist. LEXIS 5139 (2016); 2016 U.S. Dist. LEXIS 135604 (2016); 2017 U.S. Dist. LEXIS 48612, 48613, 48616 (2017); 828 S.E. 2d 767 (S.C. Court of Appeals 2019); 2019 U.S. Dist. LEXIS 182222 (2019); see additional federal court decisions in 2018-2019; 2020 U.S. Dist. LEXIS 2900 (Dist. S.C. 2020).** South Dakota trust code provision giving court power to enter preliminary orders in trust cases does not eliminate general requirements for issuance of preliminary injunction. Trustee appointed by trust protector substituted as plaintiff because beneficiaries' removal of trust protector without appointing a successor protector for three months violated the trust terms and did not bar protector from appointing trustee. Trust protector validly amended trust terms that prevented beneficiaries from removing him from office. Fiduciaries were not entitled to a preliminary injunction awarding their fees, where they could not show harm and the settlor contracted to advance the costs. Grandchild who provided affidavit in support of beneficiaries is entitled to protection of certain of her communications with counsel. State court erred by ordering trustees to distribute $50 million to conservatorship estate. Federal court resolved multiple contested discovery disputes in ongoing litigation over propriety of actions of trustees in distributing assets of irrevocable trust. Claims to invalidate 2009 transactions barred by statute of limitations.

(1) The settlor, Keith Wellin, had three children with his first wife, and remarried three times. He married his fourth wife, Wendy, in 2002.

(2) In 2003, Keith gifted $10 million to each of his children and his wife, Wendy. In 2009, Keith created an intentionally defective grantor trust, with his children as trustees and beneficiaries.

(3) In 2009, Keith sold a 98.9% limited partnership interest in a family limited partnership (with an LLC as 1.1% general partner) to the trust in exchange for a $50 million promissory note. The partnership was funded with 896 Class A Berkshire Hathaway shares.

(4) The children suspected that Wendy was manipulating Keith's finances to her advantage. In 2013, Keith sued in federal court to set aside the 2003 gifts to his children and the 2009 sale to the trust. The children then sued to appoint a conservator over Keith's assets. In 2013, a temporary conservator was appointed.

(5) In 2013, the LLC manager (the settlor's daughter) directed the liquidation of the partnership. The settlor's three adult children, as co-trustees, directed that the trust retain enough assets to satisfy the promissory note, and then distribute the balance of the assets outright to themselves as beneficiaries. Four days later, the corporate co-trustee resigned.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   (a) The motion, which relies on the court's equitable powers, is best interpreted as motion for preliminary injunction, and not as simple fee motion under trust statutes. Since the motion seeks mandatory, rather than temporary relief, there is heightened scrutiny whether the standards for imposing injunctive relief are met.

   (b) The attacking fiduciaries cannot show the irreparable harm required for imposition of injunctive relief because: (i) if fees are awarded, they would reduce the funds passing or retained by the beneficiaries and the beneficiaries would not have a superior claim to the assets; (ii) if the attacking fiduciaries have no legal right to their fees at the end of the litigation, they are not harmed by an inability to receive them now; (iii) there is no risk the attacking fiduciaries will not be paid, because of the letter agreements with the settlor (and

now his wife as administrator) that provide for payment of the charges, with the settlor's estate only being reimbursed to the extent of recovery from the trust or the children; and (iv) granting the motion would only provide a windfall to the settlor's estate at the expense of the beneficiaries.

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

(a) Applying the test in Section 139 of the Restatement (Second) of Conflict of Laws, South Carolina privilege law should apply because: South Carolina has the most significant relationship with the communications as the situs of the dispute that generated the representation and the location of the attorneys; phone and email communications between New York and South Carolina do not favor either state; and the application of South Carolina law could have been foreseen, and could have been avoided if she retained New York counsel. This approach also makes it possible to consistently determine the application of the common interest and joint defenses doctrine with respect to the various grandchildren. However, there are not significant differences between New York and South Carolina law on the privilege issues, and the law of the two states is largely compatible.

(b) Questions seeking the source of Plum's knowledge and "understanding" about the case include legal interpretation in addition to facts, would reveal privileged communications, and are protected. The act of filing an affidavit in the case stating her general understanding does not waive the privilege. Privilege protections also apply to questions about who asked her to sign the affidavit, who she consulted before signing, and why she sought counsel. However, communications with the Wellin children about the possibility of her becoming a trustee and about the background litigation facts are not privileged.

(c) Communications between Plum and her mother and her mother's counsel are protected under the common interest doctrine because: (i) while it is an open question under South Carolina law, it appears that South Carolina courts would recognize the doctrine; (ii) to the extent her mother and she are both beneficiaries (regardless of being different classes of beneficiaries, and regardless of the fact the mother was also a trustee), that is enough to apply the doctrine; and (iii) however, the protections only apply to the extent at least one lawyer was involved in the communications. Similarly, the protections of the joint-client doctrine applies to protect communications among the grandchildren only to the extent the communication involved counsel.

(21) *2017 federal court decisions*. In additional discovery fights that carried on into 2017, the South Carolina federal court largely adopted the master's report and held that: (a) the notice to take the deposition of Keith's estate is quashed; (b) parts of the Wellin children's engagement letter with counsel (subject to some approved redactions) must be produced; (c) parts of one grandchild's engagement letter (subject to approved redactions) must be produced; and (d) unredacted phone records of the grandchildren must be produced to Wendy, because they are relevant to Wendy's

claim that the children and grandchildren did not maintain regular contact with Keith during his later years.

(22) *2019 South Carolina Court of Appeals decision*. In 2013, a temporary conservator was appointed for Keith's assets. That year, the conservator delivered to the trustees of the irrevocable trust a document purporting to exercise Keith's right to substitute 58% of the limited partnership interest in exchange for forgiveness of the promissory note. The trustees rejected the swap. Following the liquidation of the trust assets, the trustees sent the conservator $50 million to pay the note, which the conservator rejected – taking the position that the note was extinguished during the purported swap, and that the conservatorship estate should receive $92 million (the value of a 58% interest in the partnership). The conservator petitioned for guidance on whether he could pursue the $92 million on Keith's behalf. The probate court ordered the trust to pay $50 million to a bank as secondary conservator. The children appealed. On appeal, the South Carolina court of appeals reversed the probate court on the grounds that: (a) the note was not part of Keith's estate to be managed or protected if the conservator is correct that the note was extinguished, and therefore the court could not order payment of the debt to the conservator; (b) even if the note had been part of the estate, the probate court lacked authority to order the payment because of pleading deficiencies with the conservator's petition, where the conservator sought affirmative relief beyond mere instructions on the discharge of his duties; and (c) the court did not have jurisdiction over the trust because the trust and its trustees were not parties to the conservatorship action, and the children were only parties in their individual capacities and objected to jurisdiction over the trust.

(23) *2018-2019 federal court decisions*.

(a) In additional discovery fights throughout 2018 and 2019, the South Carolina federal court adopted the master's various reports and ruled on the following disputed discovery issues: (a) communications between the Wellin grandchildren, their family members, and counsel; (b) a draft letter written by Peter Wellin that he shared with his attorneys but never sent to Keith; (c) the scope of the requirement to maintain a privilege log; (d) various motions for protective orders and requests for production; (e) attempts to claw back previously produced communications between Wendy and her counsel; (f) prohibitions on the estate deposing Wellin & Co.; (g) rejected attempts by Wendy to obtain certain factual summaries prepared by the children; (h) the discoverability of the files of an expert in trust and estate law that served first as a consulting expert and then as a testifying expert; and (i) the testimony of the medical experts that examined Keith in the conservatorship action.

(b) Wendy moved, on the grounds of lack of subject matter jurisdiction and the probate exception to federal court jurisdiction, to dismiss the children's federal court suit against her in which they alleged she took advantage of Keith by isolating him and exerting undue influence over his estate planning decisions during his diminished capacity. In 2015, the federal court denied the motion to dismiss. In 2018, the children amended their counterclaims filed in Wendy's probate court action and added the same declaratory judgment, tort, and contract claims against Wendy that they had filed in the federal court action. Wendy then moved for the federal court to reconsider its decision on jurisdiction, and the federal court denied the motion to reconsider under the probate exception or the *Colorado River* doctrine.

(24) *2020 federal court decision.* The federal district court granted the Wellin children partial summary judgment dismissing Wendy's claims that the Wellin children improperly orchestrated the 2009 transaction as barred by the statute of limitations, on the following grounds:

(a) South Carolina law applies because the statute of limitations is procedural under South Carolina law. The action is governed by a three-year statute of limitations.

(b) Equitable estoppel does not apply because under South Carolina law Keith's attorney's knowledge of the full impact of the 2009 transaction is imputed to Keith.

(c) Equitable tolling does not apply because there is no allegation that anyone engaged in behavior to prevent the estate from filing the claims, the estate had knowledge by imputation through counsel, and equitable tolling should only be applied sparingly.

(d) The statute of limitations began to run when the 2009 transaction was executed. The estate brought the claims after the statute of limitations had run.

17. Creditor Claims & Spendthrift Trusts

a. ***De Prins v. Michaels,*** **2020 Mass. LEXIS 650 (Massachusetts Supreme Court 2020).** Assets of self-settled spendthrift trust reachable by settlor's creditors after settlor's death.

(1) Donald and his wife moved from Massachusetts to Arizona. In 2005, they were involved in litigation with their neighbors, the De Prins, over water rights. In 2007, the De Prins won the lawsuit. In 2008, Donald and his wife moved to California, and his wife committed suicide. Immediately after, Donald returned to Arizona and created an irrevocable spendthrift trust for his own exclusive lifetime benefit (with assets passing to his daughter after his death), with his Massachusetts attorney as trustee. Immediately after signing the trust, Donald conveyed all his assets to the trust. Four months later, Donald killed the De Prinses, and then killed himself after being stopped by police in New Mexico.

(2) The De Prinses' son sued Donald's estate for wrongful death and settled the claim for $750,000. The parties agreed that the collection would be solely against the trust through a reach and apply action filed by the son, and that the action would be transferred to the Massachusetts federal district court. The son sought payment of the $750,000 which the district court approved, and the trustee appealed. On appeal, the First Circuit Court of Appeals certified the following question to the Massachusetts Supreme Judicial Court: "[D]oes a self-settled spendthrift irrevocable trust that is governed by Massachusetts law and allowed unlimited distributions to the settlor during his lifetime protect assets in the irrevocable trust from a reach and apply action by the settlor's creditors after the settlor's death?"

(3) The Massachusetts Supreme Judicial Court held that the trust assets were not protected from creditors on the following grounds:

(a) The well-established legal maxim that one must be just before generous compels that the trust assets not be protected.

(b) Section 505 of the Massachusetts Uniform Trust Code (MUTC) provides that, where the settlor has created an irrevocable trust (including a spendthrift trust), a creditor may reach the maximum amount that can be distributed to or for the settlor's benefit. Where a settlor may reach the trust assets, a settlor's creditors may also reach the assets. It is unclear, however, whether the statute addresses a creditor's ability to reach the assets after the settlor's death. Section 106 of the MUTC provides that the MUTC is supplemented by the common law and principles of equity and does not replace the common law of trusts except where modified. The common law applies here and the court may apply principles of equity. Two sections of the MUTC specify that a trust may not be created that is contrary to public policy.

(c) The trust here is an irrevocable, self-settled, spendthrift trust. The MUTC applies to express trusts of a donative nature. To the extent that a trust is self-settled such that the settlor retains the beneficial interest in the trust's assets and does not give such interest to another, it appears that the state committee that considered the adoption of the MUTC did not intend for the MUTC to apply. Applying principles of statutory construction, and because the MUTC expressly does not replace the common law and fails to address the situation here, the common law applies.

(d) Massachusetts has both statutory and nonstatutory reach and apply actions. A nonstatutory reach action is an equitable action, is broader than the statutory action, and such actions are often determined by equitable, rather than legal, principles.

(e) The established policy of Massachusetts has been that a settlor cannot place property in trust for his own benefit and keep it beyond the reach of creditors. Massachusetts has disfavored the self-settled trust as a tool to protect one's assets from creditors, as it is seen as an attempt by a settlor to have his cake and eat it too. It would violate established authority and public policy for an individual to have an estate to live on, but not an estate from which his debts could be paid. The prohibition against using a self-settled trust to protect one's assets against creditors applies both to current and future creditors. It also applies where the settlor has included a spendthrift provision in the trust.

(f) The facts lean compellingly in favor of the creditor, where the deaths were the result of Donald's intentional act of murder. It would be incongruent for a self-settled trust not to protect a settlor's assets from creditors while the settlor is alive but to have it protect the settlor's beneficiaries from the settlor's creditors after the settlor's death when, absent the trust, they would not be so protected. A self-settled trust does not become protected from creditors on the settlor's death.

(g) Although it was not argued that the conveyance to the trust was fraudulent, the timing of events could give rise to the inference that it was part of a single plan.

(h) It does not matter that the trustee did not distribute to Donald during his life and the trust terms do not provide for distributions to Donald after his death. The important point is what is within the trustee's power to do, not what he actually does. The trustee could have distributed all the trust assets to Donald during his life, and therefore his creditors should be able to reach all of the trust assets.

(i) To prevent the son of two murder victims from financially recovering for their wrongful deaths while protecting the murder's assets for his beneficiary would contradict Massachusetts public policy and condone the actions of the settlor who thought he could use a trust to shield his assets from the consequences of his violence. The equities do not allow Donald to murder and then leave the victim's family with no recovery despite the murderer possessing substantial assets during his lifetime.

18. Torts, Slayers & Claims Against Third Parties

a. ***Youngblut v. Youngblut,* 2020 Iowa Sup. LEXIS 71 (2020).** Divided Iowa Supreme Court holds that claim for tortious interference with inheritance must be joined with a timely will contest.

(1) Earl and Agnes were successful farmers and accumulated 385 acres of farmland. They had twelve children, two sons Harold and Leonard who worked on the farm, three predeceased children, and seven daughters. They formed a corporation, transferred most of the farm assets into it, and transferred shares to their children as part of their estate planning. They kept the "south farm" they lived on in their individual names. Harold eventually took over management of the farming operations. Leonard left working on the farm over a dispute with Harold. Harold, as president, pledged company assets and loaned company money to support some of his individual personal business ventures.

(2) In 2011, Earl (then age 90) and Agnes signed wills that left their company shares to Harold, with the residue divided among the other children. In 2013, Leonard emailed his siblings under the inapt title "Family Togetherness Plan", criticized operations, accused Earl of sexism, attacked Harold over his religion, proposed that he receive the south farm, and threatened litigation. Later that year, the shares owned by the daughters were redeemed by the company. As a result, Earl owned 30%, Agnes owned 30%, Harold owned 15%, Leonard owned 15%, and other relatives owned the rest. In 2014, Earl and Agnes moved into an assisted living home with Harold's help. Leonard showed up on moving day and threatened to have Harold arrested. He then emailed the siblings and threatened Harold. Earl suffered a stroke and Agnes had terminal cancer. Harold had his parents sign a lease for him to rent the south farm, and Earl and Agnes deeded their house to Harold.

(3) Two days later, Earl and Agnes signed new wills that gave the company shares to Harold, added a gift of the south farm to Leonard if he transferred his company shares to Harold for $1, and gave the residue to the daughters. The wills also included a no-contest clause. Harold found out his parents were changing their wills, was aware of the terms, and believed Leonard and his sisters improperly influenced their parents. Earl died shortly thereafter, and Agnes died the next day. The wills were probated. Harold consulted an attorney about contesting the will but decided not to as a result of the no-contest clause. The time period for contesting the will expired. Leonard gave Harold his shares for $1 and received the south farm. At that time the company was worth $6 million. Eight days after getting the shares, Harold sued Leonard and his sisters for tortious interference with inheritance and alleged undue influence. The sisters settled with Harold for a total of $80,000. The case against Leonard proceeded to trial after the court denied his motion for summary judgment. The jury returned a verdict in Harold's favor in the amount of $400,000 plus $200,000 in punitive damages. Leonard appealed.

(4) On appeal, a divided Iowa Supreme Court reversed and remanded on the following grounds:

(a) Iowa common law recognizes a law action for tortious interference with a bequest. Since that time, there have been developments in that area of the law. The Restatement (Third) of Torts limits the cause of action where the same remedy is available in the probate court, and some scholars have argued for repudiation of the tort. Another commentator would require exhaustion of probate remedies before proceeding with the tort. Enthusiasm for the tort appears to be waning in other jurisdictions, with South Dakota, Kentucky, Texas, and Nebraska recently declining to recognize the tort.

(b) There is a role for the tort of intentional interference with inheritance in Iowa. It has value in circumstances when a probate proceeding cannot provide an adequate remedy. But it should not be a substitute for a will contest. Probate is meant to provide a prompt, efficient, and centralized way of resolving issues related to settlement of estates, and that is one reason for the tight deadlines in the probate code.

(c) Where the tort claim is based on dissatisfaction with the will, there is no reason it cannot be joined with and brought at the same time as a will contest. Undue influence is a well-developed probate concept. Allowing disappointed heirs to pursue a separate tort claim in lieu of a will contest would undermine that developed law. The same issues are present in both cases. Also, the foundations of Iowa's earlier cases recognizing the tort have eroded somewhat. To prevail on either claim, the plaintiff must prove an outsider overcame the testator's independent will. The two claims involve a substantial overlap of proofs and witnesses because they share a central issue. It is not clear how a separate tort action fits into the legislative scheme which provides for a will contest before a jury, addresses the parties, and provides res judicata effect on all who get notice. Prior cases did not address this issue. The statutes do not contemplate separate actions that overturn the distribution carried out by a will.

(d) For these reasons, a party alleging a will was procured in whole or in part by tortious interference must join the claim together with a timely will contest. Prior decisions that are contrary to this holding are overruled. This is limited to claims that a party committed the tort by inducing the decedent to execute the will through wrongful means. This decision does not preclude a plaintiff from pursuing additional remedies through the tort claim, it simply holds that the tort claim must be joined with a timely will contest.

(e) Harold could have brought a timely will contest. Any challenge to a will may require the challenger to act before the contingencies under the estate plan are resolved. His claim was a de facto substitute for a will contest based on undue influence (and its cousin, duress). Precedent can be distinguished and does not require a different result for Harold. Harold deliberately bypassed the will contest, accepted the will for probate, and accepted benefits under the will. Also, prior cases did not involve interpreting a statute or rule, the areas where the court has been most reluctant to disturb precedent. Those cases were based entirely on common law that can evolve as the courts learn from experience.

(5) Two dissenting justices would affirm based on Iowa precedent and *stare decisis*.

b. ***Gomez v. Smith,* 2020 Cal. App. LEXIS 888 (2020).** Daughter who blocked lawyer from meeting with client to sign new trust agreement committed tortious interference with expected inheritance.

(1) Frank broke off his engagement to Louise because he was leaving to serve in the Korean War. Frank then married Beverly and had four children, Tammy, Richard, and two other daughters, and they created a revocable trust. Beverly died in 2012. Sixty years after their first engagement, Frank and Louise married in 2014. Tammy opposed the marriage.

(2) In 2015, Frank had a stroke and had heart surgery. Before the surgery, he went to see an attorney to update his estate plan to make sure Louise was taken care of. He told Tammy he wanted to amend his trust to give Louise a life estate and Tammy said she did not agree with his decision. His financial advisor also attended the meeting and testified that Frank expressed the intent to leave Louise a life estate, with the remainder passing to his children at Louise's death. Tammy quizzed the advisor about why Frank was seeing an attorney, but he told her it was none of her business. After surgery he was transferred to a nursing home. The attorney met with Frank in the nursing home to create a new trust, with Louise present. Frank was lucid and told the attorney he wanted a trust for Louise's lifetime with the remainder to his children at her death.

(3) Four days later, Frank went home under hospice care. Frank expressed the intent that Louise be taken care of and have the right to stay in the house as long as she wanted. The next day, Louise administered morphine to Frank. They discussed the attorney's arrival that day. A little later, Tammy and Richard arrived at the house and Louise told them the attorney was arriving and they would need to stay out while they met so they could meet privately. Tammy told Louise not to let her father sign anything, but Louise wouldn't promise that Frank would not sign his new documents. When the lawyer and his paralegal arrived at the house so that Frank and Louise could sign their new estate planning documents, Tammy confronted them in the street, shouted at them, and told them they could not go into the house because it was her mom's house and not Louise's house. Richard and Tammy physically blocked them from entering the house. Tammy told the lawyer it was not a good time to visit Frank and the attorney said he would determine that. Tammy called the sheriff and the attorney and paralegal left without Frank reviewing his new document.

(4) Frank died the next day. Louise sued Tammy and Richard for intentional interference with expected inheritance. The trial court found in Louise's favor and Tammy appealed. On appeal, the court of appeals affirmed on the following grounds:

(a) Louise expected an inheritance, was present for the meeting with the attorney, and understood Frank's intention to take care of her during her lifetime.

(b) Tammy knew of Louise's expectation of inheritance when she blocked the attorney from seeing Frank. Frank knew Tammy was prying into his business and expressed anger about her interfering. Tammy knew Frank intended to sign a new trust that gave Louise an inheritance, and the attorney testified that Tammy shouted "Frank cannot change the trust" at him.

(c) Tammy's action of intentionally separating Frank and his attorney to prevent him from confirming an estate plan he had been trying to put into place for months amounted to undue influence, wrongful conduct, and a breach of her fiduciary duties to Frank as his agent under his power of attorney. Tammy deprived Frank of finalizing his own wishes to benefit her own interests. The power of attorney did not authorize Tammy to act contrary to her duties and substitute her judgment for her father's where her judgment was in direct contravention to Frank's wishes and born out of her own self-interest.

(d) Tammy failed to prove that Frank lacked mental capacity.

(e) The trial court imposition of a constructive trust on Frank's assets to be held under the terms of the trust drafted for Frank by counsel was not ambiguous. The order provided that Louise

would have a life estate according to the terms of the draft trust instrument. Should a dispute arise in the future about Louise's use of the trust assets, the court may address it at that time.

c. ***Rambo v. Nogan,* 2020 U.S. Dist. LEXIS 36711 (New Jersey 2020).** Allegations that slayer statute violates the constitution do not support granting petition for a writ of habeas corpus from criminal murder conviction.

(1) Roy Rambo was indicted for murdering his wife. After indictment, his marital assets were frozen by the state court under the state slayer statute and denied Rambo access to the assets for the purpose of hiring counsel in his criminal proceedings. Rambo chose to represent himself at trial and was convicted. His conviction was affirmed by the appellate division, and the state and U.S. supreme courts denied certiorari. Rambo appealed the asset freeze under the slayer statute, his appeals were unsuccessful, and the state and U.S. supreme courts denied certiorari. Rambo's application for post-conviction relief were denied, and the state and U.S. supreme courts denied certiorari.

(2) Rambo petitioned for a writ of habeas corpus. The federal district court granted the petition, but the Third Circuit Court of Appeals reversed and remanded. On remand, the New Jersey federal district court denied the petition, in part, on the following grounds:

(a) The application of the slayer statute to freeze assets prior to trial did not violate Rambo's rights under the Fifth, Sixth or Fourteenth Amendments, he was not unconstitutionally divested of property rights or denied a fair trial, and the slayer statute and its application are not unconstitutional. All of the constitutional claims related to the assets freeze were raised and exhausted before the state courts and are entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996. Rambo can only show the state court's ruling was unreasonable by showing that there was no reasonable basis for the state court decision. Rambo does not cite, nor has the court found, any precedent that using the slayer statute to freeze assets prior to trial violates constitutional rights. Whether raised in the context of equal protection, right to a fair trial, fundamental fairness, denial of property rights, or any other constitutional right, without Supreme Court case law directly on point the court is unable to grant relief on those claims.

(b) Rambo's state law claims are not cognizable to grant habeas relief because on habeas review the court determines whether a person is in custody in violation of the U.S. Constitution or treaties of the United States.

(c) Without a presentation of new law or facts, the court cannot conclude it was unreasonable for the state court to allegedly fail to make a distinction between the Sixth Amendment right to counsel of choice and the Sixth Amendment right to assigned counsel for an impoverished defendant. Rambo cannot show there was no reasonable basis for the rejection of his claim that his waiver of counsel was not knowing, intelligent, and voluntary. Criminal defendants have a Sixth Amendment right to self-representation. To survive constitutional muster, the waiver must be knowing and intelligent. The freeze on his assets did not force him to proceed *pro se*, even though he moved to represent himself because the court would not release the freeze on funds to allow him to use the funds to hire counsel. Rambo's argument is novel but fails to overcome AEDPA deference. Rambo's choice to self-represent out of "necessity" is a far cry from establishing that his waiver of counsel was involuntary. The state courts were prepared to provide him with a public defender, he decided to forego that right, and there is no Supreme Court case law that establishes that a defendant's choice to proceed *pro se* as a result of frozen assets constitutes a violation of the Sixth Amendment. His dissatisfaction with assigned counsel does not make his waiver involuntary since almost all requests for self-representation will arise from dissatisfaction with trial counsel.

(d) Forfeiture of assets under the slayer statute is not an excessive fine that violates the Eight Amendment or the Firth Amendment Double Jeopardy Clause. These claims fail under both *de novo* review and AEDPA deference. Claims related to excessive fines are not generally

cognizable under habeas review. To survive constitutional muster under the Eighth Amendment, a fine must bear some relationship to the gravity of the offense it is designed to punish, and the judgment of an appropriate punishment belongs in the first instance to the legislature. Even assuming the slayer statute is a "fine", the legislature determined asset forfeiture was an appropriate remedy, and the court cannot conclude that the remedy is "grossly disproportionate to the gravity of the offense" when the statute applies to a "criminal and intentional killing". While the asset forfeiture may have affected his criminal trial, the statute on its face is not unconstitutional under the Excessive Fines Clause of the Eight Amendment.

(e) Rambo is not entitled to relief under the Double Jeopardy Clause of the Fifth Amendment. That clause does not apply to civil forfeiture because it does not constitute a "punishment" in that context. To determine whether a legislative measure constitutes punishment, the court looks to the legislature's stated intent. Here the slayer statute was placed into the laws governing the administration of estates and not into the criminal code. While the label is not always dispositive, it is rejected only when the heavy burden is met to prove that the statute is so punitive in purpose or effect that the state's intention to create a civil remedy is negated. That burden was not met by Rambo, the slayer statute was intended as a civil remedy, and the application of the slayer statute to freeze and forfeit assets does not violate the Double Jeopardy Clause.

(f) There is no merit to the argument that freezing the assets was against the public interest because it forced him to use public assets for his defense. He did not establish that the freeze under the slayer statute was unreasonable. Once frozen, Rambo was entitled to receive the assistance of defense counsel as his constitutional right as an indigent criminal defendant.

19. Charities

a. ***AG v. Sanford,* 2020 ME 19 (2020).** Discretionary charitable distributee of charitable trust has standing under the Uniform Trust Code to sue the trustee of charitable trust for breach.

(1) Richard created the Seal Cove Auto Museum in 1963 and a charitable trust to support his automobile collection in 1986. Both were established to maintain and display his large collection of antique cars. After his death in 2007, the trust acquired most of the cars and an endowment to support maintenance and display of the collection. The trust permitted, but did not require, the trustees to make distributions to Seal Cove. The collection was displayed at Seal Cove for many years. In 2008 and again in 2014, the trust entered into contracts that allowed the display of the collection at Seal Cove, and under the contracts the trust paid Seal Cove $200,000 annually to support operations. Under the contract, Seal Cove had the right to renew the contract for five-year periods in perpetuity if Seal Cove met certain museum standards.

(2) Seal Cove sued the trustees alleging taking of excessive compensation and self-dealing. The attorney general was added as a party and raised the same allegations and sought the same relief as Seal Cove. On motion of the trustees, the Seal Cove complaint was dismissed for lack of standing by Seal Cove. The trial court approved a consent decree between the trustees and the attorney general that limited future compensation but did not include the disgorgement of previously received compensation.

(3) Seal Cove appealed, and the Maine Supreme Judicial Court reversed the finding of lack of standing on the following grounds:

(a) Seal Cove is not a qualified trust beneficiary under the Maine Uniform Trust Code (MUTC) because it is not living and because charitable trusts do not have "beneficiaries" (charitable or otherwise) as that term is defined in the MUTC. However, the MUTC gives a charitable organization expressly designated to receive charitable trust distributions the rights of a qualified beneficiary. A charity having the rights of a qualified beneficiary has standing to assert a claim of breach of trust.

(b) Seal Cove is named as a permissible distributee of trust distributions in the trust instrument. Seal Cove is "expressly designated" to receive charitable trust distributions even though those distributions are subject to the discretion of the trustee and not mandatory. The MUTC definition of a "qualified beneficiary" includes both distributees and permissible distributees. The charitable distributee standing provision under the MUTC also makes reference to distributees and permissible distributees. The legislature's use of nearly identical language in those sections demonstrates the intent that a charitable organization may assert the rights of a qualified beneficiary only if it has a beneficial interest in a charitable trust equal to that of a qualified beneficiary of a private trust. A charitable organization does not need to show that the terms of the trust make it a mandatory distributee in order to satisfy the "expressly designated" requirement. Words in a statute should be given meaning and not treated as meaningless. Reading the word "designated" as "mandated" would eviscerate the phrase "or permissible distributee" from the statute.

(c) The comments to section 110 of the NCCUSL version of the UTC state that to have the rights of a qualified beneficiary, a charitable organization must be named in the trust terms and be designated to receive distributions and excluded are organizations that may receive distributions only in the trustee's discretion. The UTC comments do not require a different result or control here because the statutory language gives Seal Cove standing and the comments are not part of the statute and cannot create an ambiguity where none exists.

20. Trial Practice & Procedure

a. ***Barefoot v. Jennings,* 2020 Cal. LEXIS 293 (California Supreme Court 2020).** Trust beneficiary disinherited by amendment has standing to challenge the validity of the amendment in probate court.

(1) Joan and her husband signed a joint revocable trust in 1986. After her husband's death, Joan signed several trust amendments that disinherited their daughter, also named Joan, and increased the share for their other daughter, Shana. Joan died in 2013, and the disinherited daughter petitioned the probate court to declare the amendments invalid on the grounds of incompetence, undue influence by Shana, and fraud.

(2) The trial court dismissed the suit for lack of standing. The Court of Appeals affirmed. The California Supreme Court reversed on the following grounds:

(a) The California probate code (Section 17200) provides that "a trustee or beneficiary may petition the court under this chapter…to determine the existence of the trust". The Court of Appeals incorrectly interpreted this to mean that even wrongly disinherited beneficiaries are prohibited from making the petition.

(b) The probate code defines a beneficiary as a person with a present or future interest, vested or contingent. If the allegations are true, daughter Joan has a present or future interest and she is a beneficiary permitted to petition the probate court. An expansive reading of the standing afforded to trust challenges under the probate code not only makes sense as a matter of judicial economy, but it also recognizes the probate court's inherent power to decide all incidental issues necessary to carry out its powers to supervise trusts.

(c) Claims that trust provisions, or amendments, are the product of incompetence, undue influence, or fraud should be decided by the probate court, if the invalidity of those provisions or amendments would render the challenger a trust beneficiary. When a plaintiff claims to be a rightful beneficiary if challenged amendments are deemed invalid, she has standing to petition the probate court. Individuals with no trust interest cannot bring a claim against the trust. To hold otherwise would insulate those persons who improperly manipulate a trust settlor to benefit themselves against a probate petition. This holding provides an orderly and expeditious mechanism for limited challenges of this type to be litigated early in the probate proves, in probate court, and ensures that the settlor's intent is honored.

b. ***Trust of Ashton,* 2020 Pa. Super. LEXIS 453 (2020).** Trust beneficiary entitled to fixed annuity has standing to challenge trust division, but not bring other claims, challenge a trustee fee request, or seek appointment of a co-trustee.

(1) Under his will, Augustus created a trust with a bank as trustee that: paid a fixed annuity amount of $2,400 annually to Elizabeth for life; paid educational expenses for two beneficiaries; and applied the remaining net income to provide scholarships for college students at the University of Pennsylvania. The trust was originally funded in 1951 with $2.6 million. The trustee petitioned to settle its fourth accounting for 1983 to 2017, during which time the trust grew from $5.6 million to $73 million, while also distributing $29 million to the beneficiaries, and also sought: (a) retroactive commissions and an increase in future commissions; and (b) to divide the trust into a trust to fund the annuities with $5 million and a wholly charitable trust for the balance of the assets.

(2) Elizabeth objected and challenged several trust transactions and the trustee's fees, and also petitioned to appoint her daughter as co-trustee. The trustee objected to Elizabeth's standing, but the trial court recognized Elizabeth's standing to bring her claims because she was a trust beneficiary. The trustee appealed. On appeal, the Superior Court reversed in part and affirmed in part on the following grounds:

(a) The trial court erred by failing to focus on whether the trust beneficiary has alleged harm that is substantial, direct, and immediate. Rather, without authority, the court created an improper exception and conferred standing solely on the basis of status as a current vested trust beneficiary. While standing analysis may start there, it does not end there. If the challenged conduct does not cause substantial, direct, and immediate harm, there is no standing.

(b) The beneficiary lacked standing to challenge the accounting because: (i) there was no reduction to the $2,400 annuity; (ii) alleged future harm is speculative at best since the trust assets sharply increased during the accounting period; and (iii) there are sufficient assets to fund the annuity.

(c) An equitable interest in the trust does not translate into automatic standing for every action the trustee takes. The beneficiary may only challenge those actions of the trustee that adversely impact the beneficiary's rights in a substantial, direct, and immediate manner.

(d) The beneficiary does not have standing to seek appointment of a co-trustee because it cannot be shown that the failure to appoint a co-trustee will cause the beneficiary harm. The beneficiary lacks standing to challenge fees because: (i) the annuity will not be harmed by the payment of the fees; (ii) it cannot be assumed that the trial court will not otherwise ensure fees are proper; and (iii) it cannot be assumed that the college and the Attorney General will sit idly by and not petition the court if the trustee seeks to deplete the trust through its fees. The claimed harm is therefore wholly unrealistic.

(e) The beneficiary has standing to contest the division of the trust because it involves transferring her interest to a new trust and the funding will impact her right to the annuity, and her interest will be harmed if the new trust is not adequately funded. The fact that the trustee proposed to fund her trust with $5 million goes to the merits of the division, and not to her standing to challenge the division.

21. Odds & Ends

a. ***Aghaian v. Minassian,* 2020 Cal. App. LEXIS 1249 (2020).** The trustees and beneficiaries of a trust sued Shahen for $105 million in damages for actions Shahen took with respect to certain trust properties located in Iran. To try to avoid the possible judgment (the plaintiffs later were awarded $34 million in damages) reaching Shahen's homes, Shahen's son, who was an attorney and lived in one of the homes, arranged a plan with his parents whereby: (1) the son was appointed a guardian ad litem for his father due to the claimed incapacity of the father; (2) the parents divorced after being married since 1964; and (3) in the divorce settlement, the homes were titled to the mother with the father taking on the sole burden of any judgment. The plaintiffs in the underlying action sued Shahen

and his wife for fraudulent transfer of assets and the son for aiding and abetting the transfers. The trial court sustained demurrers to the claims, but the court of appeals reversed. Despite the claimed divorce, Shahen and his wife lived together continuously as husband and wife, and despite the alleged incapacity Shahen testified during the twelve-day trial in the underlying action without showing any signs of incapacity.

b. ***In re Trust of Dona v. Drury,* 202 Ariz. App. Unpub. LEXIS 1409 (2020).** The trust terms gave Dona's three adopted children the power to appoint a successor trustee when the named trustees declined to serve. The children's adoptive father, Thomas, claimed to have been validly appointed as successor trustee after Dona's death. The court held that the appointment was not valid where: (1) there was no writing evidencing the appointment; and (2) the sole support for the claimed appointment was a summer meeting convened by the Thomas at which he declared that he was the trustee, but one child said she was not asked at the meeting whether she wanted Thomas to be trustee and another didn't attend the meeting because he had other things to do.

c. ***Cigler Trust v. Hanson,* 2020 U.S. Dist. LEXIS 237350 (New Mexico 2020).** The trustee of a trust, proceeding *pro se*, had his claims against an individual dismissed on the following grounds: (1) the trustee could not proceed without counsel under the court rules, despite the fact that he claimed the trust was actually a church (the local rule required counsel unless the party was a natural person); (2) several of the twenty-six causes of action failed because they were claims of civil liability based on criminal statutes, and criminal statutes do not provide private civil causes of action; and (3) the remaining claims alleged violations of various sections of the Internal Revenue Code and sought a full refund with interest of all monies taken, but the trustee did not allege that he filed a timely refund claim with the IRS, which is a perquisite to maintaining a tax refund suit. The court granted leave to amend, but somewhat casually mentioned that the amended complaint must comply with Rule 11 or the court could impose sanctions.

d. ***Kelley v. Russell,* 2020 U.S. Dist. LEXIS 189989 (New Hampshire 2020).** Karyn tried to sue Charles as trustee of her revocable trust, *pro se* and without counsel. The suit was dismissed because the trust had other beneficiaries thereby requiring counsel to represent the trust. Karyn failed to retain counsel and instead amended the trust to make herself the sole beneficiary. The court then dismissed her claims because under state law, where the same person is trustee and sole beneficiary, the trust terminated under the doctrine of merger.

e. ***Estate of Clawson,* 2020 Pa. Super. Unpub. LEXIS 3946 (2020).** Mark was unsuccessful in petitioning the court to reform Edward's trust after Edward's death to remove the Diocese of Greenburg as beneficiary and name himself to receive all the trust assets. At that time, he was under investigation by the Westmoreland County Area Agency for the Aging for his handling of Edward's finances during his incapacity, and the basis for his claim that the trust was ambiguous or the product of scrivener's error was the presence of an asterisk in the trust before the word "shares" (which was not deleted or filled in, likely because the remainder passed to a single named person and was not divided into shares; that person predeceased Edward causing the assets to pass to charity).

f. ***McDonald v. McDonald,* 2020 IL App (2d) 191113-U (2020).** On May 30, 2017, the court appointed Shawn as plenary guardian of the person and estate of his brother, John, due to John's bipolar disorder, depressive episodes, and severe alcohol use. John did not participate in the proceedings, but later obtained counsel and objected to the appointment but did not pursue trial to reverse the order. About seven weeks later after the appointment, John participated in a wedding ceremony with Elizabeth in their home, with their friend as the officiant (after completing a five-minute online ministry certification course). No other witnesses were present for the wedding. They later participated in a Ketubah signing ceremony. After John's death, Shawn was appointed as estate administrator and then Elizbeth sought appointment as administrator and status as intestate heir as John's spouse. The trial court dismissed her claims as a matter of law. The court of appeals reversed and remanded on the grounds that: (1) there is a genuine issue of material fact as to Elizabeth's status as surviving spouse and sole heir; and (2) while the Illinois Probate Act provides that a court may direct a guardian to consent to marriage on behalf of the ward, the act does not require prior approval by the court before a ward can marry of his or her own accord, and the appointment of a

guardian is not sufficient, in and of itself, to show that a person was incompetent to consent to marriage.

g. ***Prizant v. Abbott,* 2020 U.S. Dist. LEXIS 199279 (S.D. California 2020).** The court imposed a temporary restraining order freezing all of the assets of the trustee of a life insurance trust who: (1) let the policy lapse in 2015; (2) from 2015 until 2019 (when the insured died) continued to request and receive $500,000 for premium payments that were not made; (3) provided allegedly forged documents to show the policy was still in effect; (4) after the death of the insured, justified the delay in paying the death benefit to the trust beneficiary by blaming the delays on paperwork, delays by the insurance company, falsely stating the claim was approved for payment; (5) saying the check was in the mail and then lost in the mail; and (6) promising to advance the funds personally over time in exchange for assignment of the policy, then failing to make the installment payments and providing a forged Deutsche Bank wire confirmation as proof of ability to pay.

h. ***Hatcher v. Hatcher,* 2020 IL App (3d) 180096 (2020).** Claims that a trustee breached his duties by making excessive principal distributions to his wife as trust beneficiary were dismissed where: (1) the trust terms provided that the trustee could distribute principle "for the benefit of any one or more of the beneficiaries of the trust as in his sole discretion he shall determine, whether because of sickness, accident or otherwise, and for educational purposes"; (2) the lack of the serial or Oxford comma did not mean that the word "otherwise" did not limit that word as being related to the word "accident"; and (3) it is common in American English for the final item in a list to not be preceded by a comma, and while the use of a serial comma can aid in interpretation, caution should be exercised in utilizing it as a controlling interpretive tool for the reason that its use is entirely optional and not universal.

i. ***Ostrosky v. Permann,* 2020 Cal. App. Unpub. LEXIS 5903 (2020).** Under his trust, Walter gave a specific gift to Eileen if she was employed by Walter's wire and cable distribution company at the deaths of Walter and his wife. The court held that Eileen did not meet the conditions for the gift because: (a) she retired for medical reasons before Walter's death; (2) the subsequent sale of the company was not the reason she left employment and therefore employment was not impossible, and she did not seek to return to company employment before the company was sold; and (3) her subsequent thirty hours of under-the-table work for Walter's model train store, spread out over a few years, did not create an employer-employee relationship with Walter because it was odd job work at Walter's hobby shop.

j. ***In re Collier,* 2020 Mich. App. LEXIS 1036 (2020).** Robert's statements, while testifying in a hearing to determine whether to appoint a conservator for him, did not create an oral trust that disturbed his will under which is gave $1 to his daughter and the rest of his assets to his son. His statements included: "And when I'm gone, I would like for them to have equal parts from my inheritance, if there's anything left. I may be fortunate enough to use up the last two little bits I've got".

k. ***In re Estate of Worley,* 2020 N. C. App. LEXIS 297 (2020).** The court of appeals reversed the trial court's rejection of a holographic writing as a possible will and remanded. The entire text of the handwritten document, which favored the decedent's alleged partner for the past thirty-six years of his life, read as follows: "I want Pat to have the power of attorney of all that I own. That means land, cars, money, guns, clothing and anything else! I don't want Grace Price Worley to have none. Signed March 13, 2001 9:00pm Paul Worley".

l. ***Lavacot v. Richards,* 2020 Cal. App. Unpub. LEXIS 2045 (2020).** The trust terms provided that no distributions would be made to Larry while he was in custody, not gainfully employed, or suffering from alcoholism. Larry was serving a twenty-one-years-to-life sentence for second degree murder and forgery. Larry signed a purported disclaimer of his interest in the trust (with the goal of ending the trust and passing the assets out to his two children) and a power of attorney naming his daughter as agent. The children demanded distributions and sought to remove the trustee, and the trustee sought instructions. Eventually the court validated the disclaimer and appointed a new trustee. The successor trustee, the children, and the daughter as agent for the father signed a global settlement, the claims against the prior trustee were dismissed, and the children each received $216,000 from the trust. The next year, the children moved to set aside the settlement agreement, in part, because

the father was not a party to the settlement agreement, which the court rejected because: (1) the father disclaimed his interest; and (2) the daughter signed on his behalf under a durable power of attorney. The appellate court noted that the trial court did not abuse its discretion in rejecting what plainly appeared to be legally frivolous arguments.

m. ***In re Benjamin Trust,* 2020 Mich. App. LEXIS 3130 (2020).** The court rejected a will and trust amendment where: (1) the documents favored one of the decedent's daughters and the daughter's spouse; (2) the documents were dated the same day that the decedent signed documents prepared and witnessed by attorneys for the decedent through U.A.W. legal services; (3) the daughter claimed to have found the documents under the decedent's mattress; (4) the daughter attached the signature pages from the UAW documents to the alleged new documents, and then after copies of the UAW documents were founds the daughter claimed to find the signature pages for the new documents; (5) the alleged witnesses to the new documents were close to the daughter and some received financial compensation through the new documents; and (6) a handwriting expert testified that the signatures on the documents were not decedent's.

n. ***Catley v Boles,* 2020 Ohio 240 (2020).** In a dispute about conflicting provisions in a trust concerning the disposition of trust assets after the death of the surviving spouse, the Ohio Court of Appeals stated: "This case presents the frequent unintended consequences of the so-called 'trust mill' living trusts, which are most times unnecessary to accomplish the goals of a simple estate plan and unfortunately contain traps for those clients and attorneys alike, who are not well-versed in the intricacies of trust law. The case exemplifies the pitfalls of a 'one size fits all' 'cookie-cutter' trust document, exacerbated by sloppy blank-filling that inserts a misspelled name of a beneficiary. The evidence before us indicates that but for this mistake in properly identifying [one of the trustee-beneficiaries], the deed meant to distribute real estate from the trust to the beneficiaries would have been signed by both trustees and recorded, thus avoiding a costly lawsuit".