Notable State Law Developments

The following materials were prepared with the notion that the applicable exclusion amount and generation-skipping transfer tax exemption are sufficient to protect over 99% of all decedent estates from federal wealth transfer taxation. As such, many estate planners are focused on issues that affect the "middle rich," for whom competent estate planning services are necessary but planning motivated by minimizing wealth transfer tax is not. This may be a new orientation for some estate planners, after many years of tax-centric planning. Numerous interesting and new state law nontax issues deserve attention, and developments that have a wider significance than the particular state's law are useful learning tools. Both notions inform these selections.

The coverage of developments here covers November 2016 through October 2017.

The following summaries seek to strike a balance between providing too little information for readers to be alert to a development that might be useful to their practice, and so much information that readers will not read the description. My intent is to encourage readers to read the original sources whenever possible – inevitably there are other issues in the cases reported that may impact a reader's reliance on the development. The highlights here are designed to give important data without forcing readers to study the entirety of an original document. But, there is no substitute for reading the original source if a topic is directly relevant to your clientele or practice, and particularly if litigation about the topic is involved. Don't rely on these summaries.

Finally, a disclaimer: These materials are intended to assist readers as a learning aid but do not constitute legal advice. Given their purpose, they may not discuss exceptions, qualifications, or other relevant information that may affect their utility in any situation. Diligent effort was made to ensure the accuracy of these materials but the author assumes no responsibility for any reader's reliance on them and encourages all readers to verify all items by reviewing all original sources and considering all consequences before applying any concept involved.

Drafting

Lapse and Antilapse At common law a bequest would fail if it was to a beneficiary who died before the testator died (a lapsed bequest). Unless pursuant to an obligation (such as a property settlement agreement) or for tax purposes, it seldom would make sense to add the bequest to the predeceased beneficiary's estate and require another administration of that property. So, unless the testator's will provided otherwise, a bequest to a predeceased beneficiary was not regarded as a bequest to that beneficiary's estate. The common law thus provided that a preresiduary disposition to a predeceased individual would fail and the subject property would fall into and pass with the residue, while a residuary bequest would fail and, because there is no residue of the residue, would pass by intestacy. Only if the bequest was to a class, any member of which survived the testator, would the gift not lapse and instead pass to the surviving class members.

These consequences can and often should be altered by the testator's will, because legislation that precludes lapse (antilapse statutes) often produces results that are contrary to the testator's intent. For example, the issue under many antilapse statutes is the breadth of their coverage, because not all predeceased beneficiaries are included under the statute's application. Many statutes apply only to relatives and do not include a bequest to a testator's spouse. See, e.g., the latest version of UPC §2-603(b), which is applicable only with respect to grandparents, descendants of grandparents, or step-children of the testator (or of a donor of a power of appointment that is being exercised). In cases not covered by the statute, traditional lapse rules continue to apply, which often is undesirable. But not always.

In re Estate of Watkins, 2017 WL 3149610 (Tenn. Ct. App.), involved a Tennessee antilapse statute that *did* apply to the decedent's surviving spouse, which meant that the decedent's stepchildren took her residuary estate to the exclusion of the decedent's descendants. Antilapse was applicable because the decedent's will did not anticipate that her husband might not survive her, it was not revised after his death, and it failed to dispose of the residue if he did not survive (he died nearly 16 years before she did). Extrinsic evidence suggested that passing her residuary estate to his children by a prior marriage was not the decedent's intent. Yet the decedent's 21 year-old will never was revised or revoked.

It is fair to suggest that an estate plan is not well designed if the destination of a testamentary disposition must be determined under either the common law lapse rules or an antilapse statute. If a beneficiary predeceases the testator, the will should designate the alternate disposition in a way that overcomes the otherwise governing effect of the common law or statutory rules. But a study of antilapse statutes, particularly the latest version of UPC §2-603(b)(3), illustrates that overriding application of the statute may be easier said than done, which makes drafting in anticipation of lapse a chore that should not be taken lightly. In this respect, state law should be inspected carefully because intuitive drafting may not be effective.

For example, UPC §2-603(b)(3) provides that the use of words of survivorship alone is not sufficient to preclude application of the antilapse rule. Required is a statement that the descendants of the named beneficiary are not to take if the beneficiary is not alive, or an alternative disposition of the gift if it lapses. That is, it will not suffice to provide for "X if X survives me." Instead, the document would need to say "to X if X survives me, and if not to Y" or "to X and not to X's descendants." This probably would have been the decedent's preferred result in *Watkins*, because her intestate estate would have passed to her own descendants and not to her stepchildren.

Ademption by Extinction Also known simply as "ademption" (as distinguished from ademption by satisfaction, which commonly is known as just "satisfaction") ademption by extinction is a traditional wills concept that deals with a specific gift of property that the decedent no longer owns at death. In many states it now also applies to gifts from trusts, and may reflect refinements that address special situations, such as a "mere change of form" or destruction of gifted property under circumstances such that a replacement gift could not be made by the donor. An example of the latter exception is a gift of an asset that is destroyed in the same event that killed the decedent, such as a bequest of an automobile that the donor was driving when struck and killed by a drunk driver. Rather than adeem, insurance proceeds from destruction of the auto in the accident may be substituted for any gift of the car.

An example of the former exception might be an exchange of one parcel of realty for another, such that replacement Blackacre could pass to the beneficiary of a specific devise of Greenacre. This exception is more difficult to apply given the historic notion that realty is not fungible – that no two parcels are the same – so that replacement property is not treated as a "mere change of form" and is not as easy to identify as might be the substitution of one automobile for another.

The distinction between the inability and the replacement exceptions may explain why some states have embraced one but not the other. For example, Iowa jurisprudence embraces the inability exception but not the replacement approach, which is advanced by UPC §2-606(a)(5). Indeed, the

Iowa legislature has considered and adopted select provisions of the UPC, but not the mere-change-in-form approach. Selective adoption of UPC provisions causes Iowa courts to regard failure to enact certain changes as purposeful. For example, **In re Steinberg Family Living Trust**, 894 N.W.2d 463 (Iowa 2017), concluded that a specific gift of an Iowa farm was not excepted from ademption by acquisition of a Minnesota property in a §1031 like-kind exchange. Notwithstanding the federal income tax treatment of the two properties as a mere-change-in-form (as if no sale or exchange occurred), the Iowa court held that the beneficiary would be disappointed by the swap, which occurred while the trust's settlor was alive and competent to amend the trust.

Two aspects of this are notable. One is the court's application of the ademption concept to a trust, and the other is the court's rejection of a like-kind exception. Under §1031 like-kind is a very broad concept when dealing with realty (dirt is dirt), which would regard an exchange of a farm in Iowa as like-kind for a penthouse apartment in New York City. UPC §2-606(a)(5) is only slightly more surgical, addressing "real property . . . acquired as a replacement for specifically devised real property." It too could apply to a tract of timberland exchanged for a feedlot, or perhaps even a condo. Which may explain why the Iowa legislature did not enact that provision. In *Steinberg* the two properties were several hundred thousand dollars different in value but otherwise appear to have both been farmland. Nevertheless the court held that the specific devisee was disappointed by the settlor's failure to amend the trust to refer to the replacement property.

The lesson for drafters is to specify whether replacement property should be substituted for a specific gift, or a particular gift adeems. An easy example might be a gift of stock in a corporation that might be acquired in a takeover or merger, in which replacement stock could take the place of the gifted stock. A less easy example might be the farmland in *Steinberg*, in which one parcel may have been managed or farmed by the specific devisee and the replacement for it may be located at some distance and has no special significance to the beneficiary of the former plot. In a jurisdiction that has selectively enacted Uniform Law provisions a drafter can more easily determine the "hot button" issues on which a specific provision likely is appropriate. Additional attention and caution is appropriate in a case like *Steinberg* in which a conflict of laws may apply if state laws may differ.

Apportionment of Gross-Up Rule Estate Tax Liability The effects of inter vivos gifts on a state law estate tax apportionment regime are difficult to predict. This recently was illustrated by **Estate of Sommers v. Commissioner**, 149 T.C. No. 8 (2017), which was very odd in that it denied summary judgment to both the government and the taxpayer, in favor of a third-party "intervenor" (the donees of inter vivos net gifts). The primary question was whether New Jersey state law would apportion estate tax caused by the §2035(b) gross-up rule to those donees. Framed as a question of first impression in New Jersey, the Tax Court undertook to determine the state law result, without the benefit of a New Jersey court decision on point. The Tax Court cited and followed In re Estate of Coven, 559 N.Y.S.2d 798 (Surr. Ct. 1990), and In re Metzler, 579 N.Y.S.2d 288 (App. Div. 1992), and rejected several other state court determinations involving situations that were more ordinary than *Sommers*.

In *Sommers* and in *Coven* each decedent's will directed that federal estate tax be paid out of the decedent's probate estate. Included in each decedent's federal estate tax computation base were gifts made inter vivos, and those gifts caused the balance of the decedent's estate to be taxed in a higher marginal federal estate tax bracket. In *Sommers*, the gifts also were made within three years of the decedent's death, they were large enough to fully consume the donor's unified credit, and thereby caused payment of gift tax. That payment triggered application of the three-year gross-up rule in §2035(b), which required inclusion in the decedent's gross estate of the gift tax, which was paid in *Sommers* by the donees under a net gift agreement.

The question in *Coven* and *Metzler* was simply whether the donee of an inter vivos gift should bear the estate tax attributable to inclusion of the gift itself in the calculation of the estate tax under the unified tax system found in §2001. Different in *Sommers* was the question whether the donees should pay the estate tax attributable to §2035(b). In each case the court rejected the apportionment argument because neither the decedent's will nor state law apportioned taxes against property transferred by gift during life.

In *Sommers*, the §2035(b) gross-up rule was regarded as inadequate to cause the donees to be regarded as transferees of any property that was includible in the decedent's gross estate. To the contrary is Shepter v. Johns Hopkins University, 637 A.2d 1223 (Md. Ct. App. 1994), in which taxes otherwise payable from the residue, which passed to a charity, were apportioned against the beneficiary of an inter vivos gift that constituted an adjusted taxable gift. That transfer boosted the federal estate tax marginal bracket but otherwise was not includible in the decedent's gross estate for federal estate tax purposes. The court held that full apportionment as adopted in states that enacted the Uniform Estate Tax Apportionment Act should include donees of gifts that are included in the federal estate tax computation. The notable element of *Shepter* is that a subsequent version of the Uniform Estate Tax Apportionment Act specifically declined to apportion estate tax to the donees of inter vivos taxable gifts. And, by ch. 55 of Acts 1995, the Maryland legislature effectively rejected the result in *Shepter*, stating that the reference in Md. Code Ann., Tax – General §7-308(a)(4) to persons to whom federal estate tax may be apportioned does not include the recipient of an adjusted taxable gift from the decedent that is not includible for federal estate tax purposes, "notwithstanding any holding or dictum to the contrary in *Shepter v. Johns Hopkins University*."

Sommers also refused to follow In re Estate of Necaise, 915 So. 2d 449 (Miss. 2005), which held that the decedent's will effectively imposed an apportionment result on the donee of an inter vivos gift that fully constituted that beneficiary's share of the decedent's total wealth. Like *Shepter* it allocated estate tax at death as if the inter vivos gift was included in the estate and then fully apportioned the estate tax liability.

A third case discussed but also rejected in *Sommers* is Bunting v. Bunting, 768 A.2d 989 (Conn. App. Ct. 2000), in which the decedent made a sizeable inter vivos gift to a child, as to which the gift tax was less than the available unified credit. At death that gift, added to the taxable estate, caused the remaining property to incur estate tax in excess of the unified credit. The decedent directed payment of all taxes from the residue of the estate, which was smaller than the combined state and federal taxes due at death. The court concluded that the decedent never anticipated that the inter vivos gift would cause taxes to be generated and therefore could not have intended for the tax payment provision to relieve the inter vivos donee of responsibility to pay estate taxes attributable to inclusion of the taxable gift in the adjusted taxable gifts base for estate tax computation purposes. Therefore, as in *Shepter* and *Necaise*, the *Bunting* court apportioned estate tax to the donee of that inter vivos gift. On similar facts, *Metzler* held that the state tax apportionment statute (which was enacted prior to unification of the estate and gift taxes in 1976) could not have intended to apportion tax to the donee of the lifetime gift, and therefore could *not* require the donee to contribute to the estate tax liability.

Sommers dismissed each of *Shepter*, *Necaise*, and *Bunting* "as illustrating courts' willingness to require apportionment of estate tax to donees of lifetime gifts, without express statutory authorization, to reach what may be perceived as an equitable result." The lodestar in such cases is to determine the decedent's intent, which may not be equitable. In all likelihood the decedent never considered the question, and the results in these cases is a stew of contradictory authority, begging for resolution either by state law or by an express provision in the decedent's estate planning documents. Experience suggests that few tax payment provisions do so, and most state laws also do not establish who should pay the federal estate tax attributable to inter vivos gifts, much less the gift tax includible in the estate under §2035(b).

A convenient result, but one not dictated by state laws, would be to regard the gross-up tax as part of the gift and regard the donee thereof as responsible for any estate tax attributable thereto. The taxpayer made this argument in *Sommers* to no avail. This suggestion itself has the inconsistent consequence of treating the federal estate tax attributable to the gift tax being paid as different from the gift tax itself, which makes it hard to determine the decedent's intent, regardless of whether the donor paid the gift tax without charge to the donee or the donee expressly agreed to pay the gift tax under a net gift agreement (such as was involved in *Sommers*). Imposing both the gift tax and then any estate tax attributable to the gift tax (a net net gift) is a viable approach that would minimize the value of the gift (both liabilities, imposed on the donees, serve to reduce the gift tax cost) and (it is hoped) avoid the controversy regarding intent that was litigated in *Sommers*.

Estate planners must especially consider the client's intent with respect to the gross-up tax issue if significant inter vivos gifts are being considered upon which gift tax may be paid within three years of the donor's death, particularly if there will be insufficient assets in the estate to pay the tax on the §2035(b) gross-up tax amount without invading otherwise deductible bequests. This could occur if a testamentary marital deduction gift is made in a situation in which the decedent totally utilized the unified credit during life and, therefore, has no nonmarital assets with which to pay federal estate tax attributable to §2035(b) inclusion. This was the case in *Sommers*, in which a second issue (not resolved, the court rejecting a motion for summary judgment) was the estate tax marital deduction consequences of the court's holding that the donees were not responsible for the estate tax attributable to §2035(b) inclusion of the gift tax paid.

A point made by the drafter of the current version of the Uniform Estate Tax Apportionment Act is that apportionment of the §2035(b)-generated estate tax to a donee also may not be viable (without some testamentary enforcement mechanism), or appropriate. See Kahn, The 2003 Revised Uniform Estate Tax Apportionment Act, 38 Real Prop., Prob. & Tr. J. 613, 630 (2004), cited by the *Sommers* opinion. By way of illustration, consider an actual California controversy that was resolved via arbitration, for which no case citation is available. Parent P intended to bequeath the entire P family business to child A. When A's siblings B and C discovered P's intent (and raised a ruckus) P agreed to transfer $5 million to each of them inter vivos, in exchange for their written waiver of any estate entitlement and their agreement not to contest P's will. P's estate planner anticipated P's impending demise and amended the tax payment direction in P's estate plan to provide that any gift tax on the two $5 million gifts would reduce A's bequest if P died before the gift tax on these two transfers was paid. P lived long enough to pay the gift tax but died within three years. So the gross-up rule in §2035(b) required inclusion of the gift tax dollars and the question was whether the federal estate tax attributable to inclusion of the gift tax dollars should be apportioned to B and C (because they received the gifts), or to A. P's estate planner never anticipated this question, and P's will was silent on the question. P's intent was that B and C would receive their $5 million gifts totally free-and-clear, but state law embraced full apportionment and the result reached (by the arbitrator) was that B and C should pay the §2035(b)-generated federal estate tax because that seemed the equitable result – they having received the gifts that generated the gift tax that spawned the §2035(b) inclusion. All notwithstanding the donees' anticipation, and contrary to P's intent.

Two other issues were involved in *Sommers*. One was the deductibility of the decedent's outstanding gift tax liability under §2053, which the court rejected because the donees of the gifts were obliged to pay that gift tax under the parties' net gift agreements. Saying that outstanding gift tax normally would be deductible under Treas. Reg. §20.2053-6(d), in this case the decedent was entitled to reimbursement if the estate paid that gift tax, which negated the deduction. The other issue was the estate tax marital deduction consequences of the estate tax attributable to §2035(b), to the extent the estate was obliged to pay that tax out of assets otherwise passing to the decedent's surviving spouse. Correctly citing §2056(b)(4), the court rejected the notion that the marital deduction would not be reduced if the estate paid that tax liability. For reasons not revealed in the opinion, the government joined with the estate in moving that the donees should pay that gift tax, which is difficult to understand. The net result of the court's holding is that the donees will not be forced to pay the estate tax generated by the gross-up rule, which will cause the marital deduction to be reduced to the extent the estate tax is imposed on property otherwise passing to the surviving spouse. And that works to the government's advantage.

Equitable Apportionment If an estate qualifies for §2032A special use valuation, state law ought to (but virtually always does not) address whether the benefit of the reduction in value, and the corresponding reduction in tax, should inure to the benefit of the recipient of the qualifying property. One argument is that both the value reduction and the tax benefit flowing from that should benefit the qualified heir, because any disqualifying sale or act that causes recapture of the tax benefit will be a liability imposed against the qualified property. By §2032A(c)(5) the qualified heir is personally responsible for the additional tax on recapture (although the recipient may post a bond to be relieved of that liability). On the other hand, some families might regard the special use property as the crown jewel asset and that receipt of it is benefit enough without also giving that recipient the additional tax reduction benefit.

An intriguing question is whether the decedent's tax clause otherwise addresses these questions, especially the recapture tax burden that may be incurred years in the future.

Known as equitable apportionment, the first concept is that the property that generates a tax reduction should receive the benefit of that reduction. This is the logic underlying the nearly universal allocation of estate tax away from a marital bequest that qualifies for the §2056 marital deduction (along with the reality that imposition of tax on a marital bequest will reduce the deduction and correspondingly increase the tax liability). Equitable apportionment is especially prescient with respect to §2032A because of the recapture tax potential, but very few cases have addressed the issue.

In re Estate of Eriksen, 716 N.W.2d 105 (Neb. 2006), raised the question whether the decedent's tax payment provision directed against statutory equitable apportionment, which the court apparently thought would apportion the tax savings attributable to either special use valuation or any deduction (only the latter of which was expressly mentioned in the statute). In re Estate of Nevius, 2007 WL 4577908 (Kan. Ct. App.), remanded to the trial court to apply the Kansas version of the Uniform Estate Tax Apportionment Act and direct the tax saving to two sons who made the qualified use election and away from one daughter who refused to encumber her land with the special use election. The appellate court did, however, provide for an alternate holding if the trial court specifically found that the decedent intended for some other apportionment rule to apply.

In a state that has no apportionment statute, **Centrue Bank v. Voga**, 2017 Il. App. 2d 160690, rejected the notion of apportioning the full tax benefit of a §2032A election to the qualified heir who received that property, saying that apportionment of the full tax saving to the qualified heir would contravene the decedent's pro rata tax payment provision. Curiously, however, the court thought that *rejection* of the claimed apportionment *was* equitable apportionment ("unless the instrument specifies otherwise, the federal estate tax will be equitably apportioned" – meaning prorated). However, the court did apportion the aggregate estate tax among the beneficiaries based on the federal estate tax value of the assets each beneficiary received, meaning that the qualified heir enjoyed the benefit of reduced valuation under §2032A in establishing a smaller share of the aggregate taxes owed. So the qualified heir benefited from the §2032A valuation reduction but did not capture the full tax saving spawned by that election. Without saying so, the net effect is something of a split-the-baby result.

A curious application of a theory similar to apportionment of the tax saved by virtue of a §2032A valuation reduction also was rejected by In re Estate of Siebrasse, 678 N.W.2d 822 (S.D. 2004), in which one child successfully challenged the valuation of property that passed to that one child, and claimed the benefit of the full tax reduction attributable to that success. The court rejected this child's claim to a greater share of the tax saving than the child's pro rata portion, based on the value of the entire estate. In essence the child's effort benefited the other estate beneficiaries pro rata. That is basically the same result as in *Centrue*.

The complexity of this issue is illustrated by California's apportionment provision, Cal. Prob. Code §20114, which expressly addresses these issues but also may produce inequities. As such, it may be instructive for drafters whose state law is silent or similarly problematic. The following example is drawn from Klug, The Effect of Special Valuation on Estate Tax Apportionment: A Plea for Uniform Legislation, 1 Prob. & Prop. 6 (Mar./Apr. 1987). He illustrates a reduction in tax due to §2032A of $97,500, but the qualified heir's pro rata share of the federal estate tax was only $76,500. Here the entire liability apportioned to the qualified heir would be offset by the apportioned benefit, and the excess $21,000 of tax benefit would be allocated to other estate beneficiaries (to avoid wasting it). If, however, a subsequent recapture event occurred, the qualified heir would be required to pay the full $97,500 of tax attributable thereto. Thus, the other takers would have shared in the benefit but would bear none of the recapture risk.

The full $97,500 of benefit might be allocated to the recipient of the qualified property if there was sufficient tax liability apportioned to that beneficiary (not all attributable to the qualified property) against which the benefit could be allocated, but this may not be the case. And allocation of the full benefit to all takers pro rata would be even more unfair (unless all takers were made responsible for the recapture tax, which would create administrative problem and reduce the incentive for the qualified heir to avoid a recapture event). Another alternative in administering the estate would be to make only a partial §2032A special use valuation election, to reduce the tax by only the amount of benefit that the qualified heir could enjoy, to avoid improper dispersion of the benefit. In any case, a side agreement might be executed whereby the other takers would agree to indemnify the recipient of the qualified property to the extent of the $21,000 excess tax liability.

Also problematic are the temporal interest rules. If the qualified property was placed into a trust and the life tenant was the party causing recapture, the corpus of the trust nevertheless would incur the tax in most cases, constituting another form of inequity. Illustrating that this is not universally true, see Estate of Libeu, 253 Cal. Rptr. 456 (Ct. App. 1988), in which both income and remainder beneficiaries were required to pay the tax. As these issues reveal, drafters working with §2032A must consider fashioning a result that is equitable and that reflects the decedent's intent, all in light of §2032A(c)(5) and any relevant state law. For example, with respect to temporal interests, the document might provide that any recapture tax will be imposed entirely on the income beneficiary if recapture was caused by a cessation of qualified use, but that the tax will be imposed in a manner that properly amortizes it against the income and remainder interests if recapture occurs because the land or business interest was sold.

Beneficiary Standing re: Trustee Removal A continuing controversy under the Uniform Trust Code (UTC) is the extent to which a remainder beneficiary has standing to challenge trustee (in)action – or even to obtain an accounting that would reveal how the trustee has performed – while the trust settlor is alive (and, in some states, competent). **In re Abbott,** 890 N.W.2d 469 (Neb. 2017), hewed to the notion that "duties of the trustee are owed exclusively to the settlor" under UTC §603(a). Nevertheless, UTC §706 gives standing to a broader class to request removal of a trustee. "The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee . . ." and "beneficiary" includes any "person . . . [with] a present or future beneficial interest in the trust, vested or contingent . . . ". See UTC §103(3)(A). Consequently, the court was put on notice regarding trustee performance and then, on its own motion, the court determined that the trustee had "committed a serious breach of trust" and was removed, in that case for violation of the trustee's duty of impartiality.

Abbott involved a revocable inter vivos trust, while the settlor was still alive. In a seemingly similar case, **In re Trelew Trust**, 2017 WL 1337487 (Mich. Ct. App.), involved trustee removal and replacement in an irrevocable trust, after the settlor's death, but it similarly addressed the question of which beneficiaries were authorized to remove and replace the trustee. An express provision in the Trelew Trust authorized "the then beneficiaries of this trust, acting by majority vote" to participate in the removal and replacement of the trustee. The controversy centered on the meaning of "then" beneficiary. The assertion made by a vested remainder beneficiary relied on the definition of "beneficiary" under the UTC, essentially the same as *Abbott* held under UTC §103(3)(A). The court rejected the notion that vested and contingent beneficiaries all were included, saying that the trust's reference to a "then" beneficiary meant something different than every vested or contingent beneficiary, because otherwise "then" would be superfluous, adding nothing to the reference to "beneficiary." In drafting such a provision, might a trust better replace "then" with "current" (which is the conclusion that the court reached) or even "income" to refer to those beneficiaries bestowed with the removal and replacement power?

Trustee Removal via Amendment Uniform Trust Code §706(b) permits trustee removal under specified circumstances, such as (1) commission of a "serious breach of trust," (2) "lack of cooperation among cotrustees," (3) "unfitness, unwillingness, or persistent failure" to perform, or (4) "a substantial change of circumstances or removal is requested by all of the qualified beneficiaries," but only if a court "finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust." Apparently because they thought it was not possible to make the case under §706(b), the beneficiaries instead sought approval of a petition to modify the trust under UTC §411 to add a power to remove and replace the trustee. In **Trust Under Agreement of Taylor**, 124 A.3d 334 (Pa. Super. Ct. 2015), rev'd, 164 A.3d 1147 (Pa. 2017), the Superior Court granted the petition by just three of the four beneficiaries under the state law iteration of UTC §411(e)(1), which provides that

> If not all of the beneficiaries consent to a proposed modification . . . of the trust under (a) [requiring consent of *all* the beneficiaries] . . . , the modification . . . may be approved by the court if the court is satisfied that (1) if all the beneficiaries had consented, the trust could have been modified . . . , and (2) the interests of a beneficiary who does not consent will be adequately protected.

In essence, then, the beneficiaries accomplished an end-run around the constraints of §706(b), presumably because they could not satisfy any of its four provisions, *and* they did not have unanimous consent.

A dissent to the lower court's opinion was correct in viewing the lower court's approval of this approach as eviscerating the trustee removal provision in §706(b)(4), permitting trustee removal only when all of the beneficiaries consent. That dissent carried the day on appeal, the high court in Pennsylvania reversing on the ground that the §706 removal provision is the "exclusive provision on removal of trustees" and that the §411 general modification provision cannot be reconciled as an alternative to the more specific provision that establishes more severe requirements for removal and replacement of trustees. "[S]tatutory sections are not to be construed in such a way that one section operates to nullify, exclude or cancel another . . . ."

Note that Restatement (Third) of Trusts §65 would allow the beneficiaries to use trust modification to remove a trustee if doing so would not be inconsistent with a material purpose of the trust, but UTC §411 is not that broad. Which reveals the important lesson that the UTC and the Restatement were drafted to be consistent with each other in many respects, but there are differences between them and, in the end, statutory provisions trump anything that the Restatement represents to be the preferred approach.

Punctuation Matters Drafting wills and trusts is hard, and it takes time to get it right. Sometimes even the punctuation – the existence or omission of a comma – can make the difference. Rush jobs, and tailored alterations to standard forms, are the most likely source of error, and increase the need for interpretation.

Drafting legislation is the same, and probably entails more thought and time, review and more inspection by many more observers and critics. Which makes a legislative defect more surprising than a mistake in a provision cobbled together for a single client. The error that spawned litigation in **Price v. Lotlikar**, 397 P.3d 54 (Or. Ct. App. 2017), was in a provision modeled after a definition now found in Uniform Probate Code §1-201(23):

> (23) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent . . . .

There were actually two issues in *Price*, one of which the latest version of the UPC resolved. Notice the difference between the UPC above, and the corresponding Oregon law:

> 111.005(19) "Interested person" includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent . . . .

Wording has been added to the current version of the UPC ("beneficiaries" and "a trust estate or"), but also the comma before the phrase (which is common to both provisions) "and any others having a property right or claim." One question is whether "creditors and any others" is meant to be one class of persons with an interest. The UPC now makes it clear that these are different classes – creditors being distinct from "any others." This was resolved by addition of the comma after creditors. But still unclear is whether all those distinct classes of persons – heirs and beneficiaries and children and spouses and creditors – all must have a property right or claim, or only the "others" who are listed last. For example, is an "heir" an interested person even if that person has no property right or claim against the estate?

How could the question arise, that an heir would not have a property right or a claim against an estate? After all, if a decedent died intestate (including if the decedent's will is invalid), then the heirs who would take under state law certainly have an interest in the estate. Imagine that there is no challenge to the validity of the decedent's will, and that beneficiary A is entitled to the entire estate. Decedent's surviving sibling (S) is the decedent's closest surviving relative, making S the decedent's heir at law. Personal representative B is accused of defrauding the estate, and S petitions the probate court to adjudicate B's improprieties. If A is not aware, or is not interested in pursuing the question, may S litigate the question as an interested person? As put by the *Price* court, is an heir an "interested person" just by virtue of being an heir, or must that heir also have a property right or claim against the estate of the decedent?

The UPC definition provision contains an added sentence that refines the definition of "interested person" by saying that "[t]he meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." Does that resolve the question – if, for example, a successful challenge to B's administration has no financial consequence to S? *Price* holds that S is not an interested person for this purpose.

Because this is not a question that often arises, the real learning from *Price* is what it says about the challenge of drafting clear and unambiguous provisions. How might these provisions be crafted to avoid the question? One alternative would be to eliminate the illustrations of interested persons ("heirs, devisees, children, spouses, creditors, beneficiaries") and just refer to "any person with a property right in or claim against a trust estate or the estate of a decedent." Sometimes examples or lists confuse rather than clarify an issue. Another approach would be to reorder the provision to refer to persons with a property right or claim, adding "*such as*" or "*may include*" an heir, devisee, child, spouse (and so on).

A third alternative is noted by the *Price* court, discussing "the doctrine of the last antecedent" that normally provides that "qualifying words and phrases" refer "solely to the last antecedent" – the last word, phrase, or clause that can be made an antecedent. Here that would be "any others." The way to show that a qualifying phrase ("having a property interest or claim") is meant to apply to all the antecedents rather than just to the immediately preceding one is to add a comma before the phrase in question. So, the suggestion is that adding a comma after "person" and before "having" would suffice. The problem with this last suggestion is that there is a common exception to the doctrine of the last antecedent if the qualifying phrase is every bit as applicable to every prior antecedent as it is to the last antecedent, in which case the qualifying clause must be read as applicable to all the prior words and not just to the last antecedent. Meaning that the doctrine is not terribly useful.

The point here is not how (or whether) to redraft the UPC (or Oregon law) but, rather, to highlight how the drafting chore can be complicated by addition of illustrations, and even by the placement of the punctuation. Drafting is hard, it requires substantial thought, including about how a provision might be read by someone other than the drafter. Knowing arcane rules of grammar and construction may help, but there are rules and exceptions too voluminous to apply or rely upon (or even to recall).

What Does "Per Stirpes" Mean? This development presents an object lesson about drafting documents that employ legal terms that have been staples of wealth transferors for centuries. The intended disposition couldn't be more basic: (quoting from the trusts involved) "to grantor's issue then living, per stirpes." A slightly different (better?) form might be "to testator/settlor's then living descendants, by right of representation," with a definition (probably in the boilerplate provisions later in the document) of what "right of representation" means.

The controversy in **Schwerin v. Bessemer Trust Co.**, 2017 WL 1017792 (Conn. Super. Ct.), arose because this distribution occurred after the death of all members of a group of individuals. In one of the two trusts involved this group included the settlor, the settlor's surviving spouse, the settlor's children, and several grandchildren who were alive when the trust was drafted. The other trust was created by the settlor's mother, so the group was similar but defined differently to reflect the generational differences. The point is that, when distribution would occur, the first living taker would be several generations younger than the settlor.

The losing plaintiffs argued that the intent was to make the division among bloodlines "equally among the members of the oldest generation that could possibly take a gift." For example, equal shares would be created for the living grandchildren and their predeceased siblings who left living descendants. This would mean that, if one child had three children and another child had only one, then four shares would be created and this would direct 75% of the wealth to the three children of the one child. As thus used, "per stirpes" would mean that the "stirpes" or shares should be determined at the grandchild level – the level at which the first division would be made would be the first level at which any taker was alive. This is not the traditional definition of per stirpes, and it did not prevail in *Schwerin*. Instead, the court held that the first division occurs at the first level below the individual whose descendants are taking. In the illustration that meant the settlor's two children, regardless of whether either child was living at that time. The fact in *Schwerin* that no child could be alive did not alter this traditional application of the common law definition of taking by the stirpes. Two shares would be created, one passing to the three children of the first child (or their descendants) and all of the other passing to the bloodline descendants of the sole child of the other child.

Some state laws – those derived from the Uniform Probate Code, in particular – alter "the right of representation" to make the first division at the first level at which a beneficiary is alive, as argued by the plaintiffs. But the term "per stirpes" is not typically used to describe that form of representation. Instead, "per capita" or "per capita at each generation" generally is used to describe the two different alternatives found (in the original 1969 version of the UPC and the 1990 revision, respectively). The *Schwerin* court held that state law followed the traditional common law, which is what most drafters likely would intend when using the quoted language from these trusts.

The question is: how might a drafter more clearly articulate a settlor's intent to avoid litigation such as that resolved in *Schwerin*? Here the answer might have been to divide and distribute in equal shares among the living children of the settlor (knowing that there would be none when distribution would occur) and deceased children of whom descendants were then living. That would make clear that the bloodline division would be based on equal shares determined at the first generation below the settlor, even though none of the children would then be alive. Drafting in that manner would be less succinct, but it might have avoided this controversy. Because such a traditional concept as "per stirpes" can be subject to several arguable interpretations, perhaps adding a few extra words is a reasonable compromise when drafting documents to minimize the risk of misinterpretation.

Contrast this with **In re Dooley Trust,** 383 P.3d 773 (Okla. 2016). The settlor created marital and nonmarital trusts. The nonmarital trust made modest bequests to three grandchildren and then distributed the residue of that trust outright to two other grandchildren (A and B), in equal shares. The marital trust (which appears to be a QTIP) benefitted the settlor's surviving spouse (S) for life, remainder to A and B "per stirpes." There was no condition of survivorship and, because this remainder was a future interest, state law also did not imply a survivorship condition. Did the settlor use the term "per stirpes" to accomplish the goal of requiring A and B to be alive to take?

The Dooley family was unlucky, in terms of longevity. The settlor survived all four of the settlor's children. A, B, and S all survived the settlor, but A and B each predeceased S and each died without descendants. So the question raised was who will take the remainder of the settlor's marital deduction trust when S ultimately dies. B's surviving spouse claimed the entire marital trust remainder because A named B as sole beneficiary of A's estate, and B named B's spouse as beneficiary of B's estate. If the shares of A and B vested when the settlor died, because survivorship was neither explicitly nor implicitly required, then B's surviving spouse would be entitled. On the other hand, if the words "per stirpes" meant that A and B did not have vested interests (and because A and B died without descendants), then the remainder of the marital trust was the settlor's intestate property, in which case it ought to pass in part to S (depending on state law, probably one-third to S as the settlor's the surviving spouse) and the balance to other heirs of the settlor (probably the five grandchildren named in the opinion – A and B and three who took modest outright bequests when the settlor died).

The dissent correctly notes that the court botched the end result because, as the settlor's intestate property, they declared that it will pass entirely to S (as beneficiary of the marital trust income – for whatever reason that makes sense). If that were correct, then S's life estate and the remainder would merge to create a fee simple, and the trust would terminate, which clearly was not the settlor's intent in this QTIP trust. The most important lesson to be learned from *Dooley* is that "per stirpes" is overused and underappreciated – drafters appear not to understand its true meaning. The opinion does not indicate who drafted the settlor's estate plan. Signed on the same date that the settlor married S, after 13 years of living together, the settlor died just over one month later, suggesting that this was end-of-life planning, perhaps without legal advice. Perhaps the settlor obtained the trust (off the internet?) and engaged in self-help. Long term, the message told by *Dooley* is that the only growth area in the estate preservation or planning corner of the law is litigation, such as this to interpret or construe badly drafted documents.

What Does "Contents" Mean? **Bogar v. Baker**, 2017 WL 4220083 (Ohio Ct. App.), concluded that "contents of said real estate" is ambiguous in the context of a gift of 31 acres of real estate used as a farm that included a house and out building. The parties litigated whether the devisee of the farm was entitled to vehicles and farm equipment located at that property and used in the farm operation. Like a gift of a dwelling with all personal property located in that home, the question is whether assets unrelated to the devise (such as intangibles, including stocks, bonds, or certificates of deposit) are meant to be included simply because they were found within the dwelling. The court in *Bogar* remanded for a determination based on extrinsic evidence to resolve what it regarded as the latent ambiguity whether these valuable implements were meant to be included in the devise of the farm itself. Does "contents" typically mean furniture, cutlery, cooking and cleaning tools, shop equipment, and the like? Or can it include vehicles and expensive specialty implements used in operating the farm? Would it matter if the devisee was the person to whom the decedent leased the property and who was acting as tenant farmer, or the one of several family members who was instrumental in operating the farm? The critical issue in many states is whether evidence of such connections is admissible, or must the document be interpreted based on a "four corners" analysis of the language of the will, without evidence outside the document? These kinds of controversies arise when drafters use stock language without considering the special circumstances of the particular client's situation.

Right to Occupy vs. Life Estate This topic deals with an issue that appears to be of new interest, relating to the difference between granting a beneficiary a life estate or a mere right to occupy property. Cluett v. Gregg, 2016 WL 5415408 (Conn. Super. Ct.), addressed that difference in the context of a child who was granted possession of a dwelling that was larger than he needed, but was denied the right to sublet a portion of it to generate monies that he needed to pay expenses that the document imposed on him.

Quezada v. Ramirez, 2017 WL 2609539 (Cal. Ct. App.), involved a trust that owned a dwelling and that terminated at the settlor's death. Distribution was to three children in equal shares, subject to the right of one of those children to occupy the dwelling for up to 50 years. The court held that the three children became undivided equal tenants in common, subject to the right to occupy in the one child. Specifically the court held that the right of occupancy was not the same as a life estate, that no merger of the two interests in the one child occurred, and that existence of the right to occupy was not inconsistent with the equal tenancy in common interests of the three children.

In re Testamentary Trust u/w/o Northcraft, 2017 WL 943248 (Penn. Super. Ct.), involved a successive right to occupy granted to the decedent's children and then grandchildren, prioritized by their respective ages. Upon the death or disclaimer of the youngest of them the remainder passed to great-grandchildren. The case arose because all the parties agreed to terminate the trust, the court ruling that none of them had any property interest or right to convey anything. Theirs was a "right to reside," not a life estate. The court thus rejected a child's claim to the remainder and to reimbursement for expenses incurred to maintain the property. In another setting such a ruling might be favorable if the parties wished to establish that their action terminating the trust was not a taxable transfer for state or federal income or wealth transfer tax purposes.

Various legal issues may turn on whether a life estate or a right to occupy is bestowed. For example, a life estate granted to a surviving spouse could qualify for the estate tax marital deduction as a qualified terminable interest property, but a mere right to occupy might flunk the QTIP all-income annually requirement. A state law principal-and-income statute may allocate expenses between a life estate and remainder, but may not apply to a mere right to occupy. Exclusivity of possession and what is meant to occur if the beneficiary ceases to occupy the property – and for what period of time – also may need to be addressed in a document creating a right to occupy.

Other issues may be determined by state or local law, such as whether any property tax benefit is available for a life tenant but not a beneficiary with a mere right of occupancy. Examples might be homestead, or exemptions for elderly owners, or even provisions that freeze property tax reassessments until title is transferred. In addition, it might be that a life estate is an exempt asset for Medicaid qualification but a right of occupancy is not (or there may be no law on the question, and it could be vice-versa under the standards applied in a particular jurisdiction). Finally, an ownership interest is required to qualify for §121 nonrecognition of gain on sale of a principal personal residence, but in the alternative a right to occupy does not appear to be an interest that constitutes or carries out income to a beneficiary for Subchapter J income tax purposes.

Exercise of Swap Power in IDGT A common approach to making an irrevocable inter vivos trust "defective" for income tax grantor trust purposes is for the settlor to retain a §675(4)(C) "power to reacquire the trust corpus by substituting other property of equivalent value" (commonly known as a swap power). Occasionally an exchange is made to permit highly appreciated property inside the trust to be included in the settlor's gross estate at death, to garner new basis under §1014 and wipe out the appreciation for income tax purposes. No matter that the appreciation is includible for estate tax purposes, because an equivalent amount of other property is removed from the settlor's gross estate in the swap. Because the trust is a grantor trust, no gain or loss realization occurs on the exchange. So, what could possibly go wrong?

Schinazi v. Eden, 792 S.E.2d 94 (Ga. Ct. App. 2016), illustrates one answer to the question. The defendant was the plaintiff's wife when the trust was created, with herself as trustee for the benefit of their daughter. He was a research doctor at a major research university who invented a number of patented antiviral drugs, and the trust corpus was a limited partnership interest that apparently owned intellectual property rights in drugs that the settlor invented. The settlor assigned his limited partnership interest to the trust in exchange for a note from the trust for $7 million. Over six years later the settlor sought to exercise his exchange power to reacquire the partnership interest in exchange for a note for over $58 million (the trust having performed as intended, to receive and shelter the significant appreciation in the value of the partnership interest). The problem was, the trustee now was the settlor's *former* spouse and she objected to the exchange on the ground that the new note was not an asset of equivalent value. "Some evidence indicates that the value of the partnership interest increased just days after the tender . . . ." In addition, "[a]lthough [the settlor] had the right to reacquire the interest, he failed to follow the necessary steps to complete the acquisition" under the terms of the limited partnership agreement. In the game of tax minimization, fiduciary duty, formalities for effective transfers, and vituperation will crush tax planning every time!

Litigation

Insurance Churning Was Elder Abuse The significance of **Mahan v. Chan Insurance Agency, Inc.**, 2017 WL 3614276 (Cal. Ct. App.), vacating 218 Cal. Rptr. 3d 808 (Cal. Ct. App. 2017), is in finding that a state's elder abuse statute can apply to a claim of financial abuse that involved assets held by a third-party trustee of a revocable insurance trust.

The gist of the complaint in *Mahan* is sufficiently common that the court quoted Elder Law expert, Larry Frolik, as follows:

> Many older policyholders have years-old whole-life policies that have accumulated a sizable cash surrender value. An insurance agent encourages them to trade in these policies and buy new ones that pay higher death benefits. This practice, known as churning, earns the agent a large sales commission while substantially increasing the policyholder's premium cost.

The plaintiffs are Fred and Martha. At the time of the alleged acts he was an 82 year old attorney "suffering from confusion and cognitive decline" and she was a 75 year old with Alzheimer's. The defendants allegedly persuaded them to use the cash value in two survivor-life permanent policies with an aggregate annual premium cost of $14,000 and aggregate death benefits of approximately $1 million, to purchase a single nine-year term policy on Fred's life, providing $1.17 million of death benefits, at an initial cost of the $250,000 cash value in the existing policies and over $100,000 in annual premiums, generating $100,000 of commissions to the defendants. If he lives that long, the policy will lapse at Fred's age 91, with no residual value. At this stage of the litigation those alleged facts were taken as true, and the defendants did not refute them.

Instead, their defense is that the plaintiffs have no standing. Because the policies that were replaced were owned by the trust, which was created and trusteed "for estate planning purposes" by the plaintiffs' daughter, who the court regards as a willing but ignorant pawn who totally relied upon her father's guidance. According to the opinion this daughter was "cut out of the loop" and signed documents that often were presented in blank. Instead of arguing (at this phase of the case) that they didn't do it, or that it wasn't wrongful, or that there were no damages, the defense argued (successfully at the trial level) that there was no compensable wrong to the plaintiffs. Although they financed these purchases (and had to dip into their other assets to pay the significantly increased premiums), the policies were not owned by the plaintiffs and the premiums were their "voluntary contribution to the trust," not to the defendants.

Why would the plaintiffs undertake such a transaction (erroneously billed as a §1035 income-tax-free exchange, which did not qualify because of the differences in insured lives), other than because they were duped? Their primary complaint is based on the California Elder Abuse Act and, given the dramatic financial realities involved, perhaps the only surprise is that the trial court agreed with the defendants. The appellate court's reversal on this appeal is what anyone would expect, and only the logic applied is questionable. Which is why *Mahan* may prove to be significant. If allowed to stand, it establishes that the transfer of funds to the trust at the behest of the defendants' scheme satisfies the Act's requirement of a deprivation of property rights carried out "by means of an agreement, donative transfer, or testamentary bequest" that is actionable as elder financial abuse. "The [defendants] deprived the Mahans of property indirectly, using the Trust as an instrument of their scheme." If the case does not settle, surely the defendants will offer more of a defense, such as alleging that the daughter should have been more attentive as trustee, or that caveat emptor should apply, or even that there were legitimate reasons for the exchange of policies. None of that was addressed or resolved at this initial stage of the litigation.

Incidents of Ownership **Lee v. Rogers Agency**, 517 SW.3d 137 (Tex. Ct. App. 2017), is not a tax case, but it addresses an issue flowing from an assignment of life insurance policies to an irrevocable life insurance trust (ILIT) and a question typically regarded as significant under §2042. The issue arose in the plaintiff's action to recover damages suffered due to alleged misrepresentations made by the defendants in the sale of life insurance policies. That action was brought under the Texas Deceptive Trade Practices Act and the Texas Insurance Code (these were the "extra-contractual" claims, meaning causes of action not derived from the insurance policy/contracts themselves). The court's holding potentially *could* be useful to taxpayers in a tax case, but might not be regarded as precedential in any federal court in any tax-related controversy. Nevertheless, the court's analysis is a useful reminder of several state law principles of traditional trust law.

The court's holding regarding life insurance "incidents of ownership" is an amalgam of decisions from several United States Courts of Appeal and states that "incidents of ownership" in life insurance policies only include powers to control the proceeds or income from life insurance policies, or the policies themselves. The issue was relevant because the insurance policies at the heart of the dispute were transferred by the plaintiff to the ILIT, and the question was whether the plaintiff's assignment of those policies carried the plaintiff's extra-contractual causes of action to the trustee. This was important because the trustee had been a party in a class action against the insurer for the same practices that supported the plaintiff's causes of action. If the plaintiff had assigned those rights when the ILIT was formed, then the suit was foreclosed by a resolution in that class action. The court found, however, that the plaintiff only intended to relinquish any incidents of ownership over the insurance contracts that might cause §2042 inclusion in the plaintiff's estate for estate tax purposes, and that the plaintiff's extra-contractual causes of action were not incidents of ownership, meaning that the plaintiff still owned them and was not barred by resolution of the class action.

The court made a surprising statement regarding incidents of ownership in its footnote 11, that "[i]nasmuch as the Trustee paid nothing for the policies, he suffered no loss by their cancellation. . . . Only [the plaintiff] suffered any loss in this case." If cancellation of the underlying policies was not a loss to the ILIT as owner of the policies, then what is the measure of the loss to the plaintiff who was settlor of the trust? Having paid a single premium of almost $240,000 for three $1 million face value life insurance policies, does the footnote mean that the only loss is the premiums paid and not the promised, contractual payout on maturation of the coverage? Is restitution of the premiums paid the only recovery that the plaintiff can expect? One might think that the proper recovery would put the trust back into the position it would have occupied had the defendant's actions not been wrongful. Perhaps that was foreclosed by the class action, so the plaintiff's only injury is having been duped by the defendant's misrepresentations. The court appears to say that the economic recovery for that injury is return of the premiums paid. And, most importantly, recovery of the premiums is not an incident of ownership. That holding is consistent with tax authority that the right to control policy dividends is not an incident of ownership. This is sensible because payment of premiums is not itself a factor for §2042 inclusion. The court correctly holds that the right to recover the premiums paid is not an incident of ownership.

Another element in the case is noteworthy. The trustee was a member of the class because the trustee received notice of the class action and did not opt out. As such, resolution of the class action was res judicata for the trust. The defendants alleged that this foreclosure of the trust also foreclosed the settlor, which the court rejected saying that "for a non-party [to the class action] to be bound under . . . the res judicata defense . . . the defendant must establish that there was a prior or ongoing 'substantive legal relationship' between the non-party and a party to the previous litigation." Holding that there was none in this case, the court stressed that a trust settlor and the trustee are not in privity with each other. After the settlor has parted with ownership the trustee's duties run exclusively to the beneficiaries, not to the settlor. Nor does the settlor have standing to enforce the trust.

There have been calls to modify this traditional standing rule – particularly in the context of enforcement of charitable trusts – but *Lee* illustrates that there would be unexpected consequences of such a change. Here, for example, if the settlor had an ongoing relationship with the trust, then res judicata might have precluded the settlor's independent action for those losses that are compensable under the extra-contractual causes of action.

The court properly recognized that, had the settlor been foreclosed from suing the defendants – for example, because of a class action of which the settlor was a class member – that preclusion of the predecessor owner would bind the trustee as a successor owner, taking all of the settlor's rights, title, and interest in the insurance policies transferred to the trust. But foreclosure does not work in reverse. Res judicata of the successor owner (the trust) does not preclude the predecessor owner from pursuing its own causes of action.

A final potentially significant element of the case is that the settlor's extra-contractual rights under state law were nonassignable, meaning that there could be no finding that the settlor's transfer of the policies also was a transfer of the settlor's extra-contractual rights. It is possible that a different result could apply under different state law in other jurisdictions.

Compensation for Services? Intestacy, the elective share, contracts to make (or not revoke) a will, and pre- or post- marital agreements are traditional ways that caregivers seek compensation for their services. Historically cases seeking a rightful share of a disabled or infirm decedent's estate involved a decedent who was the title holder of the family's wealth and a surviving spouse who was dependent financially on the decedent. If married, there were several mechanisms to provide for a disappointed surviving spouse, including a will contest to defeat a parsimonious will (causing an intestacy) or the surviving spouse could reject the will in favor of the elective share. In less common situations it might be possible to establish a marital agreement that the decedent breached.

Changes in the nuclear family, care giving by faux-family or just friends, and nontraditional relationships all challenge these traditions. In the elder care arena in particular, there has been a significant increase in financial abuse of the elderly, often by caregivers. And there are more claims that a decedent made a "contract to make a will" to entice someone to provide care for life in exchange for "being taken care of" when the decedent died. These cases often end in litigation by the disappointed caregiver who feels inadequately compensated.

Gilbert v. Hoover, 487 S.W.3d 898 (Ky. Ct. App. 2016), involved an unmarried "live-in companion" of the decedent who filed a creditor's claim for over $400,000 for "services rendered" over a 66 month period ending in the decedent's death. Although there was no documented agreement, the claim was that there was "an implied contract for compensation." The court rejected that claim, based on a presumption that care provided by family members are meant to be gratuitous. That result reflected an unfortunate Catch-22 for Gilbert, who was not a family member. The court noted that the gratuitous-service presumption applies to care provided by family members, and it acknowledged that Gilbert was neither a blood relative nor married to the decedent. But the court also concluded that "the record plainly demonstrates that Gilbert and the decedent] enjoyed a familial relationship," justifying the court in applying the presumption. That put Gilbert in a no-win position.

Estate of Henry v. Woods, 77 N.E.3d 1200 (Ind. Ct. App. 2017), involved very similar facts. The caregiver eventually moved in with the decedent, they socialized as would a married couple, and she was disappointed by the decedent's failure to provide for her as he promised. Again the decedent's heirs relied on the presumption of gratuity, arguing that the decedent and the claimant "operated as a family" and, although never married, they "lived together in a family relationship." Nevertheless, the court honored a claim for compensation, basing its judgment on either an implied contract or an action for quantum meruit based on unjust enrichment (the opinion never makes clear which theory was controlling). But the award was only roughly one-third of the amount claimed.

In re Estate of Proffitt, 2017 WL 2211088 (Kan. Ct. App.), differs in that the decedent was married and the surviving spouse was entitled to an intestate share of half. Instead she asserted breach of a contract to make an "I-love-you" will, providing 100% of the decedent's estate to the surviving spouse, subject to an agreement that the survivor would leave everything either spouse owned in equal shares to the decedent's two children and the survivor's two children. Presented with nearly unrefuted evidence of the agreement (including testimony of an estate planning attorney that the decedent sought to effect that plan but died before it could be drafted), the court relied on constructive fraud to find for the survivor. That approach was needed to avoid application of the state nonclaim statute, and its foundation was the existence of a confidential relation, flowing from the fact of marriage, and that the survivor had commingled her assets with those of the decedent. The constructive fraud was the decedent's failure to honor the spouses' agreement.

The result in *Proffitt* is an extreme example of a court finding a way to circumvent all manner of rules to achieve what it regarded as an equitable result. Not long ago this result would have been an unthinkable end run on the rigid law of Wills, and legions of cases have denied relief in similar circumstances. Especially intriguing is the *Proffitt* court's award of only a life estate to the survivor, with a remainder as anticipated by the spouses in favor of the four children of the two spouses. Instead of causing the decedent's estate to be held in trust, with the same life estate and remainder, the court carried out the terms of the spouses' agreement. The opinion acknowledged that the estate planner to whom the decedent turned, too late, encouraged the use of a trust, which would preclude the survivor from disposing of the spouses' property in a different manner than the spouses agreed (leaving the decedent's intended beneficiaries with only their own cause of action to enforce the spouses' agreement). In addition, the court's order allows the survivor to invest and consume the decedent's property with virtually none of the guidance or constraints that would apply to a trust that would protect the remainder beneficiaries.

Financial Abuse of the Elderly

A widespread controversy implicates the principle reflected in Uniform Trust Code §603 that a revocable inter vivos trust is the functional equivalent of a will. As such, while the settlor is alive, all rights of beneficiaries other than the settlor are subject to the settlor's control, and the trustee's duties run exclusively to the settlor. This informs the suspended application of the trustee's §813 duty to inform and report to beneficiaries, which does not apply while the settlor is alive. The net result of this principle is that remainder beneficiaries – following the settlor's retained enjoyment – have no standing to litigate perceived abuses by a trustee before the settlor's death, on the ground that only the settlor has a cause of action for anything that occurs during the settlor's life.

The right to demand accountings belongs to a settlor's personal representative (guardian or conservator, if one is appointed) if the settlor becomes incompetent prior to death. That remedy fails in two respects. One is because the same person whose performance is in question as trustee also may be that personal representative. The other is that often one purpose of a funded inter vivos trust is to avoid the need for a court appointed personal representative for the settlor.

Some courts allow remainder beneficiaries to obtain an accounting and to sue for any premortem breach of fiduciary duties, but only after the settlor's death. The problem with that approach is that financial abuse of the settlor was not prevented and, at that point, the fiduciary may be judgment proof, so no effective recovery is viable.

These issues are difficult because courts acknowledge that a settlor should have the same right to privacy regarding premortem transactions as would a testator, whose beneficiaries typically do not have standing to examine the testator's premortem financial activities. These issues are complicated by the reality that financial abuse of the elderly is omnipresent, whether the abuse is perpetrated by the holder of a durable power of attorney, a court-appointed personal representative, a trustee of a revocable inter vivos trust, or just someone who is able to flim-flam an elderly individual. Courts struggle to address these conflicts.

Into this fray stepped **Hauser v. Hauser**, 796 S.E.2d 391 (N.C. Ct. App. 2017), in which one child sought to avert questionable transfers made by a second child, who was accused of undue influence over their parent, who was still alive and who had not been declared incompetent. One count of the action sounded in tort, as an intentional interference with an expected inheritance. Also involved was an effort to secure an accounting that might expose misfeasance by the second child as holder of a durable power of attorney. No indication is given why the plaintiff did not seek to declare their parent to be incompetent, nor whether state law gave third parties the right to challenge actions by the holder of a durable power. The court merely held that state law does not recognize the tort of intentional interference during the life of a testator, nor did it entitle a potential beneficiary of an estate to an accounting.

An inter vivos trust could grant the right to accountings to a third party (such as a remainder beneficiary, a trust protector, or a court-appointed personal representative). Many settlors likely abhor the notion of litigation brought during their lifetime, and believe that the holder of a durable power or a trustee will protect their interests rather than abuse their fiduciary position. Developments confirm that these are significant issues. Financial abuse of the elderly is rampant and often involves fiduciaries who misuse their authority. The UTC approach may need modification, and trust settlors may alter the rules that apply. As in most planning contexts, the challenge is designating fiduciaries (especially successor fiduciaries) and establishing and enforcing oversight that is effective but not too intrusive.

Recovery of a Bailment The usual statute of limitation for making a claim against a decedent's estate entails notice to known or reasonably ascertainable creditors, triggering a nonclaim statute that typically limits the creditor's time for making a claim to something like 60 or 90 days. See, e.g., UPC §3-801. **Moulden v. Hundley**, 2017 WL 4848560 (Kan. Ct. App.), was different, in that the plaintiff claimed property from the estate pursuant to an alleged bailment, by which the decedent was found to be in possession of furniture that the plaintiff loaned to the decedent for personal use. Unlike two classic automobiles, the titles to which were transferred by the plaintiff to the decedent and therefore constituted completed gifts, the furniture was left with the decedent with the understanding that it would be returned to the plaintiff. As to this property the statute of limitation for an action of recovery was deemed to begin much later, after the decedent died, a constructive bailment arose with the decedent's surviving spouse, and then a demand for return was filed by the plaintiff against the surviving spouse. The spouse did not contest the plaintiff's ownership of the furniture, meaning that the bailment statute of limitation was applicable, and it didn't began years after the decedent's death when the plaintiff asked for return of the furniture, which the spouse refused.

Malpractice Liability Statute of Limitation Given all that goes into the estate planning endeavor, it is only natural that mistakes occur, which raises questions regarding malpractice liability. One popular misconception is that this area of practice is so complex that certain mistakes are prima facie not actionable, because certain elements of the art are beyond mastery. This misconception is augmented by the community standard defense, which states that a mistake is not actionable if the planner performed no less competently than the average in the community in which that planner practices. The problem with that defense is the inability to define the proper "community" in which to measure the average or minimum competence of estate planners in general, particularly with respect to matters that are impacted by the federal tax laws.

The most commonly miscited example of the too-complex-to-be-liable notion is the exposure of the attorney who prepared the testamentary trust that violated the Rule Against Perpetuities in Lucas v. Hamm, 364 P.2d 685 (Cal. 1961). Involved was the so-called administrative infinality or administrative contingency rule (sometimes referred to as the "magic gravel pit" rule, which presumes that any act – such as extracting gravel from a quarry – could extend forever). The trust was distributable five years after administration of the settlor's estate terminated, which conceivably could occur after expiration of the permissible period of the Rule. The court held that failure to anticipate application of this special aspect of the Rule was not negligence, explaining that the trust actually would violate the Rule only if estate administration might not be completed within the period of lives in being plus 16 years, and that the likelihood of such a delay was so remote that an attorney exercising ordinary skill in the same circumstance might make the same mistake.

Contrary to many popular misconceptions and statements about the case, however, the court did *not* accept the attorney defendant's blanket assertion that the Rule Against Perpetuities is so difficult that any violation is excusable. Indeed, the appellate court specifically noted that general practitioners who are faced with a difficult aspect of a specialized subject such as this must seek the aid of an expert. That court's imposition of liability on the attorney *was* reversed, but the California Supreme Court did not agree with the argument that no perpetuities violation can be malpractice.

A more recent example is **Security Bank & Trust Co. v. Larkin, Hoffman, Daly & Lindgren**, 897 N.W.2d 821 (Minn. Ct. App. 2017), in which the alleged malpractice was failure to consider application of the generation-skipping transfer (GST) tax to a bequest to an unrelated beneficiary who was more than 37.5 years younger than the decedent (making that beneficiary a skip person and exposing the plan to an unanticipated GST tax). Some might argue that the lack of a single case dealing with a substantive GST tax issue (as opposed to the chronological exemption) in the 40+ years since original enactment of the GST tax in 1976 is proof positive that few planners (or government officials) actually pay attention to the GST tax. In this case the estate paid over $1.6 million in GST tax, however, and the opinion suggests that there were planning options that could have avoided, deferred, or minimized that unexpected impost.

Far more interesting about both *Lucas* and *Security Bank* was each court's treatment of the attorney defendant's argument that the plaintiff lacked standing to sue because the plaintiff (the estate's personal representative) was not the client and therefore was not in privity of contract with the attorney defendant. Although there is abundant authority supporting a strict privity requirement, most of it is not current. Indeed, the only states in which relatively recent cases can be found that specifically respect the privity defense in an estate planning context were reported by Beglieter, First Let's Sue All the Lawyers – What Will We Get: Damages for Estate Planning Malpractice, 51 Hastings L.J. 325, 327 n.19 (2000), and a follow up in Beglieter, The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases, 20 Ga. St. U.L. Rev. 277 (2003), as Maryland, Nebraska, New York, Ohio, Texas, and Virginia. Alabama has since joined the list. See, e.g., Robinson v. Benton, 842 So. 2d 631 (Ala. 2002). Subsequent decisions in several of these states make the privity bar even less reliable than when Beglieter wrote about it. See, e.g., Thorsen v. Richmond Soc. for the Prevention of Cruelty to Animals, 786 S.E.2d 453 (Va. 2016), holding that an intended third-party beneficiary of an attorney-client contract may sue the attorney for malpractice in will drafting; Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009) (the executor of a decedent's estate may prosecute the same legal malpractice action that the decedent could have pursued if still living); Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010) (similar). See also McDonald v. Pettus, 988 S.W.2d 9 (Ark. 1999), and Nevin v. Union Trust Co., 726 A.2d 694 (Me. 1999) (denying beneficiary actions against drafting attorneys on privity grounds, but only because the decedents' personal representatives could assert the causes of action instead). This modern result favors a disappointed beneficiary's tort or contract action to redress an attorney's estate planning mistakes. Today the privity defense is a minority rule in the estate planning context, with cases following the modern trend in estate planning situations in several dozen states. See Annot., What constitutes negligence sufficient to render attorney liable to person other than immediate client, 61 A.L.R.4th 464.

Because a decedent's estate often is unaffected by an attorney's negligence (for example, unless additional taxes or administration expenses are incurred, the estate may be unreduced by a mistake that alters the relative interests of the estate's beneficiaries), the personal representative of the estate (or the trustee of a negligently drafted trust) may not have standing to sue to recover damages suffered by intended beneficiaries. That obviously was not the source of the defendant's argument in *Security Bank*, in which the estate incurred significant GST tax. Instead, the defendant's notion was that local law only gives a personal representative standing to pursue a cause of action owned at death by the deceased client, under a survival regime, and that this cause of action arose too late to constitute the decedent's cause of action.

Part and parcel of the defense in *Security Bank* is a daunting aspect of malpractice exposure for estate planners in general: when does the statute of limitation begin to run? This is a function of when the cause of action arises, and then when it must be brought. One alternative is to say that the action arose on the date of "occurrence," meaning at the time of the negligent representation. Another is a "damage" rule, which doesn't start the statute to run until some damage has occurred as a result of the alleged malpractice. Many states follow a "discovery" rule, meaning that the statute does not begin to run until the plaintiff should have discovered the error, which in many cases is not until the estate planning client died, or even later. See Annot., When statute of limitations begins to run on action against attorney for malpractice based upon negligence – view that statute begins to run from time client discovers, or should have discovered, negligent act or omission – application of rule to property, estate, corporate, and document cases, 15 A.L.R.6th 427. In a few jurisdictions the statute of limitation is said to begin running when the attorney ceases to represent the client. In estate planning, this frequently produces the same result because the representation ends only when the client dies. Of some concern in this respect, Hale v. Groce, 730 P.2d 576 (Ore. Ct. App. 1986), held that the defendant attorney's participation in a reformation proceeding to correct the attorney's drafting error served as an estoppel to a statute of limitation defense to a subsequent malpractice case. And, contrary to the common assertion that some issues are not worth worrying about because they arise (if at all) long after the estate planner has died (e.g., many GST tax mistakes), it has been held that a claim for malpractice may survive the planner's death, with liability of the planner's firm. See, e.g., McStowe v. Borenstein, 388 N.E.2d 674 (Mass. 1979).

Security Bank applied the damage rule and held that the cause of action arose when the client executed the estate planning documents because it was then that the client's estate "failed to protect against liability" from the GST tax "and became less valuable because of that liability." This meant that the statute began to run earlier than under other alternatives, which was favorable to the plaintiff because it meant that, under the Minnesota survival statute, the cause of action existed prior to the client's death and therefore the personal representative owned it, giving it standing that otherwise might not have existed.

Other avenues might be more attractive to plaintiffs in other circumstances. For example, **Rigoni v. Westrate**, 2017 WL 4700041 (Mich. Ct. App.), also applied a date of execution rule for the beginning of a statute of limitation on a claim for malpractice in estate planning, with the result that Rigoni's claim was time-barred. The interesting aspect of that holding was a discussion of the plaintiff's "ongoing representation" claim that would have extended the statute, with the court stating that "a distinction must be made between actions taken by counsel as part of an ongoing attorney-client representation . . . and whether [any] new action occurs pursuant to a current, as opposed to a former, attorney-client relationship." In that case the execution of documents was deemed to terminate the former relationship, and an inquiry a decade later was not adequate to extend the accrual date for legal malpractice claims. The court rejected the plaintiff's argument that "any action taken by an attorney that relates to a matter resolved through earlier representation would either resurrect the past attorney-client relationship, or establish the existence of an ongoing relationship." That holding is favorable in terms of limiting the duration of any malpractice claim from the previously-completed representation. However, it raises an issue whether a renewed representation requires a new conflict of interest waiver, a new representation agreement, and so forth.

Privity Defense Remains Relevant A decedent's estate often is unaffected by an advisor's negligence. For example, unless additional taxes or administration expenses are incurred, the estate may be unreduced by a mistake that alters the relative interests of the estate's beneficiaries. As a result, the personal representative of the estate (or the trustee of a negligently drafted trust) may have no standing to sue to recover damages suffered by intended beneficiaries.

Beginning with Biakanja v. Irving, 320 P.2d 16 (Cal. 1958), the majority of states today reject the privity defense to a malpractice claim in a negligent will drafting situation. Instead, states apply an exception to the privity defense in the estate planning context as a matter of public policy. Thus, liability will be found if (1) the estate planning engagement was intended to benefit the plaintiff, (2) the harm to the plaintiff attributable to the attorney (or other advisor's) mistake was foreseeable, (3) it is certain that the plaintiff suffered injury, (4) the connection between the defendant's conduct and the injury was immediate, (5) there is a strong public policy of preventing future harm that is fostered by imposing liability on the advisor notwithstanding the plaintiff's lack of privity, and (6) the imposition of liability to beneficiaries of negligent planning does not impose an undue burden on the advisor's profession.

In the legal malpractice context, normally a testator's intent to benefit distributees designated in a will gives those beneficiaries the right to sue for any breach of the contract between the attorney and the testator. But not always. For example, in Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1221 (Fla. 1993), a disappointed beneficiary could not prove the decedent's intent, and the estate did not suffer a loss, so negligence of a drafting attorney essentially went without redress.

This also was the case in **Estate of Agnew v. Ross**, 152 A.3d 247 (Pa. 2017), which rejected extrinsic evidence that would establish that the decedent intended to amend a trust at the same time that he executed a revised will. An amendment was drafted to that trust, which the attorney admitted was never presented to the decedent for execution, due to the attorney's oversight. Nevertheless, the court did not permit the use of this extrinsic evidence to show the decedent's intent, resulting in disappointed beneficiaries being denied redress for the attorney's alleged error. Because they were not named as beneficiaries in an executed document, those beneficiaries lacked standing to sue. "[A]n executed testamentary document naming an individual as a legatee is a prerequisite to that individual's ability to enforce the contract between the testator and the attorney he hired to draft that particular testamentary document." And "public policy considerations weigh against allowing a party to use an unexecuted testamentary document to establish standing to sue the testator's lawyer for breach of contract as a third-party beneficiary . . . " because there was no reliable evidence of the decedent's intent.

This result defeats a disappointed beneficiary's action to redress certain alleged estate planning mistakes – both of commission and omission. In essence, it breathes continued life into the privity defense, even though that concept is a minority principle in the estate planning context. Indeed, the two most common impediments to proving a malpractice case against an estate planning professional are whether it is certain that the plaintiff suffered an injury and whether imposition of liability imposes an undue burden on the professional. For example, if the allegation is that the decedent intended to benefit the plaintiff in an amount greater than the decedent's will bequeaths, typically the issues are (1) whether the plaintiff may introduce extrinsic evidence of the decedent's alleged intent and (2) whether the burden on the drafting attorney to disprove this alleged intent to avoid liability many years after the estate planning representation ended is too great.

Cases such as mistakes in execution or the proper application of state law relating to the rights of a pretermitted heir present much easier facts to address in this connection than others. On the other hand, a case alleging that an advisor failed to follow a testator's instructions about inclusion or the amount of a bequest would pose a far more difficult situation. Which underscores that the ability to establish malpractice by a third-party beneficiary of the advisor-client contract continues to be problematic.

Diversity Jurisdiction Involving Trusts The traditional common law of trusts regards a garden-variety trust as a relationship, not an entity, meaning that the trust itself has no jural personality – it cannot sue or be sued. Instead, suit is instigated by or against the trustee as fiduciary, and not by or against the trust. If a plaintiff wins a suit against the trustee, then the question turns to whether the trustee is entitled to indemnification or reimbursement by the trust. If a recovery is won by a trustee as plaintiff, then that property is subject to the same fiduciary duties as is any other trust asset.

Draft versions of the final volume of the Restatement (Third) of Trusts included provisions that advanced a notion that a trust itself could be the plaintiff or defendant in litigation, but the concept was abandoned and does not appear in the final product. A recent case illustrates why the question is multi-faceted and complex.

Loubier Irrevocable Trust v. Loubier, 858 F.3d 719 (2d Cir. 2017), addressed the question whether diversity jurisdiction in federal court existed, which turned on whether the trusts involved took the citizenship of their trustee or of their beneficiaries. A conflicted body of precedent exists on that question, which may seem odd, given the traditional rule that trusts have no jural existence (instead, it is the trustee that appears in litigation). Quoting from a 2016 decision by the Court of Appeals for the Fourth Circuit, the *Loubier* court noted that "[d]espite over two centuries of federal litigation involving trusts, the method for determining a trust's citizenship [is] long unsettled and the subject of much debate." The *Loubier* opinion laid out Supreme Court jurisprudence that essentially informs either result, much of it turning on the nature of the trust involved (a business trust in one case, a REIT in another, but most trusts being garden-variety property ownership and donative transfer vehicles).

Noting a rift between circuits, and unclear Supreme Court jurisprudence, the *Loubier* court concluded that "for these traditional trusts, it is the citizenship of the trustees holding the legal right to sue on behalf of the trusts, not that of the beneficiaries, that is relevant to jurisdiction" of the federal courts in diversity actions. "[B]ecause the party trusts . . . are traditional trusts, establishing only fiduciary relationships, they are incapable of being hauled into court except through their trustees. Thus, it is the trustees' citizenship that must determine diversity, not the citizenship of trust beneficiaries."

That traditional result is the most practical resolution in a typical asset-transfer context, especially given that the class of beneficiaries of many garden-variety trusts is subject to change through exercise of powers to appoint or in the discretion of either the trustee or a faux-fiduciary (such as a trust protector or distribution director). In other contexts the traditional rule can generate problems, such as in determining to whom the ethical duties of a lawyer hired by a trustee are owed. See, e.g., Pennell, Representations Involving Fiduciary Entities: Who Is the Client?, 62 Fordham L. Rev. 1319 (1994).

Further, what is the proper result if a judgment is rendered against the fiduciary rather than against the trust proper? If the trustee is without assets and was in breach of trust, then no effective enforcement of a judgment could be had against the trustee and reimbursement or indemnification is not available from the trust. In such a case the plaintiff, entitled to recompense, may be left without recovery. Alternatively, if the fiduciary acted without fault and is entitled to reimbursement or indemnification, what merit is there in a two-step process by which the trustee satisfies a judgment and then recovers reimbursement from the trust?

Given the centuries-old history of the common law of trusts, *Loubier* reminds us of the disconcerting reality that these fundamental questions still remain to be addressed.

Enforcement of In Terrorem Provisions In the United States today the majority approach to enforcement of anti-contest (in terrorem) provisions is reflected in UPC §§2-517 and 3-905, which establish that "a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." The challenging aspect in these formulations is the "probable cause" standard.

Cases in numerous states address the validity question in various ways, all of which seem to boil down to a rule that typically provides that no-contest provisions are *not* enforceable if a challenge was brought "in good faith," "based on reasonable grounds," that was "not frivolous or vexatious," or something similarly vague or vacuous. The comment to §3-905 refers to Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 comment *c* for a definition of probable cause as "evidence that would lead a reasonable person . . . to conclude that there was a substantial likelihood that the challenge would be successful." Restatement (Second) of Property: Donative Transfers §9.1 comment *j* referred to whether "the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts."

The point is that there is widespread agreement that something like good faith, probable cause, or reasonable grounds is enough to disable an anti-contest provision, but there is no general agreement on what the requisite standard means. **In re Estate of Workman**, 2017 WL 706342 (Iowa Ct. App.), addresses that question in a state that has adopted the UPC generally but that did not embrace §2-517, leaving "intact longstanding case precedent on the subject" that regards in terrorem provisions as unenforceable against a contest brought "in good faith and for probable cause." According to the court, "good faith" and "probable cause" are applied interchangeably.

> Persons have "probable cause for initiating civil proceedings against" others if they "reasonably believe[] in the existence of facts upon which [the] claim is based and reasonably believe[] that under such facts the claim may be valid at common law or under an existing statute, or so believe[] in reliance upon the advice of counsel received and acted

> upon." . . . "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts." . . .
>
> The "good faith" requirement has been variously interpreted, with jurisdictions applying definitions that can be categorized along a continuum from a subjective to an objective standard . . . . [O]ur good faith precedent gauges the strength of the challenger's will contest action by asking whether "a jury question was presented on the issues" and how long the jury deliberated.

The court continued to state that the good faith and probable cause standards could apply factors that bear on a challenger's *subjective* belief but that the court preferred an *objective* standard. In *Workman* one deciding factor was that the case was tried to a jury. The dissent took this to show that the lower court regarded there to be adequate evidence to overcome a motion for summary judgment, which that judge argued should suffice. The majority opinion instead regarded it as significant that the jury only "deliberated for sixty-three minutes" before deciding against the contest, which the court took to indicate that the case was weak or lacking in the objective factors that would inform good faith, probable cause, reasonable belief, and so forth.

Whelan v. Sanford, 2017 WL 1632443 (Cal. Ct. App.), addressed the enforcement question in the context of two significant factors. One was legislation in California, which has struggled (perhaps more than in any other jurisdiction) with the question of when to enforce anti-contest provisions. The other was an apparent over-reach by a successor trustee who sought court approval for a self-interested result. The unpublished opinion is not citable, which is unfortunate given the court's summary of the California Law Revision Commission's study and then recommendations regarding enforcement of anti-contest clauses:

> . . . [N]o contest clauses are . . . supported by a number of important public policy interests, including respecting a transferor's ability to control the use and disposition of his or her own property and to avoid the cost, delay, public exposure, and additional discord between beneficiaries involved in litigation over the transferor's estate plan. . . . [H]owever, . . . other public policy concerns "can trump a transferor's intention to create a no contest clause." . . . [A]s a matter of general public policy, "a person should have access to the courts to remedy a wrong or protect important rights." . . . [A] no contest clause should be applied conservatively to avoid a forfeiture that is not intended by the transferor. . . . And . . . important public policy interests support judicial supervision of an executor, trustee, or other fiduciary. . . .
>
> Accordingly, the Commission recommended that a no contest clause should be enforceable only in response to three types of contests: (1) a direct contest . . . , brought without probable cause; (2) a creditor claim; and (3) a challenge to a transfer of property amounting to a forced election.

The plaintiff in *Whelan* asserted a right to a broker's commission in addition to the trustee's regular fee for the sale of a trust's most significant asset, alleging an oral understanding with the trust's settlor. The no contest provision specifically identified any action "based on: (i) a quantum meruit theory . . . [or] (iii) any alleged oral agreement . . . claiming that the Settlor agreed to give . . . anything to such person . . . ." According to the court, "any beneficiary with a creditor's claim based on an oral agreement must make an election between pursing such claim or taking under the Trust." Seeking extraordinary compensation for the trustee's sale of a trust asset was the plaintiff's downfall.

The debate over the legitimate and effective use of litigation-suppressing provisions in wills and trusts is long from being resolved. Many courts exhibit a strident dislike for any effort to deny access to the truth-determination function that they serve. Meanwhile, some planners and their clients show a similar distaste for unfounded efforts to disrupt or defeat a transferor's intent. Among techniques that may prove useful, planners and drafters may find that (1) using anti-contest provisions sparingly – only in cases in which legitimate concerns about anticipated ill-founded challenges exist, (2) shy of committing testamentary libel, stating the concerns and facts as known and viewed by the transferor for the treatment of an expectant contestant and inclusion of such a provision, and (3) establishing for a particular situation an objective standard or test that should be applied in deciding the good faith or probable cause requirement.

Family Settlement Agreements Indiana law expressly permits "family settlement agreements" to compromise any contest or controversy regarding admission, construction, validity, or the rights of any beneficiary or heir under a testator's will. Designed to encourage the compromise and resolution of actions that otherwise would sound in probate, "family settlement agreements are favorites of the law . . . uniformly upheld and sustained . . . to preserve the peace and harmony of families." The question resolved by Salcedo-Hart v. Burningham, 656 F. App'x 888, 892 (10th Cir. 2016), relied upon by **In re Estate of Kent**, 2017 WL 3662480 (Ind. Ct. App.), is whether *prospective* heirs or beneficiaries may create a binding settlement agreement prior to the death of their anticipated decedent. To which each court answered "why not"?

Kent involved a testator who disinherited a child and a step-child, and divided his estate essentially equally between two other children. When terminally ill, the testator asked these two beneficiaries to sign an agreement, presumably in anticipation of postmortem conflict. One of those children purported to rescind the agreement several days after its execution (and before the testator died). Postmortem that child raised the issue whether premortem family settlement agreements are authorized by Indiana law, and sought to invalidate the agreement based on the purported rescission.

Finding no clear indication in the statute regarding the legislature's intent about the timing of family settlement agreements, the court held that there was no reason to deny premortem efforts to minimize family conflict. *Kent* also regarded "the desire to carry out the wishes of the testator" to be adequate consideration for a contract that may be rescinded "only when one party avers that he has performed a substantial part of his obligations under a contract and that the other party refused to perform its obligations." The court enforced the agreement because the child who sought to invalidate it had not performed any obligations under the agreement.

A handful of jurisdictions authorize premortem probate, by which a testator presents a will to the probate court for a determination that it is properly executed, not the product of undue influence or lack of capacity, or otherwise infirm. A common concern is that premortem probate requires notice to all potentially affected or interested parties, which can generate controversy even earlier than the testator's death. As a result, only Alaska Stat. §13.12.530 et seq.; Ark. Code Ann. §28-40-202; Nev. Rev. Stat. §30.040; N.H. Rev. Stat. Ann. §552.18; N.C. Gen. Stat. §28A-2B; N.D. Cent. Code §30.1-08.1-01; and Ohio Rev. Code Ann. §2107.081 appear to authorize such a process. The family settlement agreement might be an alternative method by which potential conflict may be averted, especially in states that lack premortem probate. Although individuals who don't sign the agreement would not be bound, those who the testator most expects to be combatants presumably can be mollified by a compromise agreement, and litigation potentially avoided (albeit, in *Kent* and *Salcedo*, the litigation simply shifted to contest the validity of the agreement itself).

Many courts are averse to enforcement of anti-contest (in terrorem) clauses. See Casner & Pennell, ESTATE PLANNING §3.1.2 (8th ed.) for an extended discussion. Coupled with a premortem family settlement, however, it may be that many of these courts would be less distressed by the consequences of an anti-contest provision that is triggered by a signatory's effort to rescind or invalidate that favored form of compromise.

No-Contest Provision with a Dash of Ethics Violation **In re Trust of Hildebrandt**, 388 P.3d 918 (Kan. Ct. App. 2017), affirms a district court ruling, which affirmed a district magistrate judge's grant of a petition (consented to by all of a trust's beneficiaries) to change the trustee. So at three successive levels the named trustee unsuccessfully sought to prevent being replaced, in the process alleging that the petition triggered an in terrorem provision that applied if a beneficiary "objects to any provision . . . or interferes . . . with the administration of the trust . . . ." On both scores the trustee lost in all three courts. Two elements of the decision are noteworthy.

The first is that trust modification – here to alter the successor trustee – was authorized by the Kansas version of Uniform Trust Code §411(b). It permits modification of a noncharitable irrevocable trust without consent of the settlor (who, in *Hildebrandt*, was deceased) "upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust." The court did not mention UTC §706(b)(4), which permits removal of a trustee if "removal is requested by all of the qualified beneficiaries, [if] the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust . . . ." Notwithstanding each provision's reliance on the concept, "material purpose" is not defined in the UTC. So the substantive issue of interest is the court's conclusion that the successor trustee designation was not a material purpose of the trust. In the process the court rejected the trustee's assertion that the no-contest provision meant that "all of the provisions of [the] trust were material."

The second element of interest was the trustee's assertion that naming a preferred family member as successor trustee was contrary to the settlor's intent that there be "an independent, third-party successor trustee" – meaning *it*. Which raised the question: why did the settlor name the trustee who was being removed? Here is the ethics violation. The settlor and his brother executed identical trusts that named both brothers as initial cotrustees, "to provide for the continuation of the joint farming operation created by" the two brothers. The settlor was dead, but the surviving brother stated that the independent third-party trustee idea was suggested by the drafting attorney, not by either settlor. This is not unusual – often a drafting attorney includes provisions without express request or even implicit approval by a client – the assembly of governing instruments normally requires attorney discretion. Indeed, the exercise of experience and judgment is what clients seek when obtaining professional assistance.

Nevertheless, who did the drafting attorney regard as essential to proper administration of the trust, as successor trustee? Surely you guessed this already: the drafter himself (or, if unable to serve, then "two senior members" of his firm). The drafter was deceased – which may explain why no ethics complaint was involved in *Hildebrandt*. The oft-objecting successor independent trustee was the law firm that had succeeded to the drafter's firm.

A prudent trustee might object to a petition and require a court determination, as part of its duty to ensure that all changes are appropriate, and to protect itself against any potential liability. Doing so through three judicial levels seems a bit aggressive, however. In fact it actually may have been unwise, because it shined a spotlight on the apparent violation of the anti-solicitation dictates of Model Rule 1.8.

It also raises the question whether insertion of the no-contest provision was the settlors' idea or another form of over-reach by the drafting attorney. In that regard, consider **In re Palmieri**, 54 Misc. 3d 1205 (N.Y. Surr. 2016), a case involving undue influence. The drafter asserted that "she does not ordinarily use in terrorem clauses and could not remember why she inserted . . . a broad in terrorem clause" in the decedent's final estate plan, which "deviate[d] from the decedent's long-standing estate plan and contradicts the trial testimony that decedent wanted to divide her estate equally between her two daughters." One legitimate explanation for inclusion of the in terrorem clause might have been the drafter's expectation that deviation from an equal division would cause the disfavored daughter to challenge the will. The drafter's testimony confirmed "that the inclusion of the in terrorem clause was at [the drafter's] suggestion, and not decedent's request." But she did not remember why that was her suggestion? This is enough to raise a few questions, which may be answered by a few added facts.

The daughter who benefitted from the decedent's final plan was married at the time to the "chair of the trusts and estates department" of a nationally known and well-regarded law firm, who "practices law in the private client area, advises clients with regard to estate planning issues, including wills and personal tax matters." This son-in-law "'probably' acted as decedent's attorney during the course of knowing his mother-in-law" but did not draft the decedent's final estate plan. For that the decedent employed a lawyer who attended law school with the son-in-law ("he 'showed her the ropes' in law school") and who the son-in-law recommended. That lawyer "revised [an earlier] instrument based upon [the son-in-law's] direction" and communicated with the son-in-law via email ("Can you use your influence so that I can close the file?") when the decedent delayed execution of a prior document. Adding further fuel to the fire, the son-in-law and his wife, the favored daughter, were significantly affected by "the financial crash of 2008" (they were unable to pay a $270,000 joint income tax liability). The decedent's final estate plan was crafted and signed in 2009, which raised the specter that the son-in-law and his wife, the favored daughter, exerted undue influence and created the suspicion that the in terrorem clause was an element of the same overreach.

Disinheritance of the one daughter may have been the right thing to do, and insertion of the in terrorem clause may have been appropriate in anticipation (based on experience in the context of such a dynamic) of the challenge that did occur. *Palmieri* highlights the stakes involved and underscores the reality that the goal of discouraging a contest was not reached. In fact, the existence of the provision may have added fuel to the allegation of undue influence, because a wrongdoer who understands what they are doing will seek to discourage oversight by the disfavored beneficiary.

Confidential Relations and Undue Influence Undue influence is difficult to prove because frequently it does not occur in public. As a result, many states establish a presumption of undue influence if the transferee was in a confidential relation with the transferor and was not a natural object of the transferor's bounty. If those elements are established, then the burden shifts to the transferee to disprove that there was undue influence. The aspect of **Willey v. Willey**, 385 P.3d 290 (Wyo. 2016), that may be notable is a conclusion that inter vivos and testamentary transfers differ for purposes of assessing whether either was motivated by undue influence. The consistent principle as between each form of transfer is that "courts will zealously scrutinize transactions between parties who are in a confidential relationship." So, for example, a gift to someone who is not a natural object of the donor's bounty is more suspect if that person was in a confidential relation to the donor – such as a caregiver, a fiduciary, a business partner, a member of the clergy, or a close advisor. There is nothing unusual in that concept. But, according to *Willey*, "[t]he rules as to the validity of gifts between parties in a fiduciary relation are applied with greater strictness to a gift inter vivos, by which a donor parts with something for which he still has some use, than to a gift by a will." That notion is unusual.

The theory suggests that greater scrutiny is called for because an inter vivos transferor's use of something during life has not yet terminated, as it does at death. So it is less likely that a transferor will part with something during life for less than adequate and full consideration. Meaning that lack of adequate consideration for an inter vivos transfer is more telling than a testamentary transfer, and is more subject to scrutiny if a confidential relationship is involved.

According to *Willey*, the consequence of this difference is in placing the burden of proof. According to the opinion, "if the transaction is inter vivos, the burden will shift to the party defending the transaction if a confidential relationship between the grantor and grantee is established." That statement may not accurately state the rule in all states, the majority rule being that the burden will shift at death as well, if the confidential relationship existed.

As a practical matter, the burden of proof – where it begins and whether it shifts – may not be a major consideration in litigation involving facts that strongly suggest undue influence. But in a close case, the existence of a burden of proof may tip the scale, or place one party at a disadvantage that is more likely to evoke a settlement.

The concept about the difference between inter vivos and testamentary transfers is intriguing in its own right, because it makes it easier to understand why even very wealthy clients often resist the recommendation to make transfers during life rather than waiting until death. Sometimes known as the endowment factor, the concept is that assets have a greater value to their owner than to someone who would acquire them. Which affects valuation as well, liquidation value (what a willing buyer is offering to acquire an asset) being lower than replacement cost (what a seller is asking, based on the value of the item to them). Valuation in tax cases is based on replacement cost, because typically it is higher, and these realities make the "willing-buyer, willing-seller" construct somewhat unrealistic in cases involving assets that do not routinely trade on an established market (such as the stock market).

Asset Protection

Validity of Domestic Asset Protection Trusts Domestic asset protection trusts (DAPTs) are most controversial to the extent they purport to permit domiciliaries of states without asset protection legislation to settle their wealth in trusts authorized by legislation in another state that does authorize DAPTs. Thus, for example, the effort of some state legislatures to lure out-of-state wealth to local trustees with legislative changes such as modification or repeal of the Rule Against Perpetuities, elimination of state income or wealth transfer taxation on non-domiciliary trusts, and self-settled asset protection trust legislation has spawned extensive discussion. For four reasons, **Klabacka v. Nelson**, 394 P.3d 940 (Nev. 2017), does little to address the validity of DAPTs in their most challenging context.

The most important reason for this is because both parties – spouses embroiled in a divorce – were Nevada residents. So there was no effort by a domiciliary of a state without DAPT legislation to move wealth to a DAPT jurisdiction to garner spendthrift protections not available under their home state law. It has always seemed most clear that a state legislature could enact DAPT laws that disfranchise its own domiciliary creditors. It is notable that no DAPT jurisdiction is a major commercial center. These are state legislatures that need not consider a strong creditor lobby.

Second, each trust predated any dispute between the spouses, so there was no judgement of any creditor that could raise voidable or fraudulent transfer issues.

Third, the spouses transmuted their community property and each created their own identical DAPT, which negates any notion that one spouse was "hiding" wealth that otherwise would be subject to the support, alimony, or property settlement claims of an innocent spouse.

Finally, it took litigation to the state's highest court to resolve the controversy, requiring it to reverse lower court orders that exposed the DAPT assets to claims of the settlor's spouse. This probably means that establishing the protection sought was a lengthy and expensive proposition, particularly given that the Supreme Court's conclusions are not especially useful in those situations that much DAPT planning is meant to address. It also bears noting that the lower court's determinations were very wrong, so the Supreme Court of Nevada did not go out of its way to validate the planning involved. But the judicial travel shows that a wild-hare lower court seeking to achieve what it appears to be equity can be a real danger, even in a state with clear DAPT legislation.

For what little more they are worth, the facts in *Klabacka* are stark and somewhat unusual, in terms of the sorts of situations in which DAPT planning is most likely. The parties were married for a decade before they executed their marital property agreement, transmuting their community property into separate property. Another eight years later they created the DAPT trusts, each with the settlor's own separate property. Another eight years passed before the divorce action was instituted. So this was not planning done in anticipation of divorce and, as the court found, "there is no evidence that the trust[s were] created to hinder, delay, or defraud known creditors." In addition, according to the court, Nevada stands alone on a critical element of the recovery sought. "[T]he 'key difference' among Nevada's self-settled spendthrift statutes and statues of other [DAPT] states . . . ' is that Nevada abandoned the interests of child- and spousal-support creditors . . .' ." As a result, a claim that the Restatement (Third) of Trusts §59 and most DAPT states would permit, for either variety of support, was not enforceable in Nevada. Meaning that this portion of the court's holding should not necessarily be expected, even in other DAPT states.

Most important, however, is the question that *Klabacka* did not (need to) answer – and that no other DAPT case has yet addressed: would the judgment of a court in one state, that a DAPT in another state is ineffective to shield assets from the court's order, be entitled to full-faith-and-credit in the state where the DAPT was being administered? For example, would Nevada refuse to enforce the order of a sibling state that sought to reach the trust assets in a situation like *Klabacka* in which the parties were not Nevada domiciliaries? That story has not yet been written.

Third-Party Trust Interests in Divorce The principle issue for consideration here is whether a former spouse may reach the assets of a trust that was created for a beneficiary by a third party. For these purposes, imagine that Parent (P) created the trust for an adult married child (C) and wishes to preclude C's spouse (S) from ever reaching any of the trust assets in the event that C and S divorce. The traditional rule in the majority of states is that property acquired during a marriage by gift, devise, bequest, or inheritance is not marital property. That rule *ought* to mean that S is not entitled to any portion of a trust created by P for C. But this notion is undergoing change as state laws chip away at the traditional principle.

Even if the traditional rule still applies, in many dissolution cases an expectancy or inheritance may be *considered* when a court divides or distributes marital property. The beneficial interest is not itself regarded as marital property, but it is regarded as an economic circumstance that the court may consider when determining an equitable distribution of the marital property. This concept is widespread, and is just one step shy of counting that beneficial interest as marital property.

In addition, trust monies previously distributed to a beneficiary may be marital property. Either via commingling or as an addition to the spouses' marital property. Corpus distributions are not our concern here, but trust income may be a different story. The standard rule is that income from nonmarital property remains nonmarital property, but some states regard income from nonmarital property to be marital property. In some states the income from separate/nonmarital property (including trust income) is community/marital property. And in some cases an important element is whether the beneficiary only ever has an income interest, as opposed to a present or future interest in the trust property (the income from which is marital property).

The developing trend is for courts to simply ignore the marital/nonmarital distinction and determine an equitable distribution in dissolution of marriage with all of each spouse's wealth in mind, including inherited wealth, interests in a trust, and income from a trust interest. Of particular interest in this context is Massachusetts G.L. c. 208, §34, which requires a court to consider any "opportunity for future acquisition of capital assets and income" when dividing the wealth of divorcing spouses – and not just when determining what alimony to award. This is a critical distinction, because considering a potential inheritance to determine ongoing support or alimony entitlements is one thing, allowed in many jurisdictions, but Massachusetts courts are not limited in this respect. Here is what the Massachusetts statute provides:

> Upon divorce . . . the court . . . may make a judgment for either of the parties to pay alimony to the other . . . . In addition . . . the court may assign to either husband or wife all or any part of the estate of the other . . . . In fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded . . . . The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates . . . .

In Lauricella v. Lauricella, 565 N.E.2d 436 (Mass. 1991), the Supreme Judicial Court analyzed the interest of a husband in a trust holding real estate established by his father which (1) gave the beneficiaries no power to require partition or distribution of trust assets; and (2) contained a spendthrift clause that purported to prohibit alienation or anticipation of a beneficiary's interest in the trust. The probate judge had reasoned that the father's trust was not a marital asset because this trust had nothing to do with the marriage: the husband was neither settlor nor the trustee, and the trust could be amended to eliminate the husband's beneficial interest. But the Supreme Judicial Court disagreed, concluding that the husband's interest in the trust was includable in the marital estate subject to equitable division under G.L. c. 208, §34. Although the husband's interest was subject to divestment and contingent upon his surviving until the termination of the trust, the *Lauricella* court noted that the husband had a present, enforceable, equitable right to the use of the trust property for his benefit, as well as a vested right to receive his share of the trust property upon termination of the trust according to its terms.

Lauricella held that: "The husband's interest is unlike a mere expectancy of the type that this court has held to be outside of the divisible estate under §34." Moreover, "[t]he fact that valuation of the interest may be difficult does not alter its character as a divisible asset, . . . nor does its inalienability change its character as divisible."

Trust property is thus vulnerable to equitable division under G.L. c. 208, §34. "When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under §34." Although the court requires that current valuation be possible, such valuation need not be easy. It need not be "susceptible of precise calculation" to be divisible under §34. Thus, trust property is includible in the marital estate subject to equitable division under G.L. c. 208, §34 if the beneficiary's likelihood of receiving his interest in the trust is not "too remote or speculative for inclusion within the estate." And, if a beneficiary's interest in the trust is too remote or speculative for inclusion within the marital estate of the beneficiary in divorce, it is nevertheless appropriate to consider his or her beneficial interest "under the §34 criterion of 'opportunity of each [spouse] for future acquisition of capital assets and income' in dividing the marital property."

This Massachusetts jurisprudence is expansive, and the state of the law there (as elsewhere) is confused. For example, the rule in Massachusetts is that a court should make "reasonable assumptions" about expectancy interests, but use caution when taking any expectancies into account. Notice the absence of any consideration of spendthrift trust protections, or notions of inherited wealth as being nonmarital property that is not subject to equitable distribution in dissolution.

From an earlier case, Davidson v. Davidson, 474 N.E.2d 1137 (Mass. Ct. App. 1985), comes a better understanding of this trend:

> While "[p]roperty concepts have not become immaterial," implicit in our appellate decisions is the rejection of the notion that the content of the estates of divorcing parties ought to be determined by the wooden application of technical rules of the law of property. We think an expansive approach, within the limits of the marital partnership concept, is appropriate. The purpose of §34 is to "empower[] the courts to deal broadly with property and its equitable division incident to a divorce proceeding. Such broad discretion is necessary in order that the courts can handle the myriad of different fact situations which surround divorces and arrive at a fair financial settlement in each case."

As a planning response, one suggestion is to create totally discretionary spray trusts rather than trusts with more easily valued interests. Better yet, create totally discretionary spray *group* trusts, in which no beneficiary has an exclusive right to receive anything at any time. See, e.g., *In re* Marriage of Eddy, 569 N.E.2d 174 (Ill. App. Ct. 1991), which involved a wife who had no income from gainful employment but she had income from "investments, gifts, and trusts" – including as one of several beneficiaries of trusts created by a grandparent that granted the trustee discretion to distribute income and principal to her, her parents, and other unnamed individuals under a standard (best interests and welfare). Although the court conceded that the lower court could *consider* her present interest in the trust, it held that the lower court improperly treated her interest because she was not the exclusive beneficiary.

Originally contra to this notion was **Pfannenstiehl v. Pfannenstiehl**, 37 N.E.3d 15 (Mass. Ct. App. 2015), rev'd and rem'd, 55 N.E.3d 933 (Mass. 2016). A group/pooled trust was held for 3 children and 8 grandchildren when one child was divorced. The court made an award to that child's spouse because the trust distribution provision used a standard (comfortable support, health, maintenance, welfare, and education) that the court regarded as "ascertainable" (not in the §2041 sense, welfare being impermissible), and therefore as enforceable by the beneficiary. According to the court, a different result would have applied if the trustee's authority was "wholly discretionary . . . with no distribution standards." The lower court was influenced by the trust having consistently made equal distributions to the settlor's three children until just before the one child's divorce action began, at which time all distributions to that child ceased entirely. Those distributions had supported the life style to which the child's family had become accustomed, and the court concluded that the trustee was obliged to continue to make distributions, that the cut-off was a "manipulation," and that "the spendthrift provision is being invoked as a subterfuge to mask the [child's] income stream and thwart the division of the marital estate in the divorce." These damaging facts (and wrongful "scorched earth" tactics in the divorce action itself) influenced the lower court's final determination, including an award of attorney fees to the child's former spouse.

On appeal in *Pfannenstiehl* the Supreme Judicial Court concluded that the child's

> interest in the [group] trust is "so speculative as to constitute nothing more than an expectanc[y]" and thus that it is "not assignable to the marital estate." [But] . . . on remand, the judge pursuant to G.L. c. 208, §34, may consider that expectancy as part of the "opportunity of each [spouse] for future acquisition of capital assets and income," in the judge's determination of a revised equitable division of the marital property.

Thus, the discretionary nature of the group trust served a useful purpose in preventing an absolute award to the spouse of a portion of the trust itself. But it is likely that the judge on remand will nevertheless consider the trust as a factor in dividing the spouses' property between them.

Validity of Revocable Inter Vivos Trusts Fundamentally, **United States v. Johnson** 224 F. Supp. 3d 1220 (D. Utah 2016), is a §6166 deferred-payment-of-tax case in which the qualifying closely held business became insolvent. The government is seeking to collect unpaid taxes from beneficiaries of the decedent's estate and trust. The latest decision in the case is a reconsideration of a prior order. It is broken into two parts. In one the beneficiaries who also were successor trustees of the decedent's inter vivos trust are being pursued under §6324A based on a lien to secure the §6166 election to defer payment of the estate tax liability. The other is the more interesting development, in which the beneficiaries are being pursued under §6324(a)(2) in their individual capacity as transferees of the decedent's estate and trust.

The §6324(a)(2) element is eye-catching because the court held that the beneficiaries are *not* liable as transferees of the trust, because the trust was not includible in the settlor's gross estate under §§2036 and 2038 (the so-called "string provisions"). This was a surprise, because the settlor created a funded, revocable, inter vivos, self-trusteed declaration of trust for her lifetime benefit. That noninclusion "good news" is offset by the "bad news" reason for the court's unconventional conclusion: that, instead of under the string provisions, the trust assets are deemed to be includible under the broad-based probate estate inclusion rule in §2033. As if the decedent's transfers into the trust were not valid or effective probate avoidance transfers under state law.

That conclusion raises concerns for state trust law purposes, not the least of which being the potential that a funded, self-trusteed declaration of trust is not valid during the settlor's remaining lifetime.

Two living children of the decedent (D) were cotrustees of a trust of which D was the settlor and the sole trustee at the time of her death. D retained an unlimited power to alter, amend, revoke, or terminate the trust (a power that normally triggers estate tax inclusion under §2038(a)(1)). She also was the sole income and corpus beneficiary during life, with the power as trustee to make distributions to herself without limitation (together these interests and powers normally trigger estate tax inclusion under §2036(a)(1) and (a)(2)).

At her death D's will poured the residue of her estate into the trust, which divided into shares for D's descendants (referred to in the opinion as her "heirs"). The primary asset involved was stock in a Nevada hotel that held a gaming license. Valued for estate tax purposes at over $11.5 million, that stock qualified for deferred payment of estate tax under §6166.

Nevada law required special approval for a trust to own stock in a casino. When a special permit for the trust's ownership was set to expire, the trustees chose not to seek permanent approval of the trust's ownership. Instead, the trustees distributed the stock to the trust beneficiaries. About $1.5 million of estate tax was unpaid at that time. A distribution agreement signed by each beneficiary committed them to pay the remaining estate tax as it came due. The children also executed a §6324A special lien for the estate tax deferred under §6166.

The hotel declared bankruptcy about five years later, before the deferred estate tax was fully paid. Upon which the government sought to collect the outstanding tax liability from the children under §6324(a)(2). At a first hearing on that question the court held that the two children who were the successor trustees were personally liable for the estate tax deficiency because the trust was includible in D's gross estate under §§2036(a) and 2038(a). This follows because §6324(a)(2) requires that the subject estate property be included in the gross estate under any of §§2034 through 2042 – those being the provisions that cause inclusion of several varieties of nonprobate property (including life insurance proceeds, deferred compensation and annuities, and property subject to a general power of appointment). That set up the issue for a hearing in which the children argued that the trust assets instead were includible under §2033 as probate property, because the trust effectively was not a valid entity that could hold those assets. This inclusion would negate application of §6324(a)(2).

Presented with this question of the proper provision for inclusion of the trust assets, the court concluded in the children's favor and held that §6324(a)(2) did not apply. It held that none of the §§2034-2042 nonprobate inclusion provisions was applicable. Rather, the trust assets were subject to estate tax inclusion under §2033. The court concluded that D retained "full beneficial ownership of all Trust assets during her lifetime" and failed to make any transfer to any other beneficiary prior to her death. As a result, under Utah state law, no valid trust existed prior to D's death.

That conclusion is at odds with many decades of case law and statutory reforms that make clear that funded, revocable, self-trusteed, inter vivos trusts are valid will substitutes. The notion that such trusts are valid is so well-entrenched in American law today that the Uniform Trust Code now provides that, during the life of the settlor of such a trust, the trustee owes no duties to anyone except the settlor. Meaning that future interest beneficiaries have no standing to challenge trustee actions while the settlor is alive and competent. That UTC position is viable only because the validity of such a trust is beyond question under today's jurisprudence.

Johnson turns this acceptance of such trusts on its head. It provides the exact opposite of what the UTC intends – holding that the trust does not constitute a transfer for purposes of the string provisions prior to the settlor's death. Meaning that the trust assets are includible under §2033 as if nothing was transferred into the trust inter vivos.

Perhaps *Johnson* can be limited to its facts. The court made much of the fact that D was trustee and that trust income and principal could be withdrawn without restriction by D as grantor during her lifetime. "Only upon the grantor's death were the Trust assets to be distributed . . . to the various beneficiaries of the Trust." If the trust settlor ceased to serve as trustee prior to death, then the facts of *Johnson* should be distinguishable.

Unfortunately, the court also held that, although "creation of the Trust changed the legal title of the Trust assets from ownership by Decedent personally to ownership by Decedent as the trustee of the trust . . . the beneficial ownership of the Trust assets never changed during Decedent's lifetime. . . . [T]he transfer of title to the Decedent as trustee did not change Decedent's beneficial ownership of the Trust assets during her lifetime [and] the beneficiaries of the Trust merely had a 'hope and expectation' of inheriting a beneficial interest in the Trust assets, rather than any actual ownership interests during Decedent's lifetime." This vision is directly contrary to the law as it has developed over the past half century.

Among the authorities relied upon by the court was Technical Advice Memorandum 8940003, the distinguishing fact being that at the settlor's death the corpus of the trust involved in that TAM was distributable to the settlor's estate. In that context the government held that there was no other beneficiary of the trust during the settlor's life, which is a correct but inapposite conclusion in this context. The *Johnson* court's opinion did not appreciate the distinction, saying instead that the case for §2033 inclusion in *Johnson* was even stronger because the TAM did not entail the settlor acting as trustee. This confirms that the *Johnson* court did not understand the nature of fiduciary duties and the need for a third party – even a contingent future interest beneficiary – to be able to assert the fiduciary's duties. That element was lacking in the TAM, notwithstanding that a third party was acting as trustee, but it existed in *Johnson*, which is why the cases are not the same.

The court's misconception is confirmed by the other authority cited in *Johnson*, being Rev. Rul. 75-553, 1975-2 C.B. 477, which again entailed a trust that poured back to the settlor's probate estate at the settlor's death. That Ruling expressly stated the operative rule that §§2036 and 2038 are not applicable "unless someone other than the decedent receives a beneficial interest in the transferred property" during the settlor's life. That interest existed in *Johnson* in the remainder beneficiaries but not in the Ruling. Again, the *Johnson* court did not appreciate this distinction. Instead it held that "the Decedent here beneficially owned all of the Trust assets up until the time of her death." That notion simply is not correct.

The *Johnson* court's conclusion will be unfortunate if it serves as precedent for a state court to hold that a revocable, inter vivos, self-trusteed, declaration of trust is not a valid probate avoidance device. That risk is magnified in a jurisdiction that has enacted UTC §603(a), providing that the rights of other beneficiaries are subject to the control of the settlor and the duties of the trustee are owed exclusively to the settlor while the trust is revocable and the settlor is not incapacitated to revoke the trust. The intent of §603(a) is not to suggest that the trust is not yet valid, yet a misunderstanding of this provision could lead to a *Johnson* result in any UTC jurisdiction. Which would be a wrong and unfortunate result in cases that do not entail the special §6324(a)(2) lien that is the driving subject in *Johnson*.

Unless the government successfully appeals *Johnson*, the court's conclusion could create unwarranted difficulties unanticipated by trust drafters in the many American jurisdictions that have adopted the UTC. As it is, §603(a) has produced some heartburn in terms of which (if any) beneficiaries may complain about trustee performance while the settlor of a revocable trust is alive. *Johnson* would compound the difficulties already created by §603(a) in cases that involve efforts by remainder beneficiaries to hold trustees accountable for fiduciary breaches during the settlor's lifetime. All revealing that seemingly settled concepts regarding the validity of inter vivos trusts and the objects of a fiduciary's duties are coming under review.

Johnson says nothing about probate avoidance or formalities of execution, and it is a one-off decision in the sense that it doesn't avoid estate tax inclusion. It only works to protect the beneficiaries from transferee liability under §6324(a)(2). No planner would likely take advantage of the court's ruling, so *Johnson* may be a decision that planners should dismiss as result-oriented and fundamentally wrong-minded.

Nevertheless, in thinking about the tax implications of *Johnson*, what difference does it make that inclusion is generated under §2033 rather than §§2036 or 2038? There are a handful of provisions that distinguish between probate property and nonprobate property, none of which the *Johnson* court considered. For example, §2053(b) provides a different rule, in terms of timing requirements, for the deduction of expenses of administration of property "not subject to claims" – which Treas. Reg. §20.2053-8 regards as nonprobate property. Does *Johnson* mean that the probate property rule is applicable to the sort of trust involved in *Johnson*? This could be taxpayer favorable, because §2053(a) does not impose a similar limitation on when those administration expenses must be incurred. And §2207B is a right of reimbursement for estate tax attributable to property includible in the gross estate under §2036, whereas §2205 essentially imposes the liability for estate tax on the probate estate. Which rule is applicable to the property in the *Johnson* trust? A well-drafted tax apportionment provision will circumvent the need to resolve that question.

On the other hand, it seems unlikely that the *Johnson* decision could alter fundamental state law concerns such as requirements for valid execution of a trust document, the elective share of a surviving spouse, or whether creditors have access to such a trust, either inter vivos or postmortem.

But you never know what precedent a state court might seize in litigation involving a trust designed to provide lifetime administration and then avoid probate.

Garnishment Defeats Spendthrift Protection Spendthrift trust protection against creditors is subject to various limitations. For example, many state laws (like UTC §503) provide exceptions to spendthrift protection for claims to child or spousal support. Government claims also may be immune to spendthrift protection. Nor does spendthrift protection necessarily restrict creditor rights to attach a beneficiary's right to receive immediate distributions. Rather, spendthrift protection may only serve to preclude acceleration of beneficial interests, not attachment of distributions once the beneficiary becomes entitled. As to them, a proper garnishment order may be applied to enforce this creditor entitlement, essentially mandating that the trustee pay directly to the creditor anything that is immediately distributable to the beneficiary. UTC §502(c) provides otherwise, but may not control in the type of situation described in this development. Thus, a garnishment order against a trust may not differ from a garnishment order against a debtor's wages, which may be enforceable against a trust interest in the same manner (and potentially subject to the same limitations).

Some trust drafters seek to avoid garnishment by using an "in-hand-payment" clause, directing the trustee to make distributions only to the beneficiary personally. These provisions do not appear to add any protection beyond that of a garden-variety spendthrift provision itself. See, e.g., Brent v. Maryland Central Collection Unit, 537 A.2d 227 (Md. Ct. App. 1988). In addition, they would not add anything to the protection of UTC §502(c). Nevertheless, in some trusts a facility-of-payment provision permits the trustee to make distributions for the benefit of a beneficiary, such as by paying their rent or mortgage, paying for groceries or prescriptions. These are nearly the exact opposite of an in-hand-payment provision in the sense that they are meant to deal with a beneficiary who is not competent due to age of other capacity. These provisions are not normally meant to preclude payment to creditors – as would be the intent of a spendthrift provision or an in-hand-payment provision – but rather to allow payment to trade creditors for the convenience of the beneficiary.

Two recent cases involving California law (not a UTC jurisdiction) illustrate the difference between spendthrift protection and garnishment. **United States v. Harris**, 854 F.3d 1053 (9th Cir. 2017), involved a federal claim for restitution for amounts stolen from an employee benefit plan. Harris was beneficiary of two discretionary support trusts created by third parties, each containing spendthrift provisions and both giving Harris an interest that was subject to the trustee's "absolute discretion." In **Carmack v. Reynolds**, 391 P.3d 625 (Cal. 2017), confirmed sub nom. by In re Reynolds, 867 F.3d 1119 (9th Cir. 2017), a bankruptcy trustee sought to determine the bankruptcy estate's interest in a third-party spendthrift trust as to which Reynolds had disclaimed a right to receive $250,000 immediately, $100,000 a year for ten years, and then one-third of the trust remainder. Each case allowed the plaintiff to reach monies held by the trust that were distributable to the beneficiary.

Citing 28 U.S.C. §3002(12), *Harris* held that garnishment under federal law may reach "property," which includes "any present or future interest, whether legal or equitable, in real, personal (including choses in action), or mixed property, tangible or intangible, vested or contingent, wherever located and however held (including community property and property held in trust (including spendthrift and pension trusts))." The court did not need to address whether 28 U.S.C. §3002(12) would prevail over state law in a UTC jurisdiction.

The fact that amounts were payable to Harris "subject to the absolute discretion of the trustees" (limited by standards for health, maintenance, support, education, and best interests) was not prohibitive, because absolute discretion always is subject to court review, meaning that Harris had a property interest that fell within the purview of the federal statute. In addition, citing Drye v. United States, 528 U.S. 49 (1999), Harris' alleged disclaimer of his trust interests also did not defeat the garnishment. An important factor was the court's final observation: "The government is not attempting to compel distributions from the trusts. However, any current or future distributions from the trusts to Harris shall be subject to the continuing writ of garnishment, until the restitution judgment is satisfied."

Carmack similarly rejected the beneficiary's effort to preclude creditor attachment via disclaimer (on the eve of declaring bankruptcy), and held that the bankruptcy trustee could "reach a sum up to the full amount of any distributions that are currently due and payable to the beneficiary even though they are still in the trustee's hands." Again, this was not an acceleration of future rights of the beneficiary, which a spendthrift clause effectively prevents. Instead, it is merely an immediate right to receive that which is due and payable to the beneficiary.

Adventures with Spendthrift Trusts Textbook spendthrift law provides that a settlor may not permit beneficiaries to make voluntary assignments of beneficial interests while precluding only involuntary attachment by creditors. To be effective, a valid spendthrift provision must prohibit both. Nevertheless, even if assignment is a violation of a spendthrift provision, a beneficiary who assigns a beneficial interest may not complain if the trustee honors that assignment. **Trust of Middleton**, 2017 WL 1032737 (Penn. Sup. Ct.), applied both of these rules in an unusual context.

As part of a family settlement agreement, the trust beneficiary purported to irrevocably assign all principal distributions from a spendthrift trust to a trust that the beneficiary created (on the same date). Sixteen years later – and one year after the beneficiary's mother died – the beneficiary "revoked and repudiated" that assignment. The trustee asserted that the settlement was intended to mollify the beneficiary's mother, who otherwise would have disinherited the beneficiary from the mother's estate. And the court recognized that revocation of the assignment might be a violation of the family settlement agreement. Nevertheless, because the trustee had not yet acted upon the assignment (no distributions of principal had been made in the sixteen-year period), the court held that the beneficiary was permitted to revoke the assignment. According to state law, a beneficiary who assigns in violation of a spendthrift provision always may revoke the assignment, because the assignment is invalid and therefore cannot be irrevocable.

Had the trustee honored the assignment the beneficiary would have been precluded from holding the trustee liable, but in *Middleton* the trustee's inaction meant that the beneficiary could revoke. Quaere whether, on its own motion, the trustee could decant the trust into the trust that the beneficiary created at the time of the original assignment. Particularly if the trust had a "facility of payment" provision that allowed distributions to or for the benefit of a beneficiary and that included the authority to distribute in a variety of ways that included deposits into a trust created by or for the beneficiary.

In re Amerson, 839 F.3d 1290 (10th Cir. 2016), raised a different aspect of a spendthrift trust provision, being that the beneficiary must assert the protection for it to be applicable. In the context of Bankruptcy Code §541(c)(2) a beneficiary may assert that a spendthrift provision that is valid under state law is enforceable under bankruptcy law as well. But, according to the court, this protection is permissive and the beneficiary's failure to assert the protection of the spendthrift provision meant that the beneficial interest was not exempt from inclusion in the beneficiary's bankruptcy estate, available to satisfy creditor claims. In that respect, the spendthrift provision acts like an affirmative defense that, if never asserted, makes the protection it provides unavailable. Nothing in the opinion suggests that the trustee (not the bankruptcy trustee) has an affirmative duty to assert the spendthrift protection on behalf of the beneficiary.

Disclaimer Fails to Defeat Creditor A §2518 qualified disclaimer allows a beneficiary to avoid wealth transfer tax by renouncing property, which passes to others as if the disclaimant was deceased. A less frequent (or successful) use of disclaimer planning is anticipated by United States v. Irvine, 511 U.S. 224, 239 – 240 (1994), which stated that one "important consequence of treating a disclaimer as an *ab initio* defeasance is that the disclaimant's creditors are barred from reaching the disclaimed property." In fact, that statement was dicta, and state law summarized in Casner & Pennell, Estate Planning §7.1.6 n.240, goes both ways on the issue whether creditors can be disfranchised via a debtor's disclaimer. In addition, case law also declares disclaimers to be ineffective to defeat claims by the Federal government.

The landmark case for Federal tax lien purposes is Drye v. United States, 528 U.S. 49 (1999), aff'g sub nom. Drye Family 1995 Trust v. United States, 152 F.3d 892 (8th Cir. 1998), which held that state disclaimer law cannot preclude attachment of a federal tax lien, even if the disclaimer was timely and effective for state law (and even for federal wealth transfer tax) purposes. According to *Drye*, state law determines the taxpayer's rights or interests in the disclaimed property but federal law determines whether those rights or interests are "property" as to which a tax lien may attach. The Court regarded the taxpayer's right to either accept or disclaim the property as a sufficient "right to property" to which the federal lien could attach.

United States Small Business Administration v. Bensal, 853 F.3d 992 (9th Cir. 2017), relies on *Drye* to preclude an otherwise qualified disclaimer from defeating the SBA's collection action under the Federal Debt Collection Procedures Act (FDCPA). Involved was a small business loan that the SBA sought to collect from a distribution of the disclaimant's share of his deceased father's trust. The SBA regarded the disclaimer as a "fraudulent transfer" under the FDCPA, and the legal battle was over whether state law was controlling on the question whether the disclaimer was a "voidable transfer." That issue boiled down to a question of preemption, Federal law being in direct conflict with state law. Holding that state law "is inconsistent with the FDCPA and must give way to the federal statute in light of the express preemption clause," the court relied in part on *Drye* for the proposition that the taxpayer "executed his disclaimer *after* the government already had a pre-existing interest in his property." Thus, the debtor's disclaimer failed to preclude FDCPA attachment to the inheritance.

One potential lesson from *Bensal* is that retention of the debtor's inheritance inside his father's trust, with a viable spendthrift provision, might have avoided the government's attachment prior to actual distributions to the debtor. A sprinkle or spray provision allowing the trustee to make distributions to the debtor's descendants (the same folks who would have benefitted from the disclaimer, had it been effective), would protect the inheritance for the natural objects of both the trust settlor and the debtor, immune from claims by the SBA or other creditors.

Filing a Claim in Probate Is a creditor's claim effective if mailed to an employee or agent of the decedent, who then delivers that claim to the executor? **Wilson v. Lawrence**, 2017 WL 1406434 (Ohio), held that mailing the claim to both the decedent's personal assistant (secretary) and the trustee of the decedent's inter vivos trust, who each promptly forwarded the claim to the executor, did not preserve the $200,000 claim. "The statute is not ambiguous. . . . '[A]ll creditors . . . shall present their claims . . . to the executor or administrator'," and not to an agent of the fiduciary. Moreover, the statute does not admit to "substantial compliance," and "the law should not come to the creditor's aid."

Argued by the dissent was that delivery to an agent of the executor ought to suffice. In this case delivery was to an agent or fiduciary of the *decedent*, which is not the same. But consider another suggestion made by the dissent: "Would sending a written claim by FedEx or a private courier service fail the majority's rule?" That essentially treats the decedent's assistant or fiduciary as the *creditor's* agent, to deliver the claim. Almost certainly that also was not the case. Still, the point is cogent that the executor timely received the creditor's claim, which was not unknown to the executor in the first instance. The need for certainty, in terms of the decedent's executor determining whether a claim was timely presented, was not at issue in *Wilson*, and the court's statement that "this responsibility cannot be delegated to an agent who does not owe the fidelity required of an officer of the court" almost certainly is not true. If the person truly is the fiduciary's agent, then they certainly also owe the same duties to the court as does the fiduciary personally.

All of these matters to the side, the lesson learned is that strict compliance with the procedure for filing claims is serious business. In *Wilson* the claim was filed by the creditor's attorney, who should have determined the proper addressee for the written claim. It seems likely that the attorney who failed to comply with the statute may be required to make good the creditor's loss. Furthermore, it might be that personal liability would apply if the executor paid the claim, rather than raising the defense that was successful in *Wilson*.

Questions of Status

Same-Sex Common Law Marriage Various cases have established the common law marriage of same-sex couples who were precluded from an intended ceremonial marriage by discriminatory state laws that were declared to be unconstitutional in Obergefell v. Hodges, 135 S. Ct. 2584 (2015). **In re Estate of Carter**, 159 A.3d 970 (Penn. Super. Ct. 2017), articulates the legal requirements for a common law marriage, and the facts present challenging questions about timing in the context of Pennsylvania's repeal of common law marriage after 2004. The lower court denied recognition of the couple's marriage, stating that same-sex marriage was not recognized in Pennsylvania until 2014, which was after common law marriages were no longer newly recognized by state law. On appeal the court reversed, stating that the facts showed that the couple began their common law marriage as early as 1996, notwithstanding that Pennsylvania did not recognize same-sex marriage. Because nonrecognition was improper, the court held that the common law marriage existed even though state law failed to honor it. Interesting about the case was that no one opposed the petition for recognition of the marriage, and the facts were extremely strong in support of the marriage.

Change in Circumstances Drafting wills and trusts is made more difficult when the terms used are immutable but the facts and circumstances under which the provisions will apply are subject to change. Especially when the natural objects of the client's bounty are malleable. For example, in an irrevocable life insurance trust (ILIT) it is common to grant various beneficiaries annual five-or-five rights of withdrawal (Crummey powers) to qualify contributions to the trust as present interests that satisfy the §2503(b) gift tax annual exclusion requirements. Frequently those withdrawal rights are given to close family members who will be trust beneficiaries after maturation of the insurance payable to the trust. Crummey powers typically are given to the settlor's spouse and descendants, perhaps to in-law relatives as well.

Some of these relationships are relatively immutable, but others are easier to change. For example, it is relatively easy to divorce a spouse, but not a descendant (or the descendant's spouse). The question addressed by **In re Aaron Living Trust**, 2017 WL 1373437 (Md. Ct. Spec. App.), is what the term "wife" meant in the context of an estate plan drafted when the settlor was married to Eileen, but the woman to whom he was married at death was Myrna. The document had been amended after his first wife died and he had remarried, but no change was made to the trust provision that said "I am married to Eileen Aaron. Any reference in this agreement to 'my wife' is a reference to Eileen Aaron." Notwithstanding the settlor's remarriage and subsequent amendment of other provisions of the trust, this provision remained unchanged. Was that an oversight, an indication of lack of capacity, or proof positive that provisions in the trust addressing a surviving spouse were meant to apply only to Eileen, who did not survive the settlor?

In this context the court stated that the general rule is "a gift to a husband or wife means a husband or wife at the date of the will, and if the husband or wife then living dies, and the designated person remarries a second time, the second spouse does not take." Quoting 4 Page, The Law of Wills §34.2 at 485-486 (rev. ed. 2004) and noting, first, that the context may show a different intent and, second, that the same rules should apply under a trust. There is little reason to think that a different rule would apply to a divorce, rather than death, of the former spouse (unless state law addresses the consequences of a divorce). Still, the drafting lesson is that the document should articulate the client's intent when using terms that could apply to more than one person (seriatim, it should be hoped, when dealing with spouses). A different intent may exist in drafting an ILIT with Crummey clause powers of withdrawal, and documents often articulate that adopted children should be treated as natural born, and that current spouses (whoever they might be) are meant to be included (recognizing that relations by marriage are transitory). A document lacking clarity might be interpreted according to the settlor's current intent, but better approaches than a court action may include the use of nongeneral powers of appointment, powers to alter or amend a trust to add or delete beneficiaries, decanting to a new trust with more clarity in definition, or a grant of withdrawal rights as defined in each document conveying any contribution to the trust in the future.

Marriage, Divorce, and Adoption State laws frequently vary in their definition of various individuals. Most notable in the past several years have been controversies involving marriage or divorce, and adoption (and various consequences flowing from these matters).

When individuals marry, typically they have the opportunity to undo that relationship via divorce. **Solomon v. Guidry**, 155 A.3d 1218 (Vt. 2016), reveals that this ease isn't universally true about faux-marriages. It involved a same-sex couple that entered into a Vermont civil union, before same-sex marriage was possible, and who sought to legally end that relationship. They had become North Carolina residents, where their union was not recognized and therefore could not be legally dissolved either. They had to fight through the Vermont courts to determine that they were permitted by Vermont law to return and have a Vermont court end their civil union. Those sorts of case are rare, and becoming more rare. What about when one individual adopts another – can the adoption be undone?

There are ample circumstances in which an adoptive parent – particularly following an adult adoption – concludes that the adoption was ill-advised. An impressive illustration of this involved Doris Duke, the last lineal descendant beneficiary of the Duke energy and tobacco fortune. Duke adopted an adult as her daughter, making her a remainder beneficiary of that fortune, only to later rue that decision. See In re Trust f/b/o Duke, 702 A.2d 1008 (N.J. Super. Ct. 1995). Although it entails a similar question of improvident adoption, **In re Adoption of R.A.B., Jr.,** 153 A.3d 332 (Penn. Super. Ct. 2016), appears to be a matter of first impression in most states. The plaintiff originally wished to marry his same-sex partner of over 40 years but state law, at the time, prohibited him from doing so. Consequently, he adopted his partner for (according to the court) "financial and estate planning" purposes. Several years later the state law prohibition on same-sex marriage was declared unconstitutional, and the plaintiff then wished to marry his partner, only to discover that the adoption made that unlawful.

Holding that "states have permitted adults in adoptive parent-child relationships to annul an adoption in order to marry, even where the relevant adoption statute does not expressly provide for that annulment," the court cited only two cases, one of which allowed an adoptive father and his adopted daughter to marry. They did not marry originally because she was only 16 at the time, and he already was married. They sought to marry when she was 22, to legitimize their newborn child. The instant court allowed the "unopposed annulment or revocation of an adult adoption." Notable, perhaps, are the court's two limitations – that the annulment be unopposed and that the adopted child was an adult at the time of the adoption.

More normal are cases like **Edwards v. Maxwell**, 2017 WL 1201873 (Fla. Dist. Ct. App.), which held that one child has no standing to contest the adoption of another child, even though it meant that both would be eligible beneficiaries of a discretionary trust. Because neither child had an absolute, direct, financial, and immediate interest in the trust, the child who objected to the adoption had only an indirect or contingent interest that was inadequate to provide standing to complain about the adoption. Somewhat similarly, **Eder's Appeal from Probate**, 2017 WL 4466832 (Conn. Ct. App.), rejected a challenge by a trust settlor's biological son that the settlor's adoption of two adults was an invalid subterfuge, meant to "amend" an irrevocable trust. The two adults were brothers, children of the settlor's long-term paramour. The settlor had acted as a father figure to them, even after the settlor and their mother separated (she moved back to England) and they retained close familial ties (including visits, participation in the brothers' respective weddings, and dealings with their children, who referred to the settlor as "grandpa" – presumably with the brothers' acceptance or encouragement). Holding that they were natural objects of the settlor's bounty, the court also acknowledged that the biological son and the settlor "had little involvement" with each other and that they had "a falling-out" before the settlor adopted the brothers. The court cited cases in which an adoption "has been considered an act of subterfuge" but did not find the subject case to be such a circumstance. Notable, perhaps, is that the adoption was by the settlor of the trust, not by a third party who was seeking to make yet another person a beneficiary (as often occurs when an adult adoption occurs).

Stephens v. Mikkelsen, 519 S.W.3d 437 (Mo. Ct. App. 2017), and **Cohen v. Shushan**, 212 So. 3d 1113 (Fla. Dist. Ct. App. 2017), both presented conflict of laws issues derived from differences in local law, involving the effect of an adoption in *Stephens* and the definition of marriage in *Cohen*. The difficulty in *Stephens* was that Illinois law allows a child who is adopted by a step-parent to "triple-dip" (inherit as heir of the adopting step-parent and of *both* natural parents), whereas Missouri law cuts the child off from the natural parent who was not married to the adopting step-parent. Because the adoption occurred in Illinois, the parties to the adoption may have expected that the adoption would not harm the child. But the case arose in Missouri, involving a Missouri trust created by a Missouri settlor with a choice of law provision that specified Missouri law to govern both construction and administration issues. The trust remainder passed in part to the natural grandfather of the child who was adopted by the step-parent in Illinois. Because the grandfather was deceased, and his only child also was deceased, that portion then passed by right of representation, making the grandchild's adoption away from that family relevant.

In many of these sorts of cases the adoption occurred years after the trust was established, making it "normal" that the trust did not address the effect of adoption. In *Stephens* the adoption occurred decades before the trust was created, meaning that the trust drafter might have anticipated the controversy that arose, were these facts known. It is not apparent from the court's opinion whether the individuals involved were sufficiently close to the settlor that these relationship issues would have been known by the drafter, and the document made no special provision addressing adoption. The question thus was whether the natural grandchild of the deceased remainder beneficiary would receive a share of the remainder. The court held that the Missouri rule would apply, notwithstanding an Illinois court's prior declaration that this adopted child's relation to his natural parents was not altered by the adoption. In that regard, full-faith-and-credit also might have applied but the appellate court did not even address that suggestion.

Cohen involved an even more challenging question of status and a conflict of laws. The issue was the Florida rights of a surviving spouse. The decedent (who was married once in Israel, and then divorced; his daughter from that marriage was the plaintiff), established what the court (and each expert who testified in the case) referred to as the "functional equivalent" of an American common law marriage. Israeli law has what the experts referred to as "Known in Public," and the court referred to the decedent and his "reputed spouse" (in each case because the actual Hebrew term has no English counterpart). The issue was relevant because, although Florida law does not permit common law marriage, Florida law does respect common law marriages from jurisdictions where that form of marriage is considered to be valid. The argument that prevailed (made by the daughter of the decedent's prior marriage) was that the only "marriage" that counts in Israel is a religious marriage, and the decedent and his reputed spouse never participated in a religious marriage. Thus, even though they were together for over 20 years, had four children together, held themselves out as husband and wife, and to all the world "would have seemed a married couple," their Known in Public relation was not a religious marriage and, therefore, they were not married under Israeli law, which meant that they were not married for purposes of the Florida elective share of a surviving spouse. A very strong dissent argued "that a reputed spouse in Israel is the equivalent of a common law spouse in the United States" and "the recognition that Florida courts must give common law marriages from other jurisdictions" meant that it also should respect the decedent's relation as a marriage for purposes of Florida law.

The *Cohen* court never explained why a Florida probate estate and elective share claim were involved. Presumably the decedent owned Florida property, and the elective share claim meant that he died with a valid Florida will that did not adequately provide for his surviving "reputed spouse." Wise planning could have employed any of a variety of methods by which a decedent may disfranchise the elective share of a surviving spouse, even in a state with a robust elective share such as under the Uniform Probate Code or Florida law. For more detail on that planning see Cline, Pennell, and Turnipseed, Spouse's Elective Share, 841 Estates, Gifts, and Trusts Portfolio (Tax Mgmt. 2012).

A final controversy that seemingly should have arisen before is **In re Estate of Jagodowski**, 2017 IL App. (2d) 160723, but the trial court needed to certify two questions to the appellate court. The first was whether parentage is determined under the Illinois Parentage Act or, because the question arose in a probate context, was it a Probate Code issue? And second was who has standing to question the parentage of an individual who purports to take as a child of a decedent? The court answered the first question noting that the Probate Code "does not speak to the determination of parentage," meaning that the Parentage Act – and its statute of limitation – was controlling. In this case that meant that an action brought when the alleged child was age 31 was too late, the Parentage Act requiring action no later than two years after relevant facts were known or should have been known, but in no case later than when the alleged child reaches age 18. The court also determined that the personal representative of a decedent who otherwise would be entitled to maintain a proceeding but who is deceased has standing to raise or address the parentage question.

Both answers appear reasonable, making *Jagodowski* interesting because the personal representative was seeking to determine that the decedent – who was listed on the child's birth certificate as her father – was not in fact the DNA provider. The court's resolution of the statute of limitation question means that the effort to deny that child's status will fail.

Who's Your Momma? Two recent cases addressed the consequences of assisted reproduction and the legal status of the former same-sex partner of a child's birth mother. The question in Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016), was parental rights. *In re* Brooke S.B., 61 N.E.3d 488 (N.Y. 2016) (consolidated cases), established parental support obligations and rights to visitation and custody. In each case one partner was the birth mother, each partner held herself out as a parent of the children, but the petitioner did not adopt the children. Each case arose after the couple terminated their nonmarital relationship (each relationship predated the Supreme Court's determination that state laws forbidding same-sex marriage are unconstitutional), and each held that the nonbirth partner had enforceable parental rights.

Similar to both of those cases, **McCrillis v. Hicks**, 2017 Ark. App. 221, concluded that the birth-mother's same-sex partner stood in loco parentis to the child and had both visitation rights and a support obligation. (The court reversed a lower court's grant of joint custody, however.) Unusual, perhaps, about the facts was that the parties retained counsel who created a domestic partnership agreement that addressed these questions, but they never executed it.

Traditional state parentage laws focus on paternity, because the birth mother normally is clear. Now courts are being tasked with questions flowing from various forms of assisted reproduction and relationships that fall short of marriage (and the termination of those relationships that also don't qualify as divorce). The growing body of case law may abate with the ability of same-sex partners to marry, and the likelihood that those intending to raise children will take that step. Because most jurisdictions have not yet addressed these parenting questions, forum shopping may be a common tactic until an extensive body of law is established. For parental rights purposes, adoption by one or both parties is the better avenue – provided that it is allowed by state law – and marriage (followed by divorce) may address these disputes for same-sex couples the same as it does for more traditional couples.

The aspect of these disputes that may concern estate planning may be claims by a child to inherit from a "non-biological, non-adoptive" decedent who was in loco parentis to that child, and planning historically directed at nonmarital children may become as relevant for women as it has been for men.

Class Gifts Imagine a will that distributes "in equal shares to my children, X and Y." Is that a class gift (the same as if it had read simply "in equal shares to my children" without naming X and Y) or is it a gift to individuals X and Y (the same as if the identification of them as children did not exist)? And, what difference does that make?

First, we know that X and Y must be alive to take – notwithstanding the absence of any express survivorship requirement. That's the "implied condition of survivorship" required by the common law, now expressly codified in many states (e.g., by UPC §2-603). Therein lies the source of a second issue: if either X or Y fails to survive, then a so-called anti-lapse statute might apply, to salvage the gift and prevent it from failing (lapsing). Normal state law would provide that the share of a predeceased child will pass to the child's descendants (representatives), if any. If there are no descendants, then that share might pass to other named beneficiaries under a class gift version of the anti-lapse rules – provided that this is a class gift. In a well-crafted anti-lapse statute the two rules will operate together to provide that the deceased class member's representatives will take the share if there are any. The other class members would receive the share that the class member would have taken if living, only if there are no representatives of the deceased class member.

In **Roll v. Newhall**, 888 N.W.2d 422 (Iowa 2016), the significance of the class-gift distinction was different. The question was whether X takes as a member of the class of the testator's children if X was adopted away prior to the testator's death. That is, will X be treated as no longer a child under state law if X was adopted by a third party before the testator's death? Or will X take in all events because X was named as a beneficiary and the designation as a "child" only served to better identify X (e.g., according to the *Roll* court, because there might be two individuals named X and the identification would distinguish them). In *Roll* the issue arose because child X had been adopted, as an adult, by the testator's sister-in-law (that is, by X's paternal aunt, who sought to create a parent-child relationship rather than their aunt-nephew relation, because it altered the Iowa inheritance tax rate that would apply to the aunt's estate, which apparently passed to X).

The question of status as affected by adoption into or away from a family is addressed by state law. In Iowa there is a general statute and also the intestacy statute, providing that X would not take as a child if the testator died without a valid will. The court nevertheless held that a different rule could apply for purposes of a will specifically naming X as beneficiary (rather than designating a class only by their relation to the testator). Faced with the question whether X should be disqualified because X no longer was a child for state law purposes, the court concluded that the aunt's adoption did not alter the testator's intent. And, because it regarded the will as ambiguous, it applied a rule of construction that "a class gift is defined as a 'gift to two or more persons *who are not named* and have one or more characteristics in common by which they are indicated . . .' ." Under that rule, X and Y were not meant to take as a class for class gift purposes.

The will, specifically naming X and Y and referring to them as "children," was executed one year before the adoption, and the testator lived for over six more years, meaning that there was plenty of time for the testator to amend the will if the intent was to limit the class of beneficiaries to children as defined for state law purposes. (Nothing confirms that the testator was competent to alter the will, but that appears to be the assumption.) The court was *not* troubled by the tax motive ("to avoid paying inheritance taxes" in the aunt's estate), saying that "the tax treatment of [the] gift [from the testator] is not before us." The court also noted X's argument that inheritance tax was avoided in the aunt's estate but that it was *not* avoided in the testator's estate, apparently meaning that X did not claim status as a child of the testator for inheritance tax purpose. A different result might have applied were that fact otherwise.

Curiously, the provision in *Roll* leaving the testator's estate to her children included a clause that anticipated adoption *into* her family, reading "[a]ll references to child or children shall include all children born to or adopted by me after the date this Will is executed." Did the testator really anticipate adoption, or was this just boilerplate? And if it was boilerplate, would a more expansive indication of intent regarding adoption either *into* or *away* from a family be appropriate? A more compelling observation may be that adult adoption continues to raise difficult issues that many legislatures and drafters alike have not fully considered. Indeed, adult adoption may be more controversial, and individuals' intent may be so diverse, that no "standard" provision could be crafted for use as boilerplate. Which may mean that questions such as these will continue to beguile the courts if drafters do not address them one way or the other in the documents that they craft.

In the larger context, the lesson for drafters may be that adding information to a bequest (naming X and Y *and* identifying them by their relation to the testator) is not good drafting, although most drafters would likely argue to the contrary. The Restatement of Property (Third): Wills and Other Donative Transfers §13.2 cmt. d suggests that the presumption against the language in *Roll* being a class gift is not strong, and Prof. Larry Waggoner (who was the Reporter for the Restatement) stated in his 2012 ACTEC Trachtman lecture that drafting of the variety in *Roll* (to my children, X and Y) "is never a good idea" because of the ambiguity it creates. See Waggoner, What's in the Third and Final Volume of the New Restatement of Property That Estate Planners Should Know About, 38 ACTEC L.J. 23, 26 (2012).

In re Estate of Dietrich, 2017 WL 4654561 (Mich. Ct. App.), which arose in Waggoner's home state, illustrates the significance of this. The bequest was "to Peter and Johann, my sons, . . . in equal shares" and the question arose because Johann predeceased the testator, leaving two daughters who claimed his share under the state's version of UPC §2-603. The court articulated the notion that "the fact that beneficiaries are identified by name – even if they constitute a natural class – is generally seen as indicative of an intent to make a gift to the beneficiaries individually as opposed to creating a class." In addition, the court opined that failure to expressly require survivorship supported gifts to individuals, as to which the state anti-lapse statute was applicable, meaning that Johann's daughters took the share he would have received if living, rather than the entire estate passing to Peter.

Fiduciary Duties

Executor Must File Return and Elect Portability Portability of the deceased spousal unused exclusion (DSUE) amount under §2010(c) does nothing to benefit the estate of the deceased spouse (D). Rather, it is valuable to that decedent's surviving spouse (S), and to beneficiaries of S's estate who may use the DSUE amount to offset taxes incurred by S's subsequent taxable transfers. As a result, commentators since original adoption of portability have warned that D's personal representative may choose not to incur the expense to file an estate tax return to make the election, particularly if D's estate benefits individuals who are not fond of S and are not natural objects of S's bounty (such as children by D's prior marriage). This was exactly the case presented by **In re Vose**, 390 P.3d 238 (Okla. 2017), which may be the first reported decision ordering a decedent's personal representative to file an estate tax return to make the portability election.

A unanimous Oklahoma Supreme Court held that (1) state courts may exercise jurisdiction over estate tax return filing issues and (2) the personal representative's duty to preserve estate assets compels the personal representative to make an available portability election. Notable in *Vose* is that S agreed to pay any costs associated with preparation of the estate tax return. It is possible that any future court's determination of whether a portability return should be filed will be conditioned upon a similar agreement by S to reimburse all costs involved.

Although D and S had a premarital agreement in *Vose*, it predated portability and did not mention the election. Absence of any provision relating to portability was no impediment to the decision in *Vose*, but future agreements might wisely include an obligation to make the portability election so as to minimize or avoid controversies such as this.

Also interesting about *Vose* is that less than 12 months elapsed between D's death and the Oklahoma high court's decision. Indeed, from original application to final determination took less than five months under an available "fast track" procedure in Oklahoma, all permitting the estate to file a timely return. State law in other jurisdictions may not make such a resolution as easy to establish.

Fiduciary Access to Digital Assets The issue in **Ajemian v. Yahoo, Inc.**, 84 N.E.3d 766 (Mass. 2017), will have historic consequences, which may explain why the Massachusetts high court initiated transfer of the case from the court of appeals on its own motion. But the significance of this first decision on point remains to be seen. Yahoo declined access sought by the decedent's personal representatives to the decedent's email account, on two grounds, citing prohibitions in the Stored Communications Act (SCA) and its terms of service agreement. The court held that the SCA does not preclude the personal representative of a deceased email user from access to the email account. But the court remanded the question whether Yahoo's terms of service agreement allows Yahoo to refuse access to the account. That remains to be determined.

Notable is that the SCA dates back to 1986, predating creation of the world wide web. The opinion mentions the Revised Uniform Fiduciary Access to Digital Assets Act (which it said has been adopted in over two-dozen states and was pending in eight more) but does not say whether (1) Massachusetts has adopted that Act, (2) it would apply to the estate of this decedent, who died in 2006, or (3) the Uniform Act would affect this action in any way. As such, it remains to be seen whether *Ajemian* is useful to fiduciaries in other circumstances, particularly including the estates of more recent decedents.

The court *did* conclude that the SCA is no impediment to personal representative access to a decedent's email account. The opinion speaks in terms of state law trumping federal law, but this portion of the opinion is dicta because the court also held that, even if it applied, the SCA would not preclude access and therefore doesn't present a conflict with state law. The opinion also hints that the 15 page terms of service agreement may be unenforceable as a contract of adhesion, or because there was no meeting of the minds. As the court suggests, few users read those mind-numbing and exceedingly long agreements. But that question remains for resolution on remand.

The opposite result in *Ajemian* would have been detrimental to fiduciaries who seek access to email or social media accounts, but this decision may not be affirmatively useful otherwise. Finding that the SCA does not preclude disclosure provides cover for Yahoo and other service providers, that they have no exposure to SCA liability if they provide the requested disclosure. The court also stated that "allow[ing] a decedent's personal representative to accede to the release of a decedent's stored communications accords with the broad authority of a lawfully appointed personal representative to act on behalf of a decedent." This also could have significant implications in numerous contexts. But this isn't a surprising or novel holding.

The court's thinly-veiled suggestion that terms of service agreements may be unenforceable also could be significant in numerous other contexts. "You agree that Yahoo, in its sole discretion, may terminate your password, account (or any part thereof) or use of the Service, and remove and discard any Content within the Service, for any reason" is a remarkable concession by a user, if it really grants unfettered discretion to deny access or destroy content by unilateral fiat. That aspect of the decision is not uniquely relevant to fiduciaries, however, but it could lead to a milestone determination regarding the many millions of terms of service agreements that currently exist.

Yahoo "apparently has preserved thus far" the content of this 2006 decedent's email account, and a dissenting opinion claims that destruction after instigation of a court proceeding such as this "would violate our prohibition against the spoliation of evidence." That dissent asserted that, if a lower court held that the terms of service agreement allows destruction, then "we would surely reverse that ruling. So why remand the case to permit that possibility?" The dissent argues in favor of an immediate determination of the enforceability question against Yahoo, which may foretell the next chapter in this saga. Indeed, Yahoo wisely might just drop the issue, and this case, rather than face a negative decision that could impact it for many other purposes. Stay tuned.

Ethics

Invalidating Trust that Benefits Drafter Under state law a provision in a will or trust that benefits the drafter may be presumptively invalid (and an ethics violation under Model Rule 1.8(c) unless the drafter had a close familial relationship with the benefactor). In **NPR Foundation v. Dimeff**, 2017 WL 1406817 (Cal.), attorney Dimeff became the sole beneficiary of the decedent's estate plan but did not actually draft the dispositive trust document. Instead Dimeff referred the settlor to Dimeff's friend, another attorney who "did not have much experience drafting estate plans" but who had represented Dimeff and who consulted with Dimeff on numerous occasions during the drafting process. Those were not the factors on which the court found that the trust was invalid, however. Nor was undue influence the primary finding on which the plan was invalidated. Instead, the court regarded Dimeff's preparation of the trust schedule of assets alone as sufficient "drafting" to trigger a state statute that invalidated the trust. "In so acting, Dimeff was 'in a position . . . [to] easily control or influence the distribution of property under the instrument to [his] benefit . . .'." According to the court, drafting the schedule made him "particularly well suited" to exert the form of influence that the state statute was enacted to guard against.

There can be little doubt, in reading the facts of *Dimeff*, that the court reached the right result, but the ground on which the decision rests could be a bit troubling in a case that did not actually involve an overreach by the attorney. Imagine, for example, In re Boulger, 637 N.W.2d 710 (N.D. 2001), in which the attorney was a lifelong friend of the decedent, college roommate, godfather to the decedent's child, and only later the decedent's attorney. He had represented the decedent's business for years and, when it was time to name a remote contingent beneficiary of the decedent's estate, he was named (but did not actually receive any bequest). Knowing that he should not draft the document naming him as the last beneficiary (the one who would take only if everyone named by the decedent as a primary beneficiary fails to survive), the attorney provided all the relevant client information to an independent drafter and played no direct role in the preparation of that plan. According to *Dimeff*, if the attorney provided the list of assets that ultimately became the Schedule for the client's trust, that involvement alone would trigger the statute. Should that minimal involvement tar the attorney?

In *Boulger* the client insisted that attorney Boulger draft the document, and Boulger ultimately acceded to the client's desire that no other drafter become involved. Notwithstanding that Boulger never took any property under the plan, still the court sanctioned him for the ethics violation. Similarly, the court in *Dimeff* invalidated the plan provision in Dimeff's favor as invalid (and, because he was the sole beneficiary, this effectively invalidated the entire trust). Showing that involvement in any way, and under any circumstances – snarky or otherwise – risks defeat of part or potentially all of a client's estate plan. With clear implications for estate planning attorneys.

Attorney as Personal Representative There is no doubt that attorney Allen properly was sanctioned by **In re Disciplinary Action Against Allen**, 900 N.W.2d 240 (N.D. 2017). He named himself as joint tenant on bank accounts of his elderly mother, ostensibly at her request. And, after her death, while he served as personal representative of the estate (of which he was not a beneficiary), he sought to insinuate his child, born after his mother's death, as an equal remainder beneficiary, along with his estranged daughter. Ultimately attorney Allen was removed as personal representative and suspended for six months for various violations, especially including his personal conflict of interest, which triggered Rule 1.7(a), and then by seeking to represent himself as an interested party in the estate proceeding, in violation of Rule 1.9 (conflict of interest with a former client – the estate in this case). To top it off was a Rule 3.3 violation (false statement to tribunal). He dodged a Rule 8.4(c) violation (conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer) because the court found that there was no clear and convincing evidence of the violation.

The eye-catching element in the case is a "special" concurrence in which Justice Crothers cautioned that "if a lawyer agrees to serve in a familial fiduciary capacity . . . the lawyer likely is barred from using information obtained in that capacity . . . in any subsequent proceeding involving the estate," citing Rule 1.7. Further, because "a lawyer serving as a personal representative always is a lawyer . . . , any time the lawyer ceases being either the personal representative or the lawyer for the personal representative, the lawyer will be bound by Rule 1.9 regarding former clients." Meaning that "lawyers acting as family member-personal representatives are barred in the future from asserting any claims that may adversely affect the former client" (the estate). The opinion was written "to highlight these constraints . . . and to point out that today's case will broadly impact a lawyer's ability to assert future claims. [L]awyers should . . . cautiously accept representational positions in family-related matters where they might have a personal interest that is or might be adverse to the estate."

Modification and Decanting

Decanting Allowed Trusts permit the imposition of either attractive or reprehensible (depending on who you represent) "dead hand" controls over the future use of property. Coupled with judicious use of powers of appointment, trustee discretion, and trust protector provisions, flexibility to adapt trust uses to changing conditions also is attainable. This flexibility is the key to effective estate planning that adapts to changing circumstances, whether those be family, tax, or other law or circumstantial developments.

The most direct mechanism to provide for change is a power to terminate, alter, or amend a trust, which (at least for tax purposes) can be reposed in almost anyone other than the settlor (and other than the settlor's spouse if it is appropriate to avoid grantor trust income tax problems). Thus, this power could be given to a committee, another fiduciary, or a trust protector. It also *could* be given to the trustee, although in some respects that defeats the "separation of powers" or checks-and-balances nature of bifurcating this sort of authority. Whomever is the chosen holder of the authority to make changes, the issue then is to what extent and to reflect what kinds of circumstances the power should be granted, what to do with the trust property on a termination, and any tax exposure to the powerholder, especially if that person is a beneficiary.

The preferred authority to adapt to change for many planners today is a "decanting" power – the authority of a trustee to pour the contents of an existing trust into a new trust with slight variations in terms or powers. The constraint to "slight" changes is a function of the conceptual underpinning of decanting itself, which is that a trustee with the power to make corpus distributions outright to a beneficiary may instead make those distributions into another trust for the benefit of that beneficiary. See Morse v. Kraft, 466 Mass. 92 (2013), essentially embracing this common law notion (but declining an amicus request "to recognize an inherent power of trustees of irrevocable trusts to exercise their distribution authority by distributing trust property in further trust, irrespective of the language of the trust"). The court ruled that decanting in that case was allowable under state law, without the consent of either a court or the beneficiaries.

More recently, **Beardmore v. JPMorgan Chase Bank, N.A.**, 2017 WL 1193190 (Ky. Ct. App.), authorized the conversion of two half-century-old trusts into a single directed trust (for investment purposes) and decanting of that trust to Delaware for what was represented to be income tax savings of 0.1% annually, that would apply in a $100 million trust that would extend for another 50 years ($100,000 per year, which the court regarded as "a significant aggregate tax savings"). The government had blessed the proposed changes in a 2014 PLR that confirmed that it would not taint the chronological exemption of the two trusts for generation-skipping transfer tax purposes.

Based on an analog to the exercise of a nongeneral power of appointment, which also permits appointment in further trust, as authorized by Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14 (2011), the notion is that the power to decant does not allow the trustee to change the beneficiaries or their beneficial interests. Thus, the trust-to-trust conversion must protect the basic beneficial interests while improving trust administration or taxation. See, e.g., Harrell v. Badger, 171 So. 3d 764 (Fla. Dist. Ct. App. 2015), holding a decanting to be invalid because the successor trust granted a contingent remainder interest to a new beneficiary that was different than the contingent remainder beneficiary of the original trust, in direct violation of the Florida statute authorizing decanting. But **In re Estate of Hoppenstein**, 2017 N.Y. Misc. LEXIS

1707 (N.Y. Surr. Ct. 2017), allowed distribution of a $10 million insurance policy from a 2004 trust created by the settlor to a 2012 trust created by the same settlor, the terms of which were the same *except* the settlor's daughter and her descendants all were excluded. The court distinguished this from a decanting, saying that it was an exercise of the trustee's express power in the trust "to pay such sums out of the principal of the trust (even to the extent of the whole thereof) to the Settlor's descendants . . . in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees, in their absolute discretion, shall determine . . . ."

In **Ferri v. Powell-Ferri**, 72 N.E.3d 541 (Mass. 2017), the sole question posed by certification to the Massachusetts high court was whether the trustee could decant a third-party spendthrift trust into a new trust that altered one fundamental provision. The old trust granted the beneficiary a power to withdraw trust corpus after the beneficiary reached target ages, meaning that it would lose its spendthrift status to the extent of that withdrawal right. The new trust removed that right, the objective being to preclude or minimize any state law right of the beneficiary's soon-to-be ex-spouse to reach trust corpus in a property settlement incident to their divorce. Citing and following *Morse*, the court allowed the decanting, saying first that "if a trustee has the discretionary power to distribute property to or for the benefit of the beneficiaries, the trustee likewise has the authority to distribute the property to another trust for the benefit of those same beneficiaries. . . . [The] trustee's broad discretion to distribute the assets of an irrevocable trust may be evidence of a settlor's intent to permit decanting." And then, "if a settlor intended a trust's assets to be protected from creditors, he or she necessarily intended that the trustee have the means to protect the trust assets consistent with his or her fiduciary duties. . . . If the trustee were unable to decant the portion of trust assets made 'withdrawable' as the beneficiary reached certain age milestones, the trustee correspondingly would lose the ability to exercise his or her fiduciary duties (including the duty to invest and protect the assets' purchasing power) over those assets . . . ."

The court did not mention any tax consequences that may attend to the beneficiary's failure to object to the removal of the withdrawal right. Arguably the change constituted a lapse or release of an inter vivos general power of appointment that would trigger gift tax under §2514(b) or (e), which might be acceptable to the family because estate tax would be incurred anyway, when the beneficiary died, under §2041(a)(2). Perhaps the beneficiary's exclusion amount would cover the gift tax liability at the time of decanting. In *Ferri* any potential gift tax exposure also may have been avoided by reserving in the beneficiary a nongeneral testamentary power of appointment that would defer completion of the gift. So, protection of the trust corpus from the claims of the beneficiary's ex-spouse, at no increase in wealth transfer tax, could be a benefit. Note that incurring gift tax on termination of the general power (in the form of the withdrawal right) would cause a loss of new basis at death (which would apply if, instead, §2041 was triggered when the beneficiary died). That also may have been of slight moment – there being no indication whether, for example, the trust assets might be legacy assets that the family never intended to sell.

A concurring opinion in *Ferri* took pains to "emphasize what we did not decide . . . : whether Massachusetts law will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust where the sole purpose of the transfer is to remove the trust's assets from the marital assets that might be distributed to the beneficiary's spouse in a divorce action." Meaning that the trustee's action may not succeed in its primary objective, but the court was not willing to prevent the effort. Said the concurring opinion, "I do not offer any prediction as to whether this court might invalidate as contrary to public policy a new spendthrift trust created for the sole purpose of decanting the assets from an existing non-spendthrift trust in order to deny the beneficiary's spouse any equitable distribution of these trust assets. I simply make clear that, in this opinion, we do not decide this issue . . . ." So, decanting may be allowed, but it may not serve the primary intended purpose.

A subsequent decision in **Ferri v. Powell-Ferri**, 2017 WL 3386926 (Conn.), may answer the spendthrift question for purposes of the parties' divorce. The travel of the *Ferri* dispute originated in a declaratory judgment action filed in Connecticut, by the trustees, seeking a determination that the decant was valid. The Connecticut high court certified the decanting question to the Massachusetts high court, to rule on whether the decant was valid under Massachusetts law, which applied because the trust was a Massachusetts irrevocable trust. The rationale for decanting was to preclude a court from finding that the trust corpus, to the extent subject to the beneficiary's right of withdrawal, was marital property of the Connecticut couple. Accepting the *Ferri* decision by the Massachusetts high court, the Connecticut high court concluded that the beneficiary's soon-to-be ex-spouse had standing to question whether the trustee's action was proper. But the court also held that the new trust was not subject to the claims of creditors, as would be a self-settled trust. This finding was based on the undisputed notion that the beneficiary was unaware of the trustees' decision to decant, which was performed without the beneficiary's permission, knowledge in advance, or consent. This means that, under Connecticut law, the beneficiary's interest is only a factor that a court may consider in determining alimony or support obligations. But that the trust corpus is not marital property that is subject to equitable distribution. Meaning that the trustees' primary goal of protecting the trust corpus was accomplished.

As shown in *Ferri*, decanting might be favored as one means of increasing creditor protections. Court approval may be required if the trust lacks express authority, or if state law is silent regarding the power to decant. As of 2017 over two dozen state statutes allowed decanting. In addition, in July 2015 the Uniform Law Commission approved a Uniform Trust Decanting Act that is likely to produce additional state enactments of decanting authority. For up-to-date listings of statutes consult sidley.com/experience/state-decanting-statutes or www.oshins.com/images/Decanting_Rankings.pdf (last visited 23 February 2017).

Meaningful changes in any beneficiary's interest may cause income and wealth transfer tax consequences, as if the beneficiary whose interest is diminished (but who did not object) made a gift when the right to challenge the change lapsed. As a consequence, any available trust modification or reformation may be a preferable avenue for change. Indeed, in *Ferri*, perhaps the most interesting question is why the trustee did not pursue the very favorable Massachusetts procedure to modify or reform a trust, eliminating the power of withdrawal that was the apparent source of concern. Given that a court order was required to approve the decanting, would court approval of a modification be any different?

In drafting new trusts, any express authority to decant should make clear the extent of any permissible changes, such as in terms of beneficiaries who may be added or affected (e.g., only the settlor's blood relatives and their spouses), powers of appointment that may be granted or withdrawn (e.g., for GST tax purposes), changes to accomplish or preclude certain consequences (e.g., causing grantor trust income tax exposure to the settlor of an inter vivos trust, eliminating or altering a source of wealth transfer taxation to a beneficiary or fiduciary, eliminating a spendthrift clause to permit beneficiaries to transfer their interests, or tinkering with a vesting provision to avoid violation of the rule against perpetuities), to conform to new laws (e.g., increased federal security law reporting requirements), and provisions that under no circumstances may be altered (e.g., anything that would cause loss of the marital deduction or a zero inclusion ratio in an exempt generation-skipping trust, provisions relating to the identity and accountability of fiduciaries, or the provision under which all of these changes are authorized).

In addition, procedures for exercise should be established (e.g., only independent fiduciaries may act, only with the approval of a court of competent jurisdiction, and only to accomplish a reduction of taxes or a furtherance of the settlor's objectives). State statutory or judicial authority to reform a trust – particularly the nonadministrative or nonministerial aspects – may be too restrictive. So a decanting provision should be considered for inclusion in any trust that will have an extended duration or in which other forms of providing flexibility (e.g., powers of appointment) will not be effective or appropriate. The key is that trusts permit this kind of engineering for future adaptations, and that authority should be considered carefully and provided by the document whenever possible

Decanting may be useful to change the situs (and thus the state income taxation) of a trust, moving it from a tax-expensive jurisdiction to a tax haven, or to obtain flexibility under governing laws that are more amenable to the trust. So a governing law provision ought to be included in a trust, specifying whether the law of trust administration may be altered by moving the trust for administration purposes.

In terms of the tax consequences of decanting, Notice 2011-101, 2011-52 I.R.B. 932, requested comments regarding trust decanting if trust beneficial interests are affected. (Apparently the government is not focused on transfers that only change trust administration provisions or affect state taxation of the trust or its beneficiaries.) The Notice specifically invited comments regarding the relevance and effect of various facts and circumstances that may affect one or more federal tax consequences, including (1) trust beneficial interests in principal or income are added, deleted, or changed, (2) income tax grantor trust status is altered, (3) the trust term is extended, (4) the identity of the donor or transferor for gift or GST tax purposes is changed, and (5) whether the trust is chronologically exempt from GST tax or has a zero inclusion ratio. These items highlight the government's concerns and the Notice specifies that no further PLRs will issue with respect to transfers that change beneficial interests or the applicable rule against perpetuities period, which means that taxpayers must fly blind during the current silent phase. That silence therefore increases the stakes of decanting, and places even more importance on the terms of the trust itself, authorizing decanting and specifying any limits or relevant protections.

Another source of flexibility is modification or reformation, a growing but heretofore localized trend. The circumstances in which it was granted in the past were somewhat monochromatic, with many cases making changes intended to minimize or avoid the GST tax. Most other cases still are directed at other forms of tax minimization. As relevant to this discussion, see, e.g., PLRs 201436036, 201006005, and 9805025 (reformations to correct scrivener errors by converting general powers of appointment into nongeneral powers), Dwyer v. Dwyer, 898 N.E.2d 504 (Mass. 2008) (reformation that converted a taxable general power of appointment into a nontaxable nongeneral power); Walker v. Walker, 744 N.E.2d 60 (Mass. 2001) (reformation to add an ascertainable standard to limit an otherwise general power to appoint); Hillman v. Hillman, 744 N.E.2d 1078 (Mass. 2001) (reformation to preclude a child's exercise of an inter vivos power to appoint corpus among the settlor's "issue" from including the child personally).

Most recent is **In re Brecher**, 2017 N.Y. Misc. LEXIS 38 (Surr. Ct.), which allowed reformation of a marital deduction formula provision to reflect changes to federal and state law in the 27 years since the will was executed and to eliminate over $500,000 of New York state estate tax. The court stated that the movement of funds from the decedent's nonmarital trust into a marital trust created under that will would "protect the testator's intent from being thwarted by a change in the tax law" and that lack of opposition from beneficiaries of the nonmarital trust indicates consent by those beneficiaries who "do not perceive the proposed remedy to be a threatened injury to them." Not addressed by the opinion was whether those beneficiaries' failure to object constitutes a gift by them to the surviving spouse, why a disclaimer by those beneficiaries would not have worked the same effect without raising that issue, and whether this state court determination would be binding on the federal government for estate tax marital deduction purposes. It should be binding on the state tax authorities and it may not have mattered for federal estate tax purposes, given the size of the decedent's basic exclusion amount.

Modification of Joint Settlor Trusts **In re Frei Irrevocable Trust**, 390 P.3d 646 (Nev. 2017), is the wrong case to resolve a question that the Nevada Supreme Court regarded as one of first impression (at least in Nevada). Under both the Second and Third Restatements of Trusts and Uniform Trust Code §411, the notion is that an irrevocable trust may be modified or terminated upon consent of all beneficiaries, even if modification or termination is inconsistent with a material purpose of the trust, *if* the trust settlor consents.

The immediate question presented in *Frei* was whether spendthrift protection is a material purpose. The court said that it is not, relying on Restatement (Second) of Trusts §338 comments *d* and *h*. The corresponding provision is Restatement (Third) §65, and UTC §411(c) provides that a spendthrift provision "is not presumed to constitute a material purpose of the trust." In *Frei* that was a linchpin holding because the objection to modification of the trust was brought by the very beneficiary who instituted the modification proceeding, who apparently discovered too late that the grant of his petition exposed his trust interest to his own creditors. Oops.

The other question is whether a joint settlor trust requires the consent of both settlors, along with all interested beneficiaries. In *Frei* that was an issue because one of the two settlors was deceased. Consent on her behalf was said to come from the surviving settlor and a child who held the deceased settlor's durable power of attorney. Unfortunately that consent came after the deceased settlor died, meaning that the durable power no longer was effective. The court's footnote 4 suggests that the court had no idea that this was a limiting fact, and it regarded the deceased settlor's consent as effective. In a properly-decided case, the question might be whether one of several settlors can consent on behalf of all of them. And, then, depending on the answer to that question, the joint settlor trust might be regarded with more or less favor than a more traditional trust with just one settlor. Quaere what a thoughtful drafter would provide in anticipation of this issue.

Locklin v. Locklin, 2017 WL 4700389 (Kan. Ct. App.), may answer that question, the court holding that a trust created by spouses, providing that "[w]e reserve the right . . . during our lives . . . to amend or revoke" was indicative of the intent to make the trust irrevocable upon the death of the first settlors to die. The negative aspect of that is that irrevocability during the life of the surviving spouse constitutes completion of any gift made to the trust, with acceleration of the wealth transfer tax liability with respect to any interests not retained by the surviving settlor, such as the remainder interest following the death of both spouses.

Material Purpose for Trust Reformations As shown by *Frei*, a number of recent cases address the reformation or modification of trusts. This trend is likely to grow over the foreseeable future, for various reasons. One is decanting, which allows the transfer of the corpus of one trust into an entirely new trust, potentially with different provisions. Decanting is a mechanism for the wholesale correction or modification of trust terms, in some cases many years or decades after the original trust was created. If decanting is permitted, then lesser included methods of "fixing" trusts also ought to be permissible. State laws permitting decanting are becoming more widespread, and reform or modification also are common options.

A second reason why modification and reformation is a growing phenomenon is because the privity bar to attorney/advisor malpractice has collapsed nearly everywhere, meaning that a mistake can result in liability to the trust drafter or planner. Given the choice between letting an unintended result apply because a mistake cannot be cured, and then recovering from the drafter (or from a malpractice liability insurer) any damages suffered, many courts would prefer to just fix the mistake, which accelerates the process and avoids unintended windfall consequences followed by a damage recovery. Reformation or modification of the document is more efficient and less costly.

A third reason is to adapt to changing circumstances. Provisions that seemed like a good idea when drafted become obsolete, justifying modifications to better ensure continuation of the settlor's original goals. A traditional illustration is a trust restriction on investment options, often found in documents drafted in the wake of the great depression, when distrust of equities led some drafters to limit permissible investments to corporate or government bonds. A more unusual illustration is found in **Hitz v. Hoekstra**, 2017 WL 1366066 (Cal. Ct. App.), in which the settlor created a trust to sustain a private college created 100 years ago. Offering only a two-year program, it had only 26 students and six full-time faculty at the time of the trial. Students paid no tuition but worked on an active ranch as part of their program of instruction. The school was one of only four remaining all-male U.S. colleges. The court was asked to modify the trust to permit admission of female students, which it did under a state statute permitting modification of administrative or dispositive provisions "if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment or the purposes of the trust." That law mirrors Restatement (Second) of Trusts §167(1), which the court held to apply, although it is hard to imagine why the consequences of gender specific enrollment was a condition that the settlor could not know or anticipate. The result seems to confirm that courts are more prone to grant relief under standards that are being applied in an expansive or flexible manner.

A fourth reason is because many less-experienced or qualified drafters believe that they can handle trust and estate matters, because they can obtain forms, and they regard drafting as the functional equivalent (or the intended end product) of estate planning. Experienced practitioners know that there is a difference between producing documents and planning, and that a totally "workable" document that effects the wrong goals is every bit as bad as messing up the drafting of documents. In the end, there are more messed up trusts these days because less qualified drafters are involved with greater frequency.

A similar reason is because individuals are doing-it-themselves. Downloading documents from the internet, and making mistakes that even modestly trained practitioners would avoid, these circumstances are a prescription for modification or reform. In these cases the need to resolve problems is a function of mistake by the settlor, rather than by any professional.

In this context, the enactment of state laws authorizing corrections is becoming more prevalent. **In re Brakke Trust**, 890 N.W.2d 549 (N.D. 2017), is notable because there were *two* such state laws, and they were not entirely consistent. Involved was court approval of a family settlement agreement that implicated a trust. Notwithstanding that a trust was involved, the court applied a provision under state law that was modeled after the Uniform Probate Code as adopted in North Dakota, rather than the otherwise applicable state law that was modeled after the Uniform Trust Code, also as adopted in North Dakota. It is best to compare the two Uniform laws:

> Uniform Probate Code §3-1101 provides in relevant part that "[a] compromise of any controversy as to . . . the construction, validity, or effect of any governing instrument . . . if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. . . .
>
> Uniform Trust Code §111(c) provides in relevant part that "[a] nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by a court under this Code or other applicable law.
>
> Uniform Trust Code §411(b) provides in relevant part that "[a] noncharitable irrevocable trust may be . . . modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

> Uniform Trust Code §411(e) provides in relevant part that "[i]f not all the beneficiaries consent to a proposed modification . . . of the trust under subsection . . . (b), the modification . . . may be approved by the court if the court is satisfied that: (1) if all of the beneficiaries had consented, the trust could have been modified . . . under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.

Notice in particular that the UPC does not address whether modification is inconsistent with any material purpose of the trust that is being modified.

Brakke involved a will that poured over to a trust, and controversy challenging creation of that trust as being contrary to a family-related agreement. The settlement entailed changes that significantly changed the residuary beneficiary of the trust, which otherwise was left intact. Citing an Editorial Board Comment to the UPC provision that it "would be available to resolve controversies other than those concerning a will," the court allowed the family settlement agreement that resolved the controversy, notwithstanding the significant effect on a material purpose of the trust. All by holding that the relevant statute was the UPC-inspired provision and not the UTC-inspired provisions of state law.

Dealing again with the material purpose element of UTC-inspired state laws, **Lewis v. Lewis**, 2016 WL 6311196 (Ky. Ct. App.), denied early termination (the ultimate modification) of a trust because the interests of unborn remainder beneficiaries were not protected, and that violated a material purpose "of guaranteeing a revenue stream . . . to [the settlor's] future descendants . . . ." Whether viewed through the §411(e)(2) lens of adequate protection of the interests of beneficiaries who do not (or cannot) consent, or the §411(b) lens of modifications that are not inconsistent with a material purpose of the trust, the proposed termination in *Lewis* simply fell short, notwithstanding the offer of one descendant to entrust a portion of the termination proceeds for the future benefit of unborn descendants.

Note, finally, that not all state laws are conducive to correction of errors in do-it-yourself planning, including mistakes spawned by the use of documents downloaded from the internet. As one illustration, see **In re Succession of Biscamp**, 211 So. 3d 472 (La. Ct. App. 2017), in which the court acknowledged that "minor deviations in form with regard to . . . [an] attestation clause do not render the testament invalid in the absence of any indication of fraud" but declined to overlook errors made either in the actual execution of the subject will or, at a minimum, in the attestation clause that appeared with that will. Among the execution requirements that were not acknowledged by a valid notary provision were (1) a declaration by the decedent that the document was a will, made in the presence of (2) the notary and (3) the witnesses, (4) who also signed in the presence of the notary. Many attestation formalities have been relaxed by the Uniform Probate Code because of the likelihood that they will frustrate testamentary intent. The *Biscamp* court's reluctance to allow (or forgive) deviation may have been an equity-driven reflection that the will disinherited the testator's daughters (in a jurisdiction that did not eliminate the civil law legitime entitlement of children until 1996).

ERISA

Property Settlement as Revocation of Beneficiary Designation Typical state laws provide that a will provision in favor of a former spouse is revoked by operation of law. Some statutes are blunt instruments, revoking the will in its entirety. Others are more surgical, treating the former spouse as predeceased (or, in the Uniform Probate Code, as having disclaimed, which has the same effect). The most recent version of the UPC also treats provisions in favor of family members of the former spouse also as altered by operation of law. For example, the presumption is that naming a former spouse's sibling as personal representative or step-children as alternative contingent beneficiaries likely is not the decedent's intent following a divorce.

Even more expansive is UPC §2-804, which expands the coverage of this treatment to nonprobate transfers, such as a life insurance beneficiary designation or designation of the former spouse as beneficiary of retirement benefits. The latter has spawned significant litigation, including several Supreme Court decisions because of the interplay of state statutes and ERISA. Egelhoff v. Egelhoff, 532 U.S. 141 (2001), held that state laws like UPC §2-804 that impact qualified retirement benefits and employer sponsored life insurance are pre-empted by ERISA. The Court therefore concluded that divorce did *not* cause the former spouse in *Egelhoff* to be treated as predeceased for purposes of taking under the retirement plan beneficiary designation. See In re Estate of Sauers, 32 A.3d 1241 (Pa. 2011), rev'g 971 A.2d 1265 (Pa. Sup. Ct. 2009), to the same effect as *Egelhoff*, involving a life insurance beneficiary designation (which was deemed to be subject to ERISA because the insurance was part of an employee group benefit plan).

Subsequent to *Egelhoff* it was thought that UPC §2-804(h)(2) might be a valid accommodation in some circumstances, notwithstanding *Egelhoff*. The concept applied by §2-804(h)(2) is that payment should be made to the designated beneficiary, as required by ERISA, but then a post-payment cause of action may be pursued by those individuals who would receive the benefits if the state law was valid. The plan administrator would honor the beneficiary designation, but state law would impose a constructive trust on that beneficiary, which would direct the benefits to the "rightful" takers.

Hillman v. Maretta, 133 S. Ct. 1943, aff'g 722 S.E.2d 32 (Va. 2012), expressly rejected that constructive trust approach as applied by a Virginia statute very much like UPC §2-804(h)(2). According to both the Virginia and United States Supreme Courts, the Virginia provision imposing a constructive trust violates Congressional intent that the designated beneficiary be guaranteed receipt *and enjoyment* of the benefits involved.

Hillman addressed an insurance beneficiary designation that was subject to the Federal Employees' Group Life Insurance Act, not a qualified plan subject to ERISA. Nevertheless, *Hillman* cast significant doubt on the UPC backdoor retraction of the former spouse's entitlement as being inconsistent with the objectives of ERISA pre-emption too.

Hillman specifically mentioned *Egelhoff* but it did not refer to Kennedy v. DuPont Sav. & Invest. Plan, 555 U.S. 285 (2009), which is consistent with the *Egelhoff* notion that the plan administrator must honor the beneficiary designation and disregard any allocation of property rights in a divorce decree (unless it is a QDRO). It stated expressly that plan administrators should not be required to inquire beyond plan documents and records to determine whether other documents, agreements, or orders alter the proper distribution of plan benefits. But the *Kennedy* Court's footnote 10 suggested that the former spouse's waiver of rights pursuant to a divorce property settlement may suffice to permit the decedent's estate or its beneficiaries to compel distribution of the proceeds from the former spouse as the designated beneficiary to those rightful takers. This is the logic of the UPC §2-804(h)(2) constructive trust approach.

That suggestion in *Kennedy* is consistent with footnote 4 in the *Hillman* opinion. It expressly identifies a statutory exception (to the Court's holding that the beneficiary designation normally controls, notwithstanding state law) that applies if the named beneficiary is in conflict with "the terms of any court decree of divorce, annulment, or legal separation." So, without saying so, *Hillman* may be consistent with *Kennedy* and together they may inform a conclusion that one way to prevent the named beneficiary from taking insurance or retirement benefits that are subject to a Federal pre-emption regime is to provide for a different distribution in a decree of divorce, annulment, or legal separation. This was the theory applied by **Walsh v. Montes**, 388 P.3d 262 (N.M. Ct. App. 2016), holding that the lower court erred in dismissing the plaintiff's theory that a waiver included in a divorce decree *could* be enforced (distinguishing *Hillman* because the plan was subject to ERISA, not FEGLIA).

Moreover, Estate of Kensinger v. URL Pharma Inc., 674 F.3d 131 (3d Cir. 2012), held that a plan's administrator may rely on the beneficiary designation but that the decedent's estate *may* sue the former spouse to enforce the spouse's waiver of plan benefits as part of a divorce property settlement. Because it is appealable to the Court of Appeals for the Third Circuit, **In re Estate of Easterday**, 2017 WL 4367691 (Pa. Sup. Ct.), now has held that a postnuptial agreement (executed after divorce proceedings had begun) effectively waived a surviving spouse's right to receive retirement benefits in a *Kennedy*-style case. It is a one-off application of these principles in the sense that the decedent died before the divorce was decreed. The surviving spouse was named as beneficiary of the decedent's pension and retirement benefits, and withdrew the divorce action three days after the decedent died. The court nevertheless held that the spouse took those benefits subject to the estate's right to recover them, pursuant to the postnuptial agreement, specifically citing *Kensinger* for the proposition that the spouse's waiver was enforceable after the ERISA mandated payment pursuant to the beneficiary designation.

Easterday is interesting, and any appeal will be revealing, given that *Sauers* held that the Superior Court erred in "ordering Ex Spouse, the named and unmodified primary beneficiary of the ERISA-governed insurance policy, to surrender all entitlement and interests in the proceeds of that policy." The court could have held that the former spouse would take those proceeds as dictated by the beneficiary designation, which the plan administrator would honor, and then be compelled under state law to hold those proceeds and eventually remit them to the proper state law beneficiaries. Coming as the penultimate sentence of a lengthy decision that did not mention this constructive trust issue, the result may not be a rejection of it so much as a failure to consider this refinement. *Egelhoff* figures prominently in the *Sauers* decision but *Kennedy* was not mentioned; *Easterday* does not mention *Sauers*.

That suggestion in *Kennedy* regarding the divorce property settlement agreement is consistent with footnote 4 in the *Hillman* opinion. It expressly identifies a statutory exception (to the Court's holding that the beneficiary designation normally controls, notwithstanding state law) that applies if the named beneficiary is in conflict with "the terms of any court decree of divorce, annulment, or legal separation." So, without saying so, *Hillman* may be consistent with *Kennedy* and together they may inform a conclusion that one way to prevent the named beneficiary from taking insurance or retirement benefits that are subject to a Federal pre-emption regime is to provide for a different distribution in a decree of divorce, annulment, or legal separation. And the other surefire approach is to change the beneficiary after the divorce. Otherwise, reliance on state law to accomplish the change of beneficiary result may not suffice if any Federal program with pre-emption is involved.

Medicaid

Medicaid Qualification and the Elective Share The leading case holding that a surviving spouse's right to an elective share is a countable asset for Medicaid qualification purposes is Tannler v. Wisconsin Dep't of Health and Social Services, 564 N.W.2d 735 (Wis. 1997). The court held that failure of an institutionalized surviving spouse to assert a claim against the decedent's estate constituted a disqualifying divestment under 42 U.S.C. §1396p(e)(1). Most recently, **In re Estate of Brown**, 153 A.3d 242 (N.J. Super. Ct. 2017), held that an unexercised elective share is subject to a lien for reimbursement of Medicaid benefits received by the surviving spouse. The fact that the Medicaid recipient was disinherited by the predeceased spouse (a typical effort to qualify the surviving spouse for federal benefits) is irrelevant to the question of qualification. In this case because state law provided that eligibility considers "all . . . resources . . . which the individual . . . is entitled to but does not receive because of action or inaction by the individual . . . ."

In *Brown* the survivor's heirs alleged that the elective share was not available because state law disqualifies a surviving spouse who was living separate and apart from the decedent – a form of disqualification for misconduct that typically entails abandonment, sometimes coupled with adultery. In *Brown* the alleged misconduct was the fact that the surviving spouse was institutionalized in a nursing home for Alzheimer's patients – an allegation that the court rejected saying that "there must be evidence, beyond mere separation, of a cause of action for divorce to disqualify a surviving spouse from elective share rights" in the subject state. "Mere separation is not enough."

Numerous courts have addressed various elements of the concept that an elective share is a countable resource and that failure to obtain the share constitutes a disqualifying disposition or constitutes the entitlement as a countable resource. See Casner & Pennell, ESTATE PLANNING §3.4.7 (8th ed.). Even if it is undecided in a given jurisdiction whether the share will be charged as a countable asset even if not elected, the wise approach is not just to forsake the election in hopes that the elective share entitlement will not be treated as owned property for qualification purposes. The better approach is premortem planning that causes the elective share to be regarded as worthless, so that any deemed transfer is valueless for Medicaid disqualification purposes. For the wide range of effective planning options to accomplish this objective see Cline, Pennell, & Turnipseed, Spouse's Elective Share, 841 Estates, Gifts, and Trusts Portfolio (Tax Mgmt. 2012).

Medicaid Disqualifying Transfers Annuities are exempt assets for purposes of Medicaid eligibility if "the annuity (I) is irrevocable and nonassignable; (II) is actuarially sound . . . ; and (III) provides for payments in equal amounts during the term of the annuity . . . ." 42 U.S.C. §1396p(c)(1)(G)(ii). In addition, annuities may be used to spend down or dispose of assets if "the State is named as the remainder beneficiary . . . for at least the total amount of medical assistance paid on behalf of the institutionalized individual . . . ." 42 U.S.C. §1396p(c)(1)(F). Both provisions are consistent with other exceptions – the actuarially sound aspect is akin to the full-consideration exception, and the payback aspect is akin to the (d)(4)(C) special needs trust exception. Zahner v. Department of Human Services, 802 F.3d 497 (3d Cir. 2015), considered whether the annuity "safe harbor" requires that the annuity have a minimum term or a positive rate of investment return, and effectively challenged whether the particular annuities were purchased with the intent to circumvent the Medicaid qualification rules. The rub was that the annuities were for 12 and 14 months and yielded a miniscule .05% return on the investment (which actually was negative after considering a "start-up" fee paid to brokers in each case). The state Medicaid authority asserted that these annuities were not exempt because they were not actuarially sound, because their terms were so short. Regulations mandate a maximum annuity term that may not exceed the annuitant's life expectancy (which precludes postmortem payments that benefit the annuitant's beneficiaries while sheltering wealth in the annuity safe harbor). But those regulations do not mandate a minimum term. Because Medicaid qualification is subject to annual review, a short-term annuity may return sufficient resources to the annuitant that, on review, the individual's net worth is too great to qualify. The short-term annuity tactic may be viable anyway if the annuity payments finance the individual's care while waiting out a period of ineligibility to qualify, or if costs of living consume the periodic annuity payments and, in the interim, the individual is able to qualify for Medicaid earlier than otherwise would be possible.

Annuities and insurance are functional opposites (annuities insure against living too long, and insurance protects against dying too soon). Although each relies on mortality predictions, there is no Medicaid spenddown exemption for life insurance. Instead, the asset spenddown standard is whether the purchase of an insurance policy constitutes a §1396p(c)(1)(A) disposition of assets for less than fair market value. **Moore v. Illinois Dep't Human Serv.**, 74 N.E.3d 1173 (Ill. Ct. App. 2017), held that the purchase of an insurance policy was a disqualifying disposition because the applicant was not the beneficiary of the policy and the cash surrender value of the policy was not equal to the amount paid for it.

If life insurance has a cash value that approximates the premium paid, then the transfer of cash for the policy would be a transfer for adequate and full consideration and not a disqualifying disposition. But then it likely would do little good for spend down purposes, because the value of the policy would be a countable asset the same as any cash used to purchase the policy. So the tactic employed in *Moore* was to purchase a policy with little cash value, that named the applicant's estate as beneficiary of a larger death benefit. Similar to the logic behind the annuity exception, the conversion of wealth from one form into another is not a concern if the asset purchased replaces the assets transferred, which does not reduce the applicant's net worth. But *Moore* held that the insurance ploy was a disqualifying disposition, because whatever value was received in the transaction did not benefit the applicant inter vivos.

Dwelling Exception for Medicaid Qualification The unremarkable conclusion in **Daley v. Secretary of Health and Human Services**, 74 N.E.3d 1269 (Mass. 2017), is that the dwelling exception for Medicaid qualification is not lost if a personal residence is transferred into an irrevocable trust with retained lifetime enjoyment, nor if a remainder interest in such a dwelling is transferred with a retained life estate. The Director of the Massachusetts Office of Medicaid determined that the applicants' retention of a right to live in their homes made the equity in those dwellings a countable asset, which the court rejected because retention of the dwellings themselves would not constitute a countable asset.

Under Age 65 Requirement There is uncertainty and significant debate regarding whether a pooled trust variety of special needs trust, authorized under §1396p(d)(4)(C), must be created before the beneficiary is age 65, as unquestionably is true for a §1396p(d)(4)(A) trust. The age 65 element is specifically included in §1396p(d)(4)(A), it is conspicuously absent from §1396p(d)(4)(C), but it appears to be required as to both by §1396p(c)(2)(B)(iv). The position advocated by the Centers for Medicare & Medicaid Services is that it applies to both, but this position is not universally followed among the states that administer Medicaid. The debate was rehearsed in Center for Special Needs Trust Administration, Inc. v. Olson, 676 F.3d 688 (8th Cir. 2012), and followed in **Hutson v. Mosier**, 2017 WL 3942586 (Ks. Ct. App.), which sided with the position that a penalty applies if a (d)(4)(C) trust is created when the beneficiary is over age 64. The most unfortunate aspect of *Hutson* is that the trust corpus consisted largely of the proceeds from the sale of a dwelling that itself would have been an exempt asset. But the applicant was in need of care and couldn't live independently any longer. At the age of 72, she had a life expectancy of 13 years but was estimated to exhaust her funds, even if held in a special needs trust, in four to six years. Because the court applied the penalty provision in §1396p(c)(2), a transfer penalty of 313 days was imposed. The court doesn't mention the cost of her care, but the total amount transferred was under $60,000.

Wills

Is It a Will? The classic definition of a will is that it is both revocable and ambulatory. The revocable prong informs the notion that a "contract to make a will" is an agreement that may allow for an action for breach of contract if the decedent had a compliant will and later revoked (or altered) it (or if the agreement anticipated that the decedent would execute a compliant will and instead died without). But the contract is no substitute for the will itself, and any will subject to the contract always can be changed or revoked. The ambulatory prong means that the document does nothing prior to the death of the maker.

In this light, consider a lease that contains a provision stating that "in the event of the death of the Lessor, this agreement shall not terminate. Rather, the rights and obligations of the Lessor shall immediately be transferred to X." Is that clause testamentary, making the lease (or that provision within the lease) a will, requiring that it be executed with all the formalities of a will?

Estate of Greer v. Ball, 218 So.3d 1136 (Miss. 2017), incorrectly holds that the lease was valid but the particular provision within it *is* testamentary, and therefore that this provision is not enforceable, because the lease was not signed with the requisite formalities under state law. The question was relevant because the Lessor had "another" will that benefitted someone other than X, who claimed the rental payments from the lease agreement. One possible interpretation was that this residuary beneficiary took the leasehold property, as an asset of the estate, subject to all of the provisions of the lease, meaning that this beneficiary would not receive the rental payments. The conclusion reached by the court was that the residuary beneficiary took the leasehold property subject to a lease agreement but that X could not benefit because the assignment of rental payments was an invalidly executed testamentary provision.

Over a strong (and correct) dissent, the court's error was in regarding the provision for X in the lease as conveying no interest to X prior to the Lessor's death, and therefore that it was a testamentary provision in the otherwise valid lease. That conclusion was based on the fact that the interest in X was revocable by the Lessor and Lessee, who could have altered the lease. Both rationales turn the definition of a will on its head, first because a will (or, here, the testamentary provision within the lease) must be revocable by the testator alone (not in conjunction with some other party – such as the lessee in this case). Second, because this lease was immediately effective as between the Lessor and the Lessee, meaning that it was not ambulatory. Indeed, the particular provision likely was not ambulatory, even on its own, because it is possible that the lease contained this provision because the Lessee wanted an assurance that it would deal with X after the death of the original Lessor, and not with whomever took the residue of the Lessor's estate. That assurance being an immediately effective and enforceable entitlement distinguishes the lease and this provision in it from a will.

These cases do not often arise, yet **Bonvillain v. O'Bryan**, 2017 WL 2705667 (Ky. Ct. App.), involved a royalty agreement with an assignment of postmortem payments in which the same issue existed. The court correctly held that the beneficiary designation pursuant to that royalty agreement was not an invalid testamentary disposition because the agreement "took effect and created binding and enforceable obligations upon the parties immediately upon its execution." Meaning that it was not ambulatory and therefore could not be a will.

These cases are a good reminder that clients have other agreements and documents that can affect the ultimate disposition of their estates. And that it therefore usually is prudent to obtain copies of documents like deeds, leases, covenants, easements, beneficiary designations, and the like to verify title and both the rights and obligations to which the decedent is entitled or subject. The Greer lease, for example, likely could affect the value of the underlying property and, if it was not at arm's length, it also could constitute a gratuitous transfer with gift tax implications (depending on the identity of the lessee).

Harmless Error State law formalities for execution of a will vary. Some states permit holographs (wills written entirely in the testator's hand and signed but not witnessed) or nuncupative (oral) wills, which deviate from the most basic requirements that a will be written and signed. Over forty years ago Yale Professor Langbein began a conversation about relaxing will execution formalities when it is clear that a testator intended a document to be a will and failure to comply with the formalities for proper execution did not indicate wrongdoing. See, Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489 (1975); Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law, 130 U. Pa. L. Rev. 521 (1982); and Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1 (1987). Over the years Langbein and Waggoner, as the primary authors of both the UPC and the Restatement (Third) of Property: Wills and Other Donative Transfers, have engineered changes in the law to embrace the concept that insubstantial noncompliance with will execution formalities – so-called harmless error – should not invalidate an otherwise valid will. Today, for example, the latest version of UPC §2-503 reflects this development by providing that a will is valid if the proponent of the will proves by clear and convincing evidence that the decedent intended the document to be the decedent's valid will.

This relaxation of the traditional will execution formalities had been adopted in fewer than 25% of American jurisdictions, which confirms that this concept is controversial and that change occurs slowly in the law of wills. Furthermore, even in states that have embraced the concept, case law reaches inconsistent results. For example, In re Estate of Ehrlich, 47 A.3d 12 (N.J. Super. Ct. 2012), admitted to probate under a harmless error statute an *unsigned* copy of decedent's will, found with a marginal note that the original was in the possession of the named executor, who was deceased and the executed will was not found, and In re Will of Ranney, 589 A.2d 1339 (N.J. 1991), adopted the substantial compliance doctrine in a situation in which witnesses signed the self-proving affidavit but failed to execute the attestation provision, the court granting relief because the decedent's intent was clear and there were no abuses sought to be prevented by strict adherence to execution formalities. But In re Alleged Will of Ferree, 848 A.2d 81 (N.J. Super. 2004), refused to extend substantial compliance to a holograph, saying that unwitnessed wills already represent a relaxation of the traditional execution requisites, such that additional relaxation of the execution requisites was inappropriate. Elsewhere, Dalk v. Allen, 774 So. 2d 787 (Fla. Dist. Ct. App. 2000), denied probate to a will because, in the confusion of eight different estate planning documents circulating for execution in a single proceeding, the will was properly attested and notarized but not signed by the decedent. The court refused to overlook the error. And Norton v. Hinson, 989 S.W.2d 535 (Ark. 1999), refused to apply the substantial compliance doctrine to overcome invalidity due to one witness being underage, in that case under circumstances suggesting impropriety – the 99-year-old decedent's caregiver proposing a will benefiting the caregiver, witnessed by the caregiver's child and grandchild.

Most recently, **In re Estate of Malsberger**, 2017 WL 2991773 (N.J. Super.), admitted an otherwise unsigned holograph, holding that the decedent's name, written in the first line of that document, was intended to serve as a signature and that a signature is not necessarily required under the harmless error doctrine. The *Malsberger* document provided: "I'm Alice Malsberger . . . . I wish my estate be sold . . . and 1/3 granted to [each of three named individuals]. . . . . I intend to see a lawyer & to validate everything." This handwritten document was regarded as a valid holograph, the written name in the first line was deemed to be intended to be the testator's signature, and the last sentence was not deemed to indicate that the document lacked testamentary intent.

That last issue – lack of testamentary intent – arises in cases that typically involve a letter written to an attorney asking for a will to be prepared, but the decedent died before the requested will could be executed. Courts that deny probate to the letter say that it cannot qualify as a will, because the letter lacks testamentary intent. Instead, it reflects the intent that a separate document be created, which document would then be the will requested in the letter. *Malsberger* held that this case differed because the last sentence was only meant to indicate that the testator would verify with an attorney that everything was in order.

The result in *Malsberger* is not particularly surprising, given that New Jersey has held that a document need not be signed at all to constitute a valid will, yet *Ferree* suggests that a particular result is not predictable. No knowledgeable planner would fail to perform an execution that complies with all of the technical execution requirements of state law, but these cases confirm that proponents of a will should not assume that a will is inadmissible merely because it lacks a particular formality. The courts are simply rendering unpredictable conclusions in these situations.

Elective Share of Deceased Surviving Spouse It is somewhat disconcerting to think of the rights of a surviving spouse (S) who already is deceased. But it happens – a married couple who die in relatively rapid succession. As a surviving spouse, S may have a state-law right to reject the estate plan of the first spouse to die (D) and assert an elective share in D's estate. Having died, however, S's personal representative must pursue S's elective share entitlement. Oddly, however, state laws don't always guarantee whether, or the extent to which, S (or S's estate) is entitled to share in D's estate under these circumstances.

For example, the latest version of Uniform Probate Code §2-212(a) provides that S must be alive at the time the right of election is exercised. So, being just a surviving spouse isn't good enough. Further, §2-212(b) provides that, if S survives but is incapacitated, then the share provided by the UPC is held in a trust that, upon S's death, is distributable to the estate or beneficiaries of D, not S. Effectively the elective share is converted into a life estate only.

The UPC elective share of a surviving spouse who lives and is competent is a fee simple entitlement that essentially is a community property surrogate, reflecting an economic partnership theory of the elective share. But it differs for a surviving spouse who is incapacitated. It is treated as if the elective share was based on a support theory. Further, if S is unable to elect prior to dying, then the elective share is totally lost, which makes sense in the context of a support theory but is inconsistent with an elective share that is meant to be a community property surrogate. In this sense the UPC is conflicted and probably reflects a compromise between the two theories of the elective share – one being the economic partnership and the other being a modern substitute for dower.

In re Estate of Scherr, 2017 Il. App. (2d) 160889, addressed the argument made by the heirs of D that S's renunciation of D's will in favor of the Illinois elective share "abated" when S died during administration of D's estate. Billed as a case of first impression in Illinois, the court rejected their argument, saying that filing the renunciation and making claim to the elective share was the only operative requirement. The court did not address whether a failure or inability to file before the death of S would generate a different result. Citing authority from other jurisdictions, the impression given is that Illinois regards the right of election as a modern version of dower, which has a support theory underpinning, rather than an economic partnership rationale. That disparity accurately reflects the uncertain status of the right of election in America in general. The UPC being out front in its advocacy of the economic partnership theory – the community-property surrogate as applied in disguise in non-community property jurisdictions – as opposed to a support theory meant to protect against impoverished survivors.

Trusts

Funding Inter Vivos Trusts Carne v. Worthington, 246 Cal. App. 4th 548 (2016), involved realty that was regarded as an asset of a revocable inter vivos trust, notwithstanding that there was no deed of transfer to the trust. The settlor merely stated in the trust itself that "I transfer to my Trustee the property listed in Schedule A," identified only one asset – the real estate in question. According to the court, a valid trust was created and the real estate effectively was transferred to it, relying on Restatement (Third) of Trusts §16 cmt. b:

> Good practice certainly calls for the use of additional formalities and the taking of appropriate further steps, such as changes of registration, or the execution and recordation of deeds to land. Nevertheless, a writing signed by the settlor, or a trust agreement signed by the settlor and trustee, manifesting the settlor's present intention thereby to transfer property (such as all property listed on an attached schedule) is sufficient to create a trust.

The *Carne* trust was created by the settlor's execution of the trust document and then funding with the realty, which effectively was transferred to the trust merely by listing it on the trust's schedule of assets. According to California law, the only formalities required to transfer the realty being (1) a written instrument, (2) naming the transferor and transferee, and (3) delivery to and acceptance by the transferee.

As alluded to by the quoted comment, however, this result says nothing about the validity of the transfer vis-à-vis third parties. Recordation of the transfer would be required to be effective as to strangers to the transfer, such as creditors of the transferor. But as a donative device, the transfer was effective to remove the property from the transferor's estate (or, in *Carne*, from another trust of which the transferor was the settlor and trustee) and place it in the transferee trust. Meaning that it would pass as provided in the transferee trust and not as a part of the settlor's estate (or under the terms of the transferor trust).

As a point of distinction, compare **In re Griffith**, 2017 WL 193162 (Md. Ct. Special App.). The decedent executed a self-trusteed declaration of trust just over one month before dying, and declared that, among other assets, the trust corpus consisted of "all accounts" held at various banks. The account in question was a joint tenancy account (which previously had been a POD account) naming one of the decedent's five children as joint tenant. That same child was designated as successor trustee of the trust and the question was whether the pre-existing joint account was a trust asset or did it belong to the one child as the surviving joint tenant?

Under the rationale in *Carne* it might appear that merely listing the account on the trust schedule of assets caused it to become a trust asset. And state law might provide that a completed gift of a jointly held financial account such as this does not occur if the decedent contributed all of the funds in the account. That issue was not addressed in *Griffith*. Instead, the court simply noted that "ownership of the joint checking account was not transferred to the [trust] merely by virtue of its being listed in Schedule A as trust property." In partial explanation, the court also held that a state law "presumption of equal ownership of funds among parties to a multiple-party account" was not rebutted.

The real difference, however, may have been that the decedent didn't own the joint account unilaterally – he was a joint owner with the child. According to the court the decedent could have withdrawn all of the funds in the joint account and opened a new account in the name of the trust.

That would be consistent with the traditional state law that the depositor to a joint account may withdraw his or her contributions at will. As the Restatement comment quoted above indicates, however, more may be required under state law to create trust ownership of an asset vis-à-vis third parties, such as the surviving joint owner of that account.

Powers to Appoint

Avoiding General Power Treatment A question that has arisen numerous times involves a power to appoint held by a descendant of the trust's settlor, as to which the permissible appointees of the power are descendants of the settlor. The question is whether the powerholder, who is a descendant, can appoint in favor of the powerholder. An interpretative issue thus arises if the power was not meant to be a general power, meaning that §2041 inclusion in the powerholder's estate was not the settlor's intent.

Multiple authorities have established that, if the power is not exercisable inter vivos, then the powerholder cannot appoint to the powerholder personally. This is because the powerholder will be deceased when the power becomes exercisable. See, e.g., PLRs 201436036, 201427008 and -010 to -015 (all respecting state court orders providing that testamentary powers, in most cases granted to grandchildren to appoint among issue of their parents, did not permit exercise to the powerholder, the powerholder's estate, or creditors of either and therefore that the powers were not §2041 general powers), 201006005 (nontaxable reformation of a testamentary power to expressly preclude a powerholding child from appointing to the child, notwithstanding that the power was exercisable in favor of the settlor's "issue'"), 201446001 through -011 and 201444002 through -006 (all testamentary powers granted to grandchildren to appoint to the settlor's issue), 9826010, 9826008, 9826007, and 9826006 (powers were deemed to be nongeneral notwithstanding that grandchildren as powerholders could appoint to grandchildren of the settlor, with no specific exclusion of the powerholder grandchild from the class of permissible appointees), and Hillman v. Hillman, 744 N.E.2d 1078 (Mass. 2001) (a trust reformation case, brought to preclude a child's exercise of inter vivos power to appoint corpus to the settlor's "issue" from including the child personally and thereby constituting a general power of appointment). The facts of PLR 199938024 were so similar that it may well have been the *Hillman* case. PLR 200152026 involved a very similar issue and holding, the government concluding that the power was not general because it was titled "limited power." PLRs 200832015 and 200210038 similarly reached a taxpayer favorable result involving testamentary powers allowing the powerholders – the settlor's grandchild and child, respectively – to appoint among the settlors' descendants, which was deemed not to include the powerholders because the powers could not be exercised inter vivos and were viewed as not specifically including the estates of descendants, and PLRs 201229005 and 201231007 (apparently involving the same situation, for two different children, each of whom had a testamentary power to appoint among the "Settlors' issue"), which concluded that neither child could exercise their power in favor of their own estate or creditors of their estate, and because the powers were testamentary and therefore could not be exercised in their own favor or to their creditors while the children were living.

See also Borron, Simes & Smith The Law of Future Interests §917 (3d ed. 2011) (stating a presumption that "a donor who did not permit the [powerholder] to make an effective appointment until the [powerholder's] death intended . . . an appointment only to persons who survived [the powerholder]" and, thus, a powerholder cannot appoint to a deceased permissible appointee unless the power specifically authorizes appointment to a decedent's estate, meaning that a testamentary power to appoint among a class including the powerholder could not be exercised in favor of the powerholder unless exercise to the powerholder's estate expressly was permitted). Accord, MacBryde v. Burnett, 45 F. Supp. 451 (D. Md. 1942); Dow v. Atwood, 260 A.2d 437 (Me. 1969); In re Newlin Estate, 72 Pa. D. & C. 446 (1950); In re Sears' Estate, 215 N.Y.S.2d 859 (Surr. Ct. 1961). Restatement (Third) of Property: Wills and Other Donative Transfers §19.12(a). Note that Uniform Powers of Appointment Act §306(b) provides that a holder of a nongeneral power may exercise in favor of descendants of a deceased permissible appointee – which is contrary to the position stated in Borron – but this surrogate antilapse rule does not alter the result in the cited cases and rulings; instead, it confirms the rule in §306(a) that appointment to a deceased permissible appointee is not effective.

Brozman v. Brozman, 2016 WL 7163618 (Cal. Ct. App.), misconstrues drafting that was intended to avoid the issue involved in these developments. The power to appoint was testamentary, allowing a child to "appoint . . . for the benefit of one or more of any of my lineal descendants and their spouses (excluding from said class, however, such beneficiary and such beneficiary's creditors, estate, and creditors of such beneficiary's estate)." The court held that "the most reasonable construction of 'lineal descendants and their spouses' is that the appointment *must* be exercised in favor of a lineal descendant and *may* also include the lineal descendant's spouse . . . ." (emphasis in original). Which is to say that appointment to the spouse of a descendant alone was regarded as invalid. Testimony of the drafter that "and" should be read as "or" was rejected, not because the disjunctive is the exact opposite of the conjunctive but, instead, because the document was "not ambiguous" (which is bizarre, given the construction the court established).

If a drafter was intent on making clear that such a power is not general, perhaps it would better avoid confusion if the power stated that it is a "nongeneral power to appoint among a class consisting of any one or more of my descendants (specifically excluding the powerholder) and spouses of my descendants (not excluding the powerholder's spouse)."

Blending Exercise of Power to Appoint A "blending" exercise of a power to appoint occurs when the powerholder commingles appointive assets with other property, typically the powerholder's own assets, often under a single document or in a single trust. For example, in **McDowell Revocable Trust v. Stockall**, 894 N.W.2d 810 (Neb. 2017), the powerholder exercised a nongeneral testamentary power in favor of the powerholder's revocable trust, from which the powerholder's debts, expenses, and taxes could be paid. This violated an express limitation in the power that precluded appointment in favor of the powerholder, the powerholder's estate, or creditors of either (a common provision that seeks to preclude making the power a taxable general power). This invalid exercise could have been avoided had there been a provision in the power, the exercise, or under state law that would segregate the appointive assets and selectively allocate them to permissible appointees. See Uniform Powers of Appointment Act §308, which is designed to salvage an exercise such as this.

Specific Reference Requirement Well-drafted powers to appoint typically require the powerholder (historically known as the "donee" of the power) to make a specific reference to the power as a means of precluding an inadvertent exercise of the power. The most common case of an unintended exercise is "blanket exercise" language often found in wills that purport to dispose of "all the residue of my estate, *including any property over which I may have a power of appointment*." If asked, the typical client likely would respond affirmatively to the question: do you want to control any appointive assets? But when studied, the typical power benefits the same takers who will receive the powerholder's estate anyway, making a "blending exercise" of the power, meant to direct appointive assets to those same beneficiaries, unnecessary and potentially problematic.

For example, in states that still apply some version of the Rule Against Perpetuities, no new period under the Rule begins to run with exercise of a nongeneral power. Yet the powerholder often blends the appointive assets with their own and places them in a trust, with a perpetuities saving clause that is tied to the powerholder's death, rather than to when the period began to run with respect to the trust that gives the power that is being exercised. Which all means that the exercise may fail. Invalid appointment can occur in other respects as well (e.g., because a beneficiary of the trust into which the exercise was made is not a permissible appointee under the power). The way to minimize these sorts of risks is to require the powerholder to inspect the power so as to comply with the specific reference requirement. Making specific reference often forces inspection of the document granting the power, to make an affirmative statement that establishes knowledge about the power and its parameters, and a positive intent to exercise. In the process, the theory is that invalid appointments are less likely.

In re Estate of Pierce, 394 P.3d 316 (Okla. Ct. Civ. App. 2017), illustrates these sorts of concerns, the powerholder having exercised a nongeneral testamentary power by directing the trust assets to a new trust granting a life estate to an individual (the powerholder's surviving spouse) who was not a permissible appointee (that class being limited to descendants of the powerholder). With a remainder to the powerholder's child, the court correctly held that the life estate aspect of the exercise was invalid, but the court failed to state what the effect of the invalid appointment will be – sequestration of the life estate for the default takers, or acceleration of the remainder. (Indeed, the court also failed to state who the default beneficiaries were).

More important to the case was whether the exercise was effective in any respect, because of the specific reference requirement. The court held that the exercise was effective, based on several theories. The first was that the exercise did not specifically refer to the power itself (as required by the express terms of the power) but it did identify the primary asset held in that trust, which the court took as adequate to satisfy what the court regarded as the primary goal of the specific reference requirement, which is to make clear the powerholder's intent to exercise. A second rationale for holding the exercise to be effective is an Oklahoma statute providing that "formalities in addition to those prescribed in this act be observed in the execution of the power . . . may be disregarded." The court held that the specific reference requirement was such a formality that could be ignored. And, finally, the court relied on an "equitable rule" articulated in Restatement (Third) of Property: Wills and Other Donative Transfers §19.10 cmt. d and Restatement (Second) of Property (Wills and Other Donative Transfers) §18.3, to the effect that the court may disregard the powerholder's failure to satisfy a formality required by the donor of the power. See Kingma, Using Equity to Aid the Exercise of a Power of Appointment that Fails to Specifically Refer to the Power, 51 Real Prop., Trust & Est. J. 457 (2017), which reveals that author Kingma was an expert witness in such a case. Without saying so, that case might have been *Pierce* (at least the timing is very fortuitous, the case and the article appearing in print at nearly the same time).

Powers of Attorney

Forged Power of Attorney Son forged Mother's signature on a power of attorney. Nevertheless, Notary acknowledged Mother's signature on the document without Mother ever being present. Son then used the power of attorney to borrow from Lender, pledging Mother's dwelling as collateral. Son defaulted on the loan, Lender foreclosed on the dwelling, and then sold it to Bona Fide Purchaser for value (BFP). Mother subsequently sued BFP to regain title to the dwelling.

A California statute provides that "[a] third person who acts in good faith reliance on a power of attorney is not liable to the principal or any other person if . . . (1) [t]he power of attorney is presented to the third person by the attorney-in-fact . . . (2) [t]he power of attorney appears on its face to be valid [and] (3) [t]he power of attorney includes a notary public's certificate of acknowledgement . . . ." Intended to facilitate third party reliance on what appears to be a valid power of attorney, the statute was deemed *not* to protect BFP in **Yi v. Oh**, 2017 WL 3393283 (Cal. Ct. App.), because the power was presented to Lender, not to BFP. In addition, the court noted the traditional common law notion that a forgery conveys no title, which meant that BFP obtained no title from Lender, who also obtained no title because the power of attorney was a forgery.

If the statute had applied, then Lender could rely on the power of attorney, and Lender's title would be immune to attack by Mother as rightful owner of the dwelling. And, if Lender had good title, due to reliance on the power and based on the statute, then BFP presumably would have obtained Lender's good title. But in *Yi* the common law notion meant that Lender obtained nothing, and so too BFP. The end result was that the court rejected BFP's demurrer to Mother's claim to recover the property.

As a practical matter, how would BFP know that Lender obtained title from Son, acting under Mother's forged power, and how could BFP ascertain whether that power was invalid because it was a forgery? And how will BFP recover its consideration paid to acquire the dwelling? Presumably BFP could sue Lender, based on the notion that Lender did not have marketable title. And the statute will not protect Lender, notwithstanding that it purports to protect Lender from both Mother and "any other person" – which would appear to include BFP. Perhaps either BFP or Lender also may sue Notary, whose acknowledgement facilitated Son's fraud. In some states Notary may be bonded but, if Notary is not (adequately) insured, then it would appear that both BFP and Lender must rely on any protection they obtained from having title insurance.

If allowed to stand, *Yi* defeats the intent of the statute, which is meant to facilitate use of and reliance upon powers of attorney. At least in this particular corner of fraud and abuse, maybe that's a good lesson to learn, in the sense that powers of attorney have spawned much abuse and litigation and, notwithstanding statutes of this nature, perhaps they should not be regarded as reliable.

As a matter of policy, who should bear the loss in any case involving abuse perpetrated by a power of attorney? In *Yi*, Son is judgment proof, having borrowed the money and defaulted on the loan. Should Mother – the subject of the original fraud – bear the loss? That frequently is the result in cases that involve abuse flowing from powers of attorney. That harsh result may confirm that powers of attorney are a source of evil, and perhaps estate planners should be less willing to encourage their use. And the statute, well-intentioned but (at least in this case) ineffective, may be wrong minded to the extent that it discourages more caution.

State Taxation

State Estate Taxation The federal estate, gift, and generation-skipping transfer taxes are known collectively as the "wealth transfer" taxes because, by Article I, §§2 and 9, of the United States Constitution, Congress may not impose an unapportioned direct tax on property. That explains why the Sixteenth Amendment is critical to the federal tax regime – because it authorizes a direct tax on income. Other Federal taxes must be excise taxes. In the case of wealth, we respect the notion that the transfer of wealth, and not the wealth itself, is the subject of taxation.

Most state laws that impose an estate tax (only Connecticut imposes a gift tax) piggy-back on the Federal estate tax, including its mandate that there must be a transfer to justify a taxable event. Therein lies the genesis of the argument that the taxpayer lost in **Estate of Ackerley v. Dep't of**

Revenue, 389 P.3d 583 (Wash. 2017), in which §2035(b) – the gross-up rule – was challenged for state estate tax purposes in Washington state. The taxpayer argued that Washington cannot tax the gift tax paid on a gift made within three years of a decedent's death because there is no "transfer" as defined for state tax purposes. According to the dissent, "the gift taxes Ackerley paid during his life do not shift any interest in any property at the time of Ackerley's death, there is no transfer of property, and without some transfer or other shifting of property rights upon death, the estate tax does not fall upon the gift taxes paid during Ackerley's life." Although the logic makes sense, it still was a losing argument.

The gross-up rule has been ruled to be constitutional for federal estate tax purposes, and the Washington legislature embraced the federal concept of the taxable estate for state death tax purposes. As a result, the court found that the gross-up rule was legitimately imposed at the state level. It is no surprise and, with $5.5 million of federal gift taxes involved, it was worth a try!

State Estate Taxation of QTIP Trust To set the stage for **Estate of Brooks v. Comm'r of Rev. Servs**, 159 A.3d 1149 (Conn. 2017), consider the fundamental "contract" underlying the federal estate tax marital deduction. The basic requirement of all forms of qualified marital deduction transfer (outright transfer, or a general-power-of-appointment or QTIP marital trust) is "payback" inclusion in the estate of the surviving spouse (under §2033, 2041, or 2044). Congress has, in effect, said that "We won't tax these assets in your estate, provided that you leave them in a form that will cause inclusion in your spouse's estate." As a result, the marital deduction is not designed to reduce the estate tax for a married couple. Instead, it merely defers the tax until death of the surviving spouse.

The equity of this "payback" notion is illustrated by In re Estate of Bracken, 290 P.3d 99 (Wash. 2012), a state death tax case in which the court denied the Washington State Department of Revenue's effort to require inclusion of QTIP trusts in the estates of surviving spouse decedents, because there was no state law QTIP marital deduction allowed (because there was no state death tax) in the estates of the trust settlors. These trusts *did* qualify as marital deduction QTIP trusts in the estate of the first spouse to die for federal estate tax purposes, and the state death tax was a piggyback on the federal inclusion. But having garnered no state death tax benefit in the settlor's estate, *Bracken* correctly held that it was not appropriate for the Department to seek payback inclusion when the surviving spouse beneficiary died.

In response to *Bracken*, the Washington legislature amended its Estate and Transfer Tax Act to specifically allow the Washington Department of Revenue to tax QTIP trusts, regardless of when created or whether the state had granted a marital deduction in the estate of the settlor spouse. *See* Wash. Rev. Code § 83.100.048. This amendment was upheld as constitutional in Estate of Hambleton v. Dep't of Revenue, 335 P.3d 398 (Wash. 2014), notwithstanding that it puts the "contract" in a different light than exists for federal estate tax purposes.

Consistent with the Washington legislation, Estate of Ackerley v. Dep't of Revenue, 389 P.3d 583 (Wash. 2017), subsequently held that federal gift tax included in a decedent's federal gross estate under §2035(b) (the so-called "gross up" rule) also is subject to state estate tax, because the state tax piggybacks on the federal taxable estate. Essentially these developments reveal an effort to tie state estate tax to the federal estate tax return, making whatever is includible for federal purposes also includible for state estate tax purposes. And they indicate that the state death tax posture is fundamentally different than that at the federal level.

In this context, then, consider the facts in *Brooks*, in which the settlor of two QTIP trusts died in Florida, which has no state estate tax. These trusts qualified for the federal estate tax marital deduction but served no state death tax deferral function because there was no state death tax to be deferred. Add the complication that the surviving spouse relocated to and subsequently died in

Connecticut, which does have an estate tax. These QTIP trusts didn't garner a deferral of Connecticut estate tax either, because the trust settlor did not die in Connecticut. Nevertheless, Connecticut successfully imposed its estate tax on these QTIP trusts when the surviving spouse died, based on the logic in both *Bracken* and *Ackerley*, that the state estate tax piggybacks on the federal gross estate and QTIP trusts are includible in the federal gross estate of a surviving spouse. The lack of deferral and notions of payback notwithstanding, the court also stating that termination of the surviving spouse's life estate is a "sufficient 'shifting at death of particular incidents of property' to properly impose an excise tax" on the transfer of wealth.

Quaere the result if the facts had been reversed, and the surviving spouse in *Brooks* had qualified for the estate tax marital deduction in Connecticut but then moved to and died in Florida. The fundamental notion articulated in *Brooks* is that the law of the surviving spouse's domicile at death is the applicable law for purposes of the state death tax imposed, again regardless of the federal payback concept.

State Income Taxation of Trust Income The topic of state income taxation of trust income that is not distributed to a beneficiary has been the subject of several recent decisions. For example, last year Kaestner Family Trust v. North Carolina, 2015 WL 1880607 (N.C. Super. Ct.), aff'd, 789 S.E.2d 645 (N.C. Ct. App. 2016), held that taxation of undistributed trust income based solely on the North Carolina residence of trust beneficiaries violates both the Due Process and the Commerce Clauses of both the State and Federal Constitutions. (The appellate court did not address the Commerce clause issue). As a result, the North Carolina statute that taxes "income of [a] trust that is for the benefit of" a resident beneficiary, even if that trust has no other contacts with the state, was held unconstitutional.

Massachusetts law taxes trust income if at least one grantor, one beneficiary, and one trustee are inhabitants of Massachusetts. Bank of America v. Commissioner of Revenue, 54 N.E.3d 13 (Mass. 2016), involved only the question whether the trustee was an inhabitant (the parties stipulated that the trust was created by a Massachusetts grantor and that trust income was "accumulated for the benefit of a known inhabitant"). The court concluded that the corporate trustee, as trustee (not based on its actions as a corporation), was an "inhabitant" based on its in-state (1) maintenance of over 200 branch offices, and (2) conduct of trust administration activities.

Quill v. North Dakota, 504 U.S. 298 (1992), is a lodestar decision holding that Due Process requires "sufficient contacts" with a State that make it "fair and reasonable" for the State to impose the taxes involved. For example, a State constitutionally may tax trust beneficiaries on income distributed to them. But *Kaestner* confirmed that a State may not tax *undistributed* trust income based on the mere residence of the beneficiaries within the State.

Most recently, **Fielding v. Commissioner of Revenue**, 2017 WL 2484593 (Minn. Tax Ct.), addressed whether Minnesota may tax the worldwide income of an irrevocable inter vivos trust based solely on the fact that the trust's settlor was a domiciliary of Minnesota when the trust was created. The court rejected the State's argument that the state had a perpetual constitutional nexus based on that one factor. Based again on Due Process and Commerce Clause objections, the court held that gain and income from sources outside Minnesota were immune to local income taxation at the trust level, lacking other contacts such as trust administration within Minnesota.

> With respect to state taxation, due process imposes two constraints. First, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Second, "the income attributable to the State for tax purposes must be rationally related to 'values connected with the taxing State.'"

> Due process nexus actually "embodies two discrete inquiries: first, is there a minimum connection with (and hence, jurisdiction over) the taxpayer; second, is there a minimum connection with (and hence, jurisdiction over) the activity the state seeks to tax."

According to the court, residence of a trust beneficiary would allow the State to tax trust income distributed to that beneficiary, regardless of its source. But some other nexus must exist for it to tax trust income not distributed to Minnesota domiciliaries. One such nexus would be income sourced to Minnesota – but only to the extent of taxing that source income. Residence of the grantor at the time the trust was created was not a sufficient nexus to continue to tax nonsource income.

Two elements of the exceptionally well-written opinion are notable. One is that the court distinguished Chase Manhattan Bank v. Gavin, 733 A.2d 782 (Conn. 1999), which many observers believe to support the State's taxation in *Fielding*. According to the court the principle factor that supported state income taxation in *Gavin* was that a noncontingent beneficiary was a Connecticut domiciliary, which the court regarded as meaning that "domicile of the grantor alone is not sufficient to justify the resident tax treatment" of the *Gavin* trust. According to *Fielding*, "state protections must be contemporaneous with the accumulation of the income to be taxed" and "[i]t is unsurprising that courts universally rejected state efforts to tax trusts as 'residents' based solely on the domicile of the grantor at the time an *inter vivos* trust became irrevocable."

The other notable element is the court's insistence that irrevocable inter vivos trusts are distinguishable from testamentary trusts for nexus-generating purposes, agreeing with the notion expressed by some that "[t]he case for asserting jurisdiction to tax a testamentary trust based on the domicile of the decedent . . . is probably a stronger one because of the connection that a testamentary trust has to the state's probate courts . . . given the continuing supervisory relationship which [state] courts have with respect to administration of such a trust." Although not the subject addressed in *Fielding*, quaere the notion that any ongoing connection attributable to creation of a testamentary trust via the will of a long-since deceased settlor is sufficient. The suggestion alone may be another reason to favor inter vivos trusts unless state income taxation is not a relevant consideration.

Idaho Income Tax The result in **Estate of Stahl v. Idaho State Tax Comm'n**, 2017 WL 3623976 (Idaho), should surprise no one. The decedent died in 2010, the decedent's estate made the §1022 election to avoid federal estate tax in exchange for modified carryover basis, and the court concluded that the estate's basis for federal income tax purposes was its basis for Idaho state income tax purposes too. As a result, the estate's sale of appreciated property generated a gain subject Idaho income tax, just as it did for federal income tax purposes.

Notable State Law Developments

Professor Jeffrey N. Pennell
Emory University School of Law
Atlanta