FIDUCIARY LITIGATION UPDATE

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PART A: DEFENSES AND LIMITATIONS

1. *Dunham Trust Co. v. Wells Fargo Bank, N.A.*, 2019 WL 489095 (D. Nev. Feb. 7, 2019). Custodian of bank account was not liable for trustee's misappropriation of trust assets where custody relationship was governed by contract and Wells Fargo had no fiduciary duties with respect to the account.

A. This case involved a testamentary trust that a court ordered created for the grandson of the decedent (Rickey Jr.), and naming the son of the decedent (Rickey Sr.) as trustee. The court order required that financial accounts of the trust be "blocked accounts", meaning that Rickey Sr. was required to receive permission from the court to make disbursements in support of his son. The Trustee opened an account at Wells Fargo without disclosing the terms of the trust and the requirement for a blocked account. Wells Fargo allegedly did not request to see trust documentation, the name or identity of the trust beneficiary, or ask for the terms of the trust.

B. After discovering that Rickey Sr. had taken money from this account for his own use and without prior court permission, the court removed Rickey Sr. and appointed Dunham Trust to serve as successor trustee. Dunham Trust subsequently filed suit against Wells Fargo in a Nevada court to recover the lost trust funds, alleging (1) aiding and abetting fiduciary fraud; (2) conversion; (3) unjust enrichment; (4) negligence; (5) negligence of an agency relationship; and (6) violation of the Nevada Uniform Fiduciaries Act. Wells Fargo removed the case to federal court on the basis of diversity jurisdiction and filed a motion to dismiss the complaint.

C. The U.S. District Court granted Wells Fargo's motion to dismiss the case. On the aiding and abetting claim, the Court held that Dunham Trust failed to allege any facts indicating that Wells Fargo knew that Rickey Sr. was actively breaching his fiduciary duties, and further failed to allege any facts that would indicate Wells Fargo's knowing participation in the Trustee's misconduct.

D. The Court dismissed Dunham Trust's negligence claim on the basis that the Uniform Fiduciary Act of Nevada bars negligence claims on bank accounts and that Dunham Trust failed to allege bad faith, failed to explain how the duty of care arose, and failed to explain how Wells Fargo's alleged conduct was the approximate cause of the damages suffered. Further, the negligence of an agency relationship claim failed as a matter of law since under Nevada law, the relationship between a bank and its depositors is that of a debtor and creditor, not an agent and principal.

E. With respect to the claims for conversion and violation of the Uniform Fiduciaries Act, the court dismissed these claims based on Dunham Trust's (1) failure to provide factual allegations to support the conversion claim and (2) failure to specific information that would allow the court to identify what portions of the Uniform Fiduciaries Act had been allegedly violated. The unjust enrichment was barred because there cannot be such a claim where there exists an express contract between the parties which governs their relationship. Here there was such a contract between

Rickey Sr. and Wells Fargo; that alone was enough to warrant the dismissal of the Dunham Trust unjust enrichment claim.

2. *Trudel v. SunTrust Bank*, 924 F.3d 1281 (D.C. Cir. May 28, 2019). Court held that "special circumstances" did not exist to establish a fiduciary duty where SunTrust held a deposit account.

A. In the mid-1990s a depositor, Yevgenyi Scherban, deposited over a million dollars into an account at SunTrust Bank and designated his wife and son as its beneficiaries. The money disappeared under mysterious circumstances, sometime between the deaths of Scherban and his wife in 1996 and SunTrust's closure of the account in 2003. The decedents' estates and Scherban's son accused SunTrust of stealing the money or allowing others to do so. SunTrust maintained that the funds were likely withdrawn by Scherban's former assistant, through no fault of the bank. Account records were discarded in 2010, which was consistent with SunTrust's record-retention policy. As a result, the decedents' estates and Scherban's son ("Plaintiffs") filed suit against SunTrust in District Court for the District of Columbia. The court granted SunTrust's motion for summary judgment on Plaintiffs' claims for an accounting and for fraudulent concealment.

> "In Florida, "[a] bank and its customers generally deal at arm's-length as creditor and debtor, and a fiduciary relationship is not presumed." . . . To prove such a relationship, the plaintiff must show "special circumstances" establishing both "some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party."

B. The U.S. Court of Appeals affirmed the ruling of the district court. Florida law governed this case because the funds were deposited into a Florida bank account. Under Florida law to obtain an equitable accounting, a party must show either: (1) a sufficiently complicated transaction and an inadequate remedy at law (not asserted in district court), or (2) the existence of a fiduciary relationship.

C. The Court of Appeals confirmed that Plaintiffs failed to show a genuine dispute as to whether "special circumstances" existed to establish a fiduciary relationship between Scherban and SunTrust. Plaintiffs produced no evidence showing SunTrust undertook to advice, counsel and protect Scherban or his family. And, because Plaintiffs failed to raise the argument before the trial court that the disputed transactions were complex enough to warrant an accounting, that argument was forfeited.

D. The Court of Appeals also affirmed the district court's holding with regard to Plaintiffs' claim for fraudulent concealment. Plaintiffs pled in their Complaint that SunTrust concealed relationships with contractors who may have had records regarding the disputed funds; however, in opposition to SunTrust's motion for summary judgment, Plaintiffs advanced a different theory. Since Plaintiffs did not raise their new concealment theory until summary judgment briefing, the district

court had rejected the theory as untimely and thus forfeited, and the Court of Appeals agreed with that determination.

3. *Tangwall v. Wacker,* 2019 WL 4746742 (D. Mont. Sept. 30, 2019). Vexatious litigant's attempts to evade collection through fraudulent transfers to self-settled domestic asset protection trust were denied.

A. Donald Tangwall, for himself and as trustee of the Toni 1 Trust, filed several lawsuits against William and Barbara Wacker in Montana state court, which resulted in a Montana state district court's judgment in favor of the Wackers. Before the issuance of the last of the default judgments in favor of the Wackers, Toni Bertran and Barbara Tangwall transferred parcels of real property to an Alaska self-settled domestic asset protection trust, the Toni 1 Trust. The Montana district court held that the members of the Tangwall family had fraudulently transferred property to the Toni 1 Trust, and the court rescinded the transfer.

B. Donald Tangwall, as trustee of the Toni 1 Trust, filed a complaint on behalf of the trust asking the U.S. District Court to reverse the state district court's judgment. The Wackers then filed a motion to declare that Tangwall was a vexatious litigant.

C. The court outlined many of the cases filed by Tangwall over the years, illustrating his pattern of vexatious pro se litigation. The court highlighted Tangwall's 20-year history of filing frivolous and patently meritless lawsuits, and noted in detail Tangwall's bad faith, his filings' lack of clarity or basis in law or fact, his frequent failures to attend hearings or respond to motions, his incomplete and unsupported briefs, and his attempt to represent corporate entities as an unlicensed attorney.

D. Pursuant to 28 U.S.C. § 1651(a), the court may impose filing restrictions on abusive litigants. However, before imposing a filing restriction, the court must: (1) give litigants notice and opportunity to oppose the order before it is entered; (2) compile an adequate record for appellate review, including a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as "to closely fit the specific vice encountered."

E. The U.S. District Court granted the Wackers' motion to declare Tangwall a vexatious litigant, finding that the Wackers had thoroughly documented Tangwall's history of vexatious litigation. The court noted that Tangwall's litigation activity has spanned 20 years and numerous state and federal venues, that he has been declared a vexatious litigant in four other jurisdictions, and that three such rulings stem directly from Tangwall's litigation against the Wackers over the course of eight years.

F. Tangwall's history of litigation involved frequent actions on behalf of trusts, corporate entities and individuals, though he did not have a law license. His actions demonstrated a belief that he could fraudulently transfer assets to a trust and protect them from actions for recovery so long as he sufficiently badgered the opposing parties with repeated meritless filings, forcing them to back down or settle. While

noting that Tangwall has a right to seek redress with courts, the U.S. District Court found his filings to be numerous and redundant, and to commonly lack any basis in fact or law. The court found he acted fraudulently and in bad faith, and that he harasses his opponents, in particular, the Wackers.

G. Lastly, in holding that Tangwall was a vexatious litigant, the court ordered that Tangwall must obtain preapproval before filing any further documents in the case at issue and any new complaints against the Wackers or their attorney. In addition, the court extended the limitation to other entities and individuals acting under Tangwall's direction, to address Tangwall's habit of ghost-writing complaints and other documents on behalf of legal entities and other individuals.

4. *United States v. Argyris*, 2020 WL 1957549 (D. Nev. Apr. 22, 2020). A spendthrift trust does not protect assets from a writ of garnishment when a federal court orders restitution in a criminal case.

A. Joann Argyris and her son, Peter Argyris, co-owned a Las Vegas gas station until Peter set fire to the gas station to fraudulently collect insurance proceeds. Though Peter was the driving force behind the fraud, Joann knew or reasonably should have known that Peter's actions were fraudulent, but she deliberately avoided learning the extent of Peter's fraud. Ultimately, Joann pled guilty to one count of mail fraud.

B. The insurer had paid approximately $1.3 million to Joann and Peter following the fire and, after Peter's death, sought restitution from Joann for this amount. The U.S. District Court for the District of Nevada issued an order imposing restitution on Joann for the full amount and issued a corresponding writ of garnishment. When the government attempted to collect restitution from Joann, she filed a motion to vacate the district court's restitution order or, alternatively, to quash the writ of garnishment.

C. Joann requested that the court quash the writ of garnishment because her assets are contained in a spendthrift trust. She claimed that assets in a spendthrift trust fall outside the reach of a restitution order. In addition, Joann contended that the restitution order must be vacated because the court did not comply with the procedural requirements of 18 U.S.C § 3664 for issuing an amended judgment.

D. The Fair Debt Collections Practices Act (FDCPA), codified as 28 U.S.C § § 3001-3308, pre-empts all state laws that seek to protect funds from a valid federal restitution order. The FDCPA explains that state law cannot "curtail or limit the right of the United States … to collect any fine, penalty, assessment, restitution, or forfeiture arising in a criminal case." *See* 28 U.S.C. § 3003(b)—(b)(2) (emphasis added).

E. The district court held that a spendthrift trust does not protect its assets from a valid federal restitution order arising in a criminal case and those assets are not exempt from a valid writ of garnishment. The court explained that while spendthrift trusts protect their assets from some court orders, a criminal restitution order is not one of

those. The district court also held that the restitution order was procedurally proper under 18 U.S.C § 3664. The court therefore denied Joann's motion entirely.

F. Spendthrift trusts may protect their assets from some court orders; however, this protection has its limitations. Assets in a spendthrift trust are not protected from valid restitution orders in a federal criminal case or from appropriate federal writs of garnishment seeking recovery of funds pursuant to that criminal restitution order.

PART B: ADMINISTRATION AND COMPENSATION

5. *In re Deborah Dereede Living Trust dated December 18, 2013 v. Karp,* 2019 WL 1549157 (S.C. Ct. App. Apr. 10, 2019). A trustee's reasonable, good-faith departure from the express terms of a trust nevertheless constituted a breach of fiduciary duty.

A. Courtney Feely Karp was the personal representative of the estate of her mother, Deborah Dereede (the decedent), and the successor trustee of the decedent's revocable trust agreement, which became irrevocable at the decedent's death. The decedent's revocable trust agreement provided that "as soon as practicable" after the decedent's death, the trustee should sell certain real property, discharge the mortgage secured by the property and distribute one-half of the net proceeds of sale to Karp's stepfather, Hugh Dereede.

B. Because she was also serving as personal representative of the decedent's estate, Karp believed that she could not sell the real property and distribute the proceeds until the time for creditor's claims against the estate expired. Hugh Dereede disagreed and brought an action in the applicable South Carolina Circuit Court. In response, Karp claimed Dereede violated a no-contest clause in the decedent's revocable trust by initiating the lawsuit. The Circuit Court ruled that Karp breached her fiduciary duties by failing to sell the real property and distribute the property to Dereede as soon as possible. Karp appealed.

C. According to the Court of Appeals of South Carolina, a trustee is obligated to administer a trust in accordance with its express terms. In particular, a trustee must adhere strictly to express directions as to how and when to dispose of trust property. While personal representatives often must delay the distribution of assets until the personal representative determines that the estate has sufficient liquidity to satisfy all creditors' claims, that rule does not apply in the case of trustees. According to the Court of Appeals, a trustee breaches her fiduciary duties by failing to act in strict compliance with the terms of the trust agreement, even if the trustee does so reasonably and in good faith. Furthermore, according to the appellate court, a no-contest clause in a will or trust agreement cannot be enforced against an interested person who has probable cause to contest the validity of the document or the actions of the fiduciary.

D. The Court of Appeals upheld the Circuit Court's decision, finding that Karp breached her fiduciary duties by failing to take any action to sell the real estate within six months of the decedent's death. The Court of Appeals also held that Dereede did not

trigger the no-contest clause in the trust agreement because he had probable cause for bringing his action against Karp.

6. *Sutherlin v. Wells Fargo Bank, N.A.*, 767 Fed. Appx. 812 (11th Cir. Fla. Apr. 3, 2019). Wells Fargo had no duty to violate blocking order imposed by Department of Treasury based on narcotics trafficking and Wells Fargo properly complied with garnishment order issued with respect to trust assets before blocking order was lifted.

A. In 1999, a settlor, Saieh, established a trust (the "Trust") in the Cayman Islands and an investment company, JAMCE Investment Ltd., to help manage the assets of the Trust. In 2006, the Department of Treasury's Office of Foreign Assets Control served the trustee, Wells Fargo, (the "Trustee") with a "blocking order" based on the government's determination that Saieh and JAMCE were "specially designated narcotic's traffickers" connected to a terrorist organization – the Revolutionary Armed Forces of Columbia ("FARC"). The blocking order prohibited Wells Fargo from distributing the assets of the Trust.

B. The trust dissolved upon Saieh's death in 2007 so Wells Fargo terminated the Trust and consolidated the assets of over $800,000.00 of the Trust in their compliance office in New York. Additionally, Wells Fargo kept internal records of the steps that it would take to distribute the Trust's assets after the Department of Treasury's Office of Foreign Assets Control lifted the blocking order. A court eventually permitted a transfer of those Trust funds to a group with a judgment against FARC under the Antiterrorism Act in response to that group's service of a garnishment against the Trust in aid of its collection efforts on the group's judgment for over $318,000,000 against FARC. The antiterrorism claimants based the garnishment on the U.S. government's designation that the Trust was associated with the terrorist organization. However, at the time the court authorized the release of the funds, the government had removed JAMCE from the list of specially designated narcotic's traffickers and had lifted the blocking order. That turnover order was upheld on appeal because JAMCE failed to timely oppose the turnover motion.

C. The Trust beneficiaries sued Wells Fargo claiming that the bank failed to notify them when the Trust was terminated upon Saieh's death, failed to distribute JAMCE's assets to them once it dissolved, moved the funds from the Cayman Islands to the United States in violation of the Trust deed, failed to notify them when the writ of garnishment was entered, failed to defend the Trust against the writ, and failed to mention to the court that JAMCE was no longer considered a specially designated narcotics trafficker. The trial court nonetheless granted Wells Fargo's motion to dismiss for failure to state a claim.

D. The Court of Appeals for the Eleventh Circuit affirmed, holding that under Florida law, Wells Fargo had no duty to violate the blocking order nor was the Trustee obligated to deny cooperation with the garnishment action. Further, Wells Fargo did not have a duty to distribute the Trust's assets to the Trust beneficiaries after the government lifted the blocking order. Because the garnishment action had begun

before the blocking order was lifted, the Trustee could not distribute the funds until the court ruled on the garnishment. Wells Fargo did not owe or breach a duty to distribute trust assets once OFAC delisted JAMCE and unblocked its assets. Because the writ of garnishment had been served on Wells Fargo before the delisting, the assets were still considered "blocked" for purposes of the turnover claim, notwithstanding the delisting decision. And once the turnover judgment was entered and affirmed on appeal, Wells Fargo properly complied with that judgment.

E. The Eleventh Circuit also affirmed that the Trustee was not the proximate cause of the order releasing the Trust's assets to the antiterrorism claimants because the beneficiaries had appeared in that lawsuit and had waived opposing the motion requesting the transfer of those funds to the claimants. Accordingly, the beneficiaries' actions in that lawsuit were the cause of the Trust assets being awarded to the claimants.

7. *In the Estate of Victor J. Mueller Irrevocable Trust Number One and Number Two, Stephanie Mueller v. Krohn*, 2019 WL 3210857 (Wis. Ct. App. Jul. 17, 2019). Trustee's report adequately disclosed the existence of a claim so as to shorten the statute of limitations period for matters disclosed in the report to one year.

A. Victor Mueller established two separate, interrelated trusts during his lifetime, referred to as "Trust One" and "Trust Two." Trust One contained two working farm properties. Stephanie is the sole income beneficiary of Trust One. Upon her death, the residue will go to UW Foundation for scholarships. All of Victor's other assets were placed in Trust Two. Upon Victor's death, Trust Two provided for the payment of certain specific bequests, directed the Trustee to liquidate the gemstones, and pour the remainder into Trust One. Stephanie was bequeathed $500,000 and all of Victor's tangible personal property from Trust Two. Krohn was appointed as trustee of both trusts. Following Victor's death, Krohn liquidated most of the assets of Trust Two and paid 50% of the specific bequests; Stephanie received $250,000. Krohn retained a reserve of assets to pay any additional estate taxes. Krohn continued Victor's contracts with farm operators and hunters who had formed and hunted the two properties in prior years. Stephanie received between $58,000 and $69,700 in the years 2014 through 2016. Stephanie filed a petition for judicial intervention, alleging that Krohn owed damages, had improperly charged a trustee's fee and should be removed as trustee for breach of fiduciary duty. Krohn and UW Foundation filed motions for summary judgment seeking to dismiss the petition. The Circuit Court dismissed Stephanie's claims on summary judgment and awarded attorneys' fees to Krohn and UW Foundation. Stephanie appealed.

B. Under Wisconsin law, a claim must be brought within one year of the date the beneficiary "was sent a report that adequately disclosed the existence of a potential claim for breach of trust." "[A] report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence."

C. On appeal, the Court of Appeals addressed several issues and claims for breach of fiduciary duty. With respect to Krohn's statute of limitations defense the Court held that Krohn's acceptance of the trustee fee was not a breach of fiduciary duty. Both trust documents provided for "reasonable compensation" as agreed upon with the settlor or with the majority of living adult beneficiaries. Less than 3 months after Victor's death, Victor's attorney, Louise Andrew, sent Stephanie a "Notice Regarding Trust" describing the trustee fee in detail. The Notice specifically stated Krohn's compensation and included terms concerning an increase in compensation for 2014. Stephanie did not object to the compensation until she filed the petition underlying this appeal in April 2016. The Court held that Stephanie's objection was barred by the statute of limitations and that, contrary to Stephanie's claim, it is not necessary that a report must contain the contents of an annual report in order to trigger the one-year period.

D. The Court held that Krohn did not otherwise breach her fiduciary duty by (1) continuing the farm contracts previously entered into by Victor with Krohn's brother and nephew, (2) employing her family members to clean and sell Victor's property, and (3) continuing the hunting leases granted by Victor to Krohn's family members. The Court found that Stephanie had received a letter and a copy of the estate tax return which adequately disclosed the existence of a potential claim for breach of trust with respect to the farming contracts and compensation of Krohn's family members helping with the estate and therefore her claims were time-barred by the one-year statute of limitations. As to the hunting leases, the agreements were entered into prior to Victor's death, and even so the transaction was authorized by the terms of the trusts.

8. *Waldron v. Susan R. Winking Trust,* 2019 WL 3024767, 2019 Tex. App. LEXIS 5867 (Tex. App. Tyler Jul. 10, 2019). A Texas Court of Appeals held that a trustee's fiduciary duties are not discharged until the trustee has been replaced by a successor trustee.

A. Susan R. Waldron was the beneficiary of a trust created by her parents. The current trustee resigned and the named successor trustee declined to serve. Pursuant to the trust agreement, if the named successor trustee failed or ceased to serve, a bank or a trust company was to be appointed as successor trustee. The trust agreement also provided that Susan could terminate a trustee, without cause, by written letter if both grantors were legally disabled or deceased.

B. Susan was unable to find a bank or trust company willing to serve as trustee and filed an application with the 241st Judicial District Court in Smith County, Texas, to appoint Raymond W. Cozby III as the successor trustee. Several days later, the district court approved Susan's request.

C. Less than a year later, Susan filed a pro se application asking the district court to appoint her as trustee. Susan alleged that Cozby refused to resign as trustee of the trust and as a result of his conduct, she would be forced to relocate to Tyler, Texas, "bereft, homeless, penniless and needlessly in danger." Cozby stated that he was

willing to resign and had no objection to his removal upon the appointment of an appropriate successor trustee as provided in the trust agreement, or as otherwise determined by the court. He asked for a declaratory judgment and requested a finding that he complied with the trust's terms, that he be removed or allowed to resign, that an appropriate successor trustee be appointed and that he be discharged from any further liability.

D. After a bench trial, the trial court found that the final accounting fairly and accurately set forth the trust's assets, liabilities, income and expenses, and the court approved it. The trial court further found that Cozby administered the trust in accordance with its terms and the applicable law and was not liable to Susan on any claims. The trial court also found that all expenses and professional fees Cozby paid or incurred were reasonable and necessary. The trial court appointed another individual as successor trustee with her term to begin 10 days after the judgment became final or all appeals exhausted, whichever was later.

E. Susan appealed, claiming that pursuant to the terms of the trust, she could terminate a trustee immediately, without cause, by written letter if both grantors were legally disabled or deceased. Accordingly, Susan argued that Cozby's resignation was complete the moment Cozby received her termination letter and he was not entitled to reimbursement for professional expenses incurred thereafter.

F. The terms of the trust prevail over any provision of the Texas Trust Code with certain exceptions that are not applicable in this case. However, where a trust agreement is silent, the Texas Trust Code controls. Pursuant to the Texas Trust Code, where a successor trustee is not selected under the terms of the trust instrument, a court may, and on the petition of an interested person shall, appoint a successor trustee. Moreover, the resigning trustee's fiduciary duties are not discharged until the trustee is replaced by a successor trustee.

G. The Court of Appeals of Texas affirmed the trial court's judgment. The trust agreement provided that Susan could terminate a trustee by letter and appoint a successor bank or trust company that was willing to serve, but no bank or trust company was willing to serve. Accordingly, the Court of Appeals held that Susan's attempt at removal by letter without naming a bank or trust company as successor was ineffective. Rather, the only procedure available to replace Cozby under these circumstances was by petition to the district court for the appointment of a trustee. The Court of Appeals held that although ready and willing to be replaced, Cozby, as trustee, was obligated to continue in the performance of his duties until replaced by a successor trustee, and thus was entitled to reimbursement for professional expenses incurred until he was properly replaced.

9. *Matter of Sochurek*, 174 A.D.3d 908 (N.Y. App. Div. 2d Dep't Jul. 31, 2019). Beneficiary claim against an executor for breach of fiduciary duty does not necessarily cause that beneficiary to violate an in terrorem clause.

A. A decedent was survived by his wife, Anna Marie T. Sochurek, and his two daughters from a prior marriage, Lynn Ammirato and Lisa Birch. The decedent's will gave the wife a life estate in the decedent's interest in a limited liability company, including "all of the duties and responsibilities for the operation of [the company] as if she was the owner and member thereof." Upon the wife's death, her life estate would terminate and her interest would pass to the daughters in equal shares.

B. The will left the remainder of the decedent's estate to the wife outright, and made the wife the decedent's executor, with the power to "run, manage and direct any business of which [the decedent] may die possessed, temporarily or permanently, or to sell or otherwise dispose of such business and all the assets thereof upon any terms which [the executor] deem[s] advisable." The will contained an in terrorem clause that provided for the revocation of the interest of any beneficiary who "institute[s]… any proceedings to set aside, interfere with, or make null any provision of [the will] … or shall in any manner, directly or indirectly, consent the probate thereof."

C. After probating the will and being appointed as the executor, the wife sold the company, retaining for herself a 50 percent share of the sale proceeds. The wife and the daughters entered a standstill agreement whereby the wife agreed to hold the proceeds from the sale of the company in a segregated bank account until the wife and daughters agreed on the daughters' interests in the liquidated assets of the company as the remainder beneficiaries of the wife's life estate. The daughters then filed an action in the Supreme Court against the wife for breach of fiduciary duty to the daughters, as remainder beneficiaries, in retaining the sale proceeds for herself.

D. While the Supreme Court case was pending, the wife petitioned the Surrogate's Court of Dutchess County to construe the in terrorem clause of the will. The Surrogate's Court ruled that the daughters' commencement of the Supreme Court action interfered with the wife's administration of the estate in violation of the in terrorem clause and thus forfeited their legacies under the will. The daughters appealed.

E. In New York, in terrorem clauses are enforceable, but case law provides that such clauses are not favored and must be strictly construed based on the testator's intent. The testator's intent must be determined from reading the will in its entirety and in view of all the facts and circumstances under which the provisions of the will were framed.

F. The Supreme Court, Appellate Division, held that the beneficiaries did not violate the in terrorem clause. The Supreme Court rejected the daughters' argument that the pending Supreme Court action effected a bar to the wife's proceeding in the Surrogate's Court, but found in favor of the daughters on the merits.

G. The daughters' allegations against the wife in the Supreme Court action did not violate the in terrorem clause because the daughters' breach of fiduciary duty allegations did not raise any contest as to the validity of the will, or "otherwise interfere[] with its provisions granting [the wife] discretion to dispose of the estate assets in her capacity as executor." Further, the daughters' allegations that the wife violated the standstill agreement did not implicate any challenge to the will. Accordingly, the Supreme Court reversed the Surrogate's Court and remitted the case to the Surrogate's Court for entry of an amended decree declaring that the daughters' action did not violate the in terrorem clause of the will and did not forfeit their legacies under the will.

10. *Raggio v. Second Judicial Dist. Court of Nev. (In re William J. Raggio Family Trust)*, 460 P.3d 969 (Nev. Apr. 9, 2020). Nevada Supreme Court found that the settlor's surviving spouse, as trustee, did not have a duty to consider her other assets, including assets in a sub-trust, prior to making distributions to herself from a second sub-trust under the specific terms of the trust and Nevada law.

A. Settlor William Raggio created the William J. Raggio Trust that split into two sub-trusts upon his death: (i) the Marital Deduction Trust; and (ii) the Credit Shelter Trust. Pursuant to the terms of the William J. Raggio Trust, petitioner Dale Checket Raggio (the settlor's second wife) was the named trustee and life beneficiary of the sub-trusts. More specifically, the sub-trust permitted Dale, as trustee, to distribute as much of the principal of the sub-trust "as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of Dale. Leslie Righetti and Tracy Chew (the settlor's daughters from his first marriage) were the remainder beneficiaries of the Marital Deduction Trust. Dale's grandchildren from her first marriage were the remainder beneficiaries of the Credit Shelter Trust.

B. Following the death of the settlor, the daughters sued Dale for breach of trust and breach of fiduciary duties as trustee of the Marital Deduction Trust. In sum, the daughters alleged that Dale only made distributions for her benefit from the Marital Deduction Trust resulting in the intentional depletion of the daughters' remainder interest while preserving the remainder interest of her grandchildren in the Credit Shelter Trust. The daughters further complained that the amount of the distributions from the Marital Deduction Trust were excessive pursuant to the terms of the sub-trust. During discovery in the litigation, the daughters sought an accounting and distributions from the Credit Shelter Trust.

C. Dale objected to the discovery requests and sought partial summary judgment. The daughters moved to compel and further argued on summary judgment that the distribution standard in the terms of the William J. Raggio Trust fell within the statutory exception under Nevada law that required Dale to consider her other sources of income in making distributions, including the Credit Shelter Trust.

D. Following a hearing and recommendation before the probate commissioner, and also a hearing before the district judge, the district court denied Dale's motion for partial summary judgment. The district court found, among other things, that the "vested

remainder beneficiaries are entitled to examine the need and propriety of the trustee's decision to withdraw principal from the marital deduction trust by reference to other trust and non-trust resources available for the trustee's necessary and proper support." The district court further compelled Dale to provide the discovery related to the Credit Shelter Trust.

E. Thereafter, Dale filed an appeal in the Nevada Supreme Court seeking a writ of prohibition, or alternatively, mandamus. The Nevada Supreme Court elected to exercise its discretion to hear Dale's writ of prohibition request since it found that the discovery order was likely to cause irreparable harm as it implicated Dale's privacy interests.

F. In considering specifically "whether Dale, as trustee, has an obligation to consider other assets, including those in the Credit Shelter Trust, before making distributions to herself, as beneficiary, from the Marital Trust," the Nevada Supreme Court analyzed the applicable Nevada statute, NRS 163.4175, and found that it did not require a trustee to consider other assets unless set forth in the trust agreement. The court then analyzed the terms of the trust agreement as a whole, and specifically, the distribution standard set forth above.

G. It found that a "fair and reasonable interpretation" of the trust agreement demonstrates that the settlor's intent was not to restrict Dale's discretion in making distributions for her benefit and did not require her to consider her other assets (including assets of the separate sub-trust). The Nevada Supreme Court explained that the words "necessary" and "proper" alone do not trigger the exception of NRS 163.4175 requiring a trustee to consider all other assets.

H. Review of other provisions of the trust helped confirm this analysis. The section covering administration and distribution to the descendants of a grandson gave Dale discretion to make such payments as she deemed necessary for their proper support, but only "after taking into consideration any other income or resources of such issue known to …" Dale. Thus, this language demonstrated that the settlor understood how to restrict Dale's authority but deliberately chose not to do so with regard to Dale's discretion on distributions from the Marital Deduction Trust.

I. In light of this analysis, the Nevada Supreme Court further ruled that the district court erred in compelling the discovery related to the Credit Shelter Trust.

J. The Nevada Supreme Court held that neither the terms of the trust agreement nor Nevada trust law required the settlor's surviving spouse (as trustee) to consider her other assets (in her capacity as a beneficiary) prior to making distributions from a sub-trust. The relevant provision of the trust agreement the court considered was the provision that allowed the trustee to make distributions "as much of the principal of the Trust as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of the beneficiary. The Nevada Supreme Court further held that discovery relating to her other assets were irrelevant as to whether the trustee breached fiduciary duties and did not require its disclosure.

11. *Canarelli v. Eighth Judicial Dist. Court of Nev.*, 464 P.3d 114 (Nev. May 28, 2020). Nevada Supreme Court finds there is no fiduciary exception to attorney-client privilege.

A. Scott Canarelli is the beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust. Scott's parents, Lawrence and Heidi Canarelli served as family trustees of the trust and made certain discretionary distributions from the trust to Scott for his benefit. Edward Lubbers (who was also Lawrence and Heidi's personal attorney) served as the independent trustee of the trust.

B. Scott asserted claims that the trustees unlawfully withheld distributions from the trust. In a pre-suit demand letter, Scott threatened a lawsuit, and Scott's parents resigned as family trustees. Lubbers then became the successor family trustee. Shortly after the resignation of Scott's parents, Lubbers entered into an agreement on behalf of the trust to sell off the trust's ownership in Lawrence and Heidi's business entities.

C. Scott then filed a petition and sought to compel discovery from Lubbers concerning all information related to the purchase agreement, as well as an inventory and accounting related to the trust. Lubbers retained counsel and responded to Scott's petition. Scott thereafter filed a supplemental petition to add new claims of breach of fiduciary duty against his parents and Lubbers as trustees. Ultimately, Lubbers resigned as trustee and died shortly thereafter.

D. In the discovery process, Scott's parents and Lubbers' representative inadvertently produced documents containing Lubbers' notes and tried to rescind the production by asserting the attorney-client privilege and work product doctrine. The two categories of documents in dispute include: (1) Lubbers' notes related to a phone call with the attorneys he retained and consulted concerning responding to Scott's petition (Group 1); and (2) Lubbers' notes memorializing an in-person meeting he attended with the co-trustees, counsel, Scott and an independent trust appraiser (Group 2). Scott sought a determination of privilege for both groups of documents from both the discovery commissioner and the district court. Ultimately, the district court largely agreed with the discovery commissioner and found that a portion of the documents were discoverable and not subject to privilege or immunity.

E. The former trustees then filed a petition for writs of prohibition and mandamus to prevent the disclosure of any of the documents containing Lubbers' notes.

F. In a matter of first impression, and in looking to federal law, the Nevada Supreme Court determined that physical delivery to an attorney is unnecessary for notes to constitute "communications" under NRS 49.095 and the common-law attorney-client privilege to attach. The Nevada Supreme Court explained that "so long as the content of the notes was previously or is subsequently communicated between a client and counsel, the notes constitute communications subject to the attorney-client privilege." Therefore, it found that the Group 1 documents were subject to the attorney-client privilege and that the district court abused its discretion as the petitioners properly proved that the notes concerning the phone call discussion were communicated to

counsel. It further extended the privilege to the factual information contained within the Group 1 documents to the extent it was used to obtain legal advice.

G. In rejecting Scott's request to apply a fiduciary exception to the Group 1 documents, the Nevada Supreme Court reasoned that "NRS 49.015 provides that privileges in Nevada are recognized only as 'required by the Constitution of the United States or of the State of Nevada' or by a specific statute. NRS 49.115 expressly lists five exceptions to the attorney-client privilege, none of which are the fiduciary exception." Thus, the Nevada Supreme Court declined to create a sixth exception.

H. In addition, the Nevada Supreme Court explained that the common interest exception did not apply because: (1) the counsel were not retained in common, and (2) Lubbers' communication with counsel was not related to a matter of common interest. *See* NRS 162.310(1) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal."). Finally, the Nevada Supreme Court illuminated the intent behind its ruling rejecting creation of a fiduciary exception — i.e., "allowing a beneficiary to view communications between a trustee and his or her attorney when the trustee is adverse to the beneficiary would discourage trustees from seeking legal advice."

I. With respect to the Group 2 documents, the Nevada Supreme Court found that they were protected by the work-product doctrine. *See* NRCP 26(b)(3)(A). Pursuant to NRCP 26(b)(3)(A)(ii), in order for documents subject to the work product doctrine to be discoverable, the party seeking disclosure has the burden to demonstrate "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *See* NRCP 26(b)(3)(A)(ii).

J. In this case, the Nevada Supreme Court found that the district court abused its discretion under the totality of the facts and circumstances in finding that the Group 2 documents were not protected from discovery by the work product doctrine. In rejecting that the substantial need doctrine applied, the Nevada Supreme Court reasoned that Scott was at the meeting in question and could obtain any missing information related to the meeting by deposing one of the remaining living attendees.

K. The Nevada Supreme Court found that Nevada law recognized only five exceptions to the attorney-client privilege, and that a fiduciary exception is not one of them. As a result, the Nevada Supreme Court declined to create the fiduciary exception and held that it is not recognized in Nevada.

12. *Ron v. Ron*, 2020 WL 1426392 (S.D. Tex. Feb. 4, 2020). Under Texas law, a trust protector did not owe fiduciary duties to the grantor of the trust.

A. Suzanne Ron and Avishai Ron were married in 1994. In 2012, Suzanne created an irrevocable trust with Avishai as trustee and Gary Stein as trust protector. Suzanne named her three children as the lifetime beneficiaries of the trust.

B. The trust agreement provided that the trust protector's purpose is "to direct the trustee in certain matters concerning the trust, and to assist, if needed, in achieving [Suzanne's] objectives expressed by other provisions of [Suzanne's] estate plan hereunder." The trust agreement also permitted the trust protector to add Avishai, among others, as a beneficiary of the trust. The trust agreement stated that the trust protector's authority was conferred "in a fiduciary capacity."

C. Suzanne filed for divorce in 2014, and the divorce was finalized in 2017. Following the Rons' divorce, Gary, as trust protector, added Avishai as an additional beneficiary of the trust.

D. Suzanne sued Avishai, alleging that he had improperly transferred large sums of the couple's community property to the trust. She also sued Gary, alleging that he had assisted Avishai in making those transfers. In addition to claims for conversion and fraudulent transfer, which did not involve Gary's alleged fiduciary duties as trust protector, Suzanne alleged that Gary had breached his fiduciary duty to her as trust protector.

E. Gary filed a motion to dismiss Suzanne's claims for failure to state a claim. The motion was assigned to a magistrate judge to consider and then to submit his report and recommendation on the motion to the district judge.

F. Texas law recognizes two types of fiduciary relationships: formal fiduciary relationships and informal fiduciary relationships. A formal fiduciary relationship is expressly created by law or the terms of an agreement, such as an attorney's fiduciary duties to a client. By contrast, an informal fiduciary relationship arises from a special relationship of trust and confidence. The special relationship must exist prior to and apart from the transaction in question.

G. The magistrate judge concluded that Gary, as trust protector, was a fiduciary. However, the magistrate judge held that under the trust agreement and the Texas statute governing trust protectors, Gary's fiduciary duties were owed to the trustee and not to Suzanne.

H. With respect to Gary's fiduciary duties created under the trust agreement, the magistrate judge noted that the trust agreement states that only a beneficiary or interested party could compel the trust protector to take an action. Because the trust agreement stated that Suzanne had no interest or incidence of ownership in the trust, Suzanne could not compel the trust protector to take an action.

I. Furthermore, as for Gary's fiduciary duties under Texas law, the magistrate judge found that the Texas statute only created a fiduciary relationship between the trust protector and the trustee, and not one between the trust protector and the grantor.

J. The magistrate judge also concluded that Suzanne failed to demonstrate an informal fiduciary relationship between herself and Gary. In her complaint, the only evidence of a "special relationship" between Suzanne and Gary was her appointment of Gary as trust protector. Suzanne did not allege any facts that would suggest that a special

relationship of trust and confidence existed prior to and apart from the creation of the trust. Therefore, the magistrate judge concluded that Suzanne's complaint could not establish an informal fiduciary relationship between herself and Gary. Accordingly, the magistrate judge recommended that the claim of breach of fiduciary duty be dismissed.

PART C: JURISDICTION AND STANDING

13. *In the Matter of Estate of Cooney*, 454 P.3d 1190 (Mont. Dec. 24, 2019). Contract to make a will claim was not within the jurisdiction of the probate court.

A. John Cooney II and Loriann Cooney divorced in 1980. As part of the divorce settlement, they agreed that the "ranch property" John II owned at the time of his death would be distributed to their daughters and any other children born after the divorce to John II, in equal shares. John II later had two more children. He died in 2015. His will left all of his real property to his son, John III.

B. John II's will was admitted to probate and his three daughters — Jonnie, Melissa and Jill — filed a motion to invalidate portions of the will that left the ranch property entirely to John III. The district court denied the motion. The daughters appealed, arguing that the court erred in determining that they could not enforce the divorce settlement agreement in the probate proceeding. They argued that the probate court had jurisdiction to administer the estate in accordance with the divorce settlement agreement because it involves John II's property and the issue of the rightful heirs and successor to the property.

C. A district court sitting in probate has limited jurisdiction and has only those special and limited powers expressly conferred by statute, including all subject matter relating to (a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and (b) protection of minors and incapacitated persons.

D. On appeal, the Court of Appeals emphasized that the probate court has subject matter jurisdiction over estates of decedents and their administration, and that such is not an action at law nor a suit in equity. A probate court does not have jurisdiction to consider equitable matters.

E. Here, the daughters sought the enforcement of a contract to make a will. Montana law authorizes the use of succession contracts, or a written contract to dispose of a person's property by will, and the court noted that the divorce settlement agreement constituted such a succession contract. However, the remedy for a breach of contract is not a proceeding in probate court; rather, the equitable remedy of specific performance of the contract must be sought through an action in equity in a court of general jurisdiction. The claimant under a succession contract has a "right or interest in the estate, an equitable ownership therein." The Court of Appeals therefore upheld the district court's ruling, affirming that the probate court lacks jurisdiction to adjudicate a breach of contract claim related to a succession contract.

14. *Liebovich v. Tobin*, 2019 Cal. App. Unpub. LEXIS 5930 (Cal. App. 2d Dist. Sept. 5, 2019). Remainder beneficiaries have standing to challenge a court order amending a revocable trust to partially disinherit these beneficiaries when one of the settlors was not given proper notice of the request for entry of such an order.

A. In 1984, Theodore and Shirley Liebovich created the Liebovich 1984 Trust. Thereafter, they executed multiple amendments. Specifically, the sixth amendment provided that either spouse could modify or amend the trust during their lifetime if they acted jointly. Together with the sixth amendment, the spouses executed limited durable powers of attorney. Theodore went on to execute four more amendments to the trust, signing for himself and on the basis of the power of attorney for Shirley. These amendments effectively disinherited their grandchildren.

B. In 2013, Theodore filed a petition to modify the sixth amendment, to modify Shirley's power of attorney, and to validate the four additional amendments that were executed after the sixth amendment. Theodore served the petition on his children and grandchildren, but he executed a waiver of notice for Shirley as her attorney-in-fact. The probate court granted the petition and the order recited "all notices have been given as required by law."

C. After the death of both Theodore and Shirley, the grandchildren filed a motion to vacate the 2013 order as void for two reasons: (1) the grandchildren did not receive notice of the petition or the hearing, and (2) Shirley did not receive such notice. The probate court denied their motion on the grounds that the grandchildren were not entitled to mandatory notice since the trust was revocable and that any deficiency in serving Shirley was not applicable because she was not a party to the motion. The grandchildren appealed.

D. A party seeking to modify a trust under the California Probate Code must serve notice of hearing upon all trustees holding the power to revoke the trust. (*See* Cal Prob Code §17203.) A party seeking to modify a power of attorney must notify the principal. (*See* Cal Prob Code § 4544.) A void order is a "nullity" and it may be set aside not only by the parties and their privies, but also by a stranger to the action. (*See Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 Cal.2d 1, 7, 118 P.2d 815; and *Plaza Hollister Ltd Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15-16, 84 Cal. Rptr. 2d 715.) A stranger must point to some right or interest that would be affected.

E. The Court of Appeals of California granted the grandchildren's appeal, but only to the extent of holding the 2013 order was void for lack of notice to Shirley. The Court of Appeals held that the grandchildren were not entitled to notice regarding either the order modifying the sixth amendment or the order modifying the power of attorney. However, the Court of Appeals came to a different conclusion regarding notice to Shirley.

F. The Court of Appeals first addressed whether Shirley received proper notice. The Court of Appeals ruled Theodore lacked the power to execute the waiver of notice

since the power of attorney did not grant Theodore the power to waive notice on Shirley's behalf. This conclusion meant the 2013 order was void.

G. Next, the Court of Appeals turned to whether the grandchildren, as strangers to the action, had standing to request that the 2013 order be declared void. In answering this question, the Court of Appeals noted that because the 2013 order dramatically reduced the grandchildren's inheritance, their rights were affected, and thus they did have standing to challenge the 2013 order and have it set aside, reinstating the inheritance they had lost.

15. *Hogen v. Hogen (In re Curtiss A. Hogen Trust B),* 940 N.W.2d 635 (N.D. Mar. 19, 2020). The North Dakota Supreme Court held that an order of the district court awarding attorneys' fees, terminating a trust and affirmed on appeal continued to be subject to clarification by the district court so long as the clarification did not modify the district court's original order.

A. Curtiss and Arline Hogan owned land in Barnes and Cass County, North Dakota. Upon Curtiss' death in 1993, his will directed that his undivided one-half interest in the land be retained in the Curtiss Hogen Trust, with his sons Steven Hogen and Rodney Hogen as co-trustees of the trust. Rodney remained active in farming the land under a rental agreement with the trust and Arline. Upon Arline's death in 2007, her interest in the land was devised equally to Rodney and Steven. Steven was appointed personal representative of his mother's estate. Steven believed the estate was entitled to an offset from Rodney's share of his mother's estate.

B. Litigation ensued, and in *Estate of Hogen*, 2015 ND 125, 83 N.W.2d 876, the Supreme Court of North Dakota affirmed an amount Rodney owed the estate, as well as an obligation to pay the fees of the personal representative and the fees of the estate's attorney and expert witness.

C. Steven subsequently petitioned the district court for supervised administration of the Curtiss Hogen Trust to compel an accounting and to recover an offset against Rodney's share of the trust, void deeds unilaterally made by Rodney, remove Rodney as co-trustee and prevent Rodney from receiving rent from the trust land. The district court entered an interim order for supervised administration, but denied the request to remove Rodney as co-trustee.

D. At trial, the district court held that Rodney breached his fiduciary duties as trustee and permanently suspended Rodney as co-trustee. The district court further ordered Steven to divide the trust property and authorized him to pay certain debts and expenses. The district court granted Steven's petition for approval of a final trustee's report and awarded trustee's fees in the amount of $1,750; attorney's fees in the amount of $402,916.50, with $208,000 withheld from Rodney's share; and other litigation fees and costs in the amount of $26,325.25. Lastly, the district court directed Steven to withhold $10,000 for continuing fees and expenses.

E. Rodney appealed again. In this second appeal, the Supreme Court held that the district court did not abuse its discretion in approving the trustee's final report. The Supreme Court further held that the trust had not terminated at Arline's death and that Rodney had breached his fiduciary duties. The Supreme Court also upheld the authorization for Steven to sell the land to offset against Rodney's share and upheld the award of attorneys' fees to Steven.

F. Upon remand from this second appeal, Steven filed a final report of distribution in June 2019. Rodney then filed a motion for surcharge of fiduciary and motion for attorneys' fees, arguing that he did not receive the correct amount from the trust. He argued that he should have received approximately $239,000 from the trust, the difference between the preliminary cash allocation of $447,960.13 and the $208,000 withheld from his portion of the trust assets. The district court denied the motion and terminated the trust. Rodney appealed both of these rulings.

G. The "law of the case" doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings. A party cannot on a second appeal relitigate issues that were resolved by the appellate court in the first appeal or that would have been resolved had they been properly presented in the first appeal.

H. The "mandate rule" requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms.

I. On appeal, the Supreme Court of North Dakota affirmed the district court rulings, holding that the district court's increase in the amount permitted to be taken from the portion of assets devised to Rodney to account for the attorneys' fee award against him was a permissible clarification of judgment, and that the district court provided sufficient due process to Rodney in terminating the trust.

J. Rodney first argued that the Supreme Court's prior decision permitted only $208,000 to be taken from his share, and that the district court violated the mandate rule by not following the Supreme Court's prior decision. The Supreme Court noted that the previous appeal of a matter does not bar all corrections or clarifications. The district court's prior order stated that Steven was awarded attorney's fees in the total amount of $401,916.50, with $208,000 of that amount withheld from Rodney's share. On appeal, the Supreme Court affirmed the district court's award of attorney's fees; it did not interpret the meaning of the district court's order. There was no remand or mandate directing the district court to construe this order in any particular way. Therefore, the district court did not violate the mandate rule in interpreting its own order.

K. Second, Rodney argued that the district court's prior order was binding and the order denying his motion impermissibly changed the meaning of the prior order, that the order denying his motion is a modification of the previous order permitting only $208,000 to be taken from his share. *In Matter of Hogen Trust B*, 2018 ND 117, 911

N.W.2d 205, the Supreme Court analyzed the appealability of the previous order and determined it was a final order for purposes of appeal. While an unambiguous judgment may not be modified, clarification is permissible in the event of an ambiguity.

L. The order at issue directed that $208,000 be withheld from Rodney's share for attorney's fees. However, the district court did not explicitly state how the remainder of the attorney's fees would be allocated between Rodney and Steven's shares. In the order denying Rodney's motion for surcharge of fiduciary and motion for attorney fees, the district court clarified that the remaining fees would be equally withheld from the remaining trust property. The district court was aware of what it intended when allocating the attorney fees and ordered Rodney to obtain a bond based on fees that may be allocated to him, other than the fees to be paid by his share of the trust assets. The Supreme Court held that this denial of Rodney's motion was a clarification, rather than a modification of a prior order and that the district court did not impermissibly change the meaning of its prior order.

M. Lastly, Rodney argued that the district court erred in terminating the trust without notice, which constituted a lack of due process. The order terminating the trust was issued in March 2017 and affirmed on appeal. The final report of distribution and proposed order to terminate the trust were filed June 6, 2019. In his motion filed June 12, 2019, Rodney made no arguments that the trust should not be terminated. On July 5, 2019, the district court issued an order terminating the trust. The Supreme Court held that Rodney had an opportunity to be heard on the issue and contest the termination, but instead argued only that he was entitled to additional funds from the trust. Therefore, Rodney was not denied his due process rights when the district court terminated the trust.

16. *Ex Parte Huntingdon College*, 2020 WL 1482371 (Ala. Mar. 27, 2020). The probate court had no jurisdiction to approve trustees' new funding plan because the Mobile Circuit Court approved a prior agreement governing the funding issue brought before the probate court and thus only the circuit court had jurisdiction over the action.

A. The trustees and beneficiaries of the Bellingrath Morse Foundation Trust historically disagreed about the proper allocation of trust funds and entered into numerous agreements to resolve this longstanding dispute. The most recent agreement included a detailed funding plan for the trust that the Mobile Circuit Court approved in 2003.

B. When a new disagreement arose in 2017, the trustees filed an action in the Mobile probate court requesting approval of revisions to the funding plan in the 2003 agreement, which would allocate additional funds for the Bellingrath Gardens. Huntington College, a beneficiary of the trust, filed a motion to dismiss based on lack of jurisdiction, arguing that the current funding plan had been approved by the Mobile Circuit Court, so only the Mobile Circuit Court had jurisdiction to revise the agreement.

C. The probate court denied the beneficiary's motion to dismiss, concluding that it had jurisdiction over the trustees' action, and entered an order purporting to render a decision in favor of the trustees. The beneficiary then filed a petition for a writ of mandamus in the Alabama Supreme Court on the jurisdictional issue, asking the Supreme Court to direct the Mobile Probate Court to dismiss the action for lack of jurisdiction.

D. Concurrent jurisdiction for the Mobile probate and circuit courts under Alabama Code 1975 § 19-3B-203(b) applies only in proceedings involving a testamentary or inter vivos trust.

E. A party seeking to revise a circuit court judgment is required to file a motion for relief from that judgment pursuant to Rule 60(b) in the Alabama Rules of Civil Procedure.

F. The Alabama Supreme Court held that the Mobile Probate Court had no jurisdiction to alter, amend or nullify the Mobile Circuit Court's final judgment approving the 2003 agreement under which the parties were operating up until the time the trustees filed the proceeding in the probate court. The Supreme Court explained that the probate court did not have concurrent jurisdiction with the circuit court under Alabama Code 1975 § 19-3B-203(b); that code provision did not give the probate court authority to amend or raise a prior circuit court order or judgment. Therefore, the Alabama Supreme Court issued a writ of mandamus directing the Mobile Probate Court to dismiss the trustees' action because it lacked jurisdiction.

G. Furthermore, the Alabama Supreme Court found that there could "be no rational dispute that the trustees' ultimate goal in filing their petition was to attack" the 2003 agreement and "the final judgment of the Mobile Circuit Court" approving the 2003 agreement "in an attempt to substantially alter the agreed-upon and accepted limitation of funds available for the Gardens." The decision noted that the 2003 agreement provided that "the Foundation shall not increase [] payments for the support of the Gardens … at any time in the future without the unanimous consent of the Beneficiaries," and the trustees' action sought court approval to increase funds for the Gardens, in direct contradiction of the terms of the agreement. The Alabama Supreme Court held that the trustees' action was a collateral attack on the Mobile Circuit Court's judgment approving the agreement. Because the trustees sought to revise the circuit court's judgment approving the terms of the 2003 agreement, they were required to file a motion for relief from that judgment with the circuit court pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure.

17. *Roth v. Jelley*, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (Cal. App. 1st Dist. Feb. 24, 2020). Under California law, contingent remainder beneficiaries are entitled to notice in actions that eliminate their interest, even if such an interest is subject to divestment.

A. McKie Roth Sr. created a trust in his will for the benefit of his wife, Yvonne, during her life. The trust granted Yvonne a testamentary power of appointment over the remainder. The will provided that if Yvonne did not exercise the power of

appointment, McKie's three adult children from his prior marriage and Yvonne's adult son from a prior marriage would each receive a share of the remaining trust assets. The will further stated that if any of the adult children did not survive Yvonne, the descendants of a predeceased child would receive that deceased child's share, per stirpes.

B. McKie died in 1988. After McKie's death, his three adult children sued the estate in an unrelated matter. As part of a settlement agreement, McKie's three adult children disclaimed their interest as remainder beneficiaries if Yvonne did not exercise the power of appointment. In 1991, the probate court issued a final order, which followed the terms of the settlement agreement, that changed the default distribution such that Yvonne's son would take the assets in the event Yvonne did not exercise the power of appointment granted in the will.

C. McKie died, and then Yvonne died without exercising her power of appointment. McKie's son, Mark McKie Jr., then petitioned the probate court, arguing that the 1991 order and settlement agreement were void due to lack of notice and thus did not remove him as a beneficiary of the trust. The probate court denied Mark's petition. Mark appealed.

D. In California, the definition of beneficiary includes a person who has any present or future interest, vested or contingent. *See* Cal. Prob. Code § 24.

E. The Supreme Court has stated that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Court of Appeals also cited a later Supreme Court ruling in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), which held that "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party … if that party's name and address are reasonable ascertainable." *See* 462 U.S. at p. 800, 103 S.Ct. 2706.

F. The Court of Appeals of California reversed the probate court's decision and remanded for further proceedings. First, the Court of Appeals recognized that Mark had a cognizable property interest, not a mere expectancy, despite the fact that his interest was contingent and subject to divestment by Yvonne. Second, the settlement agreement, which disclaimed Mark's father's remainder interest in the trust, adversely affected Mark's property interest. Thus, Mark is entitled to notice of this action because he was not a party to the agreement and did not consent to it.

G. Finally, the trustee argued that even if Mark did have a property interest, Mullane does not require actual notice "given the remoteness of his interest." The Court of Appeals disagreed, asserting it believed that Mark was entitled to mailed notice, but there "can be no doubt he was entitled to some form of notice, and he was given none." The trustee further argued that California probate requirements for notice were met, but the Court of Appeals explained that state statutory requirements do not

automatically satisfy federal due process requirements. Because the 1991 order adversely affected Mark's property interest, he was entitled to notice by mail and an opportunity to be heard because his name and address were reasonably ascertainable.

18. *Berry v. Berry*, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576 (Tex. App. Corpus Christi Mar. 5, 2020). Under Texas law, a co-trustee of a trust that owns an interest in a limited partnership cannot sue third parties through a derivative claim brought on behalf of the partnership.

A. Marvin L. Berry and Laura Berry, the parents of four sons, including one named Kenneth, acquired a ranch in 1960. Laura and Marvin created the Flying Bull Ranch Limited Partnership ("the Ranch") and assigned a 2 percent general partner ownership interest to FB Ranch, a separate limited liability company. Marvin and Laura divided the limited partnership interests in the Ranch between themselves. Marvin also started Berry Contracting, which became a successful business.

B. Marvin died in 1997, at which time his revocable trust became a limited partner of the Ranch. In years 2000 through 2005, Berry Contracting made lease payments annually for the Ranch as shown in the Ranch ledgers.

C. Kenneth, as a co-trustee of the trust, on multiple occasions in 2006 requested documents, information and other records relating to the Ranch from Laura, as the general partner of FB Ranch, as his co-trustee, and from Berry Contracting and other family entities.

D. In 2007, Berry Contracting signed a written lease with the Ranch for exclusive use of the Ranch for the period from Jan. 1, 2000, until Dec. 31, 2024. FB Ranch, as general partner of the Ranch, and Berry Contracting signed the lease. The lease was recorded in public land records in 2007, reflecting the lease term.

E. In 2011 and again in 2014, Kenneth requested records, including copies of the lease and other records relating to the trust, from the Ranch.

F. In 2016, Kenneth and his daughter Chelsea filed suit, in part, seeking an accounting and copies of the trust and Ranch partnership documents. Kenneth and Chelsea sued Kenneth's brothers and various family entities over the Ranch, which was owned by FB Ranch as the general partner and by the trust as the limited partner. Kenneth and Chelsea alleged, in part: (1) breach of fiduciary duty as to his brothers and co-trustees; and (2) breach of the partnership agreement by the general partner and the family entities.

G. Kenneth brought these claims in his individual capacity as a co-trustee and derivatively on behalf of the Ranch. Chelsea brought her claims in her individual capacity as an unnamed contingent beneficiary of the trust. They claimed that Kenneth's co-trustees and FB Ranch breached their fiduciary duties by: (1) entering into the 2007 written lease with Berry Contracting in violation of the partnership agreement between FB Ranch and the Ranch; (2) entering into the lease for less than adequate consideration, in violation of the partnership agreement; (3) concealing the

terms of the lease from Kenneth and Chelsea; and (4) diverting lease payments from the limited partnership to another family entity.

H. In 2016, all parties and family entities entered into a consent and release agreement in which Laura acknowledged she had inadvertently deposited the lease payments into the wrong account. As part of the agreement, Laura transferred the incorrectly deposited lease payments into the correct account of the Ranch. The parties also modified the lease between Berry Contracting and the Ranch to conform to the partnership agreement. All beneficiaries, except Kenneth and Chelsea, released Laura, the trust, the Ranch and other family entities from all labilities for their actions. Kenneth and Chelsea continued to pursue their lawsuit.

I. The defendants challenged Kenneth and Chelsea's standing to bring suit. The trial court agreed that Chelsea lacked standing as a contingent beneficiary of the trust and that Kenneth lacked standing to bring a derivative claim on behalf of the limited partnership against the parties. The defendants also filed a motion for summary judgment alleging that Kenneth's suit was barred by the relevant statute of limitations due to the recording of the lease in the applicable land records. The trial court granted the defendants' summary judgment motion. Kenneth and Chelsea appealed.

J. Under § 115.011 of the Texas Code, contingent beneficiaries named as a class are not necessary parties to an action.

K. As a general rule, limited partners do not have the right to sue on behalf of a limited partnership. *See* Tex. Bus. Org. Coe Ann. §§ 153.402, 153.403.

L. An instrument that is properly recorded in the proper county is "notice to all persons of the existence of the instrument." *See* Tex. Prop. Code Ann. § 13.002(1).

M. The Court of Appeals, in agreement with the trial court, found that Chelsea, as an unnamed contingent beneficiary, lacked standing under the Texas Trust Code to assert a claim against the trust.

N. Next, the Court of Appeals held that Kenneth, as a co-trustee, had standing to sue his co-trustees but did not have standing to bring a derivative action on behalf of the Ranch, which was based on the trust's status as a limited partner in the Ranch. As a general rule, limited partners do not have the right to sue on behalf of a limited partnership and no permissible exception to this rule existed in this case. Moreover, the other limited partners of the Ranch had released these claims against these third parties by a majority action, an action that also precluded Kenneth's derivative claims. Accordingly, the Court of Appeals agreed with the trial court's ruling that Kenneth did not have standing as a co-trustee to sue third parties through a derivative action on behalf of the Ranch and, furthermore, the prior release rendered his claims moot.

O. Finally, the Court of Appeals rejected the trials court's ruling that the filing of the lease in public records was sufficient to begin the statute of limitations period on Kenneth's claim for breach of fiduciary duty. Citing to a long history of Texas court

rulings and an intervening decision of the Texas Supreme Court, the Court of Appeals held that the filing of the lease in public records did not furnish constructive knowledge to Kenneth. The Court of Appeals reasoned that filing a lease in the public records does not give an owner of the property constructive notice of subsequent impairments to title. Thus, the Court of Appeals remanded the case for further consideration on the statute-of-limitations issue.

19. *Miller v. Bruenger*, 949 F.3d 986 (6th Cir. Ky. Feb. 13, 2020). The 6th U.S. Circuit Court of Appeals held that the Federal Employee's Group Life Insurance Act does not give rise to federal-question subject-matter jurisdiction.

A. Coleman Miller was a civilian federal service employee working at Tinker Air Force Base in Oklahoma. As a federal employee, Coleman participated in a group life insurance program created under the Federal Employees' Group Life Insurance Act (FEGLIA). The U.S. Office of Personnel Management (OPM) is responsible for managing FEGLIA.

B. In 2011, Coleman and Donna Bruenger divorced. Pursuant to their property settlement agreement, Donna was to remain the beneficiary of Coleman's FEGLIA life insurance policy. The property settlement agreement (PSA) was included in a court order, as required by FEGLIA. However, the court order was not sent to OPM or Coleman's employer prior to Coleman's death, as required under FEGLIA. Furthermore, Coleman failed to designate a beneficiary.

C. Upon Coleman's death, his only child, Courtenay Miller, was paid the insurance death benefit in accordance with FEGLIA's statutory order of precedence for death benefits where the insured failed to designate a beneficiary.

D. Donna then demanded the death benefit and made a claim in Oklahoma Probate Court. However, for reasons not made clear in the opinion, the claim made in probate court was dismissed by agreement of the parties. Courtenay, anticipating Donna's state court claim, then filed an action for declaratory relief in the U.S. District Court for the Western District of Kentucky, seeking a declaration that she is the rightful owner of the death benefit.

E. The district court refused to consider Courtenay's suit, finding it lacked subject-matter jurisdiction to hear the declaratory judgment action and, therefore, dismissed the suit.

F. Courtenay appealed.

G. Federal courts are courts of limited jurisdiction, meaning they can only hear cases that are authorized by the U.S. Constitution or by federal statute. This is referred to as federal subject-matter jurisdiction.

H. There are two bases for invoking federal subject-matter jurisdiction: (1) diversity jurisdiction, where the parties are citizens of different states and the amount in

controversy exceeds $75,000, under 28 U.S.C. § 1332; and (2) federal-question jurisdiction, where the case presents a question of federal law, 28 U.S.C. § 1331.

I. A claim arises under federal law, for purposes of federal-question jurisdiction, when the cause of action is (1) created by a federal statute, or (2) presents a substantial question of federal law. Under the well-pleaded complaint rule, a defendant may not remove a state-law action to federal court on the basis of federal-question jurisdiction unless the complaint establishes that the causes of action arise under federal law. However, there is an exception to this rule, namely, complete pre-emption.

J. Complete pre-emption provides a basis for federal-question jurisdiction over certain state-law claims when a federal statute is so broad that it wholly displaces any state-law claims relating to the same subject matter. It exists in rare circumstances where Congress legislates an entire field of law, and there is a strong presumption against complete pre-emption.

K. The 6th U.S. Circuit Court of Appeals held that the district court lacked federal subject-matter jurisdiction over the action and upheld the district court's dismissal.

L. First, there is no diversity jurisdiction, as Donna and Courtenay are both residents of Kentucky.

M. Second, there is no federal-question jurisdiction. Specifically, the 6th Circuit found that FEGLIA does not contain an express or implied cause of action for one private party to sue another private party over death benefits governed by FEGLIA. Rather, only suits against the federal government are expressly authorized. Additionally, the 6th Circuit found that the cause of action did not present a substantial question of federal law. Rather, the 6th Circuit viewed the action as one truly about enforcing Donna and Coleman's property settlement agreement — clearly a question of state law. FEGLIA merely provided Courtenay with a defense to Donna's claim, and "defenses invoking federal law do not transform a state-law claim into a federal case."

N. Finally, the 6th Circuit found that FEGLIA does not completely pre-empt state law. Although, FEGLIA expressly pre-empts inconsistent state law, the 6th Circuit reasoned that the express pre-emption provision evidences Congress' intent that FEGLIA's pre-emption be limited, as opposed to complete.

20. *Black v. Black (In re Black),* 2020 WL 1814272 (Colo. App. Apr. 9, 2020). The Colorado Court of Appeals holds in a matter of first impression that a Colorado probate court can exercise jurisdiction over the trustees and assets of foreign trusts when those trusts were funded with assets misappropriated from a Colorado conservatorship.

A. Renata Black had two children: Bernard, a resident of Illinois whose son Samuel resided in Maryland, and who is married to Katherine Litvak; and Joanne, who was diagnosed with schizophrenia. Bernard and Joanne's cousin, Dain, resides in California.

B. Prior to her death in 2012, Renata created several trusts. The first one was a special needs trust (SNT) for the benefit of Joanne, with Bernard and Dain as the appointed co-trustees and with Samuel later added as the third trustee. Another trust was an irrevocable trust for the benefit of her issue, referred to as the "issue trust." The issue trust was to provide for the "financial needs and medical expenses of Bernard and his children," with Bernard and Dain appointed as the original co-trustees until Dain's resignation and Samuel's acceptance to serve in Dain's place. The assets of both the SNT and issue trust were located in Illinois, and neither the SNT nor the issue trust was registered in Colorado.

C. Before her death, Renata revised beneficiary designations on several of her bank accounts totaling approximately $3 million to be payable on death (POD), primarily to Joanne. As a result, the bank accounts would have passed directly to Joanne upon death, outside of probate. This distribution was inconsistent with the terms of her will setting forth that 2/3 of her residuary estate would pass to the SNT and the remainder to the issue trust. As a result, Bernard filed a petition for conservatorship over Joanne in the Denver Probate Court and for permission to disclaim the POD designations, asserting that Renata inadvertently changed the beneficiary designations and that they should be placed in trust instead. The Denver Probate Court granted Bernard's petition and authorized the POD disclaimer allowing him to move 2/3 of the bank account funds to the SNT and 1/3 to the issue trust. In the process, Bernard established the "2013 trust" to receive Joanne's government benefits.

D. Joanne and Dain later alleged that Bernard was mismanaging Joanne's conservatorship assets. As a result, in April 2015, the Denver Probate Court froze most of Joanne's assets and suspended Bernard as conservator pending an evidentiary hearing on both issues. Bernard did not object to this order nor the Denver Probate Court's exercise of jurisdiction over him.

E. Although the Denver Probate Court did grant Bernard's request for payment of certain taxes and fees from the assets of the trusts, it denied him the right to pay his personal legal fees from the SNT or 2013 trust or conservatorship. Bernard apparently violated this order, resulting in Dain filing a motion for contempt against Bernard. At the time of the Denver Probate Court's proceedings on these issues, Bernard did not object to personal jurisdiction over him in Colorado.

F. Nearly two years later, Joanne moved to void the POD disclaimers on the basis that he had failed to provide adequate information that he intended to divert 1/3 of her nonprobate assets to the issue trust for the benefit of his children and himself. Following an evidentiary hearing, the Denver Probate Court entered an order in September 2015 finding Bernard had breached his fiduciary duties and committed civil theft. The Denver Probate Court also removed Bernard as conservator, surcharged him for the amount of diverted assets (which was also trebled for civil theft) and ordered Bernard to pay Joanne's attorney's fees and costs in association with the September 2015 order. On these findings, the Denver Probate Court entered a judgment of $4.6 million against Bernard — but did not address the request to void the POD disclaimers.

G. In response to Bernard's appeal, the Colorado Court of Appeals affirmed the September 2015 order and associated judgment. In May 2019, the Colorado Supreme Court denied Bernard's petition for writ of certiorari regarding the September 2015 order.

H. The Denver Probate Court also entered an order in February 2016, granting Dain's petition to use SNT funds to pay Joanne's attorney and accounting fees in ongoing litigation against Bernard and Samuel in Colorado, New York and Illinois, since Dain and Samuel (in their capacities as co-trustees of the SNT) refused to make distributions for this purpose. Bernard appealed the February 2016 order, arguing that the Denver Probate Court lacked jurisdiction over the SNT's assets and thus could not authorize Dain to use SNT funds to pay Joanne's professional fees.

I. In January 2018, the Colorado Court of Appeals found that: (1) the Denver Probate Court had subject-matter jurisdiction over administration of the conservatorship; and (2) the Denver Probate Court failed to make the requisite findings as to whether Bernard, Samuel and the SNT had sufficient minimum contacts with Colorado to support the Denver Probate Court's exercise of personal jurisdiction over them. Accordingly, the February 2016 order was vacated and remanded as to the jurisdiction question.

J. While the appeal of the February 2016 order was pending, in a September 2016 motion, Dain again sought to disburse SNT funds for Joanne's professional fees. Bernard objected on the same jurisdictional grounds and appealed when the Denver Probate Court granted the motion in an October 2016 order. In April 2017, Dain again filed a similar motion, which Bernard opposed on the same grounds. The Denver Probate Court granted Dain's motion in an October 2017 order and found that it had personal jurisdiction over Bernard because he availed himself of the court's jurisdiction in the conservatorship proceeding. Bernard again appealed. The Colorado Court of Appeals stayed the appeal of the October 2016 and 2017 orders pending resolution of the appeal of the February 2016 order that first asserted jurisdiction challenges.

K. In late 2017, Joanne again sought relief from the Denver Probate Court seeking to enjoin Bernard from further transfers of SNT funds and to authorize Dain to use SNT funds to pay her professional fees in her ongoing litigation against Bernard and others. For example, Joanne claimed that Bernard and Samuel entered into fraudulent consent judgments against the SNT assets in Illinois state court in favor of Bernard's wife and another relative, in connection with purported loans to Bernard for payment of his personal attorney's fees. In response, the Denver Probate Court entered the January 2018 order, which suspended Bernard and Samuel as trustees of all trusts benefitting Joanne and barred them from taking any actions with respect to the assets of these trusts. The January 2018 order also authorized Dain to use SNT assets to pay Joanne's ongoing professional fees. Both Bernard and Samuel appealed this January 2018 order.

L. In March 2018, the Court of Appeals remanded the October 2016 and 2017 orders and directed the Denver Probate Court to address the jurisdictional issues. On remand, the Denver Probate Court entered its April 2018 order and found that it had jurisdiction over both Bernard and Samuel. At the same time, the Denver Probate Court granted Joanne's request to vacate the part of the March 2013 order that allowed Bernard to disclaim the POD designations. Bernard and Samuel appealed the April 2018 order.

M. Consolidating the pending appeals, the Colorado Court of Appeals analyzed several issues: (1) jurisdiction in Colorado over Bernard, Samuel, the SNT and the issue trust; (2) the voiding of the disclaimers; (3) payment of Joanne's professional fees from SNT assets; (4) suspension of Bernard and Samuel as trustees of the SNT; and (5) Samuel's entitlement to appellate attorney's fees.

N. **Issue 1**. The Colorado Court of Appeals found that the Denver Probate Court did not err in exercising jurisdiction over Bernard, the SNT and the issue trust. More specifically, the Court of Appeals first found that the Denver Probate Court properly exercised subject-matter jurisdiction over Joanne's conservatorship, because Bernard had filed the conservatorship petition in the Denver Probate Court and the Court of Appeals had previously found such jurisdiction was proper.

O. In so doing, the Court of Appeals rejected Bernard's arguments that: (1) the Denver Probate Court could find jurisdiction over the SNT only if it also found personal jurisdiction over the three individual trustees, and (2) the Denver Probate Court lacked in rem jurisdiction over the SNT and issue trust assets because the assets are located in Illinois, not Colorado. Specifically, Bernard claimed that "the probate court cannot exercise in rem jurisdiction over the assets of the SNT and issue trust because the disclaimer[s] caused funds from a Pennsylvania account ... to flow into a New York estate ... and then, under Renata's will, to SNT accounts in Illinois."

P. The Court of Appeals rejected this argument and instead found that the Denver Probate Court's April 2018 order finding that Bernard's actions (including filing the Colorado conservatorship action and unilaterally and improperly transferring conservatorship assets to other out-of-state trusts) did not remove these assets from control of the Denver Probate Court or otherwise out of Colorado's jurisdiction. The Court of Appeals further held that the removed assets were outside the state of Colorado only because Bernard deposited them in Illinois accounts and that Bernard did not challenge the Denver Probate Court's jurisdiction over the 2013 trust assets, which were also held in accounts outside the state of Colorado.

Q. The Court of Appeals further found that the Denver Probate Court had personal jurisdiction over Bernard as well as over the assets transferred out of state. More specifically, it found that Bernard waived any objection as to personal jurisdiction in any capacity by actively participating in various probate court proceedings without objection. He had also accepted appointment as Joanne's conservator, which under Section 15-14-111, C.R.S. 2019, means he submitted personally to the probate court's jurisdiction in any action related to the conservatorship. The Court of Appeals also

found that the funds within the SNT are not distinct from the conservatorship assets since both also relate to the original POD accounts. In prior proceedings, Bernard had also acknowledged he was appearing either in in an individual capacity or in his capacity as conservator of Joanne.

R. In view of these facts and determinations, Bernard's due process rights were not violated in this exercise of personal jurisdiction over him in Colorado as it was reasonable for the Denver Probate Court to do so under the circumstances. In making this ruling, it was not necessary to address whether the Denver Probate Court had to have personal jurisdiction over all three co-trustees of the SNT before the Denver Probate Court could exercise jurisdiction over the SNT assets or whether the Denver Probate Court had personal jurisdiction over Samuel.

S. **Issue 2**. As to the validity of POD disclaimers, the Colorado Court of Appeals held that the Denver Probate Court lacked jurisdiction and authority to void the disclaimers during the pendency of the prior appeals, and therefore did not address the merits of the Denver Probate Court's underlying analysis and decision to void the disclaimers. The case was remanded for a determination of whether the disclaimers should be voided.

T. **Issue 3**. The Colorado Court of Appeals found that the Denver Probate Court did not err in granting the myriad motions to allow payment of Joanne's professional fees in litigation from SNT assets. The Court of Appeals reasoned that these assets were improperly diverted and were more appropriately assets of the conservatorship, such that they were not subject to the distribution limitations of the SNT.

U. **Issue 4**. With respect to the suspension of Bernard and Samuel as trustees of the SNT and 2013 trust, the Court of Appeals found that the suspension of Bernard, but not Samuel, was proper. As to Bernard, the court found that there was sufficient evidence of Bernard's improper conduct and that he had proper notice of the alleged violations and the request for his removal. As to Samuel, the court found that he lacked sufficient notice as to the January 2018 hearing resulting in his suspension, and thus, under Colorado law, the Denver Probate Court lacked the authority to suspend him.

V. **Issue 5**. The Court of Appeals denied Samuel recovery of his appellate attorney's fees. Although the Court of Appeals had rejected Joanne's arguments as to jurisdiction over Samuel, the Court of Appeals found that her arguments were not substantially frivolous, groundless or vexatious, and could be traced to Samuel's participation in litigation seeking to block Joanne's conservatorship from recovery of assets Bernard had misappropriated.

PART D: CREATION, FUNDING, AND CONSTRUCTION

21. *Campbell v. Commissioner*, T.C. Memo 2019-4 (T.C. Feb. 4, 2019). U.S. Tax Court respected a foreign asset protection trust and held that the IRS could not consider the trust assets in determining the taxpayer's assets for purposes of collecting a tax liability.

A. In 2002 and while a resident of Connecticut, John F. Campbell filed his personal income tax return for 2001. Campbell's return reported taxable income of just over $200,000 and a tax liability of about $60,000.

B. Near the end of 2002, Campbell and his family moved to the island of St. Thomas in the U.S. Virgin Islands. In 2004, while a resident of St. Thomas, Campbell created the First Aeolian Islands Trust pursuant to the law of Nevis, West Indies. Campbell named Meridian Trust Co. Ltd. as the initial trustee, although the trust protector, who held the power to remove and replace the trustee, later replaced Meridian Trust with Southpac Trust Nevis Ltd. The trust was structured as an irrevocable foreign asset protection trust. Campbell funded the trust with $5 million in cash and marketable securities.

C. At the time he created the trust, Campbell had a net worth of approximately $25 million. Campbell and members of his family could receive distributions from the trust in the sole discretion of the trustee, but Campbell never received any distributions of trust assets. Campbell could not appoint or remove the trustee nor direct the trustee to make any distributions or investments. The trust was a grantor trust as to Campbell for federal income tax purposes.

D. During 2001, Campbell had engaged in a tax shelter transaction (a custom adjustable-rate debt structure, or CARDS transaction). In 2004, the IRS initiated an examination of Campbell's 2001 income tax return. In 2006, Campbell made a $27 million investment in the "GO-Zone" initiative in the U.S. Gulf Coast Region. Campbell's investments consisted of commercial and residential real estate. In 2009, about half of the residential real estate was declared uninhabitable because it had been built using toxic drywall.

E. As a result of the drywall issues and the 2008 housing crash, Campbell's investments generated an approximately $10.5 million net operating loss. Through a series of transactions in 2009, Antilles Offshore Investors Ltd., which was a subsidiary of Antilles Master Fund, a foreign entity the trust created, loaned money to one of Campbell's business entities in the Gulf Coast Region. Because of personal guarantees on a number of other loans, Campbell effectively became insolvent by 2010.

F. In 2007, the IRS completed its examination of Campbell's 2001 return and issued a notice of deficiency for approximately $13.9 million. Campbell filed a petition with the U.S. Tax Court contesting the deficiency. Campbell and the IRS ultimately settled and Campbell was able to deduct his net operating loss carryback against his 2001

deficiency. The settlement left Campbell with an approximately $1 million deficiency and a $100,000 accuracy-related penalty.

G. In 2010, the IRS issued a notice of intent to levy against Campbell's assets, to which Campbell objected. In 2012, Campbell filed a petition with the Tax Court seeking to bar the levy. The Tax Court remanded the petition to the IRS Appeals Office.

H. At the Appeals Office hearings, Campbell submitted an offer in compromise on the basis of doubt of collectability and offered to settle all his outstanding debts for $12,603. The IRS stated that Campbell was ineligible for doubt of collectability status because he had "net realizable equity" of approximately $1.5 million in the trust. As negotiations collapsed, the IRS increased Campbell's reasonable collection potential to more than $19.5 million by including the $5 million Campbell placed in the trust as dissipated assets. In 2018, the IRS formally rejected Campbell's offer in compromise. Campbell appealed to the Tax Court.

I. The Tax Court reviews the IRS' administrative determinations for abuse of discretion. Section 7122(a) of the Internal Revenue Code permits the IRS to compromise civil cases arising under the Internal Revenue Code. Regulations promulgated under Section 7122 list three grounds for compromise: (1) doubt as to liability; (2) doubt as to collectability; and (3) promotion of effective tax administration.

J. Doubt as to collectability exists when the taxpayer's income and assets are less than the amount of the tax liability. Doubt as to collectability is assessed on the basis of the taxpayer's reasonable collection potential. A taxpayer's reasonable collection potential is based on (1) assets, including dissipated assets; (2) future income; (3) assets collectible from third parties; and (4) assets available to the taxpayer but beyond the reach of the government.

K. Dissipated assets include assets that the taxpayer sold, transferred, encumbered or disposed of in an attempt to avoid the tax liability after the tax was assessed or for up to a period of six months before the assessment. According to the U.S. Supreme Court, assets collectible from third parties include assets that a third party is holding as a nominee or alter ego of the taxpayer.

L. The "nominee theory" focuses on whether the taxpayer is the true beneficial owner of the property. The "alter ego" theory focuses on whether the taxpayer has pierced the corporate veil. According to the Supreme Court, both theories look first at what rights the taxpayer has in the property under state law and then at federal tax law to determine whether the taxpayer's rights constitute a property right for collectability purposes.

M. The Tax Court ultimately found that the IRS abused its discretion in considering the trust an asset for purposes of Campbell's reasonable collection potential. The Tax Court held that the $5 million Campbell placed in the trust were not dissipated assets. Campbell placed the assets in the trust in 2002, three years before the IRS informed Campbell his 2001 return was under examination, six years before the assessment of

the deficiency and 10 years before his offer in compromise. Accordingly, the transfer to the trust was beyond the permissible period for inclusion as a dissipated asset. Furthermore, even if the transfer to the trust took place within the permitted periods, Campbell had a net worth of over $25 million at the time he funded the trust.

N. The Tax Court also held that the trust was not considered an asset Campbell could collect from a third party. In making this finding, the Tax Court focused on two facts. First, Campbell had no control over the trustee and could not force the trustee to make distributions or investments. Second, Connecticut law, which governed Campbell's state law rights in the trust at the time the tax deficiency arose in 2001, did not have a developed body of law as to whether Campbell had any property rights in a foreign asset protection trust. Because the IRS could not defend its position that Campbell had a property right in the trust under state law, the Tax Court held that the IRS' position that the trust was available to Campbell was an abuse of discretion.

O. Finally, because Campbell did not have sufficient control over the trustee or the trust to compel a distribution or investment, the Tax Court held that the trust was not an asset of Campbell's beyond the reach of the government. The Tax Court made this finding despite the IRS' argument that Campbell had the de facto right to remove and replace the trustee through the trust protector and that the trustee loaned money to Campbell's business at Campbell's effective direction.

22. *In re Antonia Gualtieri Living Trust*, 2019 WL 1265167 (Mich. Ct. App. Mar. 19, 2019). The court could not compel income distributions for payment of child support from a discretionary trust.

A. Charles Anton is the beneficiary of the Antonia Gualtieri Living Trust. Petitioner Linda Anton sought to compel the trustees of the trust to make income payments to Charles so Linda might seek payment of child support and alimony arrearages from Charles. The trial court denied Linda's petition for distribution based on the fact that the trust is a purely discretionary trust, and that Linda was not entitled to compensation for the outstanding arrearages out of income distributions made to Charles from the trust. Linda appealed. On appeal, Linda and the trustees disagreed as to whether the trust at issue is a support or spendthrift trust, or a discretionary trust.

B. Pursuant to Michigan law, a discretionary trust allows the trustee to pay to the beneficiary as much of the income and principal as the trustee determines appropriate in his discretion, whereas a support trust allows a trustee to pay income and principal of the trust to the beneficiary for support, maintenance and welfare. A spendthrift trust provides that the beneficiary's interest shall not be transferable or subject to the claims of creditors. Creditors cannot compel the trustee of a discretionary trust to pay any part of income or principal in order that the creditors be paid.

C. The Court of Appeals held that the trust at issue is a discretionary trust, not a spendthrift trust, and therefore Linda cannot compel income distributions in order to obtain compensation for unpaid child support and alimony.

D. The terms of the trust provided that the trustee "in its sole and absolute discretion, shall apply to, or for the benefit of Charles Anton as much of the principal from the trust as the Trustee deems advisable for his education, health, maintenance, and support." Linda argued that the use of the term "shall" indicates mandatory distributions and therefore a support or spendthrift trust; the trustees argued that the use of the words "sole and absolute discretion" indicates a discretionary trust. The Court of Appeals held that while the term "shall" typically indicates a mandatory provision, the fact that the word "shall" is immediately preceded by the words "sole and absolute discretion" renders the trust discretionary.

E. The appellate court noted that, in attempting to construe a trust instrument, a court must ascertain and give effect to the settlor's intent. Here, the trust document states multiple times that the trustees are permitted to use their "sole and absolute discretion." The trust document also contains provisions providing guidelines for discretionary distributions, including: (1) conservative exercise of discretion; (2) consideration of other income and resources available to the beneficiary; and (3) preservation of assets as the primary purpose. Taken together, it was clear to the court that the trust does not mandate distributions to Charles, regardless of the use of the term "shall."

F. The Court of Appeals also noted that the Michigan Trust Code provides further support for the holding that the trust is discretionary, citing MCL 700.7102(D). That statutory provision defines "discretionary trust provision" to mean "a provision in a trust . . . that provides that the trustee has discretion . . . to determine," among other decisions, whether to make distributions, in what amount, when and to whom.

G. Lastly, the Court of Appeals addressed Linda's argument that public policy supports the argument that she be compensated for the arrearages via income distributions from the trust. The case law Linda cited in support of such argument applied specifically to spendthrift trusts. Because the trust at issue is a discretionary trust, the court rejected Linda's public policy argument.

23. *In Matter of Cleopatra Cameron Gift Trust dated May 2, 1998*, 931 N.W.2d 244 (S.D. Jun. 26, 2019). Supreme Court of South Dakota holds that California court's order requiring payment of child support from trust was not entitled to full faith and credit, and that the father's child support rights were not enforceable against the trust.

A. Cleopatra Cameron was the beneficiary of three trusts created by her father. Each trust contained spendthrift provisions that prohibited the trustee from making direct payments to Cleopatra's creditors. The trust provisions also granted the trustee sole discretion to make distributions from the trusts to Cleopatra. Cleopatra and Wells Fargo served as initial co-trustees of the trusts.

B. In 2005, Cleopatra married Christopher Pallanck. The couple lived in California with their two minor children until Christopher filed for divorce in Santa Barbara, California in 2009. In March 2009, the California family court held Cleopatra and

Wells Fargo in civil contempt for failure to pay Cleopatra's child support obligations from the trusts.

C. In July 2012, Cleopatra exercised her authority as trustee to transfer the trust situs from California to South Dakota. Wells Fargo and several subsequent corporate trustees resigned as co-trustees; ultimately, Trident Trust Company was appointed as successor co-trustee of the trusts.

D. In May 2017, Cleopatra petitioned the South Dakota trial court to declare that the trustees were prohibited from making her child support payments from the trusts. The trial court agreed. In addition, the trial court held that, although Cleopatra's obligation to pay child support was determined under California law, the enforcement of those obligations against the trusts was governed by South Dakota law. South Dakota does not recognize a public policy exception for the enforcement of child support orders against trusts. Therefore, the trial court held that the California court's order directing the trustees to make payments to Christopher for child support was not entitled to full faith and credit. Christopher appealed.

E. The Full Faith and Credit Clause of the United States Constitution provides that states must recognize other states' laws and judicial proceedings. However, the Constitution does not require states to adopt other states' practices regarding the manner and mechanisms for enforcing judgments.

F. The Supreme Court of South Dakota held that Christopher could not enforce Cleopatra's child support obligations against the trusts. Although California law allows a child support creditor to enforce claims against a trust, this is an enforcement mechanism rather than a substantive legal obligation. Therefore, the California court's order was not entitled to full faith and credit. Instead, South Dakota law governed the question of whether Christopher could compel support payments from the trusts.

G. Under South Dakota law, a creditor may not compel a trustee to use trust assets to pay the beneficiary's child support obligations. The Court noted that South Dakota's legislature specifically rejected provisions in the Third Restatement of Trusts that would allow a creditor to enforce a beneficiary's child support obligations against a trust.

24. *Alexander v. Harris*, 2019 WL 2147281 (Fla. Dist. Ct. App. 2d Dist. May 17, 2019). Florida appellate court holds that father's special needs trust, which contained a spendthrift provision, is subject to garnishment in order to pay father's child support obligations.

A. Clifford Harris was involved in a serious car accident as a minor. As part of the settlement, a special needs trust under 42 U.S.C. Section 1396p was created for Harris's sole benefit. Each month, $3,035 was paid to the trust. As of December 2016, the trust had a value of $141,997.

B. Under the terms of the trust, the trustee had sole discretion to distribute trust assets to Harris; Harris had no legal authority to compel distributions. The trust also contained a spendthrift provision. Spendthrift provisions generally prevent a beneficiary's creditors from seeking payment of the beneficiary's debts from the trust assets.

C. In May 2009, Christina Alexander obtained a child support order against Harris. After Harris failed to pay the child support obligations, Alexander asked the court to hold Harris in civil contempt. The trial court granted Alexander's first motion to hold Harris in contempt. Eventually, Harris once again failed to make child support payments, and his arrearages totaled $91,780. Alexander again moved to hold Harris in civil contempt. But the trial court denied Alexander's subsequent motions. Instead, the trial court found that Harris had no ability to pay the child support arrearages or his ongoing support obligations, despite the trust assets.

D. Alexander appealed the trial court's denial of her motion to hold Harris in civil contempt.

E. Under Florida law, discretionary distributions from a spendthrift trust are not protected from garnishment for the payment of child support, though Florida courts have found that enforcement against such a trust is a remedy of last resort.

F. The Florida District Court of Appeals held that Harris's trust could be garnished in order to enforce his child support obligations. The court found that Alexander had exhausted all other sources from which she might satisfy Harris's child support obligations. Furthermore, the court noted that although Florida law has long recognized the validity of spendthrift trusts, the state's public policy gives primacy to enforcing child support orders. Therefore, the court held that Alexander was entitled to enforce Harris's child support obligations against the trust.

25. *In re Ignacio G. and Myra A. Gonzales Revocable Living Trust.*, 2019 WL 2376184, 2019 Tex. App. LEXIS 4648 (Tex. App. Texarkana, Jun. 6, 2019). Summary judgment on how to interpret a trust was inappropriate where the intent of the Settlors was not shown by sufficiently clear and convincing evidence.

A. Husband and wife created a Revocable Trust, which named their daughter, Esperanza, as Trustee. In addition to Esperanza, Husband and wife had a son, Ignacio. Wife had a daughter, Edna, prior to meeting husband. Husband adopted Edna. The Trust agreement defined "children" as Esperanza and Ignacio specifically, and the summary attached to the trust described the trust assets as passing in equal shares to Esperanza and Ignacio after the death of husband and wife. Descendants was defined in the trust to include adopted persons. The term "children" did not appear in the trust except in the identification paragraph. Edna did not appear anywhere in the trust or the summary. The trust provided that after the death of surviving grantor, "all of the remaining trust property shall be distributed to the Grantor's [_____]. If none of the Grantors' descendants survives the surviving Grantor, one-half of the property of the trust… shall be distributed to the Husband's heirs and the other half … to the Wife's heirs." After husband and wife's deaths, Esperanza, as Trustee, filed a

petition for declaratory judgment in Travis County asking the probate court to fill in the blank in the document with the word "descendants" and to determine whether Edna was a beneficiary of the trust. The attorney who drafted the trust testified that although he did not remember husband and wife personally, he assumed based on the trust summary and the clear definition of "children" that Edna was not an intended beneficiary of the trust. The probate court granted Esperanza's request for summary judgment, reformed all of the relevant trust termination provisions to provide for distribution of trust assets to the "children" rather than "descendants" and ruled that Edna was not a child and thus not a beneficiary of the trust. Edna appealed.

B. In construing a will the court focuses on the testator's intent and Texas applies the same rules to interpreting a trust. In Texas, the meaning of a trust is a question of law when there is no ambiguity as to its terms. However, when the trust instrument's language is uncertain or reasonably susceptible to more than one meaning the trust is deemed ambiguous such that its interpretation presents fact issues which precludes summary judgment. Alternatively, Texas Property Code Section 112.054 provides that a court may order modification of terms of an unambiguous trust if such reformation is necessary to correct a scrivener's error and enact the settlor's intent as established by clear and convincing evidence.

C. On appeal, the Court of Appeals of Texas overturned the trial court's award of summary judgment and remanded the case, ruling that there were genuine issues of material fact that precluded summary judgment. The Court of Appeals explained that the trial court must not have found the terms of the trust to be ambiguous, because otherwise the law would have precluded summary judgment. Accordingly, the Court of Appeals reasoned, the trial court must have been operating under the theory of a scrivener's error, which would permit summary judgment to reform the trust if the settlor's intent was shown by clear and convincing evidence as permitted by Texas Property Code Section 112.054. This section of the code did not exist when the trust was created, but the Court of Appeals reasoned that it was a codification of common law which did exist at the time of the creation of the trust and was therefore applicable. The Court of Appeals found that under that standard, the trial court should not have issued summary judgment. The Court of Appeals explained that although the trust contained multiple scrivener's errors, the evidence presented was insufficient to determine the settlor's clear and convincing intent as a matter of law. For example, one of the scrivener's errors was a mistake in fact that the settlors had only two children, when in fact they had three, and the evidence reviewed in the light most favorable to Edna (as required on appeal of summary judgement against her) could mean that the error was not in failing to use the word "children" instead of "descendants" but instead failing to include Edna in the definition of the settlor's children. Therefore, there was a genuine issue of fact to be determined by the trier of facts before the trust could be reformed.

D. On August 21, 2019, Ignacio and Esperanza filed a petition for review with the Supreme Court of Texas alleging that the Court of Appeals relied on the wrong standard of proof. As of this publication, the Supreme Court of Texas has not issued a ruling or indicated whether it intends to review the case.

26. *Levitan v. Rosen*, 95 Mass. App. Ct. 248, 124 N.E.3d 148 (Mass. App. Ct. May 6, 2019). Interest in an irrevocable spendthrift trust created by a third party deemed part of the marital estate to be considered in division of property during divorce, where wife was the sole trust beneficiary.

A. Upon his death, father created a lifetime trust, governed by Florida law, for the benefit of his daughter. The daughter and an independent trustee served as co-trustees of the trust. The independent trustee had unlimited discretion to make distributions of income and principal to the daughter as the independent trustee deemed advisable. Additionally, the daughter had the right to withdraw five percent of the trust principal each year. The withdrawal provision specifically provided that if the daughter exercised her right of withdrawal, the trustee "shall make such distribution to [her]." The trust contained a spendthrift provision that specifically included a spouse as a potential creditor that could not reach trust assets. The daughter had a limited power of appointment at her death exercisable in favor of her father's descendants. In the daughter's divorce, the trial court held that the annual right of withdrawal was includable in the marital estate to be divided in the divorce, but the remainder of the trust was not part of the marital estate because it was protected by the spendthrift clause. In dividing the marital property and the trial court included the value of the trust withdrawal right (but not the full value of the trust) in the daughter's share of the marital estate and also included the value of the withdrawal right in the daughter's income for purposes of awarding support. The daughter appealed.

B. In Massachusetts, a divorce court must divide the divorcing parties' property equitably; the size of each parties' estate for the purposes of equitable distribution includes all property to which a party holds title, however acquired. Further, in Massachusetts, a beneficial interest in a trust may, depending on the terms of the trust, be considered part of an individual beneficiary's estate even though the trustee holds legal title not the beneficiary. If a beneficial interest in a trust is not presently enforceable, Massachusetts courts have previously held that a divorcing beneficiary's interest should not be classified as property subject to equitable division but should be considered by the court under the statutory criteria of G.L. c. 208 § 34 as an "opportunity for each [spouse] for future acquisition of capital assets and income."

C. The Massachusetts Court of Appeals overturned the trial court's ruling, but in an unfortunate surprise for the daughter, did so on the basis that the full value of the trust, not just the value of the withdrawal right, should have been included in the marital estate and remanded the case for further consideration of equitable division of property and appropriate support on the basis of the expanded marital estate. The Court of Appeals did not agree that only the value of the withdrawal right should be included in daughter's income for purposes of determining support. The Court of Appeals reached this surprising result based on the fact that the daughter was the sole beneficiary of the trust and the settlor's primary intent was to provide for the daughter rather than subsequent generations. The Court of Appeals also stated that the annual right of withdrawal built in a "degree of predictability" into the trust distributions despite the fully discretionary nature of the trustee's distributions, which made the

trust more than a "mere expectancy." The Court of Appeals held that because of the spendthrift provision, the trust property could only be assigned to the daughter in the equitable distribution of marital property, and that the trial court should determine on remand how to distribute the remaining marital estate in light of that assignment.

27. *Sibley v. Estate of Sibley*, 273 So. 3d 1062 (Fla. Dist. Ct. App. 3d Dist. Apr. 3, 2019). A Florida appellate court held that an administratively dissolved private foundation is not in existence on the decedent's date of death for purposes of a bequest to that foundation, even when the private foundation is later reinstated.

A. Curtiss F. Sibley executed a revocable trust under which his brother, Charles Sibley, was named trustee upon Curtiss' death. Pursuant to the terms of the trust, Curtiss left the residue of his estate to his private foundation, the Curtiss F. Sibley Charitable Foundation, if then in existence. If the private foundation was no longer in existence at Curtiss' death, Curtiss left the residue of his estate to the Fellowship House Foundation, a charitable organization in South Miami, Florida.

B. On Sept. 23, 2011, the private foundation was administratively dissolved. Three months later, Curtiss passed away. On July 9, 2012, approximately seven months after Curtiss' death, the private foundation was reinstated. However, Charles never opened a bank account for the private foundation, he did not file any paperwork for the private foundation with the IRS, and he never funded the private foundation, despite being in control of the trust funds.

C. In 2017, the Fellowship House Foundation filed a petition to reopen for subsequent administration, alleging that the private foundation was no longer in existence on the date of Curtiss' death and, therefore, pursuant to the trust agreement, the residuary trust estate should be distributed to Fellowship House.

D. The trial court concluded that the private foundation was not in existence at the time of Curtiss' death and ordered Charles to distribute the residuary trust assets to the Fellowship House. Charles appealed.

E. The Florida Statutes provides that an administratively dissolved corporation continues its corporate existence for the purpose of winding up and liquidating its business and affairs. A corporation administratively dissolved may apply for reinstatement, and if granted, the reinstatement relates back to the date of administrative dissolution. (*See* Fla. Stat. § 607.1422.) However, it is black letter law that in construing the terms of a trust, the court must ascertain and give effect to the settlor's intent.

F. The Florida District Court of Appeals held that the private foundation was no longer in existence at the time of Curtiss' death and the reinstatement of the private foundation's corporate status seven months later did not relate back to the date of death.

G. First, the Florida District Court of Appeals viewed the lack of funding, the lack of a bank account and the failure to file any IRS filings as evidence that the private foundation was non-functioning on the date of Curtiss' death. As the administratively

dissolved foundation was non-functioning and could not take any actions at the moment of Curtiss' death except to complete its dissolution, the Florida District Court of Appeals held that the private foundation was no longer in existence at the time of Curtiss' death.

H. Second, the Florida District Court of Appeals held that the statute providing that the reinstatement of an administratively dissolved corporation relates back to the date of administrative dissolution is not applicable to the determination of whether the private foundation existed on the date of Curtiss' death. The Florida District Court of Appeals reasoned that to hold otherwise would frustrate Curtiss' intent to make his testamentary gift to the private foundation contingent on its existence on the date of his death because the foundation could possibly always be in existence so long as someone prospectively filed the necessary annual reports and paid the delinquent fees.

28. *Blech v. Blech*, 38 Cal. App. 5th 941 (Cal. App. 2d Dist. Aug. 15, 2019). In California, creditors may request trust assets be made payable directly to the creditor even from a spendthrift trust once the amount to be distributed to a beneficiary is determined.

A. Richard Blech is the beneficiary of a spendthrift trust his father created. The trust provides for annual distributions to Richard of the entire trust principal over the course of 10 years in non-discretionary predetermined amounts. The trust contains a spendthrift provision that states, in part, "[a]ll of the income and principal [of the] Trust shall be transferable, payable and deliverable only to [Richard] at the time [Richard] is entitled to take under the terms of [the] Trust."

B. Richard owed money to his siblings as a result of a settlement agreement he entered into with them. The siblings obtained money judgments against Richard and the probate court ordered the trustee of the trust to pay 25 percent of future trust distributions directly to the siblings, until their judgments were satisfied, pursuant to Section 15306.5 of the California Probate Code. Subsequently, the siblings and a third-party creditor filed petitions to enforce their money judgments against the remaining 75 percent of Richard's distributions, pursuant to section 15301(b) of the California Probate Code.

C. The court heard arguments on the matter three days before a scheduled distribution to Richard. After argument, the court ordered the trustee of the trust to proceed with payment of the 25 percent to the creditors on the scheduled distribution date but to retain the remaining 75 percent of the distribution in the trust until the court gave its ruling. Six days after the scheduled distribution, the court ruled in favor of the creditors. Richard appealed.

D. California law generally holds that a beneficiary's interest in a spendthrift trust is not subject to enforcement of a money order until payment is made to the beneficiary. (*See* Sec. 15300 and 15301 of the California Probate Code.) However, 15306.5 of the California Probate Code permits creditors to obtain a court order directing the trustee

to pay up to 25 percent of a beneficiary's future trust interest directly to such creditor until the creditor's judgment is satisfied, provided such funds are not necessary for the support of the beneficiary and his or her dependents. If there is more than one creditor proceeding against the trust under 15306.5, the aggregate amount payable directly to creditors from the trust cannot exceed 25 percent of future distributions.

E. In addition to this provision, Section 15301(b) provides that "after an amount of principal has become payable to the beneficiary under the trust instrument, upon petition to the court … by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of that principal amount." In *Carmack v. Reynolds*, 2 Cal.5th 844 (2017), the California Supreme Court construed that provision to mean that creditors may reach principal already set up to be distributed to a beneficiary despite a spendthrift provision.

F. On appeal, the Court of Appeals of California for the 5th Circuit affirmed the probate court's decision and rejected all four of Richard's arguments. The Court of Appeals rejected Richard's argument that 15301(b) bars a creditor from filing a petition to enforce a judgment before a trust distribution is due and payable based on the plain language of the statute.

G. The Court of Appeals explained that if Richard's interpretation of the statute was correct and creditors were barred from filing a petition until after the distribution is paid to the beneficiary, there would be no window in which the remedy provided in 15301(b) of the California Probate Code could be utilized by creditors. Further the Court of Appeals ruled Richard's interpretation of the trust as requiring the trustee to make all payments directly to Richard as factually inaccurate because the trust left the receipt of payment to the discretion of the trustees.

H. Additionally, the Court of Appeals rejected Richard's argument that the probate court's decision should be overturned because it failed to consider what portion of the distribution should be unreachable by creditors because it was necessary to support Richard and Richard's dependents. The Court of Appeals determined the trust was not a support trust because the distributions of income and principal were mandatory and based on factors other than Richard's education and support. Accordingly, assessment of Richard's needs and other available resources was not a necessary consideration for the probate court. The Court of Appeals did note that the trust included language that the spendthrift clause "shall not restrict … the Trustee to use and disburse funds for the support maintenance, health and education of [Richard]." Still, the Court of Appeals was not persuaded that such language converted the trust to a support trust where its primary purpose was clearly nondiscretionary distributions of principal over a set term.

I. Finally, the Court of Appeals held that the probate court was within its discretion to release a written opinion rather than rule from the bench and to order the trustee to withhold Richard's distribution until such written opinion could be finalized.

29. *In re Estate of Little*, 2019 Tex. App. LEXIS 7355, 2019 WL 3928755 (Tex. App. Dallas Aug. 20, 2019). A settlor who had the power to revoke the trust and was the sole beneficiary of the trust while alive was free to fund the trust and dispose of its property as the settlor saw fit.

A. John Little was the father of three children: Mary Ann, Jay and Dan. The Little family owned a ranch and related livestock and equipment. The father owned a 100 percent interest in the livestock and equipment. The father, Mary Ann, Jay and Dan each owned a 25 percent interest in the ranch. The father created a revocable trust with himself and Dan as co-trustees and Mary Ann, Jay and Dan as residuary beneficiaries.

B. In 2000, the father created two survivorship bank accounts with Dan, naming Dan as both accounts' sole surviving party owner. In 2006, the father sold his 25 percent interest in the ranch to Mary Ann, Jay and Dan in exchange for a promissory note secured by each child's interest in the real estate. There was no evidence that the father transferred the notes to the trust. The Little family sold the ranch and the accompanying livestock and equipment in 2014. The father deposited all sale proceeds attributed to his interests into the survivorship account with Dan as surviving owner.

C. The father died in 2015. Mary Ann and Jay subsequently sued Dan for breach of fiduciary duty for allowing the sale proceeds to be deposited into the survivorship account. They argued that Dan, as co-trustee of the trust, had a fiduciary duty to prevent such a transfer. Dan moved for summary judgment arguing that (1) Mary Ann and Jay had no standing to assert their claims against him, and (2) there is no evidence that Dan breached a fiduciary duty in connection with the deposits to the survivorship account. The trial court granted Dan's summary judgment motion. Mary Ann and Jay appealed.

D. "Any interested person may bring an action under Tex. Prop. § 115.001." *See* Tex. Prop. Code §115.011(a). An "interested person" is defined as "a trustee, beneficiary, or any person having an interest in or claim against the trust or any person who is affected by the administration of the trust." *See* Tex. Prop. Code § 111.004(7). A "beneficiary" is "a person for whose benefit property is held in trust, regardless of the nature of the interest." Id. at 111.004(2). An "interest" is "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible." Id. §111.004(6).

E. Furthermore: "The duties of a trustee of a revocable trust are owed exclusively to the settlor .... [T]he rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime." *See Mayfield v. Peek*, 546 S.W.3d 252, 262 (Tex. App. 2017, no pet).

F. Dan argued that Mary Ann and Jay, as contingent beneficiaries of the trust, had no standing to challenge what their father chose to do with his money during his lifetime. Mary Ann and Jay responded that they were not complaining about their father's

action; instead, their complaint concerned Dan's conduct as co-trustee and his alleged misappropriation of trust property. On this point, the Court of Appeals agreed with Mary Ann and Jay. The Court of Appeals found that, as trust beneficiaries, Mary Ann and Jay are interested persons, and thus had standing to assert their claims against Dan as co-trustee when these challenged transactions occurred.

G. Next, the Court of Appeals turned to the claim of breach of fiduciary duty. Jay and Mary Ann argued that Dan wrongfully retained trust funds and commingled trust funds with his own funds. The Court of Appeals found that there was no evidence that the ranch notes or the livestock and equipment proceeds were required to be placed in the trust. The Court of Appeals added that the sale proceeds and the survivorship account funds were not trust property. Furthermore, the Court of Appeals explained that the father had authority to remove assets from the trust and held that the "Trust was a revocable Trust and Father, as settlor and co-trustee, had the power to revoke the Trust and was the sole beneficiary of the Trust while alive. Father was free to fund the Trust and dispose of its property as he saw fit." Finally, the Court of Appeals held that Dan, as co-trustee of the trust, owed a fiduciary duty only to his father while his father was alive. Accordingly, the Court of Appeals affirmed the summary judgment for Dan.

30. *Hunter v. Hunter*, 838 S.E.2d 721 (Va. Mar. 1, 2020). A trust beneficiary may condition his request for relief on the court's determination that the request would not trigger the trust agreement's no-contest clause, and the beneficiary's request to construe a purported waiver of the trustee's duty to provide trust financial information does not trigger the no-contest clause.

A. Theresa Hunter created a revocable living trust in 2011. Under the trust agreement, upon Theresa's death, the remaining trust assets were to be distributed in equal shares among Theresa's two children, Chip and Eleanor, and Theresa's granddaughter.

B. The trust agreement also contained a "no-contest" clause. Under the no-contest clause, if a person contested a provision of the trust agreement, he would automatically forfeit his interest in the trust. The trust agreement defined an action to "contest" a provision of the trust as "any action to invalidate, nullify, set aside, render unenforceable, or otherwise avoid the effect of such instrument, action or transaction."

C. Theresa died in 2015, and Eleanor became sole trustee of the trust. After Theresa's death, Chip received an account statement for the trust that allegedly showed the trust assets had declined from $4.25 million to $1.77 million over an approximately six-year period. After receiving the account statement, Chip requested additional information from Eleanor, including a report of the trust's receipts and disbursements during that time. According to Chip, Eleanor refused to provide this information, citing a provision in the trust agreement that "waive[d] the Trustee's formal requirements to inform and report under Section 55.548.13 of the Code of Virginia." (This statute has been recodified, without substantive changes, as Section 64.2-775 of the Code of Virginia.)

D. Chip filed a lawsuit in the Circuit Court for Williamsburg-James City County, Virginia. Ultimately, Chip's lawsuit asked the court to confirm that the trust agreement did not waive Eleanor's duty to provide him financial information about the trust.

E. However, to avoid the trust agreement's no-contest clause, Chip divided his complaint into two "counts," In Count II, Chip asked the court to answer the question ultimately at issue: whether the trust agreement waived Eleanor's duty to provide the requested financial information. But, in Count I, Chip asked the court first to determine whether addressing Count II would trigger the no-contest clause. If the court determined addressing Count II would trigger the no-contest, then Chip asked the court not to rule on Count II.

F. Eleanor filed a counterclaim alleging that Chip's complaint triggered the no-contest clause and that Chip therefore had forfeited his interest in the trust.

G. The Williamsburg-James City County Circuit Court agreed with Eleanor and held that Chip's complaint had triggered the trust agreement's no-contest clause. Accordingly, it ruled that Chip had forfeited his entire interest in the trust.

H. Chip appealed to the Supreme Court of Virginia.

I. Virginia law recognizes no-contest clauses, though courts will strictly construe those clauses.

J. In asking the court for relief, a plaintiff is deemed the "master of the complaint." The plaintiff may plead "in the alternative" and specify the conditions under which he seeks relief.

K. The Supreme Court of Virginia reversed the trial court's decision. First, the Supreme Court held that Chip could plead "in the alternative." That is, Chip could ask the trial court to rule on the question in Count II — whether the trust agreement in fact waived Eleanor's duty to provide financial information — if, and only if, it determined that the request would not trigger the trust agreement's no-contest clause. Because the trial court concluded that Chip's complaint triggered the no-contest clause, it should not have reached Count II at all. Instead, the trial court's analysis should have ended with the resolution of Count I.

L. The court further held that Chip's complaint did not trigger the no-contest clause. The no-contest clause sought to prevent actions to contest the trust agreement. But, the no-contest clause did not (and perhaps could not) prevent an action to construe the trust agreement. Chip was seeking to determine the meaning of the trust agreement, not to challenge its terms. Therefore, Chip's lawsuit was an action for construction, and it did not trigger the no-contest clause.

M. Notably, the Supreme Court did not rule on whether the Virginia law would allow the trust agreement to prohibit a suit to construe the terms of a trust agreement. The

Supreme Court appeared to suggest, though, that it would take a skeptical view of such efforts to "seal the courthouse doors."

31. *Gowdy v. Cook*, 455 P.3d 1201 (Wyo. Jan. 8, 2020). The Wyoming Supreme Court held that a trust beneficiary's attempt to modify the terms of a trust agreement triggered the no-contest provision and the beneficiary thereby forfeited his interest in the trust.

A. In 1996, Marian L. Jackson retained Dennis C. Cook, a partner of the law firm of Cook & Associates P.C., to provide estate planning until her death in 2015. Dennis drafted numerous estate planning documents, including a revocable trust agreement, an amended and restated revocable trust agreement, and several amendments to the revocable trust agreement (as amended, the "Trust Agreement").

B. Marian was the trustee and the primary beneficiary during her life under the Trust Agreement. Upon her death, the trust assets were to be retained in further trust for the primary benefit of Marian's longtime domestic partner, Gerald E. Gowdy, during Gerald's life. Gerald was granted a power of appointment over a portion of the trust assets at his death. Additionally, at Gerald's death, a portion of the trust assets passed to Marian's descendants.

C. Marian served as the trustee during her life, and upon her death, Marian appointed Dennis as her successor trustee and Craig C. Cook, Dennis' brother and law partner, as her trust protector (collectively, the "Cooks"). In addition, under the terms of the Trust Agreement, Cook & Associates P.C., or its successor, was given the power to remove any trust protector without cause, and to appoint a successor trust protector. The Trust Agreement further provided that the trust protector or a majority of the income beneficiaries could remove a serving trustee and appoint a successor trustee. A successor trustee could be an individual or a corporate fiduciary, provided that any corporate trustee met the qualifications set forth in the Trust Agreement. Specifically, it said a corporate trustee must:

    1. not be related or subordinate to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code, and
    2. have assets or insurance coverage of at least $100 million.

D. The Trust Agreement also included a no-contest clause whereby any trust beneficiaries were to be treated as if they predeceased Marian and thereby forfeit any interest they had under the Trust Agreement if they sought to void, nullify or set aside the Trust Agreement or any of its provisions.

E. During Marian's life, Dennis also prepared durable powers of attorney for healthcare and living wills for Marian and Gerald, in which they named each other as their agents. On other occasions, Dennis prepared deeds for Marian and Gerald for their jointly owned property.

F. At Marian's death, the trust became irrevocable and Dennis began serving as trustee and Craig began serving as trust protector. Additionally, Dennis prepared estate

planning documents for Gerald. Several months later, Gerald complained that the trust was being mismanaged and asked Dennis to resign as trustee. In the alternative, he asked Craig, as trust protector, to remove Dennis and replace him with another trustee. Gerald also claimed that the Cooks had conflicts of interest regarding their management of the trust and Dennis's representation of him. Craig resigned as trust protector and appointed another estate planning colleague, William Winter, in his place. Dennis refused to resign as trustee.

G. A year later, Gerald filed a complaint in the District Court of Wyoming, Second Judicial District, Albany County. His stated causes of action were malpractice, breach of fiduciary duties, breach of the duty of good faith and fair dealing, and negligence relating to Dennis' drafting of Marian's Trust Agreement, Gerald's various estate planning documents and the Cooks' administration of the trust. Gerald sought various forms of relief, including a request that the district court enter a self-modified trust, which was attached to the complaint, to "repair issues" due to Dennis' drafting errors. The self-modified trust removed the requirement that the corporate trustee have assets or insurance coverage of at least $100 million.

H. The Cooks filed an answer, and Dennis, as trustee, counterclaimed for a declaratory judgment ruling. Dennis requested that the district court declare that Gerald, under the no-contest provision, had forfeited his rights as a trust beneficiary by requesting the district court to approve and enter a decanted trust removing the requirement that a corporate trustee have assets or insurance coverage of at least $100 million.

I. The Cooks then filed a motion for summary judgment in their favor on all claims. Gerald also filed a motion for summary judgment in his favor on all claims. Following a hearing, the district court granted summary judgment in favor of the Cooks and denied Gerald's motion for summary judgment on all counts. In particular, the district court ruled that Gerald had forfeited his rights as a trust beneficiary under the no-contest provision when he attempted to remove the corporate trustee qualification requirements from the Trust Agreement.

J. Gerald appealed, arguing that the no-contest clause should be applied only to challenges to distributions under the trust.

K. No-contest or *in terrorem* clauses are valid in Wyoming. *See*, e.g., *EGW v. First Federal Savings Bank of Sheridan*, 413 P.3d 106, 110 (Wyo. 2018); and *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983). Additionally, the intent of the settlor regarding contests to the trust is controlling. *See EWG*, 413 P.3d at 111. Furthermore, "A party's subjective intent ... is not relevant or admissible in contract interpretation; rather, we use an objective approach to contract interpretation." *See Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 239 P. 3d 1077, 1084 (Wyo. 2010). Moreover, a trust instrument is construed as a whole, and a construction which renders a provision meaningless should be avoided. *See Shriners Hospitals for Children v. First Northern Bank of Wyoming*, 373 P.3d 392, 405-06 (Wyo. 2016); and *Wells Fargo Bank Wyoming, N.A. v. Hodder*, 144 P.3d 401, 409 (Wyo. 1973).

Finally, a trust agreement is governed by the plain language contained in the four corners of the document. *See EWG*, 413 P.3d at 115.

L. The Supreme Court of Wyoming affirmed the trial court's order granting summary judgment in favor of the Cooks and denying Gerald's motion for summary judgment on all counts.

M. With regard to the no-contest provision, the Supreme Court upheld the district court's declaratory judgment finding that Gerald forfeited his interest under the Trust Agreement by filing his complaint. First, the Supreme Court rejected Gerald's argument that he was merely attempting to repair issues due to Dennis' drafting errors. Rather, the Supreme Court saw Gerald's attempt to remove certain corporate trustee qualifications as an attempt to nullify a provision of the Trust Agreement, thereby triggering the no-contest clause.

N. Second, the Supreme Court rejected Gerald's argument that the no-contest provision be applied only to challenges to distributions because that was Marian's intent as evidenced by testimony given during the summary judgment hearing. Rather, the Supreme Court said Marian's objective intent is evidenced by the plain language of the Trust Agreement which, when read as a whole, unambiguously states that a beneficiary would forfeit his interest if he attempted to void, nullify and/or set aside any provision of the Trust Agreement. Accordingly, the Supreme Court upheld the district court's holding that Gerald's attempt to nullify the corporate trustee requirement provisions triggered the no-contest provision.

32. *In re Thomson*, No. 1075 EDA 2019, 2020 WL 3440529 (Pa. Super. Ct. June 23, 2020). Pennsylvania Superior Court analyzed the discretionary distribution standard where the terms of the trust required the beneficiary, prior to being eligible to receive any trust distributions, to demonstrate to the trustee that the beneficiary remains sober and capable of holding employment and making responsible financial decisions.

A. Settlor Eleanor R. Thomson created a trust for the benefit of her son, Gary Wayne Thomson. Eleanor's other son and Gary's brother, James Thomson-Caliendo, served as trustee of the trust. More specifically, Eleanor's will divided her estate equally among her five children, with Gary's share to be placed in the trust, which contained this distribution standard:

> If my son GARY WAYNE THOMSON survives me, I direct that the share of my estate distributable to him shall be retained by my Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect the income, and after paying all expenses incident to the management of the Trust, to use and apply as much of the net income and principal as may be necessary, in the sole and absolute discretion of my Trustee, for GARY's maintenance, support, and well-being, provided that GARY has proven to the satisfaction of my Trustee, in my Trustee's sole and absolute discretion, that GARY is and remains alcohol and drug free, capable of

holding employment, and capable of making responsible financial decisions.

B. Gary's two sons were the remainder beneficiaries of the trust.

C. In May, 2018, Gary petitioned the orphans' court to terminate the trust or to remove James as trustee and make certain distributions from the trust. During an evidentiary hearing before the orphans' court, the testimony revealed that Gary lived in a run-down travel trailer, owed $10,000 in rent, owed the IRS over $17,000 in back taxes and interest (which resulted in a tax lien), owned a pickup truck that needed significant maintenance, and was considered disabled by the Social Security Administration after sustaining a shoulder injury. Gary had also previously abused drugs and alcohol (which his mother, Eleanor, knew), although Gary had apparently been sober since approximately 2017. Gary and James were estranged and had not spoken since their father's funeral in 2002.

D. Gary first requested trust distributions in February 2016. James made the first three trust distributions totaling $6,200 between April and June 2018, but only after Gary had submitted results from recent drug tests.

E. Following the evidentiary hearing, the orphans' court: (1) directed James to make certain distributions totaling $40,000 to Gary and ongoing monthly payments of $5,000 to Gary upon submission of quarterly proof that Gary remained sober; (2) ruled that Gary was entitled to select his own health insurance plan; (3) required that James not deny Gary sufficient and adequate housing; (4) found that drug and alcohol testing of Gary was reasonable but that James had not made distributions to Gary to enable him to complete the testing; (5) found that the obligation that Gary be capable of employment was no longer an applicable requirement under the terms of the trust in light of the SSA's determination that Gary was disabled; and (6) held that the requirement that Gary be "capable of making responsible financial decisions" was too vague and therefore unenforceable.

F. Although the orphans' court further found that James had "seriously breached his duties as trustee, had not acted in good faith, and that the purpose of the [T]rust was not being fulfilled," the orphans' court declined to remove James as trustee because there was no evidence that the designated successor or any other party was willing to serve as trustee of the trust and further refused to terminate the trust. *Id.* at *2-3.

G. James appealed the orphans' court order and questioned whether it: (1) improperly disregarded the terms of the trust requiring that Gary had to satisfy James concerning his sobriety, employment and financial situations prior to receiving any trust distribution; (2) misinterpreted the settlor's intent by forbidding James from considering Gary's government benefits in making distributions that may disqualify Gary from those same benefits; (3) disregarded trust language that required James to balance the interests of Gary as the lifetime beneficiary and those of the remainder beneficiaries; (4) wrongly ordered that Gary be allowed to select his own health insurance plan; (5) wrongly held that James as trustee could not deny Gary adequate

housing; (6) wrongly ordered James to issue a check for the amount acceptable to the IRS to satisfy its tax lien; (7) ordered distributions that allowed Gary to determine the distribution amounts; and (8) improperly directed payment of Gary's attorney's fees from the trust without legal authority and evidence.

H. **Issue 1**. With respect to the first issue, the Superior Court found that "the [O]rphans' [C]our[t] improperly restricted the trustee's oversight of Gary's compliance with the trust requirements." *Id.* at *4. The Superior Court held that the plain language of Eleanor's will creating the trust gave James as trustee the "sole and absolute discretion" to make the determinations as to Gary's sobriety and whether he is capable of holding employment and making responsible financial decisions. Although the Superior Court agreed that the record demonstrated James "showed a persistent unwillingness and inability to administer the trust in the interest of the beneficiary of the trust," among other things, the Superior Court found that James had not been deficient as to his duties with respect to the three distribution conditions as provided for in Eleanor's will. *Id.* at *5-6. Thus, it found that ordering monthly payments of $5,000 going forward was improper as they did not allow James to exercise his discretion and assumed Gary would remain in compliance with the three trust requirements.

I. **Issue 2**. As to whether the orphans' court erred in ruling that James could not consider Gary's receipt of government benefits or other sources of income in deciding distribution amounts, the Superior Court found that the general Pennsylvania rule is that in the "absence of evidence of a contrary intent, an ambiguous trust provision should ordinarily be viewed as authorizing the invasion of trust principal even where the beneficiary has access to substantial income from other sources." The Superior Court recognized that this rule is not rigid and that its main purpose is to effectuate the testator's/settlor's intent. *Id.* at *6. Notwithstanding the sole and absolute discretion afforded James, the Superior Court noted that Gary's other sources of income (government distributions and food stamps) are only available given Gary's lack of other funding and that he has not been able to enjoy a comfortable standard of living as provided for under the terms of the trust through the "well-being" language in the distribution standard. In other words, while the trust terms prevented distributions if Gary could not demonstrate his sobriety, the terms did not allow James "… to limit distributions to Gary for his maintenance, support and well-being once he had reformed his unhealthy habits."

J. **Issue 3**. The Superior Court rejected James' argument as to the remainder beneficiaries and found that the duty of impartiality to successive beneficiaries is inapplicable to wholly discretionary trusts, such as this trust. The Superior Court noted that the distribution standard was broad and did not contain a requirement to reserve any principal or income for the remainder beneficiaries.

K. **Issue 4**. The Superior Court also upheld the orphans' court's order allowing Gary to select his own health insurance plan, as the terms of the trust did not provide James the authority to make healthcare decisions on behalf of Gary. However, the Superior

Court did agree that the trust terms also did not require the trustee to fully cover the total amount Gary requested for health insurance if the amount was unreasonable.

L. **Issue 5**. The Superior Court similarly held that the orphans' court's order that James not deny Gary adequate housing was not an abuse of discretion, while simultaneously finding that that provision did not automatically determine that a distribution of approximately $169,000 for a house, as Gary had requested, was necessary.

M. **Issue 6**. As to the effect of the unpaid taxes and tax lien, the Superior Court determined that Gary's failure to pay the IRS debt was not a demonstration of a lack of financial responsibility. Withholding a distribution of trust funds necessary to satisfy the tax lien, the Superior Court found, would impermissibly prevent Gary from establishing to James in the future that he was financially responsible (since he had no other adequate sources of income to pay off the debt). Thus, the Superior Court upheld the orphans' court order requiring the trust to pay Gary's IRS debt.

N. **Issue 7**. As to whether the trust was responsible for the payment of Gary's attorney's fees, the Superior Court found that exceptional circumstances existed to warrant payment since Gary lived in poverty and lacked resources to pay his attorney's fees. If they were not paid, the Superior Court found, it would "only further deepen his need for support from the trust for his maintenance, support, and well-being." *Id.* at 11. The Superior Court did hold, however, that the amount of the award lacked evidentiary support and remanded this issue to the orphans' court for further determination as to the proper amount of attorneys' fees for the trust to pay.

PART E: AMENDMENT, MODIFICATION, TERMINATION, AND DECANTING

33. *Matter of Fund for Encouragement of Self Reliance an Irrevocable Trust of Phung*, 440 P. 3d 30 (Nev. Apr. 25, 2019). Where the terms of a charitable trust appointed multiple trustees and did not explicitly provide that the trustees could act alone, consent by all of the co-trustees was required to decant the trust, despite the reference in the decanting statute to "a Trustee," in the singular.

A. The terms of a charitable trust appointed co-trustees. The trust did not include provisions giving any one trustee the ability to act unilaterally. When a dispute arose among the co-trustees, the 8th Judicial District Court, Clark County, Nevada, ordered that half of the property be decanted into a new trust with the same purpose as the original trust, but to be administered by only one of the original trustees, against the objection of the co-trustees. The co-trustees appealed on the grounds that consent of all of the co-trustees was required to decant the trust.

B. The Nevada decanting statute provides that "unless the terms of … [the] irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust as provided in this section." NRS 163.556(1). The term "trustee" is defined by NRS 163.500 to mean "a trustee, trustees, person or persons possessing a

power or powers referred to in [the Charitable Trust Act]." The governor of Nevada amended that law on June 5, 2019, but not in a way that substantively changed the law relied on in this case.

C. The Nevada Supreme Court overruled the lower court and held that the decanting statute does not permit decanting of the trust without the consent of all of the trustees. In reaching its decision, the Nevada Supreme Court noted that, in relevant part, the trust provided that the "*Trustees* … may, in *their* discretion" manage trust property and income (emphasis added by the Nevada Supreme Court). Quoting Bogert's *Law of Trusts and Trustees*, the Nevada Supreme Court explained, "In the absence of statute or contrary direction in the trust instrument, the trustees are regarded as a unit."

D. Because neither the statutory definition of trustee, nor the terms of the trust contradicted that presumption, the Nevada Supreme Court found that unanimous consent by all of the co-trustees would be required to exercise a discretionary power, including the statutory decanting power. However, because the Nevada Supreme Court found consent from all of the co-trustees was required, they did not need to address the issue of whether the Nevada decanting statute even applies to charitable trusts.

34. *Wilson v. Elkhorn ValleyBank & Trust (In re Fenske),* 303 Neb. 430, 930 N.W.2d 43 (Neb. June 28, 2019). Modification of trust to remove Bank as trustee was improper and violated a material purpose of the trust.

A. In his last will and testament, Jack Fenske devised most of his property to Elkhorn Valley Bank & Trust (the "Bank"), as trustee, for the benefit of specific family members. The family members included the appellants Jennifer Lea Wheeler and Laura Jean Grace, his great-nieces, and their children. Jennifer, Laura, and their children all supported removing the Bank as trustee and replacing it with David P. Wilson, Laura's attorney husband. Accordingly, Wilson sent a request to the Bank asking it to voluntarily resign as trustee. The Bank refused.

B. Pursuant to Neb. Rev. Stat. § 30-3862, Jennifer and Laura filed a Petition to Modify the trust to remove the Bank as trustee and to approve and to appoint Wilson as trustee. Section 30-3862 is identical to § 706 of the Uniform Trust Code, and provides authority for courts to remove trustees under certain circumstances. In pertinent part, it provides that a court may remove a trustee if: (1) removal is requested by all of the qualified beneficiaries; (2) removal of the trustee best serves the interests of all of the beneficiaries; (3) removal is not inconsistent with a material purpose of the trust; and (4) a suitable co-trustee or successor trustee is available.

C. The Bank filed a general objection to the Petition to Modify. The county court issued a written order denying the Petition to remove the Bank as trustee. Jennifer and Laura appealed.

D. The Supreme Court of Nebraska confirmed the county court's decision to deny the Petition to Modify the trust. The Court found that the beneficiaries failed to prove that removal of the trustee was "not inconsistent with a material purpose of the trust." The Court noted that in "cases in which it is important to the settlor that a particular person or entity or a person or entity with particular qualities serve as trustee . . . replacement of the selected trustee with another person or entity or person or entity that lacked the desired qualities would be inconsistent with a material purpose."

E. The Supreme Court of Nebraska found that the testimony at trial demonstrated that Fenske wanted a trustee that was "independent" and that he did not want a trustee that was a part of his family. The Court held that selection of the Bank as trustee was more than an incidental means to an end, that independence from his family was, for Fenske, an important quality in a trustee. Thus, the Court found that removal of the Bank would be inconsistent with a material purpose of the trust.

35. *Boegh v. Bank of Oklahoma, N.A.*, 2019 WL 1495712 (Ky. Ct. App. Apr. 5, 2019). Beneficiaries' rights against a trustee are purely equitable, and a "letter of understanding" does not transform them into contract claims.

A. This consolidated case involved two trusts, the Charles R. Jones, Sr., Inter Vivos Trust dated May 1, 1973, and the Eula Kathleen Jones Testamentary Trust dated October 24, 1967 ("Trusts") whose sole asset was a 100% ownership interest in the Three Rivers limestone quarry in Livingston County, Kentucky ("Three Rivers"). Bank of Oklahoma, N.A., as the sole trustee of the Trusts ("Trustee"), had entered into a 99 year lease agreement with Martin Marietta Materials, Inc. ("Martin Marietta"), granting Martin Marietta the right to conduct mining operations at Three Rivers.

B. During an audit, an accounting firm engaged by the Trustee uncovered an approximately $100,000 shortfall in royalties paid from Martin Marietta to Three Rivers over a fifteen year period. After becoming informed of the royalty shortfall, a group of beneficiaries from the Vander Boegh family who collectively held approximately 3/16 of the beneficial interests in the Trusts ("Vander Boeghs") requested that the Trustee cease accepting royalty payments from Martin Marietta and issue Martin Marietta a notice of default pursuant to the lease. The remainder of the beneficiaries objected to the Vander Boeghs' request, prompting the Trustee to file a declaratory judgement action seeking instructions from the McCraken Circuit Court. The Vander Boeghs filed numerous counterclaims against the Trustee alleging breach of contract, breach of fiduciary duty, and negligence.

C. The trial court issued a declaratory judgement directing the Trustee to continue accepting royalty payments from Martin Marietta and to resolve the royalty dispute using all remedies available at law other than terminating the lease. The trial court then proceeded to trial on the Vander Boeghs' counterclaims. After trial, the trial court issued findings of fact and conclusions of law holding that (1) the Vander Boeghs' breach of contract and negligence claims failed because, subject to only minor exceptions, beneficiaries may only bring equitable actions against a trustee,

and (2) the Vander Boeghs failed to establish any basis showing that the Trustee breached its fiduciary duties. The trial court also awarded over $2 million in attorneys' fees and costs to the Trustee. The Vander Boeghs appealed.

D. With only minimal exceptions, a beneficiary's rights against a trustee are purely equitable. A claim for breach of contract is an action at law and cannot be sustained by a beneficiary against a trustee. Furthermore, a beneficiary's allegations that a trustee acted negligently cannot transform an equitable action (breach of fiduciary duty) into an action at law, even if the applicable standard for a trustee's misconduct includes elements of a claim for negligence. A trustee is liable to the beneficiaries for breach of fiduciary duty only if the trustee failed to act reasonably (often referred to as the "duty of care" or the "duty of prudence") and in the best interests of the beneficiaries (often referred to as the "duty of loyalty"). The fact that some beneficiaries disagree with the trustee's decision, or that a different trustee would have acted differently, does not make a trustee liable for breach of fiduciary duty.

E. The Court of Appeals of Kentucky ("Court") affirmed the trial court's judgement regarding the Vander Boeghs' counterclaims but remanded the trial court's award of attorneys' fees. The Vander Boeghs attempted to argue that a "letter of understanding" between the Trustee and the beneficiaries amounted to a contract. The Court disagreed, stating that the letter of understanding and all of Vander Boueghs' counterclaims concerned how the Trustee carried out its fiduciary duties. The Court declined to hold the Trustee liable for failing to follow the Vander Boueghs' request to terminate the lease because it recognized that the Trustee had good reasons for not terminating the lease, including certain unusual market features about the lease and the loss of royalty payments while the Trustee searched for a new operator for the quarry. Accordingly, the Court affirmed the trial court's judgement that the trustee did not breach its fiduciary duties. The Court, however, found that the Trustee's legal invoices, which it submitted to support its award of attorneys' fees, contained too many redactions to provide sufficient factual support for the $2 million award. Accordingly, the Court remanded the attorney fee issue back to the trial court.

36. *Matter of Troy S. Poe Trust,* 2019 WL 4058593 (Tex. App. El Paso Aug. 28, 2019). Texas appellate court determined that jury trials are available in trust modification actions to determine disputed facts.

A. The settlor had two adult sons, Troy and Richard. The settlor established a trust for the benefit of Troy, which named himself, Richard and Anthony Bock, an accountant, as trustees. The trust contained a provision requiring the trustees to take actions unanimously. However, despite the terms, the settlor typically made decisions regarding distributions from the trust.

B. In September 2010, the trust entered into a care agreement with Angel Reyes Jr., who would be reimbursed for reasonable out-of-pocket expenses for Troy's care and maintenance. After the settlor's death, Bock looked at the history of distributions the settlor had regularly made and attempted to follow the same pattern. However, Richard insisted that Bock strictly comply with the trust terms demanding the trustees

act jointly in taking actions. As a result, Bock and Richard disagreed on expenditures relating to Angel Reyes Jr.

C. Bock filed a petition to modify the unanimity requirement and add an extra trustee because of changed circumstances since the settlor's death. The petition asserted that the purposes of the trust had become impossible to fulfill, and modification would further trust purposes. The probate court set the matter for a bench trial despite Richard's request for a jury trial. The probate court entered a judgment modifying the trust in two ways. First, it appointed a family friend as successor trustee. Second, the order set a procedure for always ensuring there would be three trustees who could make decisions by majority vote. Richard appealed.

D. The Texas Trust Code, contained in the Texas Property Code, § 115.012, provides that normal civil procedure rules and statutes apply to trust actions. The Texas civil procedure rules and the Texas Constitution guarantee the right to a jury trial. Under Texas law, the right to a jury trial extends to disputed issues of fact in equitable, as well as legal proceedings. (*See San Jacinto Oil Co. v. Culberson*, 100 Tex. 462, 101 S.W. 197, 198 (1907).) As a general rule, where contested facts issues must be resolved before equitable relief can be determined, a party is entitled to have a jury resolve them. (*See Hill v. Shamoun & Norman*, LLP, 544 S.W.3d 724, 741 (Tex. 2018).)

E. The Court of Appeals of Texas set aside the order modifying the trust and remanded for a new trial.

F. Richard raised two issues for review. He claimed first that the probate court's modification was improper because it contravened the settlor's unambiguous intent, and second, that the probate court improperly denied him a jury trial. Richard argued that the questions of whether there were changed circumstances, or that the purpose of the trust had become impossible to fulfill, were for a jury to resolve. The Court of Appeals agreed with Richard in holding that whether a trust needed to be modified was a factual question that should have been decided by a jury upon proper jury demand.

G. Bock asserted three reasons why the right of a jury trial did not apply here: (1) Richard failed to pay the jury fee; (2) Richard, a trustee, had no justiciable interest in the terms of the trust; and (3) as a matter of law, the result would be the same.

H. The Court of Appeals rejected the jury fee argument because Bock failed to raise the issue in the probate court. In addition, the Court of Appeals rejected Bock's argument that Richard had no justiciable interest due to the fact that Bock had named Richard as a party, and that fact gave him a right to a jury trial. Last, the Court of Appeals held that questions as to the changed circumstances and impossibility of performance were disputed factual questions, and thus the refusal to grant a jury trial amounted to a harmful error.

I. Because the court remanded for a jury trial on these issues, it did not comment on Richard's first claim regarding the appropriateness of the probate court's modification order.

37. ***Evertson v. Evertson Fiduciary Mgmt. Corp. (In re Evertson Dynasty Trust)*****, 446 P.3d 705 (Wyo. Aug. 12, 2019**). **Wyoming Supreme Court holds that a trustee with the power to distribute income and principal for any purpose had the authority to decant a trust. However, the Supreme Court held that the trial court erred by considering whether a specific decanting proposal was permissible.**

A. Bruce Evertson created the Bruce F. Evertson Dynasty Trust, with Evertson Fiduciary Management Corporation as trustee. The beneficiaries of the trust were Bruce's wife, his two children and his children's descendants. Bruce funded the trust with 2,300 acres of ranch and recreational property in Nebraska.

B. After Bruce's death, the trustee filed a petition for instruction asking the court to confirm it had the power to decant the trust. The trustee also sought approval of its proposed decanting, which involved dividing the trust into two separate trusts, with one trust for Bruce's wife and his daughter and the other trust for Bruce's son, Edward. The trustee claimed that the proposed decanting was in the best interests of the beneficiaries and consistent with Bruce's intent.

C. Edward objected to the petition and argued, among other things, that the proposed decanting contradicted his father's intentions and constituted a breach of trust. In response, the trustee filed a motion for judgment granting its petition for instructions.

D. The trial court held that the trustee had the power to decant the trust. Over Edward's objection, the trial court also held that the specific decanting proposal was not a breach of fiduciary duty because the decanting was consistent with Bruce's intent.

E. Edward appealed.

F. A judgment on the pleadings is appropriate only if all material facts are admitted in the pleadings and only questions of law remain. If a material fact is in dispute, then judgment on the pleadings is not appropriate.

G. The Supreme Court of Wyoming affirmed the trial court's ruling that the trustee had the authority to decant the trust. However, the Supreme Court reversed the trial court's finding that the proposed decanting was not a breach of fiduciary duty. The Supreme Court found that Bruce's intent in creating the trust was a material fact for determining whether the decanting constituted a breach of trust, and that the parties disputed what Bruce's intent was. Therefore, the trial court erred by granting a motion on the pleadings except on the limited question of whether the trustee had the power to decant the trust generally.

H. Decanting is a powerful tool for trustees to modify a trust in light of changes in the law or family circumstances. Although court approval is often not required to exercise the decanting power, a trustee should consider seeking court approval if a

beneficiary or another party, such as the IRS or a local tax authority, might contest the decanting.

38. *Demircan v. Mikhaylov,* 2020 WL 2550067 (Fla. Dist. Ct. App. 3d Dist. May 20, 2020). A Florida District Court of Appeals held that a lower court did not err in permitting the modification of a trust pursuant to common law upon agreement of the settlor and beneficiaries, and that the enactment of a statute permitting judicial modification only upon the finding of certain circumstances did not abrogate or control the common law.

A. Igor Mikhaylov created the Igor Mikhaylov 2015 Irrevocable Trust in order to invest in a complex business venture involving the development of a shopping mall. The purpose of the trust was to fund the venture and to benefit his children. Genna Demircan was appointed as initial trustee and Anatoly Zinoviev was granted the power to remove the trustee or appoint additional trustees. After multiple disagreements, Igor halted all funding by the trust. Igor and the beneficiaries filed suit in the civil division to modify the trust by stripping Zinoviev of his powers and removing Demircan as trustee, naming both as defendants. Zinoviev and Demircan moved to dismiss the complaint, and Igor and the beneficiaries voluntarily dismissed the suit without prejudice. Demircan's motion for attorney's fees was denied.

B. Igor and the beneficiaries then refiled an identical suit in the probate division, but did not name Zinoviev as a defendant. Upon learning that Zinoviev had appointed Nelson Rincon as successor trustee, the petitioners filed an amended complaint naming Rincon as a defendant and seeking his removal. Demircan agreed to resign as trustee and sought to be dismissed from the suit.

C. At the hearing, Rincon argued that Zinoviev was an indispensable party who had not been joined, that the beneficiaries' consent was not sufficiently shown, and that the common law modification required consideration of factors other than consent, in accordance with Chapter 736 of the Florida Statutes.

D. The trial court allowed the modification of the trust, denied the removal of Demircan from the proceeding as moot, and denied Rincon's removal for lack for authority to order such. The trial court granted the motion to modify the trust pursuant to the common law rule expressed in *Preston v. City National Bank of Miami*, 294 So. 2d 11 (Fla. 3d DCA 1974).

E. As held in *Preston v. City National Bank of Miami*, the terms of a trust may be modified if the settlor and all beneficiaries consent. This common law modification is neither abrogated nor controlled by Section 736.04113 of the Florida Statutes, which allow judicial modification of trusts only upon certain evidentiary findings regarding, among other things, the impracticability or materiality of the trust's purpose.

F. The District Court of Appeals held that the lower court did not err by failing to join Zinoviev as a party to the proceedings. An indispensable party is "one whose interest will be substantially and directly affected by the outcome of the case, where the

subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible." The indispensable parties to a trust action generally include the trustee, the settlor and the beneficiaries. In this case, it was not necessary that Zinoviev be joined to the proceedings, as a complete and efficient determination of the equities and rights between the other parties was possible in his absence.

G. Second, the District Court of Appeals held that the lower court did not err in allowing the modification of the trust pursuant to the common law as set forth in *Preston*. Rather, the court held that "a common law modification under *Preston* is neither abrogated, nor controlled by Section 736.04113's requisite findings. Judicial modifications at common law are different from, — and have so far survived, — judicial modifications under chapter 736." *Preston* allows the modification of a trust if the settlor and all beneficiaries consent, even if the purposes of the trust have not been accomplished.

H. The Florida Trust Code allows judicial modification of trusts, so long as the modification is not inconsistent with the settlor's intent, and upon required findings on the practicability, materiality and substantial impairment of the trust's purpose. However, the code recognizes that "the common law of trusts and principles of equity supplement [the code], except to the extent modified by this code or another law of this state." The appellate court emphasized that the section permitting judicial modification of the trusts specifically notes that "the provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts" and that the sections regarding modification do not provide the exclusive means to do so.

I. The appellate court rejected Rincon's argument that the trust provisions included a waiver by Igor of his right to revoke or modify the trust, and therefore, *Preston* either does not apply or requires the trustee's consent, holding that such a waiver can have this effect only where the settlor waives the right expressly conditioning it on the trustee's assent. As the provisions of the trust do not include this condition, *Preston* is still applicable and the trustee has no reason in law or equity to oppose the modification.

J. Lastly, the appellate court agreed that the lower court had discretion to deny attorney's fees to Demircan as a former trustee, but held that it incorrectly denied attorney's fees and costs whose payment was mandated by the terms of the trust. The trust provided that the settlor intended to hold harmless and indemnify trustees from reasonable attorney's fees, expenses and costs incurred as a result of their services as trustee.

PART F: SETTLEMENT AND ARBITRATION

39. *Smith v. Szeyller*, 31 Cal. App. 5th 450 (Cal. App. 2d Dist. Jan. 16, 2019). A beneficiary who received notice but did not participate in litigation between another beneficiary and the trustees found herself with no recourse to object to the settlement reached between the litigating beneficiary and the trustees, even where the settlement agreement provided that a portion of the litigating beneficiary's legal fees be paid out of the non-participating beneficiary's trust share.

A. Mr. and Mrs. Smith created a trust naming their five children as beneficiaries. At Mr. Smith's death, Mrs. Smith became the sole trustee of the trust. Mrs. Smith named her daughter, Joann, as her co-trustee, and Joann's husband, Edward, as her successor trustee. After Mrs. Smith's death, Joann and Edward served as co-trustees of the trust (the trustees).

B. One of Joann's brothers, Don, objected to an accounting the trustees provided and filed a verified petition questioning trust expenditures and gifts made to Joann and Edward from the trust before Mrs. Smith's death. Don's petition requested that the court freeze the trust assets, remove the trustees and pay Don's attorney's fees from the trust assets. The trustees agreed to freeze trust assets, make a distribution of $200,000 to each of the beneficiaries before trial and revised their accountings. The trustees petitioned the court for approval of their revised accountings. Don filed objections and a petition for financial elder abuse. The other three siblings — Donna (through her conservator), Dave and Dee — were all notified of the petitions but did not respond. Additionally, Don specifically asked Donna (through her conservator) if she wanted to join the litigation and she declined.

C. After three days of trial, the trustees advised that they had revised their accountings again to address Don's concerns. The trustees and Don then reached a settlement agreement that the court approved. The agreement provided, in part, for the payment of Don's attorney's fees from the trust assets. Donna (through her conservator) filed post-trial motions for a new trial and to vacate the judgment on the grounds that she had been denied due process and challenging the award of attorney's fees.

D. In general, the "American rule" requires successful litigants, including a beneficiary challenging the actions of a trustee, to pay their own attorney's fees. An exception to this rule is the "common fund doctrine," which permits the court to require that non-litigants who receive a pecuniary benefit as a result of the litigation bear a portion of the legal fees. The substantial benefit doctrine extends the common fund doctrine to permit a court to require passive parties who receive non-pecuniary benefits as a result of litigation to bear a portion of the legal fees.

E. On appeal, the California Court of Appeals affirmed the trial court's ruling and upheld the settlement agreement, including the award of attorney's fees from trust assets. The Court of Appeals rejected Donna's due process argument because Donna had been notified about the litigation and chose not to participate. Because Donna chose not to participate in the litigation, the California Court of Appeals determined

that she was not entitled to additional notice regarding the proposed settlement agreement, which addressed matters already before the court. Additionally, the Court of Appeals found that the award of attorney's fees and the application of the substantial benefit doctrine were appropriate in this case because the non-participating beneficiaries received the benefit of more accurate trust accountings, refunds to the trust from the trustees and a stop to further inappropriate depletion of the trust assets by the trustees, all of which benefitted all of the beneficiaries, not just the litigating party.

40. *Gibbons v. Anderson*, 2019 Ark. App. 193 (Ark. Ct. App. Apr. 3, 2019). Arkansas Court of Appeals held that the arbitration provision in a trust agreement was unenforceable in a suit challenging the validity of the trust on grounds of undue influence.

A. Woodrow W. Anderson Jr. executed a trust agreement on April 1, 2014, with himself as initial trustee, and his children, Woodrow Anderson III and Kandice Gibbons, as successor trustees. The trust provided that the trust would pay for the college educations of all grandchildren of the grantor up to $100,000 total, and no more than $25,000 each. Each grandchild was to receive a car, not to exceed $30,000, after completing one semester or two terms in college. The trust further provided that each grandchild was to receive $500 per month for expenses.

B. On Nov. 7, 2014, Woodrow Jr., Woodrow III and Gibbons executed the first amendment to the trust, making several significant changes to the terms of the trust. Woodrow Jr. was in poor health and under the influence of narcotics at the time. He died 17 days later.

C. On Jan. 4, 2017, Seth Anderson and Trevor Anderson, grandchildren of Woodrow Jr., filed a complaint for breach of trust, alleging that the amendment was executed as a result of undue influence and that the changes to the terms of the trust were not in the best interests of the beneficiaries. Specifically, the amendment gave the trustees the sole discretion to make distributions for education, and removed the specific provisions originally included. Seth and Trevor further alleged that the trustees had breached the trust and acted in bad faith by failing to provide $500 per month for expenses and a vehicle as set forth by the original terms of the trust.

D. The complaint sought to set aside the amendment, to remove the trustees, to appoint new trustees, to obtain an accounting of the trust, to restore any funds improperly distributed under the amendment and to impose a constructive trust against any property improperly removed from the trust. They also requested a judgement against the trustees and the trust for the value of the vehicles that should have been purchased, the payment of $500 per month that should have been paid pursuant to the trust, and to recover the amounts the trustees had expended on educational expenses.

E. The trustees filed a motion to dismiss, or in the alternative, to compel arbitration in accordance with the arbitration clauses contained in the trust and the amendment. Seth and Trevor filed a response to the motion, alleging that the arbitration clause in

the trust did not purport to bind the beneficiaries, and the arbitration clause in the amendment was not valid because the grantor was not competent at the time of execution of the amendment.

F. The trial court held that the question went to the integrity of the amendment and whether the grantor was under undue influence at the time of execution of the amendment, and that was a question for the court to decide, not an arbitrator. The trial court denied the motion to compel arbitration. The trustees appealed.

G. Arkansas law is silent on whether a trust may contain any arbitration provision, and Arkansas has not enacted a law addressing the applicability of an arbitration clause to a dispute concerning the validity of a trust.

H. The Court of Appeals stated that the dispute concerned the testamentary capacity of the grantor and the validity of the trust and the amendment, and that where there is an allegation of undue influence or incompetency of the grantor, arbitration cannot determine the validity of the trust. The Court of Appeals held that the validity of the trust and the amendment were within the jurisdiction of the trial court, irrespective of the arbitration provisions contained in both.

I. In holding that the question of trust validity was one for the court rather than arbitration, the Court of Appeals looked to statutes enacted in Florida and Arizona concerning arbitration clauses in trusts, both of which exclude disputes over the validity of a trust from arbitration. The court also looked to case law in California, where in *McArthur v. McArthur*, 224 Cal. App. 4th, 651 (2014), the California Court of Appeals denied a motion to compel arbitration as to the validity of a trust where a trust instrument contained an arbitration clause, thus indirectly holding that the validity of a trust agreement is not subject to arbitration.

J. Because Seth and Trevor sought to set aside the amendment on grounds of undue influence, this constituted a challenge to the validity of the instrument and therefore not an issue to be resolved through arbitration.

41. *Middleton v. PNC Bank N.A.*, No. 2017-CA-001673-MR, 2019 WL 1224621 (Ky. Ct. App. Mar. 15, 2019). Award of all Trustee's attorneys' fees was not appropriate without a review of whether the fees were reasonable.

A. Lawrence L. Jones, Sr. settled a trust in 1933. Mr. Jones created the trust to benefit his three daughters and their decedents (the "Daughters' Trust"). In 2004, PNC, as trustee of the Daughters' Trust, filed a declaratory judgment action ("2004 Declaratory Judgment Action") in Jefferson Circuit Court in Kentucky to determine whether the descendants of Mr. Jones's son – the Middletons – were included in the class of remainder beneficiaries to the Daughters' Trust.

B. In 2007, the Middletons filed a separate lawsuit in Jefferson Circuit Court against PNC. The complaint alleged that PNC breached its fiduciary duties in its administration of the Daughters' Trust. While this lawsuit was pending, the 2004 Declaratory Judgment Action was settled in 2007. As part of the settlement, the

beneficiaries of the Daughters' Trust paid a sum of money to the Middletons. In return, the Middletons gave up their claim to the Daughters' Trust and, further, agreed to indemnify the Daughters' Trust for any damages, including attorneys' fees incurred by the Daughters' Trust, if the Middletons lost their 2007 suit against PNC. The settlement did not require a determination that the Trust's attorneys' fees were reasonable as part of their recovery against the Middletons. Further, the Middletons had acknowledged to the trial court in a hearing requesting approval of the settlement agreement for the 2004 Declaratory Judgment Action, "[i]f the Trust has to pay the trustee's fees to defend [our suit against PNC], my brother and I have to pay it back."

C. The Middletons eventually lost their suit against PNC, and the court found that under Kentucky law, PNC's attorneys' fees for the defense of the Middletons lawsuit were properly charged to the Daughters' Trust. The successor trustee to PNC then filed a separate action against the Middletons to collect the $1.08 million in attorneys' fees that PNC had spent in defending the Middletons suit. The trial court awarded the trustee's fees without determining that the fees were reasonable because the settlement agreement contained no such limitation in the indemnity provision.

D. In the PNC action, the Middletons specifically argued that PNC was prohibited from using Trust funds to defend the action against it because it had been sued in its individual capacity rather than as trustee of the Trust. The trial court rejected this argument, finding that all of the claims in the Middletons' complaint were premised upon PNC's alleged breach of fiduciary duties in its capacity as trustee. For that reason, PNC could employ and pay counsel utilizing Trust funds. Having already litigated before and lost the issue of whether PNC was entitled to use Trust funds to defend the action, the Middletons were collaterally estopped from relitigating this issue a second time.

E. The Kentucky Court of Appeals unanimously overturned the trial court's award of attorneys' fees and remanded the award holding that, under Kentucky law, all attorneys' fees awards must be reviewed for their reasonableness. The appellate court recognized that PNC's lawyers had "obtained an outstanding result for PNC," but held that "it was improper for the trial court to defer to the contractual provision in the indemnity award to determine an appropriate award;" the trial court had to make its own determination of the reasonableness of the requested fees award.

42. *Bazazzadegan v. Vernon*, 588 S.W. 3d 796 (Ark. Ct. App. Oct. 30, 2019). Arkansas Court of Appeals holds that an arbitration provision in a trust is mandatory and bound successor co-trustees and beneficiaries of the trust.

A. Dolores Cannon created the Dolores E. Cannon Living Trust on April 4, 2014. After Dolores' death, her daughters, Julia Bazazzadegan and Nancy Vernon, became co-trustees of the trust. Julia and Nancy were also beneficiaries of the trust.

B. Nancy filed a lawsuit against Julia alleging breach of trust, breach of fiduciary duties as a corporate officer, and misappropriation of funds. In response, Julia moved to compel mediation or arbitration of Nancy's claims.

C. The trust agreement contained three provisions related to alternative dispute resolution. First, in Section 12.24, the trust agreement empowered the trustee to settle any claims against or in favor of the trust by compromise, adjustment, arbitration or other means.

D. In Section 11.04 of the trust agreement, Dolores "requested" that any questions or disputes arising during the administration of the trust be resolved by mediation and, if necessary, arbitration.

E. Finally, in Section 11.14 of the trust agreement, Dolores again "requested" that the trustees settle any matters by mediation or arbitration, unless the trustees agreed otherwise.

F. The trial court denied Julia's motion to compel mediation and arbitration. Julia appealed.

G. In construing a trust, the grantor's intent is paramount. The Arkansas Supreme Court has held that the words "I request" represent mandatory direction rather than a permissive or precatory wish.

H. Furthermore, when a trustee agrees to act as such, the trustee accepts the terms of the trust.

I. The Arkansas Court of Appeals, Division IV, held that the trust agreement required mediation and arbitration of Nancy's claims. The court found that the word "request" indicated that Dolores intended to require arbitration, rather than merely to give the trustee the choice to arbitrate claims.

J. The court also held that the arbitration provisions were enforceable against Nancy. Although neither Julia nor Nancy was a party to the trust agreement, each of them had accepted the terms of the trust when she became a trustee. Nancy, as a beneficiary, was also bound by the trust in her individual capacity as a beneficiary, having accepted the benefits of the trust intended for her.

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- Reformation of private, split-interest and charitable trusts
- Accountings
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