ACTEC

THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

2024 New England Regional Meeting

October 19–October 20, 2024

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New England Update

Saturday, October 19

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New England Update - Connecticut

ACTEC 2024 New England Regional Meeting
Mystic, Connecticut
Saturday, October 19, 2024

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Recent Updates: Legislation & Case Law

A. Connecticut is the only state with a state gift tax. C.G.S.A. § 12-640.

1. In 2024, the Connecticut gift tax annual exclusion is $18,000 per person.
2. As of January 1, 2023, the Connecticut gift tax exemption <u>equaled</u> the *2023* Federal Basic Exclusion Amount (not the Federal Basic Exclusion Amount in effect at the time the CT statute was passed).
3. Accordingly, in 2024, the Connecticut gift tax exemption is equal to $13,610,000. This is an increase of $690,000 from 2023. Thus, individuals can make additional transfers gift tax free in 2024. The gift tax is imposed at a flat tax rate of 12%.
   a. Gifting Opportunity until December 31, 2025: Absent any changes to the Federal Basic Exclusion Amount and Connecticut law, there is a window until December 31, 2025 where clients can gift up to the Federal Basic Exclusion amount and not have to pay any Connecticut gift tax. This is a great opportunity for clients who have not made gifts or have only made gifts up to the pre-2023 Connecticut gift tax exemption.
4. There is a $15 million cap on the amount of gift tax paid by a donor for all calendar years commencing on or after January 1, 2016. C.G.S.A. § 12-642(c)(2).

B. Connecticut Estate Tax. C.G.S.A. § 12-391.

1. As of January 1, 2023, the Connecticut estate tax exemption <u>equaled</u> the *2023* Federal Basic Exclusion Amount (not the Federal Basic Exclusion Amount in effect at the time the CT statute was passed).
2. Accordingly, in 2024, the Connecticut estate tax exemption is equal to $13,610,000. This is an increase of $690,000 from 2023. The estate tax is imposed at a flat tax rate of 12%.
3. A credit against the estate tax is allowed for any gift taxes paid on or after January 1, 2005. There is a $15 million cap on the estate tax that is payable, which is reduced by any taxes paid to CT by the decedent or the decedent's estate for CT taxable gifts made on or after January 1, 2016. C.G.S.A. §12-391.
4. **Potential Clawback?** - As more fully set forth below, the Connecticut Bar Association has proposed legislation to prevent potential clawback.
   a. **The Problem:** Absent a change in current Connecticut law, it is possible that there could be clawback (or basically a retroactive gift tax) if the Connecticut exemption amount decreases below the maximum Connecticut exemption amount that existed at the time of the gifting. This is due to occur when the federal gift and estate tax exemptions sunset at the end of 2025 (absent a change in law).
   b. **Proposed Legislation:** See page 16.

C. Connecticut PASSES Connecticut Uniform Trust Decanting Act – Public Act 24-104

1. **Effective January 1, 2025**
2. **Existing Law:**
    a. Connecticut has no current statutory provision specifically authorizing decanting.
    b. There is the concept of common law decanting, based on the concept that a trustee with absolute discretion over distributions has wide discretion to distribute the property outright or in further trust, subject to the terms and conditions of the trust agreement.
    c. There is the concept of nonjudicial merger that can be used as an alternative to decanting. C.G.S.A. § 45a-499ll.
    d. There is the possibility of a nonjudicial settlement agreement. C.G.S.A. § 45a-499k.
    e. The power to appoint assets in trust to a second trust is provided in C.G.S.A. § 45a-572. While this a workaround, it does not provide the safeguards and procedural mechanisms that a decanting statute provides.
3. **Purpose:** The new law will provide the ability to modify many trusts with outdated or suboptimal provisions. The statute provides safeguards and procedural steps to effectuate a decanting. This was drafted to work alongside the Uniform Trust Code, which became effective January 1, 2020.
    a. **Does NOT apply to:**
        1. solely charitable trusts (trusts held <u>solely</u> for charitable purposes);
        2. statutory trusts created under C.G.S.A. Chapter 615, §§ 34-500 to 34-599;
        3. trusts that specifically restrict or prohibit the exercise of the decanting power (Section 15)
    b. Special considerations for Special Needs Trust – must be consistent with Federal law.
    c. Probate court advance approval is required for decanting testamentary trusts.
4. **Provides a non-judicial process to:**
    a. Modernize trust provisions (for example, adding a protector or directed trust language)
    b. Change situs of trust or governing law.
    c. Change trustee succession.
    d. Convert a third-party settled trust into a supplemental needs trust for a disabled beneficiary.
    e. If the trustee had absolute discretion:
        1. add or expand a power of appointment
        2. remove beneficiaries of a trust

        3. extend duration (but not beyond the rule against perpetuities of the first trust).
    f. If the trustee has limited discretion (for example, by HEMS), you cannot change the distribution standard or the beneficiaries. However, the trust term may be extended and during that post-termination period certain changes may be made. Certain provisions may also be modernized.

5. **Prohibited Changes:**
    a. Adding beneficiaries.
    b. Reducing fiduciary liability.
    c. Increasing trustee compensation.
    d. Voiding certain tax deductions the trust has already taken (for example, marital and charitable deductions).
    e. Extending the term of a trust beyond the rule against perpetuities.
6. **Details of each section: Began with the Uniform Trust Decanting Act language and adapted it for Connecticut.**
    a. **Section 1:** Title
        1. The provisions of the act shall be cited as the Connecticut Uniform Trust Decanting Act ("CUTDA").
    b. **Section 2:** Definitions – These have been modified to conform with the Connecticut Uniform Trust Code ("CUTC"). Where definitions are the same as the CUTC, there are cross-references.
        1. For example, among others, the definitions of ascertainable standard, beneficiary, current beneficiary, jurisdiction, person, testamentary trust and qualified beneficiary.
    c. **Section 3:** Scope – Applies generally to trusts (irrevocable or revocable by settlor only with consent of trustee or person with an adverse interest, inter vivos or testamentary), but doesn't limit the power to distribute in further trust under the first trust agreement, other state law, common law, court order or a non-judicial settlement agreement.
        1. CUTDA does NOT apply to a trust held solely for charitable purposes.
        2. A trust instrument may restrict or prohibit the power to decant.
        3. The decanting power may <u>not</u> be used inconsistently or to contravene with federal law with respect to 42 U.S. Code § 1396p(d)(4) (treatment of trust amounts in determining eligibility for government benefits)
    d. **Section 4:** Fiduciary Duty
        1. Trustee must act in accordance with fiduciary duties and in accordance with purposes of first trust.
        2. No duty to exercise or inform beneficiaries of this power.

3. Except as provided in the terms of the trust, the first trust is deemed to include a decanting power.

e. **Section 5:** Application; Governing Law.
   1. Applies to any trust whether established before, on or after January 1, 2025 that:
      a. Has its principal place of administration in CT (even if changed to CT); or
      b. provides by its trust instrument that it is governed by the law of CT or is governed by the law of CT for purposes of (a) administration, (b) construction of the terms of the trust; or (c) determining the meaning or effect of the terms of the trust.

f. **Section 6:** Reasonable Reliance
   1. A Trustee or other person that reasonably relies on the validity of a distribution pursuant to the CUTDA is not liable to any person for any act or failure to act due to such reliance.

g. **Section 7:** Notice; Exercise of Decanting Power
   1. Except as otherwise provided (decanting of testamentary trusts still requires court approval), can exercise decanting power without beneficiary consent or court approval.
   2. Notice is required to:
      a. the Settlor of the first trust (if living or then in existence);
      b. the qualified beneficiaries of the first trust and/or any designated representatives;
      c. each person holding a power of appointment over the first trust;
      d. each person having the right to remove or replace the Trustee that has the power to distribute assets of the first trust; and
      e. the Trustees (and any other fiduciary) of the first trust and the second trust.
      f. If the trust has a charitable interest or is a special needs trust, then there are additional notice provisions.
   3. The notice shall: (1) specify the manner in which the authorized fiduciary intends to authorize the decanting power; (2) specify the proposed effective date; (3) include a copy of the first trust instrument; and (4) include a copy of the trust instrument(s) for the second trust(s).
   4. The Trustees must give 60 days' notice prior to the decanting, but that period can be waived by the notice recipients (in a signed record) to allow for an earlier decanting.
   5. Receipt of notice or waiver of notice period or expiration of period does NOT affect the right of an interested person to

file a petition under Section 9 that the attempt to decant is ineffective because it failed to comply with CUTDA or was an abuse of discretion or fiduciary duty.

6. Notice to the Attorney General shall not be effective for purposes of exercising the decanting power unless the authorized fiduciary has a confirmed electronic mail delivery notification or certified mail receipt indicating delivery as made.
7. Certain provisions regarding waiver of notice, etc. See C.G.S.A. § 45a-499i.

h. **Section 8:** Representation
   1. Notice may instead be given to a person with authority to represent and bind a party who is entitled to notice.
   2. Consent or waiver by a person with authority to represent is binding unless the person represented objects before the consent or waiver becomes effective.
   3. A settlor may not represent or bind a beneficiary.

i. **Section 9:** Court Involvement
   1. Authorizes an interested party to apply to the court to: (i) confirm the decanting is consistent with the trustee's fiduciary duties; (ii) appoint a special fiduciary who would have the authority to decant; (iii) approve an exercise of the decanting power; (iv) determine that a proposed or attempted exercise is ineffective; (v) increase fiduciary's compensation; or (vi) modify a provision granting a person the right to remove or replace the fiduciary.
   2. For testamentary trusts, an exercise of the decanting power must be approved in advance by the probate court upon petition by the fiduciary.

j. **Section 10:** Required formalities – must be:
   1. In writing and signed.
   2. Identify the first trust and the second trust or trusts.
   3. State the specific property of the first trust being distributed to each second trust and the property remaining, if any, in the first trust.

k. **Section 11:** Decanting Power under Expanded Distributive Discretion
   1. Where a trustee's discretion is NOT limited by an ascertainable or reasonable definite standard (i.e. complete and full discretion), CUTDA permits the trustee to: (i) exclude one or more current and successor beneficiaries (may NOT add beneficiaries); and (ii) create, modify or omit powers of appointment.

a. More specifically, the second trust may:
    i. Reduce or eliminate a nonvested interest of any beneficiary of the first trust;
    ii. Retain a power of appointment granted in the first trust;
    iii. Omit a power of appointment in the first trust other than a presently exercisable one;
    iv. Create or modify a power of appointment if the holder is a current beneficiary; or
    v. Create or modify a power of appointment if the holder is a presumptive remainder or successor beneficiary, but only after that beneficiary would have become, if living, a current beneficiary.

2. The exercise of the power cannot reduce or eliminate a vested interest or modify provisions critical to the tax status of the first trust.
3. The class of permissible appointees of the powers of appointment referenced above may be BROADER than or DIFFERENT FROM the beneficiaries of the first trust.
4. If there is expanded distributive discretion over only PART of the trust property, the decanting power discussed in Section 11 can be exercised only over that part.

l. **Section 12:** Decanting Power under Limited Distributive Discretion
    1. Where Trustee discretion is limited to an ascertainable standard or reasonably definite standard (e.g. health, maintenance, education and support), the Trustee may NOT change current or successor beneficiaries, the standard, modify a power of appointment of the first trust or reduce or eliminate a vested interest.
    2. However, the Trustee may EXTEND the term of a trust with a limited standard until the termination is required because of the expiration of the rule against perpetuities period of the first trust.
        a. The distributive standard MAY be expanded for the period AFTER the trust would have otherwise terminated.

m. **Section 13:** Trust for Beneficiary with a Disability
    1. Definitions for special needs trusts.
    2. A trustee may create a special needs trust for a beneficiary who is believed may qualify for governmental benefits based on disability.

3. Allows the trustee to reduce or eliminate a vested interest EVEN IF the trustee does not have discretion to distribute principal.
4. The decanting power must not be exercised in a manner that would impair the state's claim on the death of the beneficiary for medical assistance provided or any claims for which the state would have valid claims against the estate of the deceased beneficiary (which have not been previously paid or reimbursed).

n. **Section 14:** Protection of Charitable Interest
   1. Definitions regarding charitable interests.
   2. If there is a determinable charitable interest (right to current, periodic or on the occurrence of a specified event or after a specified passage of time, a mandatory distribution, which is unconditional or held solely for charitable purposes), the Attorney General has the rights of a qualified beneficiary.
   3. A trust held solely for charitable purposes may NOT be decanted under CUTDA.
   4. If the first trust has a charitable interest, the second trust or trusts may NOT: (i) diminish the charitable interest; (ii) diminish the interest of an identified charitable organization; (iii) alter any charitable purpose stated in the first instrument; or (iv) alter any condition or restriction related to the charitable interest.

o. **Section 15:** Trust Limitation on Decanting
   1. If the first trust prohibits decanting, then decanting is not permitted.
   2. Any provisions limiting, but not prohibiting, decanting in first trust, must be retained in the second trust.
   3. Prohibitions on revoking or amending a trust instrument or a spendthrift clause do not preclude decanting.

p. **Section 16:** Change in Compensation
   1. Second trust cannot increase trustee compensation above compensation specified in first trust unless (i) all qualified beneficiaries' consent or (ii) court approval is obtained.
   2. Second trust cannot increase unspecified compensation above reasonable compensation (cross-references CUTC).

q. **Section 17:** Relief of Liability and Indemnification
   1. Second trust cannot relieve trustee from liability for breach of trust to greater extent than first trust. However, the second trust may divide fiduciary powers among for example a trustee and a trust director or an investment trustee and a

distributions trustee, i.e. the standard applies in the aggregate.

r. **Section 18:** Removal or Replacement of Authorized Fiduciary
    1. Second trust cannot modify a provision in the first trust granting another person power to remove and replace the fiduciary unless:
        a. The person holding the power consents (by signing);
        b. The person holding the power and the qualified beneficiaries of the second trust consent (by signing) and the modification grants a substantially similar power to another person; OR
        c. The court approves the modification and the modification grants a substantially similar power to another person.

s. **Section 19:** Tax-related limitations
    1. Relevant definitions.
    2. Decanting cannot cause a trust that qualifies for the marital or charitable deduction, qualifies for the annual exclusion from gift or GST, acts a shareholder of an S corp, or other tax benefit of the first trust to not qualify where it would otherwise qualify.
    3. Second trust may be non-grantor even if first trust was grantor trust.
    4. Second trust may be a grantor trust even if the first was non-grantor (under certain circumstances, grantor may have an opportunity to object).

t. **Section 20:** Duration of Second Trust
    1. Second trust may have the same or different term as the first trust, but property attributable to first trust is subject to the perpetuity period of the first trust.
    2. Second trust may extend the term of the first trust, but property of the first trust remains subject to the perpetuity period of the first trust.

u. **Section 21:** Need to Distribute Not Required
    1. Trustee can decant whether or not the Trustee was required to make or could have been compelled to make a discretionary distribution at that time.

v. **Section 22:** Saving Provision
    1. If the second trust does not comply with the CUTDA, the exercise of the decanting is still valid and (1) any provision that is not permitted is deemed void; and (2) any provision that was required, but not included in the second trust, is deemed to be included.

    2. If a trustee or other fiduciary determines there is a non-compliance issue, said fiduciary shall take corrective action.

w. **Section 23:** Pet Trusts
    1. Definitions with respect to pet trusts.
    2. Decanting power may be exercised over a pet trust that has a protector as though the pet were an individual beneficiary.
    3. The second trust must provide that trust property may be applied only for its intended purposes for the period the first trust benefited the pet.

x. **Section 24:** Terms of Second Trust
    1. Reference to a “trust instrument” or “terms of a trust” in the CUTC include the terms of a second trust instrument.

y. **Section 25:** Settlor
    1. Settlor of the first trust is deemed the settlor of the second trust to the extent of the portion of the principal of the first trust which was decanted.
    2. In determining settlor intent with respect to the second trust, the intent of the settlor of the first trust, the settlor of the second trust and the authorized fiduciary may be considered.

z. **Section 26:** Later-Discovered Property
    1. If the decanting was to distribute ALL of the property of the first trust, it applies to later-discovered property and thus is deemed a part of the second trust.
    2. If the decanting was to distribute PART of the property of the first trust, the later-discovered property remains in the first trust.
    3. An authorized fiduciary can directly address later-discovered property belonging to the first trust in the exercise document or by the terms of the second trust.

aa. **Section 27:** Obligations
    1. Any obligation (debt, liability or otherwise) enforceable against property of the first trust is enforceable to the same extent against the property once decanted and held by the second trust.

bb. **Section 28:** Uniformity of Application and Construction
    1. The CUTDA should be construed to promote uniformity among the states that have adopted it (18).

cc. **Section 29:** Relation to Electronic Signatures in Global and National Commerce Act
    1. This section preempts the federal Electronic Signatures in Global and National Commerce Act. The effect of this section is to leave to state law the procedures for obtaining and validating an electronic signature.

dd. **Section 30:** Notice Repeal and replace C.G.S.A. § 44a-499i
    1. Applies CUTC methods of providing notice to decanting.
        a. Permissible methods: first-class mail, personal delivery, delivery to person's last known residence or place of business, or if there is advance consent to receive notices or documents electronically, a properly directed electronic message.

ee. **Section 31:** Jurisdiction - Repeal and replace C.G.S.A. § 44a-499o
    1. Provides that with respect to an exercise of the decanting power, the Probate Court has original jurisdiction over testamentary trusts and jurisdiction is concurrent with the Probate Court and Superior Court for inter vivos trusts.

ff. **Section 32:** Probate court fees – Repeal and replace C.G.S.A. § 45a-106a
    1. The fee to file a motion, petition or application to petition to exercise the decanting power is $300.00

D. Connecticut Probate Court Operations.

1. The Connecticut Probate Court Rules of Procedure were republished in 2024. This is the 6th edition since the rules were published in 2013 and contains all of the amendments to such original rules to date. The full text of the rules can be found here: http://www.ctprobate.gov/Documents/Probate%20Court%20Rules%20of%20Procedure.pdf
    a. See Table of Changes to rules for recent changes.
2. As of January 1, 2020, attorneys were required to e-file all probate matters through Turbo Court. See C.G.S.A. § 45a-136f.
3. The probate court forms are periodically updated by the Probate Court Administrator. The current probate court forms can be found here: http://www.ctprobate.gov/Pages/Probate-Court-Forms.aspx?type=TrustsEstates

E. Interpretation Cases

1. Adoption – *Buzzard v. Fass*, 2023 WL 1252092 (Conn. Super. Ct. Jan. 24, 2023).
    a. The Superior Court held that persons adopted in 1948 (as an infant) and 2008 (when he was 53) were beneficiaries of a testamentary trust created under a will of a decedent who died in 1947.
    b. The court focused on the interpretation of C.G.S.A. § 45a-731, which generally treats adopted persons as children, issue and descendants. This statute provides an exception. The rule generally applies to Wills of testators dying and trusts irrevocable prior to October 1, 1959 unless (a) a contrary intention is found by

clear and convincing evidence; or (b) distribution of the estate or under the will is made pursuant to a court order entered prior to October 1, 1991.

   a. The court found there was not contrary intention because the will did not mention adopted persons.
   b. The distribution from the estate in 1949 was to the testamentary trust, not to the beneficiaries and thus the exception under (b) did not apply.

c. The court held that the plaintiff could not show that adopted persons should be excluded as beneficiaries because the plaintiff relied solely on the Will and its terms did not exclude adopted persons.

2. In Terrorem Clause – *Salce v. Cardello*, 210 Conn. App. 66 (2022).
   a. Defendant, a beneficiary, after noting errors in the estate tax return, requested a probate hearing on the matter since the Executor/Trustee refused to make any changes absent a probate court order otherwise.
   b. Plaintiff, also a beneficiary of the Will, alleged that the filing of the request for a probate hearing violated the in terrorem clause contained in the Will/Trust.
   c. The court held that the defendant (daughter) did not violate the in terrorem clause set forth in her deceased mother's will and trust agreement by filing a creditor's claim against the estate. While the defendant's actions clearly violated the plain language of the in terrorem clause, enforcing the clause would be against public policy. The court suggested that in terrorem clauses should apply to fiduciary actions which involve discretion and judgment as opposed to purely ministerial actions such as preparing and filing the estate tax return.

F. Fiduciary Duties Cases

1. *Abrahms v. Baitler,* 2023 WL 4145028 (D. Conn. June 23, 2023).
   a. Plaintiff alleged that the Trustee breached his fiduciary duty by distributing to him a large portion of his trust despite his knowledge of the plaintiff's past poor-decision making.
   b. "A fiduciary relationship creates: '(a) a duty of loyalty on the part of the defendant to the plaintiff, (b) an obligation on the part of the defendant to act in the best interests of the plaintiff, and (c) an obligation on the part of the defendant to act in good faith in any manner relating to the plaintiff."
   c. The court found that the trustee did not breach his fiduciary duty where the plaintiff failed to allege any self-dealing, fraud or conflict of interest, when he made a large distribution to the plaintiff to open

an art gallery even though the trustee knew he had a history of mental illness and bad-decision making. The court found that there were no facts to show that the trustee made the disbursement for his own self-interest and the trustee's compensation was not linked in any way to the trust disbursement.

d. The court held that the cause of action required a finding of self-dealing or conflict of interest. The holding here was effectively negated by Barash v. Lembo.

2. *Barash v. Lembo*, 348 Conn. 264 (2023).
    a. Issue: Whether the trustee of an inter vivos trust that is the residuary beneficiary of the estate of the settlor-decedent has a duty to protect and collect assets that have not yet been transferred to the trust?
    b. Facts: An estate which had been open for about seventeen years had not yet been settled. The revocable trust had not yet been funded with the residue.
    c. Arguments:
        a. Plaintiff: The co-Trustee of the revocable trust breached her fiduciary duty by failing to protect and collect trust property and inquire with the Executor as to the delay of the funding. The Trustee should be required to take reasonable steps to enforce the rights of the trust.
        b. Defendant: Since the revocable trust had not yet been funded, her fiduciary duties as a trustee did not arise until the estate settled and the residue was distributed to the revocable trust.
    d. The Superior Court ruled in favor of the Defendant. The Supreme Court reversed the Superior Court's decision and held that the co-Trustee had a duty to act prudently and take reasonable steps to safeguard and collect the revocable trust's assets. The duty is not absolute, but is limited to the due diligence required given the facts and circumstances surrounding the administration of the trust.

G. Intestate/Elective Share Cases

1. Mirando v. Woodruff-Mirando, 2023 WL 5031026 (Conn. Super. Ct. July 31, 2023).
    a. Issue: Whether the conduct of the defendant, from the moment that she asked her husband to leave the marital residence until the time of his death, supports a finding of abandonment under Connecticut law?
        a. H and W were in the middle of a difficult divorce. Text messages were reviewed by the court. The wife asked the

husband to move out of the residence. At the time of his death, there did not appear to be any intent to reconcile.

b. C.G.S.A. § 45a-436 provides that a surviving spouse who abandons the decedent without sufficient cause is entitled to neither an intestate share nor an elective share in the decedent's estate. Abandonment has been defined as the act of a husband/wife who voluntarily leaves his/her spouse with an intention not to return to that spouse and not to resume his/her marital duties towards the spouse.
c. The court found abandonment without sufficient cause and thus the wife was not entitled to receive the elective share.

2. Nystrand v. D'Antonio, 2023 WL 6995315 (Conn. Super Ct. October 18, 2023).
   a. Plaintiff, decedent's wife, made a claim that she was entitled to an intestate share under C.G.S.A. § 45a-237. She claimed her absence from her husband's will was not intentional. Plaintiff married decedent after the signing of the will.
   b. After reviewing extrinsic evidence, the probate court held that the omission had been intentional.
   c. On appeal, the Superior Court reversed, concluding that the court could not consider extrinsic evidence per the language of the statute. On review of the language of the Will, it was silent about plaintiff or any other wife. The statute presumes that the omission is unintentional. Accordingly, since there were surviving issue who were not issue of the plaintiff, the plaintiff was found to be entitled to one-half of the estate.

H. Other Recent Connecticut Case Law Developments.

1. Refer to Cooper, Jeffrey A. and Ivimey, John R. and Mulry, Katherine, *2022 Developments in Connecticut Estate and Probate Law* (September 14, 2023). Connecticut Bar Journal (Forthcoming), Available at SSRN: https://ssrn.com/abstract=4571968 or http://dx.doi.org/10.2139/ssrn.4571968.

Proposed Legislation in Connecticut

A. An Act Concerning Consistency of Federal and Connecticut Estate and Gift Taxes

1. **Purpose:** Conform the Federal and Connecticut estate and gift tax laws.
2. **Clawback Proposal:** The IRS has issued regulations to avoid a retroactive tax if the current estate tax exemption does in fact sunset on December 31, 2025 and is thus lowered. The proposed legislation follows the Federal model on how to avoid clawback from occurring, while also preventing

abuse by taxpayers (but only considers CT taxable gifts, not Federal taxable gifts in the calculation). The effective date of this proposal if passed would be January 1, 2026.

a. **Example of the problem:** Client, a Connecticut resident, is unmarried (has no DSUE) and has made no taxable gifts during Client's life. In 2024, knowing of the upcoming potential sunset, Client makes a gift of $13.61 million that is taxable for both Federal and CT gift tax purposes. Client pays no gift taxes because he still had available his full Federal Basic Exclusion Amount and CT exemption.
    i. Client dies in 2026. Assume the Federal exemption is $7 million (likely to be $5 million base adjusted for inflation). Assume Client's federal taxable estate is $10 million (not including the prior gifts) and tax rates are unchanged. Client does not have any out of state property. For illustration purposes, we are assuming there are no deductions.
    ii. **Federal Taxes:**
        1. Taxable estate: $10,000,000
        2. Adjusted taxable gifts: $13,610,000
        3. Total tax base: **$23,610,000**
            a. Tentative tax: **$9,389,800** ($23,610,000 - 1,000,000 = 22,610,000 *.4 = 9,044,000 + $345,800)
            b. Gift tax payable using exclusion at time of gift: $0
            c. Tentative Tax – Gift Tax Payable = **$9,389,800**
            d. Calculate credit based on exclusion amount under IRC § 2001(g)(2) and Proposed Regulation 87 FR 24918) (see (e) below for tax payable)
                i. $13,610,000: **$5,389,800** ($13,610,000 – 1,000,000 = $12,610,000 *.4 = 5,044,000 + 345,800)
                ii. $7,000,000: **$2,745,800** ($7,000,000 – 1,000,000 = $6,000,000 *.4 = 2,400,000 + 345,800)
                iii. **Difference =** 2,644,000 ($5,389,800 – 2,745,800)
            e. Subtract credit amount from tentative tax to arrive at tax payable at death:
                i. **Without regs: $6,644,000 (retroactive gift tax)**
                    1. Tentative tax = $9,389,800
                    2. LESS credit: $2,745,800

ii. **With regs: $4,000,000**
   1. Tentative tax = $9,389,800
   2. LESS credit: $5,389,800

iii. **Connecticut Taxes:** The 0% rate will only apply up to the then lower exemption of $7 million (not the exemption when you gifted) and thus there is effectively a higher transfer tax (or retroactive gift tax).
   1. Federal Taxable estate: $10,000,000
   2. Adjusted taxable gifts: $13,610,000
   3. Total tax base: $23,610,000
   4. Tentative tax: 1,993,200 ($23,610,000 - $7,000,000 = $16,610,000 * .12)
   5. Less amount of CT gift tax taxes paid: $0.00
   6. Total tax payable:
      a. **Current law: 1,993,200**
      b. **Under proposed legislation: $1,200,000** if CT gave a credit for the exemption when gifted → $23,610,000 - $13,610,000 = $10,000,000 * .12 = $1,200,000) (difference of $793,200).

3. **Portability Proposal**: Portability began as a Federal concept, but has begun to be adopted by some states (Hawaii and Maryland). The proposed legislation adopts portability for Connecticut estate and gift tax purposes to allow a surviving spouse of a Connecticut resident decedent the option to elect to be able to use any unused Connecticut exemption amount from the predeceased spouse. The effective date of this proposal if passed would be January 1, 2026.

4. **Estate Tax Filing Deadline Proposal**: Connecticut currently requires the state estate tax return to be filed and the tax liability to be paid within six months of the decedent's date of death. This is the shortest deadline of any jurisdiction in the United States and creates hardships for complex and illiquid estates. While the time to file deadline may be extended by 9 months upon request, in order to obtain an extension for time to pay, the estate needs to establish a reason for the extension. The proposal would make the initial filing deadline and payment date nine (9) months from the date of the decedent's death (same as Federal) and allow for a reduced six (6) month extension upon request. This would allow for alignment between Federal and Connecticut law. The effective date of this proposal if passed would be January 1, 2025.

5. **Duty to Amend Estate Tax Returns**: The proposed legislation will change what adjustments at the federal level require an amendment to a Connecticut filing and requiring amended returns to be filed with the Probate Court (CT-706NT and CT-706/709). Requires estates to report increases

in the gross estate that would increase the probate fee on the decedent's estate. The effective date of this proposal if passed would be January 1, 2026.

B. Revocation of Beneficiary Designations Upon Dissolution of Marriage.

1. Connecticut has a currently effective statute governing Wills in this context. C.G.S.A. § 45a-257c.
2. Connecticut currently revokes provisions in a Power of Attorney (C.G.S.A. § 1-350i), and Health Care Appointment (C.G.S.A. § 19a-579b of a former spouse.
3. **Purpose:** The statute is intended to assist the divorced individual who hasn't yet had a chance to revise their beneficiary designations or perhaps does not have sophisticated counsel to assist. The average person likely does not want his/her ex-spouse (or the ex-spouse's relatives) inheriting his/her assets or serving in fiduciary roles.
4. **Background:** A committee of the CT Estates & Probate Section modeled the proposed legislation after the Minnesota statute (*see Sveen v. Melin*, 138 S. Ct. 1815 (2018), where the Supreme Court ruled that Minnesota's revocation upon divorce statute's application to a life insurance beneficiary designation made before the statute's enactment does not violate the Constitution's Contracts Clause), the New York statute and the Uniform Probate Code § 2-804.
5. **Summary of Proposed Legislation:** The statute provides that upon a dissolution of marriage, except as provided by the express terms of a governing instrument, a court order, or contract between the divorced individual and the former spouse, the law will: (A) revoke any revocable: (1) disposition or appointment of property for a former spouse (or relative of a former spouse); (2) provision conferring a general or non-general power on a former spouse (or relative of a former spouse); (3) nomination of a former spouse (or relative of a former spouse) to serve in any fiduciary or representative capacity; and (4) provision giving a former spouse (or relative of a former spouse) the power to appoint or remove a person serving in a fiduciary or representative capacity; and (B) sever joint tenancies with the right of survivorship into tenancies in common (excepting real estate – see C.G.S.A. § 47-14g).
    i. The legislation does NOT apply to Wills, appointments of agents under a Power of Attorney, health care appointments, conservatorships or guardianships, but as part of the proposal there are proposed amendments to the Wills, Power of Attorney and Health Care statutes to conform with this statute (i.e. to extend the automatic revocation to relatives of a former spouse who are not related to the divorced individual after the marriage is dissolved).
    ii. The statute supplies a mere default rule, which the policyholder/Settlor can modify by: (1) providing otherwise in a

divorce agreement, prenuptial agreement or postnuptial agreement; (2) reestablishing beneficiaries or fiduciaries post-divorce; or (3) providing express language to the contrary in the governing instrument when initially drafted.

   iii. The law will only have **prospective effect** and thus is not intended to address dissolutions of marriage before the effective date. However, it WOULD revoke designations made BEFORE that date.

6. **Next steps:** The proposed legislation will be proposed (for the third time) during the next legislative session. The legislation has support from multiple stakeholder groups of the Connecticut Bar Association.

C. Other Legislative Efforts – The Connecticut Bar Association Estates & Probate Section has the following subcommittees currently drafting proposed legislation on the below topics:

1. **Uniform Fiduciary Income and Principal Act ("UFIPA")**
   i. Provide trustees with a statutory unitrust option. Approximately two-thirds of the states now have unitrust statutes, but Connecticut currently does not. UFIPA contains a well-considered unitrust provision that is consistent with recent developments in tax law related to unitrusts.
   ii. Expands a trustee's power to adjust between income and principal consistent with the Uniform Prudent Investor Act by removing some limitations on a trustee's power to adjust that were inadvertently preventing the trustee from exercising that power when it was appropriate to do so.
   iii. Clarifies and streamlines the rules related to which state's laws will apply to questions of principal and income, which is becoming more important in today's mobile society.
   iv. Updates and modernizes the remedies to be applied by courts when a trustee has been found to have improperly followed the rules related to income and principal.

2. **Electronic Estate Planning Documents and Remote Notarization**
   i. Effective October 1, 2023, Connecticut passed a law allowing remote notarization. The execution of estate planning documents was specifically **excluded** from this law. See C.G.S.A. § 3-95b.
   ii. A committee of the Connecticut Bar Association Estates & Probate Section is working on drafting a law that encompasses the Uniform Wills Act and the Uniform Electronic Estate Planning Documents Act. This new legislation will likely allow for optional remote notarization of estate planning documents.

Connecticut Specific Key Considerations

A. Connecticut does NOT currently have its own succession or generation-skipping transfer tax.
   1. Succession Tax – applies to those who died before January 1, 2005.
   2. Generation-skipping Transfer Tax – repealed (existed from 1997-2004).

B. Connecticut allows Remote Ink Notarization but NOT for estate planning documents – C.G.S.A. § 3-95b
   1. Effective October 1, 2023.
   2. Remote ink notarization authorized, but not online or electronic notarization.
   3. Grants the Secretary of State authority to adopt regulations regarding the procedures, standards and requirements for performing remote notarizations.
   4. Allows a Notary Public to remotely notarize documents, but not a Commissioner of the Superior Court.
   5. The following are EXCLUDED from the law (i.e. they may not be remotely notarized at this time):
      i. Will, codicil, trust or trust agreement
      ii. Health care instructions
      iii. Designation of a standby guardian
      iv. Living will and related self-proving affidavit
      v. Power of attorney
      vi. Mutual distribution agreement
      vii. Disclaimer
      viii. Real estate closing documents

C. Connecticut Uniform Power of Attorney Act – C.G.S.A. §1-350 to 1-353b.
   1. Effective as of October 1, 2016.
   2. See C.G.S.A. §1-352 for statutory power of attorney short form and long form power of attorney.
      a. C.G.S.A. § 1-352(a)(2) - Short form power of attorney
      b. C.G.S.A. § 1-352(a)(2) – Long form power of attorney – includes all of the powers in the short form, and also contains additional estate planning powers that must be "opted into."

D. Advance Health Care Directive or Appointment of Health Care Representative.
   1. C.G.S.A. §§§ 19a-575, 19a-575a and 19a-577.
   2. State of Connecticut Forms: https://portal.ct.gov/-/media/AG/Health-Issues/advdirectivescombinedform2006alt-pdf.pdf

E. Considerations for Non-residents Owning Connecticut Vacation Homes → Limited Liability Company Look-through Law.

1. A nonresident client with a Connecticut vacation home cannot avoid Connecticut estate tax solely by putting the Connecticut real property in an LLC.
    a. If real property and tangible personal property is owned by a pass-through entity, the entity will be disregarded for estate tax purposes and such property will be treated as personally owned by the decedent in proportion to the decedent's constructive ownership of the pass through-entity UNLESS the entity is carried on for a business purpose or the ownership of the property is for a valid business purpose. See C.G.S.A. § 12-391(e)(2)(B).
    b. There is not a great deal of guidance on what would be considered a valid business purpose.
2. Potential monetary exposure:
    a. If the property is included in the Connecticut taxable estate, Connecticut estate tax is imposed on non-residents based on the proportion of the estate consisting of Connecticut property. Accordingly, even if the value of the property is below the Connecticut exemption amount, a Connecticut estate tax could still be due if the entire estate is not below the Connecticut exemption amount.
    b. Even without full probate, there is a Connecticut probate court fee, which is based on the value of the non-resident's Connecticut situs property.

F. Connecticut Estate and Probate Lien Release Statute – C.G.S.A. § 45a-107b(d). Effective May 2022.

1. The State of Connecticut imposes estate and probate fee statutory (and unrecorded) liens on real property when the owner dies in order to: 1) secure payment of any estate taxes owed (death triggers the lien even if no estate tax is owed); and 2) secure the statutory probate fee (whether or not the real property was probate property).
    a. These often become an issue when the real property is to be sold and a title searcher discovers that the property was at some point transferred from a deceased individual, but there were no lien releases recorded on the land records.
2. This statute provides a simplified mechanism to **release the probate fee lien** when: (1) the lien arises out of a decedent's retained life use or survivorship interest in the property; (2) the lien arose more than a decade ago; (3) no probate proceeding was commenced; (4) no CT estate or succession tax return was filed with the DRS; (5) no estate tax was

assessed by the DRS; and (6) based on the value of all known property and taxable gifts, no CT estate tax could be assessed.

a. File a petition with the probate court to remove the lien including the following:
    i. Statement that the petitioner did not receive title from the decedent as his or her immediate successor
    ii. Statement that petitioner does not have information required to file a complete CT estate tax return.
    iii. Statement of diligent search of heirs, beneficiaries or transferees who were located and failed or refused to file estate tax return.
b. Submit an estate tax return reporting value of real property and, to the best of the petitioner's knowledge, the value of all other property of decedent owned at time of death and taxable gifts made by decedent.
c. Pay probate fee (including interest).

3. This statute provides the following rules with respect to **releasing succession tax/ estate tax liens**:
    a. Any lien for the succession tax is deemed released (unless the decedent died on or prior to January 1, 2005 and prior to October 1, 2018 a return had been filed or tax had been assessed).
    b. Any estate tax lien release shall be deemed released ten years from the date of death of the decedent, except for estates that have filed a return or been assessed a tax prior to ten years from the date of death of the decedent.

G. Connecticut Uniform Trust Code – C.G.S.A. § 45a-499a – 45a-500s.

1. Effective January 1, 2020, Connecticut adopted a version of the Uniform Trust Code.
    a. Includes:
        1. rules on creating, administering, modifying, terminating and enforcing trusts;
        2. the Uniform Directed Trust Act;
        3. the Domestic Asset Protection Trust Act;
        4. expansion of the rule against perpetuities (800 year period);
        5. new notice and reporting requirements for trustees;
        6. reasonable compensation for trustees; and
        7. new trustee powers.
    b. Excludes:
        i. Uniform Prudent Investor Act (see previously enacted Connecticut Uniform Prudent Investor Act C.G.S.A. §§ 45a-541 to 45a-541l);

    ii. Uniform Principal and Income Act (see previously enacted Connecticut Principal and Income Act C.G.S.A §§ 45a-542 to 45a-542ff, but see note regarding UFIPA under the Heading "Proposed Legislation"); and
    iii. Uniform Trust Decanting Act – Although this was originally excluded, effective January 1, 2025, the Connecticut Uniform Trust Decanting Act will be part of CT law.
  c. Probate Court retains control over testamentary trusts.
  d. For a summary of relevant terms, see Peck, Kelley Galica, *Connecticut Adopts Omnibus Trust Code*, LISI Estate Planning Newsletter #2733, (June 27, 2019) at http://www.leimbergservices.com.
2. More recently, there were updates/corrections to the Uniform Trust Code.
  a. There was an error in the original legislation that did not extend the new rule against perpetuities period of 800 years to a statutory provision. This was corrected.
  b. Provides clarification that a "designated representative" (a person who may receive notices in place of the beneficiary) "shall act in good faith on behalf of any beneficiary so represented." C.G.S.A. § 45a-499u(a).
  c. Defines "terms of trust," which is used frequently in the UTC, but was not previously defined. C.G.S.A. § 45a-499c(28).

H. Connecticut Parentage Act – C.G.S.A. §§ 46b-450 to 46b-553.

1. Fully effective as of July 1, 2022.
2. Establishes parentage by providing presumptions and rules related to acknowledgment and adjudication.
3. Modernizes Connecticut law to provides rules related to children of same-sex couples, unmarried couples, assisted reproductive technology (including posthumous birth and conception) and gestational and genetic surrogacy.
4. This new law needs to be considered in drafting estate planning documents.
  a. Impacts who legally can inherit from another and who is entitled to notice for probate proceedings.
  b. Consider the client's age as it relates to the client's reproductive years and the client's intent to have children.
  c. Consider effect on more remote descendants and a client's intent with respect to said descendants.
  d. Consider how to dispose of stored reproductive materials, such as frozen embryos.

I. Commissioner of the Superior Court Concept

1. Often Connecticut estate planning documents are acknowledged by a Commissioner of the Superior Court, instead of a Notary Public. Many out-

of-state institutions are unfamiliar with this concept. Certain state statutes, such as the Connecticut Uniform Power of Attorney Act (C.G.S.A. § 1-350r(a)) specifically reference and allow acknowledgment by a Commissioner of the Superior Court.

2. C.G.S.A. § 51-85. "Each attorney-at-law admitted to practice within Connecticut, while in good standing, shall be a commissioner of the Superior Court and, in such capacity, may, within the state, sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgments of deeds."
3. C.G.S.A. § 1-29. "The acknowledgment of any instrument may be made in this state before: (1) A judge of a court of record or a family support magistrate; (2) a clerk or deputy clerk of court having a seal; (3) a town clerk; (4) a notary public; (5) a justice of the peace; or (6) **an attorney admitted to the bar of this state**." (emphasis added).

J. Connecticut follows strict "per stirpes."

1. *Schwerin v. Ratcliffe*, 335 Conn. 300 (2020).
   a. Issue: At issue is which generation should serve as the "roots" when a trust provides that it will be distributed to "the grantor's issue then living, per stirpes." In this particular case, all children were deceased and there were six grandchildren.
      1. Should, as the plaintiffs argued, the trust property be divided into six equal shares for each of the grantor's six grandchildren because the three children are deceased OR should, as the defendant's argued, the initial division be made at the level of the children so that each "branch" would receive one-third?

   b. Holding: The initial division should be made at the level of the children (even though deceased) so that each "branch" would receive one-third. Thus, the court confirmed Connecticut's "strict" per stirpes approach, which it found consistent with Connecticut case law, Connecticut's intestacy laws (see C.G.S.A. §§ 45a-437 to 439) and the Restatement (Second) of Property. The use of the term "then living" did not change the court's conclusion because it held that such phrase "merely conditioned the receipt of a distribution from those trusts on surviv[al]" rather than effecting where the division must be made.
      i. Importantly, Connecticut's strict per stirpes approach contrasts New York's modern per stirpes approach, which would have held that the initial division should occur at whatever level of descendants has a member then living (for this case, the level of the grandchildren). See NY EPTL § 1-2.14.

Recent Updates in Related Areas of the Law

A. Connecticut Passes Revised Paid Sick Leave Law – C.G.S.A. § 31-57r-w

1. Effective Date: January 1, 2025
2. Existing Law: Applies to employers who employ at least 50 individuals in Connecticut who are considered service workers.
3. New Law: Annually lowers the threshold of employees needed to require compliance with the law until it applies to all employers as of January 1, 2027.
    - i. January 1, 2025 – Employers employing 25 or more individuals in CT.
    - ii. January 1, 2026 - Employers employing 11 or more individuals in CT.
    - iii. January 1, 2027 - Employers employing 1 or more individuals in CT.
    - iv. Does not apply to:
        1. Self-employed workers
        2. Seasonal employees (works 120 days or less in any year)
        3. Certain unionized employees whose employers participate in a multiemployer health plan pursuant to a collective bargaining agreement
4. Details:
    - i. Sick pay leave is accrued at the rate of 1 hour per 30 hours worked up to a maximum accrual of 40 hours per year.
        1. Employees must be either: (1) permitted to carry over at least 40 hours of accrued, unused paid sick leave (but only entitled to use 40 hours per year); or (2) provided a bank of paid sick leave at the beginning of a calendar year (in lieu of carryover) as long as it is immediately available to be used.
    - ii. The law does not require payout of accrued unused paid sick leave when employment is terminated.
    - iii. Although hours start to accrue immediately, new employees will be eligible to use paid sick leave after being employed for 120 days.
    - iv. Sick leave reasons (although the employer may not require supporting documentation that the leave is pursuant to one of these reasons):
        1. An employee's (or employee's family member's) illness, injury or health condition;
        2. The medical diagnosis, care or treatment of an employee's (or employee's family member's) mental or physical illness, injury or health condition;
        3. Preventative medical care for an employee's (or employee's family member's) mental or physical health;
        4. Mental wellness day;

5. For closure by order of a public official due to a public health emergency of an employer's place of business or a family member's school or place of care or other determination by a relevant health authority related to an employee or an employee's family member's exposure to a communicable disease; or
6. For an employee or employee's family member being a victim of sexual assault and matters related to ensuring the safety of the victim.

v. Notice requirements:
1. Employers must display a poster in a conspicuous place with the details of this new law; and
2. Provide written notice to each employee no later than January 1, 2025, or at the time of hire, whichever is later.

vi. Payroll tracking: In the employee's payroll information each pay period, the employer must include (1) the number of hours, if any, of paid sick leave accrued by or provided to the employee; and (2) the number of hours, if any, of paid sick leave used by the employee in the calendar year. These records shall be maintained for three (3) years. Failure to maintain this information can result in a $100 fine per violation.

B. Connecticut Modifies Law Regarding Retirement Income Withholding (C.G.S.A. § 12-705(a)(2) (P.A. No. 24-151)

1. Effective for tax years on or after January 1, 2025, income tax withholding is permitted rather than required on certain retirement income distributions (for example, profit-sharing plan, stock bonus, deferred compensation plan, pensions, annuities, IRAs). Accordingly, withholding will only be required if the payee requests it. However, if the payee does not make a request to have an amount withheld from distribution of a lump sum (defined under the law as a distribution of more than $5,000 or 50% of the payee's account balance, whichever is less), the payer shall withhold at the highest marginal rate.

C. Connecticut Passes Certain Tax Cuts/Revisions

1. **Increase in earned income tax credit** from current rate of 30.5% of the federal credit to 40% of the federal credit (effective from passage).
    i. Refundable state income tax credit for low to moderate income working individuals and families.
2. **Lowers the two lowest marginal rates:** Effective for tax years on or after January 1, 2024, there was a tax rate reduction from 3% to 2% for the first $10,000 of income for Connecticut single filers and the first $20,000 of income for Connecticut joint filers. Additionally, there was a tax rate reduction from 5% to 4.5% for income greater than $10,000 but not more

than $50,000 for Connecticut single filers and for income greater than $20,000 but not more than $100,000 for joint filers. These reductions phase out for single filers earning more than $105,000 and joint filers earning more than $210,000 and are capped for single filers earning more than $150,000 and joint filers earning more than $300,000.

3. **PTET Changes:** In 2024, the legislature passed changes to the Pass-Through Entity Tax, making it elective, rather than mandatory. For tax years starting on and after January 1, 2024, written notice of the election is required to be filed with the DRS for each tax year in which the election is made by the due date for filing the return considering any extensions.
    ii. Eliminated the standard base method and requires all entities to use the alternative base method;
    iii. Requires the entity to file the return and pay the tax on behalf of any non-resident member for whom the business is the only source of CT income;
    iv. Eliminates the credit against the corporation business tax for PTE tax paid by an entity on behalf of a corporation that is a member of said entity and is subject to corporate tax; and
    v. Eliminates the option for a PTE to file a combined return with one or more commonly-owned PTEs.
4. **Phase-out for pension, annuity and IRA distribution deductions**. Effective for taxable years beginning on or after January 1, 2024. The legislation extends the eligibility for the pension, annuity and IRA (other than Roth IRA) income tax subtraction modification to taxpayers with AGI of (1) at least $75,000, but less than $100,000 for single filers, and (2) at least $100,000 but less than $150,000 for joint filers. The legislation gradually reduces the amounts until they fully phase out at $100,000 or $150,000, as applicable. The income tax subtraction modification for IRA distributions (other than Roth IRA) phases in over four years as follows: 25% of such distribution for 2023, 50% of such distribution for 2024, 75% of such distribution for 2025 and 100% for 2026 and future years.

D. Connecticut Paid Family and Medical Leave Act (CTFMLA) and CT Paid Leave (CTPL) - (C.G.S.A. § 31-51kk to 31-51qq).

1. CT Family and Medical Leave (CTFMLA) – provides eligible employees with job-protected leave for up to 12 weeks in a 12-month period if they cannot work for qualifying reasons.
    a. Applies to almost all Connecticut private-sector employers with one or more employee.
    b. Need to have worked for at least three months preceding the leave.
2. CT Paid Leave (CTPL) – provides limited wage replacement to eligible employees taking leave for qualifying reasons allowed under the CTFMLA for up to 12 weeks over a 12 month period.

a. Fully funded by employee contributions – collections began January 1, 2021 (.5% deduction from employee wages remitted to CT Paid Leave Authority each quarter).
b. Benefits became available as of January 1, 2022.

E. Real Estate Closings Must be Overseen by an Attorney. C.G.S.A. § 51-88a(a).

1. Effective October 1, 2019.

New England Update: Massachusetts

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Changes to the Massachusetts Estate Tax

History of the Massachusetts Estate Tax

- In 1997, Massachusetts decided to switch over to a **sponge tax** to piggyback on the federal estate tax return.
- When the federal government changed the federal estate tax in 2001 under EGTRRA, the Commonwealth faced the prospect of the future **elimination** of the state tax credit.
- As a result, in 2003 the Massachusetts estate tax was decoupled from the federal return, opting to determine the amount of the **state death tax credit** based upon the Internal Revenue Code as in effect on December 31, **2000**.
- In 2006 and thereafter this meant that the Massachusetts estate tax exemption for decedents was **$1 million dollars**.

Decoupled 2003 MGL c. 65C sec. 2A

- (a) A tax is hereby imposed upon the transfer of the estate of each person dying on or after January 1, 1997 who, at the time of death, was a resident of the commonwealth. The amount of the tax shall be the sum equal to the amount by which the credit for state death taxes that would have been allowable to a decedent's estate as computed under Code section 2011, **as in effect on December 31, 2000**, hereinafter referred to as the "credit'', exceeds the lesser of:
  - (i) the aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to the several states of the United States, other than the commonwealth, in respect to any property owned by that decedent or subject to those taxes as part of or in connection with his estate; or
  - (ii) an amount equal to the proportion of such allowable credit as the value of properties taxable by other states bears to the value of the entire federal gross estate wherever situated.
- (b) A tax is hereby imposed upon the transfer of real property situated in this Commonwealth and upon tangible personal property having an actual situs in this Commonwealth of every person who at the time of his death was not a resident of this Commonwealth. The amount of this tax is a sum equal to the proportion of the credit which the value of Massachusetts real and tangible personal property taxed in this Commonwealth which qualifies for such credit bears to the value of the decedent's total federal gross estate.
- (c) Notwithstanding any other provision of law, the tax imposed by subsections (a) and (b) shall be computed upon the value of any property subject to a power of appointment which is includible in the federal gross estate, notwithstanding that a tax has been paid thereon pursuant to section fourteen of chapter sixty-five.
- (d) For the purposes of computing the tax imposed by subsections (a) and (b), the provisions of section three shall not apply.
- (e) For the estate of decedents dying on or after January 1, 2003, all references and provisions in this chapter to the Internal Revenue Code or Code, unless the context clearly indicates otherwise, shall be to the Code as in effect on December 31, 2000.

2023 Changes to the Massachusetts Estate Tax

- On October 4, 2023, Massachusetts Governor Maura Healy signed into law a new $1 billion dollar **tax reform package**. *See* H.R. 4104, 2023 Leg., 193rd Sess. (Mass. 2023).
- These were the **first tax cuts** in more than 20 years in Massachusetts.
- The intent of the change was to boost the **affordability** in the Commonwealth for businesses and residents and to boost the Commonwealth's **economic competitiveness** with other states.

Massachusetts cut its estate tax

- The new 2023 law amended the estate tax by providing a credit of up to $99,600, the equivalent of a **$2 million dollar** state estate tax exemption.
- The law also eliminates the so-called "**cliff" effect** of the prior law, which taxed the full value of an estate quickly if the estate's value was over the $1 million threshold.
- The new law was made effectively retroactively to January 1, **2023**.
- Up until then Massachusetts was tied with **Oregon** with having the lowest estate tax threshold.

2023 MGL c. 65C sec. 2A

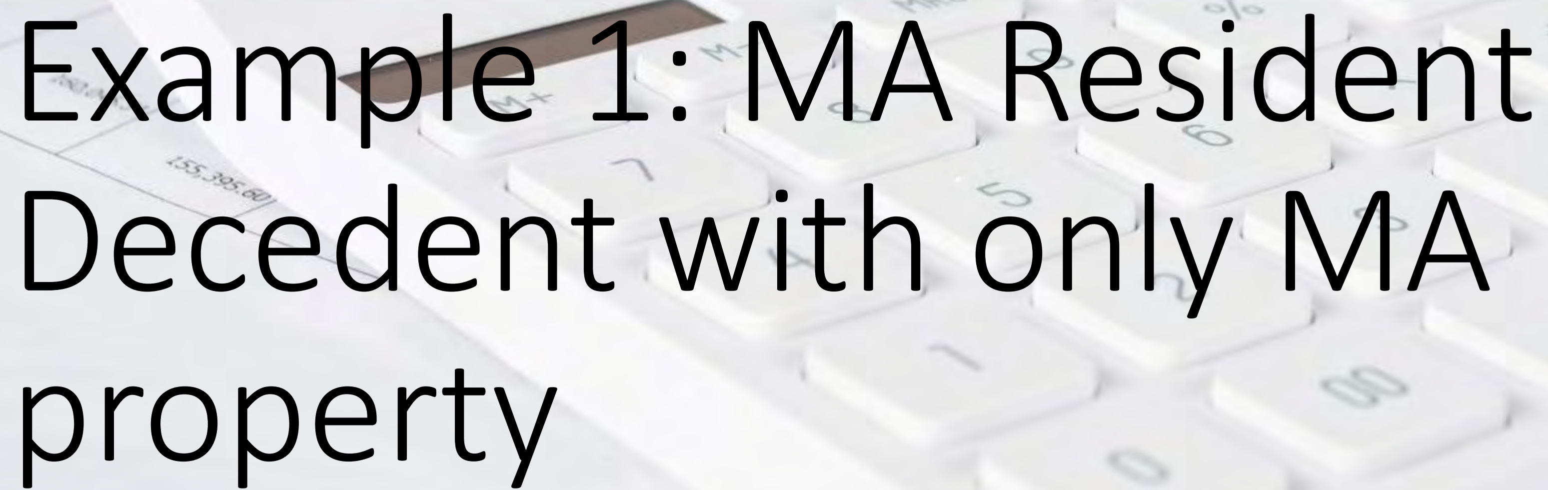
- (a) A tax is hereby imposed upon the transfer of the estate of each person dying on or after January 1, 1997 who, at the time of death, was a resident of the commonwealth. The amount of the tax shall be equal to the credit for state death taxes that would have been allowable to a decedent's estate as computed under section 2011 of the Code, as in effect on December 31, 2000, hereinafter referred to as the "credit''. If the **federal gross estate** of a person includes real or tangible personal property located outside of the commonwealth at the time of death, the tax shall be reduced by an amount equal to the proportion of such allowable credit as the value of such real or tangible personal property located outside of the commonwealth bears to the value of the entire **federal gross estate** wherever situated, as determined under section 2011 of the Code, as in effect on December 31, 2000.
- (b) A tax is hereby imposed upon the transfer of real property situated in this Commonwealth and upon tangible personal property having an actual situs in this Commonwealth of every person who at the time of his death was not a resident of this Commonwealth. The amount of this tax is a sum equal to the proportion of the credit which the value of Massachusetts real and tangible personal property taxed in this Commonwealth which qualifies for such credit bears to the value of the decedent's total federal gross estate.
- (c) Notwithstanding any other provision of law, the tax imposed by subsections (a) and (b) shall be computed upon the value of any property subject to a power of appointment which is includible in the federal gross estate, notwithstanding that a tax has been paid thereon pursuant to section fourteen of chapter sixty-five.
- (d) For the purposes of computing the tax imposed by subsections (a) and (b), the provisions of section three shall not apply.
- (e) For the estate of decedents dying on or after January 1, 2003, all references and provisions in this chapter to the Internal Revenue Code or Code, unless the context clearly indicates otherwise, shall be to the Code as in effect on December 31, 2000.
- (f) For the estates of decedents dying on or after January 1, 2023, a credit shall be allowed against the tax imposed by subsections (a) and (b) equal to the amount of such tax; provided, however, that the credit shall not exceed $99,600.
- (g) The estates of decedents dying on or after January 1, 2023 shall not be required to pay any tax under subsections (a) and (b) if the value of the federal taxable estate is not more than **$2,000,000**.

How much Massachusetts estate tax will be due?

Massachusetts Estate Tax	
2 M	$ 0
2.5 M	$ 39,200
3 M	$ 82,400
3.5 M	$ 129,600
4 M	$ 180,800
4.5M	$ 236,000
5 M	$ 292,000
5.5 M	$ 351,200
6 M	$ 410,400
7 M	$ 538,400
8 M	$ 673,600
9 M	$ 816,800
10 M	$ 968,000
11 M	$ 1,127,200
12 M	$ 1,287,200
13 M	$ 1,447,200
14M	$ 1,607,200
15 M	$ 1,767,200
20 M	$ 2,567,200

Breaking News

- On September 19, **2024**, the Massachusetts Legislature made further changes to MGL c. 65C, sec. 2A which affected the treatment of **out of state real estate** for Massachusetts decedents.
- More information later in this discussion.



Example 1: MA Resident Decedent with only MA property

Example 1: MA Resident with MA property only

- MA resident decedent
- Unmarried
- $4,000,000 taxable estate consisting of cash

- Credit for state death taxes on pro forma 706 would be $280,400
- How does the MA estate tax differ if the decedent died in 2022 as opposed to 2024?

In both cases, tax would be based upon the Pro Forma 1999 federal 706

Part 2.—Tax Computation

Line	Description	Sub-box	Sub-amount	Box	Amount
1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)			1	4,000,000.
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)			2	0.
3	Taxable estate (subtract line 2 from line 1)			3	4,000,000.
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))			4	0.
5	Add lines 3 and 4			5	4,000,000.
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions			6	1,840,800.
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If Line 5 is $10,000,00 or less, skip line 7a and 7b and enter -0- on line 7c	7a			
b	Subtract $10,000,000 from line 7a	7b			
c	Enter 5% (.05) of line 7b			7c	0.
8	Total tentative tax (add lines 6 and 7c)			8	1,840,800.
9	Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)			9	0.
10	Gross estate tax (subtract line 9 from line 8)			10	1,840,800.
11	Maximum unified credit (applicable credit amount) against estate tax	11	345,800.		
12	Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed $6,000. See page 4 of the instructions.)	12	0.		
13	Allowable unified credit (applicable credit amount) (subtract line 12 from line 11)			13	345,800.
14	Subtract line 13 from line 10 (but do not enter less than zero)			14	1,495,000.
15	Credit for state death taxes. Do not enter more than line 14. Figure credit by using the amount on line 3 less $60,000. See Table B in the instructions and **attach credit evidence** (see instructions)			15	280,400.
16	Subtract line 15 from line 14			16	1,214,600.
17	Credit for Federal gift taxes on pre-1977 gifts (section 2012)(attach computation)	17			

M706 – Part 1. Tentative MA estate tax

Part 1. Tentative Massachusetts estate tax

Line	Description	Line	Amount
1	Total gross estate (from page 1, line 1 of U.S. Form 706 with a revision date of July 1999 or from Part 5, line 12 of this return)	1	4000000
2	Total allowable deductions (from page 1, line 2 of U.S. Form 706 with a revision date of July 1999 or from Part 6, line 11 of this return)	2	0
3	Subtract line 2 form line 1	3	4000000
4	Adjusted taxable gifts (from page 1, line 4 of U.S. Form 706 with a revision date of July 1999)	4	0
5	Add lines 3 and 4	5	4000000
6	Total gift tax payable (from page 1, line 9 of U.S. Form 706 with a revision date of July 1999)	6	0
7	Credit for state death taxes (from page 1, line 15 of U.S. Form 706 with a revision date of July 1999)	7	280400

Example 1a - M706 if the decedent died in 2022

Part 4. Massachusetts estate tax due

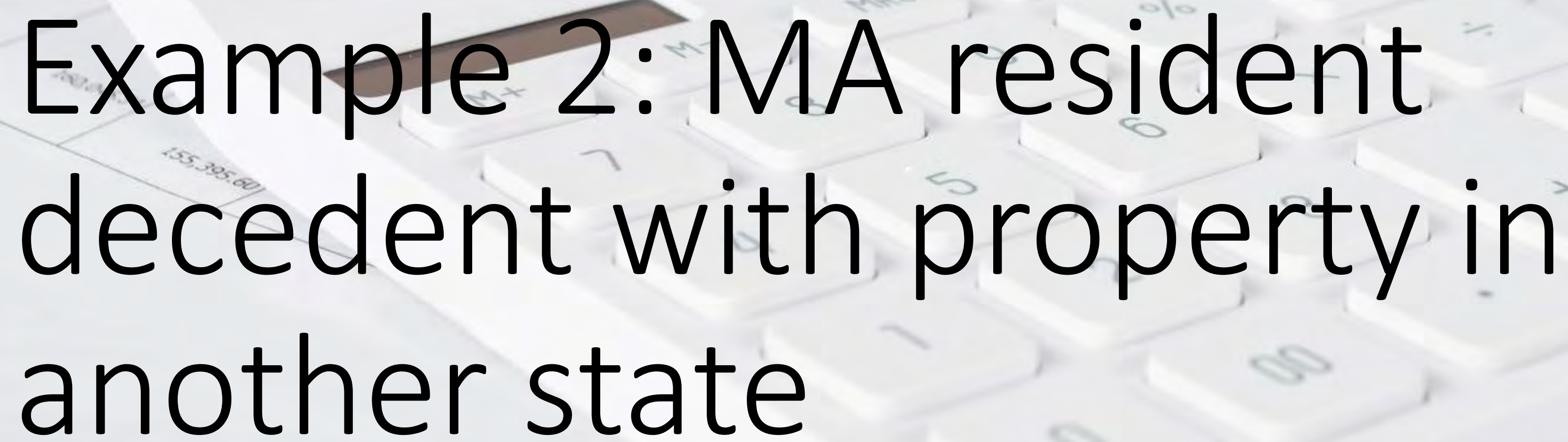
Line	Description	Line	Amount
1	Massachusetts estate tax. Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	1	280400
2	Late file and/or late pay penalties	2	0
3	Interest	3	0
4	Total amount due. Add lines 1 through 3	4	280400
5	Payments made with extension. Attach a copy of Form M-4768	5	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	6	0
7	Total payments. Add lines 5 and 6	7	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter "0" in line 8 and omit line 9	8	0
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	9	280400

Example 1b - M706 if the decedent died in 2024

Part 4. Massachusetts estate tax due

Line	Description		Amount
1	**Massachusetts estate tax**		
	a Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	1a	280400
	b Massachusetts credit for decedents dying on or after January 1, 2023. For decedents dying on or after January 1, 2023, enter the smaller of Part 4, line 1a, or $99,600	1b	99600
	Total tax. Subtract line 1b from line 1a. Not less than 0	1	180800
2	Late file and/or late pay penalties	2	0
3	Interest	3	0
4	Total amount due. Add lines 1 through 3	4	180800
5	Payments made with extension. Attach a copy of Form M-4768	5	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	6	0
7	Total payments. Add lines 5 and 6	7	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter 0 in line 8 and omit line 9	8	
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	9	180800

Example 2: MA resident decedent with property in another state



Example 2: MA Resident with non MA real estate

- MA resident decedent
- Unmarried
- $4,000,000 taxable estate consisting of:
  - $3,000,000 cash and
  - $1,000,000 real estate located outside of MA.
- Assume that decedent paid no estate tax to the state where the real estate is located.

Pre-Dassori

Example 2a

- In this version of the example Decedent died in 2015, prior to Dassori (2016) or the 2023 MA estate tax law change.

- At the time MA took any unused state tax credit.
- The old form would take the greater of:
  - MA's pro rata share of the state tax credit based upon the value of the property in other states vs. the entire taxable estate, and
  - The **state tax credit minus any estate taxes paid to other states**

  As Massachusetts estate tax.
- Effectively this meant that if estate taxes were not paid to another state, that Massachusetts would "sponge up" the entire untaxed credit.

- Credit for state death taxes on pro forma 706 would be $280,400, assuming that the $1M of non-MA real estate was listed on the return.

Pro Forma 1999 federal 706 (including the real estate)

Part 2.—Tax Computation

1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)	1	4,000,000.
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)	2	0.
3	Taxable estate (subtract line 2 from line 1)	3	4,000,000.
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))	4	0.
5	Add lines 3 and 4	5	4,000,000.
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions	6	1,840,800.
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If Line 5 is $10,000,00 or less, skip line 7a and 7b and enter -0- on line 7c — 7a		
b	Subtract $10,000,000 from line 7a — 7b		
c	Enter 5% (.05) of line 7b	7c	0.
8	Total tentative tax (add lines 6 and 7c)	8	1,840,800.
9	Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)	9	0.
10	Gross estate tax (subtract line 9 from line 8)	10	1,840,800.
11	Maximum unified credit (applicable credit amount) against estate tax — 11: 345,800.		
12	Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed $6,000. See page 4 of the instructions.) — 12: 0.		
13	Allowable unified credit (applicable credit amount) (subtract line 12 from line 11)	13	345,800.
14	Subtract line 13 from line 10 (but do not enter less than zero)	14	1,495,000.
15	Credit for state death taxes. Do not enter more than line 14. Figure credit by using the amount on line 3 less $60,000. See Table B in the instructions and **attach credit evidence** (see instructions)	15	280,400.
16	Subtract line 15 from line 14	16	1,214,600.
17	Credit for Federal gift taxes on pre-1977 gifts (section 2012)(attach computation) — 17		

M706 Computation of tax Pre Dassori

Part 2. Computation of tax for estate of Massachusetts resident decedent with property in another state

Line	Description	Line	Amount
1	Total gross estate, wherever situated. Enter the amount from Part 1, line 1	1	4000000
2	Credit for state death taxes. Enter amount from Part 1, line 7	2	280400
3	Estate or inheritance taxes actually paid to other states	3	0
4	Gross value of real estate and tangible personal property in other states	4	1000000
5	Percentage of estate in other states. Divide line 4 by line 1. **Note:** Complete computation to six decimal places.	5	0.250000
6	Prorated credit. Multiply line 2 by line 5.	6	70100
7	Deduction allowable for taxes paid to other states. Enter the smaller of line 3 or line 6	7	0
8	Massachusetts estate tax. Subtract line 7 from line 2. Enter here and in Part 4, line 1.	8	280400

M706 Pre Dassori

Part 4. Massachusetts estate tax due

Line	Description	Amount
1	Massachusetts estate tax. Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	280400
2	Late file and/or late pay penalties	0
3	Interest	0
4	Total amount due. Add lines 1 through 3	280400
5	Payments made with extension. Attach a copy of Form M-4768	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	0
7	Total payments. Add lines 5 and 6	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter "0" in line 8 and omit line 9	0
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	280400

Post Dassori

Dassori v. Comm'r of Revenue
Lawyers Weekly No. 15-002-16 (2016)

- In Dassori, the decedent died a **resident of Massachusetts**, owning an **apartment in France**, through a French entity called a **société civile immobilière (SCI)**. The estate filed a Massachusetts estate tax return showing the apartment as real estate subject to Massachusetts estate tax. It then filed an amended return that **excluded the value of the apartment** from the Massachusetts gross estate and requested a refund in the amount of $176,880. The request for a refund was denied.
- The Court decided that the SCI was an entity like a **nominee trust** which should be disregarded with the decedent being treated as if the real estate were owned directly. It decided in favor of the refund for the estate on summary judgment.
- This case implies that it is **unconstitutional to apply Massachusetts estate tax to a Massachusetts resident's real estate located outside of the Commonwealth**.

- As a result of the Dassori case, many practitioners began to **stop listing out of state real estate on their pro forma 706s** or listing such property with a $0 value.
- This could result in **significant tax savings**. If we exclude the $1,000,000 of real estate from our example, it saves the estate $98,400.
- Massachusetts could no longer sponge up the entire credit, because the non Massachusetts real estate was **not being listed** with a value on the return.

Example 2b: 2017 MA Resident with non MA real estate

- In this version of the example Decedent died in 2017, after Dassori but prior to the 2023 MA estate tax law change.

Once again:

- MA resident decedent
- Unmarried
- $4,000,000 taxable estate consisting of:
  - $3,000,000 cash and
  - $1,000,000 real estate located outside of MA.

- Credit for state death taxes on pro forma 706 would be $182,000, assuming that the $1M of non-MA real estate was not listed on the return.
- Assume that decedent paid no estate tax to the state where the real estate is located.

Pro Forma 1999 federal 706 (excluding the real estate)

Part 2.—Tax Computation

Line	Description	Sub-line	Sub-amount	Line	Amount
1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)			1	3,000,000.
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)			2	0.
3	Taxable estate (subtract line 2 from line 1)			3	3,000,000.
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))			4	0.
5	Add lines 3 and 4			5	3,000,000.
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions			6	1,290,800.
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If Line 5 is $10,000,00 or less, skip line 7a and 7b and enter -0- on line 7c	7a			
b	Subtract $10,000,000 from line 7a	7b			
c	Enter 5% (.05) of line 7b			7c	0.
8	Total tentative tax (add lines 6 and 7c)			8	1,290,800.
9	Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)			9	0.
10	Gross estate tax (subtract line 9 from line 8)			10	1,290,800.
11	Maximum unified credit (applicable credit amount) against estate tax	11	345,800.		
12	Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed $6,000. See page 4 of the instructions.)	12	0.		
13	Allowable unified credit (applicable credit amount) (subtract line 12 from line 11)			13	345,800.
14	Subtract line 13 from line 10 (but do not enter less than zero)			14	945,000.
15	Credit for state death taxes. Do not enter more than line 14. Figure credit by using the amount on line 3 less $60,000. See Table B in the instructions and **attach credit evidence** (see instructions)			15	182,000.
16	Subtract line 15 from line 14			16	763,000.

M706 Computation of tax (excluding the real estate)

Part 1. Tentative Massachusetts estate tax

Line	Description	Line	Amount
1	Total gross estate (from page 1, line 1 of U.S. Form 706 with a revision date of July 1999 or from Part 5, line 12 of this return)	1	3000000
2	Total allowable deductions (from page 1, line 2 of U.S. Form 706 with a revision date of July 1999 or from Part 6, line 11 of this return)	2	0
3	Subtract line 2 form line 1	3	3000000
4	Adjusted taxable gifts (from page 1, line 4 of U.S. Form 706 with a revision date of July 1999)	4	0
5	Add lines 3 and 4	5	3000000
6	Total gift tax payable (from page 1, line 9 of U.S. Form 706 with a revision date of July 1999)	6	0
7	Credit for state death taxes (from page 1, line 15 of U.S. Form 706 with a revision date of July 1999)	7	182000

2017 Decedent (excluding the real estate)

Part 4. Massachusetts estate tax due

Line	Description	Line	Amount
1	Massachusetts estate tax. Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	1	182000
2	Late file and/or late pay penalties	2	0
3	Interest	3	0
4	Total amount due. Add lines 1 through 3	4	182000
5	Payments made with extension. Attach a copy of Form M-4768	5	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	6	0
7	Total payments. Add lines 5 and 6.	7	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter 0 in line 8 and omit line 9	8	0
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	9	182000

2023 Tax Law Change

The Legislature also responded to Dassori in their 2023 tax law change

- The legislature didn't only raise the exemption to $2,000,000 in its 2023 revision to the Massachusetts estate tax.
- It also attempted to address the issues raised by Dassori.
- It no longer tried to collect the full amount of the credit for state death taxes to the extent other states were not taking it.
- It now only sought to collect its proportionate share of the credit.
- However it seemed to prescribe that the proper approach was to include the real estate outside of Massachusetts in the gross estate.

2023 MGL c. 65C sec. 2A

- (a) A tax is hereby imposed upon the transfer of the estate of each person dying on or after January 1, 1997 who, at the time of death, was a resident of the commonwealth. The amount of the tax shall be equal to the credit for state death taxes that would have been allowable to a decedent's estate as computed under section 2011 of the Code, as in effect on December 31, 2000, hereinafter referred to as the "credit''. If the **federal gross estate** of a person includes real or tangible personal property located outside of the commonwealth at the time of death, the tax shall be reduced by an amount equal to the **proportion** of such allowable credit as the value of such real or tangible personal property located outside of the commonwealth bears to the value of the entire **federal gross estate** wherever situated, as determined under section 2011 of the Code, as in effect on December 31, 2000.
- (b) A tax is hereby imposed upon the transfer of real property situated in this Commonwealth and upon tangible personal property having an actual situs in this Commonwealth of every person who at the time of his death was not a resident of this Commonwealth. The amount of this tax is a sum equal to the proportion of the credit which the value of Massachusetts real and tangible personal property taxed in this Commonwealth which qualifies for such credit bears to the value of the decedent's total federal gross estate.
- (c) Notwithstanding any other provision of law, the tax imposed by subsections (a) and (b) shall be computed upon the value of any property subject to a power of appointment which is includible in the federal gross estate, notwithstanding that a tax has been paid thereon pursuant to section fourteen of chapter sixty-five.
- (d) For the purposes of computing the tax imposed by subsections (a) and (b), the provisions of section three shall not apply.
- (e) For the estate of decedents dying on or after January 1, 2003, all references and provisions in this chapter to the Internal Revenue Code or Code, unless the context clearly indicates otherwise, shall be to the Code as in effect on December 31, 2000.
- (f) For the estates of decedents dying on or after January 1, 2023, a **credit** shall be allowed against the tax imposed by subsections (a) and (b) equal to the amount of such tax; provided, however, that the credit shall not exceed $99,600.
- (g) The estates of decedents dying on or after January 1, 2023 shall not be required to pay any tax under subsections (a) and (b) if the value of the federal taxable estate is not more than **$2,000,000**.

Example 2c: 2023 MA Resident with non MA real estate

- In this version of the example the decedent died in 2023, after Dassori and the 2023 MA estate tax law change.

Once again

- MA resident decedent
- Unmarried
- $4,000,000 taxable estate consisting of:
  - $3,000,000 cash and
  - $1,000,000 real estate located outside of MA.

- Credit for state death taxes on pro forma 706 would be $280,400, assuming that the $1M of non-MA real estate was listed on the return.
- Assume that decedent paid no estate tax to the state where the real estate is located.

Example 2c – Pro Rata Including the Real Estate

- Massachusetts is **content with its pro rata share**, and does not seek to sponge up any unused credit.
- However its form seems to expect that the **full value** of the out of state real estate should be listed on the pro forma.
- This will make the **taxable estate larger** because it is augmented by the value of the out of state real estate.
- Presumably, the assumption is that this will be constitutional.
- In our example, this leads to $28,300 **more tax**, even though MA is only seeking to take a pro rata share.

Pro Forma 1999 federal 706 (including the real estate in gross estate)

Part 2.—Tax Computation

No.	Description	Line	Amount	Line	Amount
1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)			1	4,000,000.
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)			2	0.
3	Taxable estate (subtract line 2 from line 1)			3	4,000,000.
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))			4	0.
5	Add lines 3 and 4			5	4,000,000.
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions			6	1,840,800.
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If Line 5 is $10,000,00 or less, skip line 7a and 7b and enter -0- on line 7c	7a			
b	Subtract $10,000,000 from line 7a	7b			
c	Enter 5% (.05) of line 7b			7c	0.
8	Total tentative tax (add lines 6 and 7c)			8	1,840,800.
9	Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)			9	0.
10	Gross estate tax (subtract line 9 from line 8)			10	1,840,800.
11	Maximum unified credit (applicable credit amount) against estate tax	11	345,800.		
12	Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed $6,000. See page 4 of the instructions.)	12	0.		
13	Allowable unified credit (applicable credit amount) (subtract line 12 from line 11)			13	345,800.
14	Subtract line 13 from line 10 (but do not enter less than zero)			14	1,495,000.
15	Credit for state death taxes. Do not enter more than line 14. Figure credit by using the amount on line 3 less $60,000. See Table B in the instructions and **attach credit evidence** (see instructions)			15	280,400.
16	Subtract line 15 from line 14			16	1,214,600.
17	Credit for Federal gift taxes on pre-1977 gifts (section 2012)(attach computation)	17			

M706

Part 2. Computation of tax for estate of Massachusetts resident decedent with property in another state

Line	Description	Line	Amount
1	Total gross estate, wherever situated. Enter the amount from Part 1, line 1	1	4000000
2	Credit for state death taxes. Enter amount from Part 1, line 7	2	280400
3	Reserved for future use	3	
4	Gross value of real estate and tangible personal property in other states	4	1000000
5	Percentage of estate in other states. Divide line 4 by line 1. **Note:** Complete computation to six decimal places.	5	0.250000
6	Prorated credit. Multiply line 2 by line 5.	6	70100
7	Reserved for future use	7	
8	Massachusetts estate tax. Subtract line 6 from line 2. Enter here and in Part 4, line 1a.	8	210300

MA estate tax due (including the real estate in gross estate)

Part 4. Massachusetts estate tax due

Line	Description	Ref	Amount
1	**Massachusetts estate tax**		
	a Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	1a	210300
	b Massachusetts credit for decedents dying on or after January 1, 2023. For decedents dying on or after January 1, 2023, enter the smaller of Part 4, line 1a. or $99,600	1b	99600
	Total tax. Subtract line 1b from line 1a. Not less than 0	1	110700
2	Late file and/or late pay penalties	2	0
3	Interest	3	0
4	Total amount due. Add lines 1 through 3	4	0
5	Payments made with extension. Attach a copy of Form M-4768	5	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	6	0
7	Total payments. Add lines 5 and 6.	7	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter 0 in line 8 and omit line 9	8	0
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	9	110700

Apportionment Issue

- Is it **constitutional** for MA to piggy back on the real estate outside of MA to augment the size of the taxable estate?
- In Estate of Anderson v. Commissioner of Revenue, 222 Westlaw 17588033 (2022) the Tax Court found that this was constitutional.

2024 Tax Law Change

2024 Changes to MA Estate Tax

- Some practitioners continued to file the M706 **excluding** any values for the out of state real estate. Surprisingly the MDOR **accepted** these forms.
- On September 19, 2024 the Legislature made further changes to MGL c. 65 sec. 2A, indicating that the out of state real estate **should be excluded** from the calculation completely.

MGL c. 65C sec. 2A amended 9/19/2024

- (a) A tax is hereby imposed upon the transfer of the estate of each person dying on or after January 1, 1997 who, at the time of death, was a resident of the commonwealth. The amount of the tax shall be equal to the credit for state death taxes that would have been allowable to a decedent's estate as computed under section 2011 of the Code, as in effect on December 31, 2000, hereinafter referred to as the "credit''. If the federal gross estate of a person includes real or tangible personal property located outside of the commonwealth at the time of death, credit shall be determined based upon the value of the federal taxable estate after such estate is reduced by the value of such real or tangible personal property located outside of the commonwealth.
- (b) A tax is hereby imposed upon the transfer of real property situated in this Commonwealth and upon tangible personal property having an actual situs in this Commonwealth of every person who at the time of his death was not a resident of this Commonwealth. The amount of this tax is a sum equal to the proportion of the credit which the value of Massachusetts real and tangible personal property taxed in this Commonwealth which qualifies for such credit bears to the value of the decedent's total federal gross estate.
- (c) Notwithstanding any other provision of law, the tax imposed by subsections (a) and (b) shall be computed upon the value of any property subject to a power of appointment which is includible in the federal gross estate, notwithstanding that a tax has been paid thereon pursuant to section fourteen of chapter sixty-five.
- (d) For the purposes of computing the tax imposed by subsections (a) and (b), the provisions of section three shall not apply.
- (e) For the estate of decedents dying on or after January 1, 2003, all references and provisions in this chapter to the Internal Revenue Code or Code, unless the context clearly indicates otherwise, shall be to the Code as in effect on December 31, 2000.
- (f) For the estates of decedents dying on or after January 1, 2023, a credit shall be allowed against the tax imposed by subsections (a) and (b) equal to the amount of such tax; provided, however, that the credit shall not exceed $99,600.
- (g) The estates of decedents dying on or after January 1, 2023 shall not be required to pay any tax under subsections (a) and (b) if the value of the federal taxable estate is not more than $2,000,000.

Example 2d: 2025 MA Resident with non MA real estate

- In this version of the example the decedent died after Dassori and the 2023 and 2024 MA estate tax law changes.

Once again

- MA resident decedent
- Unmarried
- $4,000,000 taxable estate consisting of:
    - $3,000,000 cash and
    - $1,000,000 real estate located outside of MA.

- Credit for state death taxes on pro forma 706 would be $182,000, assuming that the $1M of non-MA real estate was not listed on the return.
- Assume that decedent paid no estate tax to the state where the real estate is located.

Pro Forma 1999 federal 706 (excluding the real estate)

Part 2.—Tax Computation

Line	Description			Line	Amount
1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)			1	3,000,000.
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)			2	0.
3	Taxable estate (subtract line 2 from line 1)			3	3,000,000.
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))			4	0.
5	Add lines 3 and 4			5	3,000,000.
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions			6	1,290,800.
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If Line 5 is $10,000,00 or less, skip line 7a and 7b and enter -0- on line 7c	7a			
b	Subtract $10,000,000 from line 7a	7b			
c	Enter 5% (.05) of line 7b			7c	0.
8	Total tentative tax (add lines 6 and 7c)			8	1,290,800.
9	Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)			9	0.
10	Gross estate tax (subtract line 9 from line 8)			10	1,290,800.
11	Maximum unified credit (applicable credit amount) against estate tax	11	345,800.		
12	Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed $6,000. See page 4 of the instructions.)	12	0.		
13	Allowable unified credit (applicable credit amount) (subtract line 12 from line 11)			13	345,800.
14	Subtract line 13 from line 10 (but do not enter less than zero)			14	945,000.
15	Credit for state death taxes. Do not enter more than line 14. Figure credit by using the amount on line 3 less $60,000. See Table B in the instructions and **attach credit evidence** (see instructions)			15	182,000.
16	Subtract line 15 from line 14			16	763,000.

M706 Computation of tax (excluding the real estate)

Part 1. Tentative Massachusetts estate tax

1	Total gross estate (from page 1, line 1 of U.S. Form 706 with a revision date of July 1999 or from Part 5, line 12 of this return)	**1**	3000000
2	Total allowable deductions (from page 1, line 2 of U.S. Form 706 with a revision date of July 1999 or from Part 6, line 11 of this return)	**2**	0
3	Subtract line 2 form line 1	**3**	3000000
4	Adjusted taxable gifts (from page 1, line 4 of U.S. Form 706 with a revision date of July 1999)	**4**	0
5	Add lines 3 and 4	**5**	3000000
6	Total gift tax payable (from page 1, line 9 of U.S. Form 706 with a revision date of July 1999)	**6**	0
7	Credit for state death taxes (from page 1, line 15 of U.S. Form 706 with a revision date of July 1999)	**7**	182000

2025 Decedent (excluding the real estate)

Part 4. Massachusetts estate tax due

Line	Description	Ref	Amount
1	**Massachusetts estate tax**		
	a Enter the amount from Part 1, line 7; Part 2, line 8; or Part 3, line 5, whichever applies	1a	182000
	b Massachusetts credit for decedents dying on or after January 1, 2023. For decedents dying on or after January 1, 2023, enter the smaller of Part 4, line 1a, or $99,600	1b	99600
	Total tax. Subtract line 1b from line 1a. Not less than 0	1	82400
2	Late file and/or late pay penalties	2	0
3	Interest	3	0
4	Total amount due. Add lines 1 through 3	4	82400
5	Payments made with extension. Attach a copy of Form M-4768	5	0
6	Other amounts previously paid. Attach copies of any prior filings with payment dates and amounts	6	0
7	Total payments. Add lines 5 and 6	7	0
8	Overpayment. If line 4 is smaller than line 7, subtract line 4 from line 7. This is the amount of your refund. If line 4 is larger than line 7, omit line 8 and complete line 9. If lines 4 and 7 are equal, enter 0 in line 8 and omit line 9	8	
9	Balance due. If line 4 is larger than line 7, subtract line 7 from line 4. This is the amount of the payment due at time of filing	9	82400

“Federal Taxable Estate”

- The new tax law uses the words **“federal taxable estate,”** which the 2003 law did not.
- Does this mean that potentially the tax is only imposed upon the **federal taxable estate** instead of the Massachusetts taxable estate?
- For example, if the estate of a decedent included a **MA QTIP from a deceased spouse** could it be implied that the MA QTIP could be excluded from the taxable estate?
- Probably not.

CASE LAW SJC

In the Matter of the Estate of Slavin 492 Mass. 551 (2023)

- **CASE SAYS: The appointment of a Voluntary PR counted as a prior appointment for purposes of the exception to the three year time limit for a Late and Limited Probate.**
- **Background**: Patricia Slavin was **murdered** on May 10, 2016.
- On August 5, 2016, the decedent's daughter **Kathleen** Slavin filed a Voluntary Administration and became **voluntary personal representative** of the estate.
- Kathleen later decided to pursue a **wrongful death claim** on behalf of the estate. The Voluntary Administration was insufficient to grant her the authority to pursue this claim.
- On September 25, 2020 Kathleen filed a **Petition for Formal Probate**. This was more than 3 years after the death.
- MGL c. 190B, sec. 3-108 indicates that no informal or formal probate proceeding may be commenced more than three years after a decedent's death. Otherwise a **Late and Limited Probate** is required.
- There are several **exceptions** to this time limit, including the commencement of "appointment proceedings related to an estate in which there has been a **prior appointment**."
- The Probate and Family Court judge dismissed the Petition for Formal Probate as **untimely**, on the basis that the Voluntary Administration should not be considered a prior appointment.
- The **SJC** allowed an application for direct appellate review.

In the Matter of the Estate of Slavin

- **Discussion**: The SJC **concluded** that the Petitioner's status as a **voluntary personal representative** constituted a **"prior appointment**" within the meaning of the exception to the three year time limit.
- The **usual and accepted meaning** of appointment would mean "the choice or designation for a job or duty" and this would seem to include the position of a voluntary personal representative with the duty of administering a decedent's small estate.
- The voluntary personal representative has virtually **full authority** to administer the decedent's small estate.
- The language of 3-108's exception **does not specify** that the prior appointment must be as a full personal representative.
- While the **Procedural Guide** published by the administrative office of the Probate and Family Court indicates that the authority of a Voluntary PR is "limited by law and does not result in an official appointment by the court," this is in conflict with the **plain meaning** of the meaning of appointment in the statute.
- Moreover, inclusion of a Voluntary PR appointment as an appointment is consistent with the purpose of establishing a **basic limitation period**.
- It is also consistent with the intent to make the MUPC **flexible**. The MUPC directs that its provisions shall be liberally construed and applied to promote its underlying purposes and policies.
- Therefore, the Petitioner's Petition for formal appointment was timely. **Judgment reversed**, and remanded.

In the Matter of the Estate of Jablonski
492 Mass. 687 (2023)

- **CASE SAYS: Testatrix's intent controlled what happens to a pet trust when it failed for lack of beneficiaries.**
- **Background**: Theresa Jablonski executed a Will on August 13, 2013 that left her entire estate in testamentary trust for her **cocker spaniel**, Licorice, as well as any other **pets** owned by her.
- The testamentary trust indicated that **after the death of all of the beneficiaries** of the trust, the Trustees then retained the power and authority to **designate a charity** to receive the remaining trust property.
- On May 24, 2019 **Theresa passed away** at age 89. She did not have any **pets** at the time.
- Her **next of kin** were her nieces and nephews: Joseph, Paul, Sally, and Ann. Ann was named as **Personal Representative** of the Will.
- On June 19, 2019, Ann filed a **Petition** to probate the Will and be appointed as Personal Representative.
- Joseph, Paul and Sally **objected** to the Petition, on the basis that the only bequest in the Will had **lapsed** because Licorice had predeceased Theresa and there were no other pets.

In the Matter of the Estate of Jablonski

- The Judge granted partial summary judgment to Ann's motion for Summary Judgment, in favor of the validity of the charitable remainder provision.
- The case was transferred to the SJC on its own motion.
- **Discussion**: MGL c. 203E, sec. 408 governs the requirement for a valid pet trust under MA law.
- Because there were no pets at the time of Theresa's death, there were no beneficiaries of the testamentary trust and the **trust lapsed**.
- The Will did not demonstrate a "**clear intent**" that the estate should be awarded to a charity in the event the trust lapses. It **only** indicates that the Trustee should have the power to designate a charity **after the death of all beneficiaries** of the trust.
- There is a genuine issue of fact as to what Theresa's **intention** was. The award of **summary judgment** was improper.
- The SJC therefore **vacated** the decree, and remanded the matter for further evidence.
- If it was found that the charitable provision was inapplicable, the estate would pass as **intestate property**.

<u>Gibney v. Hossack</u>
493 Mass. 767 (2024)

- **CASE SAYS: The anti lapse statue did not apply when the Testatrix devised property to her mother "if she survives me."**
- **Background:** In March of 2016 Heather Hossack executed a Will.
- She was single but had a significant other, Donald Etchison.
- She had a brother, John Hossack.
- Her father was dead but her mother Ethel Wyman was alive at the time.
- The Will gave
  - **Her "Baird accounts and U.S. Trust accounts to her mother Ethel "<u>if she survives me</u>**" and
  - "Fidelity accounts" to her brother John "if he survives me."
  - The Will indicated that no beneficiary shall be considered to have survived her unless the beneficiary survived for at least 90 days.
- The Will left her tangible personal property and real property to her significant other, Donald Etchson "**<u>per stirpes</u>**."

<u>Gibney v. Hossack</u>

- Her neighbor, Thomas Gibney, was the devisee of the residuary estate "**<u>per stirpes</u>**."
  - Gibney was also her primary health care agent under her health care proxy.
  - Gibney was named as Personal Representative.
- The mother Wyman predeceased Heather.
- In March of 2019, Heather died.
- The Will was admitted to probate.
- Counsel for the estate informed John that because Wyman did not survive Heather, the **U.S. Trust accounts** would fall to the **residuary estate** and go to Gibney.
- John challenged, contending that the **<u>anti-lapse statute</u>** required that the failed devise fall to him.
- **Discussion**: The anti-lapse statute, MGL c. 190B, sec 2-601, provides that "if a devisee who is . . . a **lineal descendant of a grandparent** [of the testator]. . . fails to survive the testator, . . . The **issue** of the deceased devisee who survive the testator take in place of the deceased devisee."
- So the question is, did Heather intend by the line "**if she survives me**" intend to disinherit her brother John of the U.S. Trust accounts if her mother Wyman predeceased her?

Gibney v. Hossack

- The language of the Will indicates Heather's intent:
  - The Will states that Wyman would only receive the U.S. Trust accounts "**if she survives me**."
    - This evidences a **desire to avoid the anti-lapse statute**, since it plainly conditions the devise upon whether Wyman was living.
  - The language of the Will further indicates that a devisee is only considered to have survived if the devisee **survives Heather by 90 days**.
  - The devises to Wyman and John are conditioned by "if [he or she] "survives me" v. devises to Gibney and Etchison being made "**per stirpes**."
- **Summary judgment was affirmed**, allowing the U.S. Trust accounts to pass to Gibney as part of the residue of the estate.

Furnas v. Cirone
493 Mass. 57 (2024)

- **CASE SAYS: The loss of a joint tenant's right to use the property broke a joint tenancy.**
- **Background:** Anthony Cirone and Jane Furnas owned a house together as **joint tenants**.
- In December of 2016, Furnas filed a **Petition to Partition** the property pursuant to MGL c. 241, sec. 1 with the **Probate Court**.
- On August 9, 2018, Cirone and Furnas presented a **negotiated agreement** to the probate court, which was made into a **Decree**.
- Under the Agreement:
  - Cirone would **remove his personal items** from the home by September 30, 2018,
  - Cirone would pay to Furnas money for **half the mortgage**, and Furnas would keep the mortgage current and would either:
    - **Remove** Cirone from the mortgage by September 1, 2020, or
    - List the property for **sale** by June 1, 2020 with the proceeds being split equally.
- On June 4, 2020, **Cirone died**.

Furnas v. Cirone
493 Mass. 57 (2024)

- Furnas argued that Cirone's death meant that she should receive the **entire property**, as surviving joint tenant.
- The Judge **denied** Cirone's motion.
- **Analysis:** The **Agreement** severed the joint tenancy.
- A joint tenancy depends on the existence of the four unities: interest, title, time, and possession.
  - **Unity of possession** was destroyed by the Agreement because Cirone could no longer use the entire property. He was required to remove his **personal items** from the property.
- This case is **different** from one in which a Petition for Partition was completed, because it was ultimately resolved by an **Agreement** and not a partition.
- The Probate Court has **jurisdiction** to enforce the Agreement and did not need to resort to its general equity powers.
  - The Probate Court has jurisdiction because the **Petition** was brought in the probate court.
  - Probate courts and the land court have **concurrent jurisdiction** of all petitions for partition.
  - As the Decree was entered **prior** to Cirone's death, his ownership interest **passed to his estate**. The estate was thereafter entitled to commence an action to enforce to decree.

CASE LAW
Mass App Court

Schwalm v. Schwalm
102 Mass. App. Ct. 825 (2023)

- **CASE SAYS: The common law duty of Trustee to keep trust records is separate from the duty to account.**
- **Background: William** Schwalm was married to **Karen** Schwalm. He also had three children from a **prior marriage**: Gregory, Paul and Peter.
- On December 29, 2019, William died. His trust was held for the **sole benefit** of Karen, with the three children as **remainder beneficiaries**. The **Trustee** of the trust was Karen.
- The children asked for an accounting and other documentation related to the trust.
- Karen did not provide the documents, and the children filed an equity complaint to compel the information.
- Karen filed a motion to dismiss the complaint, which was allowed. The matter was appealed.
- **Discussion:** MGL c. 203E, sec. 813(c) provides that a Trustee has a **duty to account to qualified beneficiaries**.

Schwalm v. Schwalm

- In the Matter of the Colecchia Family Irrevocable Trust indicates that a person becomes a "qualified beneficiary" on the event that occurs to trigger the beneficiary's entitlement under the trust.
- Since the three children are not currently beneficiaries of the trust, they are **not qualified beneficiaries.**
- Aside from the MUTC, there are also **common law duties** that are applicable to Trustees.
  - One of these is that a Trustee is **required to keep** clear and accurate **records** with respect to the administration of a trust from the trust's inception.
  - Another duty is the duty of a Trustee to account.
- These two duties are **separate**.
- The common law duty to account does not require a Trustee to account to **nonqualified beneficiaries.**
- So the Trustee could comply with the **first duty** by keeping records even if she did not provide them to anyone.
- And the Trustee could comply with the **second duty**, even if she did not give accountings to nonqualified beneficiaries like the children as long as she accounted to qualified beneficiaries like herself.
- This is what the Trustee did. **Judgment affirmed.**

Matter of Estate of Khan
102 Mass. App. Ct. 1106 (2023)

- **CASE SAYS: Witnesses to a Will needed to either witness the Testator's signature or witness the Testator's actual acknowledgement of his signature.**
- **Background**: On April 16, **2011**, Ronald Khan signed a **will** leaving his entire estate to his grandson attorney **Kristopher** Aleksov, but the will was **not witnessed or notarized** at the time.
- On January 7, **2014**, Ronald was in his **kitchen** talking to his friend Robert Barnat and one of his tenants Linda Reed.
- Kristopher came into the room and asked Barnat and Reed to sign the 2011 Will as its **witnesses**.
- He would **not allow Reed to see** the rest of the document, and **threatened** her with losing her apartment if she would not sign.
- Both Barnat and Reed **signed** the Will. It was **not notarized**.
- Ronald was in the room but he did **not acknowledge** that the document was his will, nor did he acknowledge his signature.
- Ronald **died** on May 3, 2019. Kristopher attempted to probate the 2011 Will.

Matter of Estate of Khan
102 Mass. App. Ct. 1106 (2023)

- After a trial, the Judge disallowed the 2011 Will (and also a 2019 Will provided by Kristopher's mother) and declared that Ronald died **intestate**. Kristopher appealed.
- **Discussion**: MGL c. 190B, sec. 3-406(a) provides that in order to be valid a non-self proved will must be: (1) in **writing**, (2) **signed** by the testator or at the testator's direction, and (3) signed by at least 2 individuals who either **witnessed** (a) the signing of the will or (b) the testator's **acknowledgment** of the Will.
- In this case, even though Ronald remained in the kitchen he **never expressly acknowledged** his signature on the will. He played "little or no role" in the witnessing of the Will. The requirements of 3-406(a) were unmet.
- Accordingly, the judgment to disallow the 2011 Will was **affirmed**.

Jones v. Jones
103 Mass. App. Ct. 223 (2023)

- **CASE SAYS: A mandatory distribution to a daughter from a trust was held to be a marital interest in divorce even if the Trustee could postpone the distribution**
- **Background**: In August 1998 a couple was married and later had two children.
- During the marriage, the wife's mother in Michigan made significant financial gifts to the family which allowed them to maintain a lavish lifestyle.
- The mother created and funded a **Michigan irrevocable trust**, of which the wife is the sole beneficiary.
  - The Trustee could make discretionary distributions of income and principal that the Trustee in its "sole and absolute discretion, considers to be necessary for the [wife's] best interest and welfare."
  - The Trust had a spendthrift provision.
  - It provided for a **mandatory distribution of its corpus upon the mother's death**.
  - The Trust had a "**postponement of distribution**" provision, which authorized the Trustee to indefinitely delay any required distribution if there is a compelling reason.
- The couple divorced in Massachusetts.
- Was the wife's interest in the trust a marital asset?

Jones v. Jones
103 Mass. App. Ct. 223 (2023)

- **Discussion**: The Appeals Court found that the interest was a **marital interest**.
- Even though the outright distribution could be postponed, the Trustee **could not divest** the wife of her interest.
- Thus the interest was sufficiently fixed and vested to constitute a marital asset.
- The Appeals Court therefore affirmed the trial court's decision to **include the wife's trust interest** in the overall value but assigning that interest to her and requiring her to make equalization payments to the husband over time from other assets that were assigned to her.

Birkenfeld v. Birkenfeld
103 Mass. App. Ct. 628 (2023)

- **CASE SAYS: Standing to exercise the common law right to object to the appointment of a PR could only be exercised by someone with a legal interest in the estate.**
- **Background**: **Ronald** Birkenfeld was married to **Pamela** Birkenfeld.
- He had three children from his prior marriage including his son, **Bradley** Birkenfeld, and a daughter from a prior relationship.
- On October 25, 2007, Ronald executed a **Will** giving his tangible personal property to Pamela and the remainder to a revocable trust.
- Pamela was named as **Personal Representative** of the Will.
- The Will explicitly **excluded** Ronald's children.
- On December 25, 2020, Ronald **died**.
- The sole beneficiary of Ronald's revocable trust was Pamela during her lifetime.

Birkenfeld v. Birkenfeld

- Bradley did **not challenge** the Will, but filed a Petition seeking to have his **brother** appointed as Personal Representative of the Will. Pamela objected and filed a **counter petition**.
- Judge Moriarty found that Bradley had **no standing** to object to the appointment of Pamela as PR, because he was **not an interested party** in the estate. Bradley appealed.
- **Discussion**: Standing to challenge the **allowance** of a will is **separate** from standing to bring a petition concerning the **appointment** of a Personal Representative.
- MGL c. 190B, sec. 3-414 states that a challenge to a **will** may be "commenced by an interested person."
- The MUPC is **silent** with regard to who may bring a petition concerning the **appointment** of a personal representative.

Birkenfeld v. Birkenfeld

- **Discussion:** Appeals court found that in the absence of statutory language on the issue, the **common law** requirement is for a person to have "a **legal interest** in the decedent's estate" in order to have **standing** to challenge the **appointment** of a Personal Representative.
- Bradley does **not** have this standing.
  - The Will explicitly **excludes** Bradley as a beneficiary of the estate.
  - Bradley's contingent remainder interest in the **trust** is insufficient to confer standing.
  - Bradley can **only** receive property from the trust upon Pamela's death and at her discretion at the time.
- The order allowing the motion to dismiss Bradley's petition was **affirmed**.

<u>In the Matter of the Estate of Olson</u>
103 Mass. App. Ct. 842 (2024)

- **CASE SAYS: A will signed by a Conservator in his own name in good faith as conservator for a protected person without court authorization could be proven based upon extrinsic evidence of Testatrix's intent.**
- **Background:** In 2017 a Conservator was appointed for Jean Olson.
- The decree gave "all powers" to the Conservator and directed that a financial and **estate plan** be established.
  - The Conservator concluded based upon legal advice that this decree authorized him to execute a Will for Olson **<u>without a Petition</u>** for an Estate Plan or the **appointment of a GAL**.
- Conservator hired an attorney to **draft a Will** for Olson.
  - Olson expressed her desire to the Conservator and attorney that she wanted to make major bequests to **Boston Children's Hospital** and the **Masonic Lodge** in Brockton.
  - The Conservator **met with Olson** to go over the draft.

In the Matter of the Estate of Olson
103 Mass. App. Ct. 842 (2024)

- On October 23, 2018 the Will was executed by the Conservator and **signed by the Conservator in his own name as Olson's conservator**.
- The Will gave Olson's property 25% to Boston Children's Hospital, 25% to the Masonic Lodge, 11% to each of nephews, and 3% to each of her nieces in law.
- On May 6, 2019, **Olson died**.
- The nephews argued that the Will was not valid because it was **not signed by Olson or in Olson's name**.
- **Summary Judgment** was granted for the objectors.

In the Matter of the Estate of Olson

MGL c. 190B, Section 2-502. [Execution of Wills.]

(a) **Except as provided in subsection (b)** and in sections 2--506 and 2--513, a will shall be:

(1) in **writing**;

(2) **signed by the testator or in the testator's name** by some other individual in the testator's conscious presence and by the testator's direction; and

(3) signed by at least 2 individuals, each of whom **witnessed** either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

(b) Intent that the document constitute the testator's will can be established by **extrinsic evidence**.

In the Matter of the Estate of Olson

- **Analysis:** The nephews had argued that the Will was not a valid will under MGL c. 190B, sec. 2-502 (a) because it was **not signed by Olson nor signed in her name**.
- The Conservator argued that it should be allowed to use **extrinsic evidence** to establish that it was Olson's intent to establish the Will, under the **exception under subsection (b)**.
- The Appellate Court found that if read literally subsection (b) would lead to the illogical result of **nullifying** the requirements that a will be **signed and witnessed**.
- In addition, the Conservator did not file a **Petition** for an Estate Plan or have a **GAL** appointed under MGL c. 190B, sec 5-407(d)(7).

In the Matter of the Estate of Olson

- Nevertheless, given the **context** of this specific case:
  - Conservator has no **direct financial interest** in the matter
  - He acted upon good faith that the **Decree** authorized him to execute a Will, and
  - the conservator could have filed a **Petition** for an Estate Plan,

the Court decided to **vacate** the decree of dismissal and allow the admission of **extrinsic evidence** in this specific case to determine whether the Will complies with Olson's testamentary intent.

Verdura v. DelGrosso
103 Mass. App. Ct. 1105 (2023)

- **CASE SAYS: Once it was identified that an error had been made on a deed, the statute of limitations started to run.**
- **Background:** A father created a trust for the benefit of his children Clorinda and Benedict. It was funded with a house.
- After the father died, the siblings signed an **agreement** in 1997 to transfer the house out of the trust and outlined how they would use and maintain the property.
- They **mistakenly** transferred the property to themselves as **joint tenants** instead of as tenants in common.
- Under the 1997 Agreement, sister Clorinda lived on the first floor and brother Benedict and his wife **Carmela** lived on the second floor.
- In 1999 **Benedict died** and his ownership passed to sister **Clorinda** as joint tenants. Wife Carmela continued to live on the second floor consistent with the 1997 Agreement.

Verdura v. DelGrosso

- In 2013 Sister Clorinda transferred her interest to her daughter Nancy.
- **At the end of the year**, it was **identified that there was no deed** transferring Benedict's interest to Wife Carmela. Wife Carmela established an irrevocable trust and attempted to transfer her interest in the real estate to it.
- After sister Clorinda died, wife Carmela and the Trustee of her Trust filed a lawsuit seeking reformation of the original deed from joint tenants to tenants in common consistent with the 1997 Agreement.
- **Discussion:** The court held that the **statute of limitations** had passed and allowed the defendant's motion for summary judgment.
- The court held that the parties knew at the end of 2013 that the property was transferred as joint tenants rather than tenants in common.
- At that time the parties knew that the 1997 Agreement had been breached and therefore the statute of limitations applies to prevent wife Carmela and the Trustee from forcing the reformation.

Verrill

Anya F. Endsley

Partner

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Anya truly enjoys working with individuals and families, and brings her wealth of experience to bear on each unique situation.

Anya is the Vice Chair of Verrill's Private Clients & Fiduciary Services Group. She focuses her practice in all aspects of estate planning, probate administration and trust administration, and counsels clients on tax planning, sophisticated wealth transfer strategies and charitable giving. She is also skilled at planning for shared family real estate and business succession planning.

Before joining Verrill, Anya practiced Trusts and Estates in upstate New York, following a clerkship as part of the Central Staff at the New York State Court of Appeals. Anya also draws on her tax background, having worked as a corporate tax attorney in the New York City office of an international law firm after graduating from law school.

Anya lives in Portland with her husband and four children, and when she is not in the office, she enjoys spending time with her family exploring the beautiful State of Maine, running, creating art, and baking.

Education

- Benjamin N. Cardozo School of Law (J.D., *cum laude*)
  - Order of the Coif
- University of Texas at Austin (B.A., *magna cum laude*)

Clerkships

- New York State Court of Appeals

Bar Admissions

- New York
- Maine

Services/Industries

- Private Clients & Fiduciary Services

Memberships and Professional Associations

- Trusts and Estates Section, New York State Bar Association
- Maine State Bar Association
- Maine Estate Planning Council
- Participant, New England Fellows Institute of the American College of Trust and Estate Counsel (Class I)

Community Involvement

- Board of Directors, Maine Estate Planning Council (2022-present)
- Past President, The Telling Room (President 2021-2023; Vice President 2019-2021; Board Member 2017-2023)

Honors

- Listed in *The Best Lawyers in America: Ones to Watch©* under Trusts and Estates in Portland, Maine

ACTEC 2024 New England Regional Meeting

Maine Law Update

By Anya F. Endsley, Partner, Verrill

Title and Description:

Maine Law Update: Navigating Recent Developments in Estate and Trust Law

This session will provide an update on some of the key developments in Maine law that impact estate and trust planning. Specifically, the topics covered will include the current Maine estate tax laws including considerations for nonresidents owning property in the state, as well as the income taxation of resident and nonresident trusts. Time permitting, the session will touch on the key elements of the Maine Uniform Trust Decanting Act, passed in 2021, and implications for those managing trusts in the region.

Outline:

I. **Maine Estate Tax Update**
   a. **Estate Tax Exemption:**
      i. The 2024 Maine estate tax exemption is $6.8 million per person
      ii. The 2025 estate tax exemption won't be known until likely late January 2025
      iii. Maine does not have portability
      iv. Maine has no gift tax, but gifts within the one-year period ending on the date of death (not the prior calendar year) are included in the Maine taxable estate (36 M.R.S. § 4102(7))
      v. Maine elective property (i.e., property held in a Maine QTIP for the benefit of the decedent) is included in the Maine taxable estate
      vi. Maine QTIP property reduces the Maine taxable estate

   b. **Estate Tax Rates:**
      i. The Maine estate tax rate is a graduated rate and is only applied to amounts in excess of the exemption
      ii. The rates are set forth in Table A in the instructions to the Maine estate tax return (Form 706ME).
      iii. If Maine taxable estate is:

More than	But not more than	Subtract from Maine taxable estate	Multiply result by	Add the following
$0	$6,800,000	$0	0%	$0
$6,800,000	$9,800,000	$6,800,000	8%	$0
$9,800,000	$12,800,000	$9,800,000	10%	$240,000
$12,800,000		$12,800,000	12%	$540,000

c. **Maine Elective Property and Maine QTIP Property**
   i. Maine allows a separate Maine QTIP election to be made for a "gap estate" where the total estate is less than or equal to the federal estate tax exemption
   ii. If a decedent is predeceased by a spouse whose estate elected a deduction for a Maine QTIP, that property is included in the value of the estate of the surviving spouse for state estate tax purposes
   iii. *Planning opportunity*: If a Maine QTIP is created for a surviving spouse and the surviving spouse subsequently moves to another state, the Maine QTIP is not taxable in Maine when the surviving spouse dies unless Maine property is held in the Maine QTIP

d. **Taxation of Maine residents**
   i. Maine residents are taxed on all real and tangible personal property located in Maine, as well as intangible personal property wherever situated
   ii. Real and tangible personal property outside of Maine is not subject to Maine estate tax

e. **Taxation of Nonresidents**

i. Filing requirement: The estate of a nonresident decedent must file a Form 706ME if –

1. The decedent owned property in Maine and a federal estate tax return is required to be filed
2. The decedent owned property in Maine and the decedent's gross estate, wherever located, exceeds the Maine exemption amount (currently $6.8 million)

ii. Taxation of Real Estate owned by Nonresidents

1. If Maine real estate or TPP is owned by a "pass-through entity" (i.e., a trust, S corp, partnership) and included in the estate of a nonresident, the entity may be disregarded and the property treated as Maine situs property that is personally owned by the decedent in the following circumstances:
    a. If the entity does not actively carry on a business for the purpose of profit or gain
    b. The ownership of the property in the entity was not for a valid business purpose (e.g., Family Limited Partnership)
    c. The property was acquired by other than a bona fide sale for full and adequate consideration and the decedent retained a power with respect to or interest in the property that would bring the real or tangible personal property located in Maine within the decedent's adjusted federal taxable estate
2. With respect to b., above, the Assessor will determine whether the transfer to the entity was for a valid business purpose by looking at the economic realities of the transfer. Tax avoidance is not considered a valid business purpose.
3. *Planning tip*: beware of transfers that may be subject to 2036(a). If real property is gifted and the decedent retains any interest or occupies the property even through a fair market rental agreement, it may be subject to a challenge by Maine Revenue Services

iii. Calculation of Tax

1. The value of all real and tangible personal property located in Maine is divided by the "apportionable base" (federal gross estate, plus any Maine elective property and gifts made within

1 year of death) to determine the “nonresident apportionment factor”

2. Gross Maine estate tax is then determined based on the total taxable estate as shown on the 706, and then multiplied by the nonresident apportionment factor to determine the net Maine estate tax
3. So, even if the Maine property does not exceed $6.8 million, there will be some estate tax to pay in ME if the total estate exceeds $6.8 million (assuming no marital or charitable deductions)

iv. <u>Domicile</u>

1. Maine courts define domicile under common-law as the place (A) where a person resides, and (B) where that person intends to remain and, whenever absent, intends to return.
2. Domicile is a question of fact and includes the same factors as determining income tax domicile

f. **Filing requirements**

i. <u>Form 706ME</u>: Form 706ME with required attachments is due within 9 months of death. The filed Form 706, if one is required, must be attached to the return. If no federal Form 706 is required, a pro forma federal Form 706 with all attachments must be attached to the Form 706ME

ii. <u>Extension of time to file</u>:

1. If a federal extension to file has been granted, a Maine extension to file is automatically granted up to the federal extension period, and up to 8 months may be granted by written request
2. If no federal return is being filed and no extension requested, the taxpayer can obtain an extension of up to 8 months by written request

iii. <u>Extension of time to pay</u>: Payment is due within 9 months of date of death, unless the Assessor grants an extension of time to pay based on a request showing the estate is unable to pay, and may require a bond

g. **Lien and Discharge of Estate Tax Lien**

  i. Estate tax lien attaches automatically upon death, except lien does not attach to:

    1. any property transferring by right of survivorship to a surviving spouse as joint tenant
    2. to any property after the property has been sold or disposed of for value by the personal representative of the estate, trustee of a trust or surviving joint tenant

  ii. The lien is automatically released by operation of law 10 years after the decedent's date of death

  iii. Discharge of Estate Tax Lien:

    1. A Certificate of Discharge of Estate Tax Lien must be filed with Maine Revenue Services to release the statutory Maine estate tax lien under 36 M.R.S. § 4112. The Certificate of Discharge gets filed along with the Form 706ME
    2. If no Form 706ME is required to be filed, a Statement 700-SOV along with a Certificate of Discharge of Estate Tax Lien must be filed with MRS stating that no estate tax is due to release the lien
    3. Escrow agreements: the Assessor may allow an estate to establish an escrow account in favor of MRS in lieu of a tax bond typically required by the probate court to secure the estimated ME estate tax liability or to issue a Certificate of Discharge of Estate Tax lien so the property may be sold

II. Income Taxation of Trusts in Maine

a. Maine imposes a tax on the income of estates or trusts. The tax rates are graduated and are equal to the individual income tax rates. For tax years beginning after 2015, the rates are 5.8%, 6.75% and 7.15%.

b. The fiduciary or trustee of a trust or estate must file a Maine income tax return (Form 1041ME) if the estate or trust has any:

  i. Maine tax additions [*credits previously used to reduce ME tax that are subject to recapture*];

  ii. Maine taxable income; or

  iii. Gross income of $10,000 or more for the taxable year (resident estate or trust) or both distributable net income derived from or connected with sources in this state and gross income of $10,000 or more for the taxable year (nonresident estate or trust)

c. Resident estate or trust
    i. An estate of a decedent who at death was domiciled in Maine
    ii. Testamentary trust created under a will of a decedent who at death was domiciled in Maine
    iii. Irrevocable inter vivos trust if trust was created by or consisted of property of a person domiciled in Maine at time it was funded
    iv. Revocable trust is a resident trust if grantor is domiciled in Maine when trust created. A revocable trust ceases to be a resident trust when the grantor becomes domiciled elsewhere

d. Nonresident estate or trust
    i. Estate or testamentary trust created under a will of a decedent who was not domiciled in Maine at time of death is a nonresident estate/trust
    ii. Irrevocable inter vivos trust if grantor was not domiciled in Maine when funded
    iii. Nonresident revocable trust becomes a resident revocable trust when grantor establishes domicile in Maine
    iv. *Planning opportunity:* Creates opportunity to migrate nonresident irrevocable trust to Maine with a Maine trustee to avoid state level income tax

III. **Maine Uniform Trust Decanting Act** – effective 10/1/21 (note: of the New England states, the Uniform Act has been recently enacted in VT and CT, and has been introduced in MA)

a. **Overview – Uniform Act adopted in full**
    i. Act applies to a trust that has its "principal place of administration in Maine." *Note*: This is not the same standard as Maine resident trust for income tax purposes. Principal place of administration may be changed to ME to take advantage of the Act
    ii. Fiduciary duty – the decanting power is in furtherance of carrying out Trustees fiduciary duties
    iii. Discretionary - Decanting is solely discretionary on the part of the Trustee – no requirement to decant or inform beneficiaries the option

b. **Mechanics**
    i. 60-day advance notice required to be given to –
        1. Settlor
        2. qualified beneficiaries
        3. holders of presently exercisable power of appointment

4. persons who have current right to remove or replace trustees
5. other trustees of first trust
6. trustees of second trust
7. AG if charitable beneficiaries

ii. The notice must specify the manner of decanting, effective date, and include copies of first and second trust instrument. Notice can be waived

iii. Beneficiary consent not required

iv. A person entitled to notice can challenge in Court

v. Court approval required to (i) increase trustee compensation and (ii) modify certain rights to remove and replace fiduciary

vi. Decanting instrument: in a record signed by fiduciary, and must identify first and second trusts, and property of first trust being distributed to second trust and, if any, property remaining in first trust

c. **Decanting power**

i. **Section 1210 – decanting under expanded distributive discretion**

1. A trustee with a broad/sole discretion standard can decant in multiple ways, as long as it is consistent with the trustee's fiduciary duties. Theory is that the trustee can decide whether or not to make distributions of all or any amount now, so can exercise power to decant to a trust with more limitations – e.g., can remove a beneficiary.
2. Limitations: New current or remainder/successor beneficiaries cannot be added, and cannot reduce or eliminate a vested interest
    a. Vested interest: right to mandatory income, withdrawal right, holder of a currently exercisable GPOA, a right to receive an ascertainable part of the trust upon termination
3. Powers of appointment: A second trust may -
    a. retain a POA in first trust
    b. omit a power of appointment (other than presently exercisable GPOA)
    c. create or modify a POA if holder is a current beneficiary of first trust and the trustee has broad discretion to distribute principal to the beneficiary

d. create or modify a POA held by a presumptive remainder / successor beneficiary of the first trust, but exercise of POA may only take effect after the holder becomes (or would have become if living) a current beneficiary

ii. **Section 1211 – decanting under limited distributive discretion**

1. More limited decanting power if the trustee is limited to making distributions pursuant to an ascertainable standard
2. Beneficial interests in 2nd trust must be "substantially similar" to the interests in the 1st trust

iii. **Section 1212** – trust for beneficiary with a disability – Act allows the ability to decant to a SNT to limit the distribution rights of a beneficiary with disabilities to allow for qualification for public benefits

iv. **Section 1213** – wholly charitable trusts not covered by the Act, but if a trust has charitable interests, certain provisions protect those interests

v. **Section 1214** – cannot decant if a trust expressly limits the decanting power. General prohibition on amending/revoking or inclusion of a spendthrift provision does not restrict decanting power

vi. **Tax provisions (Section 1218)** are very taxpayer favorable, negating any decanting that may cause adverse tax consequences, including decanting to a trust that includes provisions that would disqualify a marital/charitable deduction, GST exemption, or jeopardizes the trust qualifying as a QSST.

IV. Recent Notable Maine Cases

a. Connary v. Shea, 259 A.3d 118 (2021) and 320 A.3d 429 (2024)

i. This case addresses what constitutes a specific bequest/ademption

ii. A joint trust established by husband and wife as Settlors left "all of" the Bank stock to the Settlors' nieces and nephews. After the death of the first Settlor, the Bank stock was redeemed and was not part of the trust estate upon the death of the surviving Settlor. The Trustee advised the nieces and nephews that because the stock was redeemed, no distribution would be made with respect to the bank stock. The nieces and nephews sued arguing that the gift of the bank stock was a general rather than a specific devise and they should be

entitled to the equivalent value of the Bank stock as of the date it was redeemed

iii. The trial court granted summary judgment to the defendant, finding that the language of the trust reflected a "plain and clear intent" to create a specific bequest of the bank stock, and the gift had adeemed because no shares remained in the trust upon death. The Supreme Judicial Court affirmed.

iv. One notable take-away from the case was that the SJC found that the rules of construction under the old probate code (Title 18-A) applied because the Settlor died prior to enactment of the new probate code (Title 18-C). [Under the Maine Uniform Trust Code, 18-B MRSA § 112, the rules of construction that apply to wills also apply to trusts.] This was material to the case because the new Probate Code, 18-C M.R.S.A. § 2-606(1) E and F, reflect an "intent" theory of ademption and provide that a specific bequest adeems and the "devise fails unless the evidence establishes that failure would be inconsistent with the testator's intent." Title 18-A on the other hand applies an "identity" theory of ademption, in which a specific bequest completely fails if the property is no longer owned by the estate at the time of the testator's death. The Court found that the rules of construction under Title 18-A applied on the theory that that the decedent did not have an opportunity to revise the Trust if she disagreed with the application of the new Probate Code

v. On remand, the trial court considered the second count raised in the complaint that the trust should be reformed due to mistake based on extrinsic statements made by the surviving Settlor. The Court granted summary judgement to the defendant. The SJC affirmed, but on a different basis. The SJC held on appeal that in the case of a joint trust, reformation is appropriate only if necessary to conform to the terms of both Settlor's intentions, and there was not evidence of both Settlor's intentions regarding what would happen if the Bank stock were to be redeemed. There was only evidence of extrinsic declarations made by the surviving Settlor. Furthermore, the SJC concluded that reformation is limited to mistakes in the context of donative intent at the time the trust was executed, and not to address a change in circumstances that occurred after the trust was formed and the stock was redeemed.

b. <u>Attorney General v. Sanford</u>, 225 A.3d 1026 (2020)

i. This case involved a lawsuit commenced by Seal Cove Auto Museum against the Trustees of the Richard C. Paine, Jr. Automobile Collection Charitable Trust for certain breaches of trust, including taking unreasonable trustee fees and self-dealing. The Attorney General was joined as a necessary party-in-interest.
ii. The Museum and Trust were both established by Richard Paine, Jr. to maintain his collection of antique automobiles. Following Paine's death, the Trust acquired most of the automobile collection, which has been displayed at the Museum for many years. The Museum was a permissible recipient of trust income and principal under the terms of the trust.
iii. Seal Cove Museum's complaint was dismissed for lack of standing by the Superior Court on the basis that it was not a qualified beneficiary of the trust, and the Museum appealed.
iv. The Supreme Judicial Court vacated the judgment. The SJC held that the Museum was a charitable organization with the rights of a qualified beneficiary under the Maine Uniform Trust Code, and had standing to bring the action against trustees for breach of trust. Although the Museum did not meet the definition of a qualified beneficiary under 18-B M.R.S. § 103(12) because it is not a "living" beneficiary, under 18-B M.R.S.A. § 110(1)(A), "a charitable organization expressly designated to receive distributions from a charitable trust *has the rights of a qualified beneficiary* ... [if it]... [i]s a distributee or permissible distributee of trust income or principal." The words "expressly designated" in Section 110(1) were intended to give a charity the rights of a qualified beneficiary equal to that of a qualified beneficiary of a private trust as set forth in Section 103(12). Accordingly, it was enough that the Museum was a permissible distributee, and it did not need to show that it was a mandatory distributee to have standing to sue.

c. Estate of Giguere, 315 A.3d 737 (2024)
   i. This case involved the estate of a decedent whose will provided for the disposition of her assets if her husband survived her, but contained no disposition of the residuary estate in the event the husband predeceased her, which occurred. Had the husband survived, under the will, a trust was to be established for the husband, and upon the husband's death, the remaining trust property was to be distributed to his two sons. The will also contained an intentional

omission clause providing that no provision was being made for the decedent's daughter from whom she was estranged or any other persons not mentioned in the will.

ii. Upon a petition for instructions for how the estate should be distributed and to reform the will on the basis that it contained a scrivener's error, the Probate Court held that the residuary estate passed by intestacy to the daughter. Testimony from the attorney who prepared the will was that the decedent had revised her will to omit her daughter, but stated that she was "not ready" to decide what would happen to the residuary estate if her husband failed to survive her, and the omission in the will was not a scrivener's error. The decedent did not execute a new will after her husband's death.

iii. The Probate Court found that there was not clear and convincing evidence of the decedent's intent as to what should happen if the husband predeceased her that would be sufficient to allow reformation of the will. The will simply did not dispose of the residuary estate, and there was testimony that this was not a scrivener's error. The husband's sons appealed, arguing that the disposition to the daughter was illogical because it conflicted with the decedent's clear intent expressed in the will and provided evidence of her intention. The SJC affirmed, finding that there was not clear and convincing evidence of the decedent's intentions that supported a reformation of the will and ,to the contrary, the unequivocal testimony of the drafting attorney suggested that there was no scrivener's error.

d. Estate of Beckey, 314 A.3d 218 (2023)

   i. This case addresses whether an ambiguity in a specific devise causes an entire gift to fail, or only the part that is ambiguous.

   ii. Decedent was survived by a son and two daughters. His will provided for the specific disposition of certain real property, 1/3 to each child, subject to adjustments for other property they had received. At issue was the share passing to one of the daughters, Angela, because there was a clause (the "minus" clause) which purported to reduce Angela's share by the value of another parcel of land she had received, but that land could not be identified and there was no evidence of a conveyance of any parcel of land to Angela. The residuary estate passed in equal 1/3 shares to the three children. A special administrator proposed that the share passing to Angela should fall to residue because the ambiguity could not be resolved.

iii. The trial court held that the description of the property in the "minus" clause was ambiguous and accordingly, the entire devise to Angela of her 1/3 interest in the property failed and fell to the residue. The daughters appealed.

iv. The Supreme Judicial Court reversed, finding that the ambiguity in the "minus" clause should not cause the entire devise to the daughter to fail, and it simply makes that portion of the devise irrelevant. The result proposed by the Special Administrator also would result in the children getting unequal shares of the estate, even though there was a clear intent by the testator that they all receive a 1/3 interest in the estate, reduced by the value of certain properties passing to each child.

e. <u>Estate of O'Donnell</u>, 314 A.3d 197 (2024)

  i. Supreme Judicial Court held that the distribution of an intestate's estate was governed by the version of the Probate Code in effect at the time of the intestate's death, and not the new Probate Code

  ii. Decedent died intestate in January 2019, when the old version of the Probate Code (Title 18-A) was in effect and prior to the enactment of the new Probate Code (Title 18-C). Decedent was survived by her husband, father and mother. Under the new Probate Code, the first $300,000 would pass to the spouse, leaving nothing to pass to the parents. Under the old Probate Code, the spouse would be entitled to the first $50,000 plus half of the balance of the intestate estate.

  iii. The Court held that Title 18-A applied. An omission in Title 18-C was remedied 9 months after enactment by adding a provision in Section 8-301(2)(A-1) providing that the intestacy provisions in Title 18-C apply to the estates of decedents who die on or after the effective date of September 1, 2019. The Court rejected the argument that under Section 8-301(2)(B), Title 18-C applies because the proceedings were pending on the effective date, holding that Section 8-301(2)(B) is limited in application to the Code's procedural rules and not its substantive rules.

V. Maine Probate Updates

a. Maine Uniform Probate Code was passed in 2019

b. Probate and Trust Law Advisory Commission ("PATLAC")

  i. Formed by statute and tasked with continuing to study, examine and evaluate the probate and trust laws.

ii. Comprised of two Probate Court Judges, one Superior Court Justice, five practitioners who are members of the T&E section of the Maine State Bar Association appointed by the Chief Justice of the Supreme Judicial Court, one member representing the interests of older people appointed by the Governor, and the AG or an AG designee.
iii. PATLAC occasionally proposes changes or improvements to the Trust Code or Probate code.
iv. Recently announced that Inflation adjustments for allowances, intestate share, and threshold for small estate affidavit, are available on the Maine Probate Court website (www.maineprobate.net)

c. Informal probate in Maine is relatively quick and informal
   i. The probate documents are filed online and appointment typically takes 4-8 weeks depending on the county.
   ii. There is no accounting or further filings required in probate court.
   iii. The probate assets which are reflected on the Certificate of Value are not made public and remain confidential.

d. *Practice tip:* For taxable estates that do not contain sufficient real estate as part of the probate estate to secure the lien, nonprobate real estate may be taken into account. In addition, a letter can be filed with the probate documents stating that there are sufficient liquid assets in the trust to pay the estate tax liability, and that those assets will be segregated and maintained until the estate tax is paid in full.

New England States T&E Update: New Hampshire
2022-2024

American College of Trust and Estate Counsel
2024 New England Regional Meeting
Mystic, Connecticut
October 19, 2024

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I. STATUTORY DEVELOPMENTS

A. Specific Powers of Trustee; Powers of Fiduciaries in Environmental Matters [SB 435 (2023), RSA 564-B:8-816-a]

1. SB 435 inserted RSA 564-B:8-816-a which empowers fiduciaries to assess current trust property to determine the environmental condition of such property, take action to prevent and remediate found contamination, and to otherwise bring the property into compliance with environmental regulations.

2. Unless otherwise limited in the trust agreement or order establishing the fiduciary relationship, the fiduciary only has such powers so long as the fiduciary discloses, in writing, to the person or persons to whom the fiduciary sends communications or statements regarding the fiduciary property their intent to exercise any or all of the authority granted to them prior to actually exercising such powers.

3. Under the new provisions, fiduciaries have the following powers: (i) to inspect and monitor real and personal property over which the fiduciary has legal title or over which a fiduciary may exercise control for the purposes of determining compliance with environmental laws and respond to actual or threatened violations affecting such property; (ii) to take, on behalf of an estate, person, or business, any action necessary to prevent or otherwise remedy any actual or threatened release of hazardous substances or violations of environmental laws affecting real or personal property held, either before or after the initiation of an enforcement action by any governmental body; (iii) to refuse or accept real or personal property in trust if such property is or may be contaminated by hazardous substances which could impair the value of the assets held or controlled of such property may be in violation of environmental laws; (iv) to settle or

compromise any and all claims against the estate, trust, person or business which may be asserted by any governmental or private body involving the alleged release or threatened release of hazardous substances; and (v) to release or disclaim any power granted by any document or statute which in the sole discretion of the fiduciary, may expose them to liability under the environmental laws or impairs the value of the assets retained or controlled.

4. The statute further provides that a fiduciary may charge the reasonable cost of any abatement, cleanup, inspection, assessment, insurance, database review, monitoring, or any other remedial action against the income or principal of the estate, trust, or business assets, and shall not be personally responsible for any such costs.

5. Failure to exercise the powers granted under this statute does not in and of itself create a cause of action against a fiduciary.

6. Effective September 24, 2024.

B. Scope of New Hampshire Trust Code [SB 435 (2023), RSA 564-B:1-102]

1. SB 435 amends RSA 564-B:1-102 relative to the scope of the New Hampshire Trust Code.

2. RSA 564-B:1-102 is amended to now include the applicability of the New Hampshire Trust Code to special needs trusts which are required to be administered as express trusts.

3. SB 435 adds a new section (b) to RSA 564-B:1-102 which states that the New Hampshire Trust Code does not apply to a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree by any other court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

4. Effective September 24, 2024.

C. **Duties and Powers of Trustees [SB 435 (2023), RSA 564-B:8-812(b) and (c)]**

1. SB 435 amends RSA 564-B:8-812 relative to the duties and powers of a trustee to add the phrase "prior to the trustee's acceptance of trusteeship" in RSA 564-B:8-812 (b) to now read in relevant part, "Except as otherwise provided under the terms of the trust, the trustee shall take reasonable steps to redress a breach of trust known to the trustee to have been committed by a cotrustee or a former trustee prior to the trustee's acceptance of trusteeship."

2. SB 435 also added the word 'former' before the references to trust advisors and trust property under section (c) of RSA 564-B:8-812 which now states that, except as otherwise provided under the terms of the trust, the trustee shall take reasonable steps to redress a breach of trust actually known to the trustees to have been committed by a former trust advisor or a former trust protector.

3. Effective September 24, 2024.

D. **No Duty to Review Actions of Trustee, Trust Advisor, or Trust Protector [SB 435 (2023), RSA 564-B:12-1204]**

1. SB 435 amends RSA 564-B:12-1204 (a) to state that an excluded fiduciary has no duty to take actions redress a breach of trust.

2. Specifically, SB 435 adds (a)(4) to RSA 564-B:12-1204 which now provides that whenever, pursuant to the terms of a trust, an agreement of the qualified beneficiaries, or a court order, an excluded fiduciary is to follow the direction of a trustee, trust advisor, or trust protector with respect to investment decisions, distribution decisions, or other decisions of the non-excluded fiduciary, then, except to the extent that the terms of the trust, the agreement of the qualified beneficiaries, or the court order provide otherwise, the excluded fiduciary shall have no duty to redress a breach of trust actually known to the excluded fiduciary to have been committed by a trustee, trust advisor, or trust protector.

3. Notwithstanding the above, if an excluded fiduciary has actual knowledge of a serious breach of trust, then such trustee shall take responsible steps to redress such serious breach.

4. Effective September 24, 2024.

E. Duty of Co-Trustee to Redress Breach of Trust known to Co-Trustee [SB 435 (2023), RSA 564-B:7-703]

1. SB 435 amends RSA 564-B:7-703 to clarify when a co-trustee is to exercise reasonable care to redress a serious breach of trust by a co-trustee when the serious breach is actually known to the co-trustee.

2. Paragraph (g) of RSA 564-B:7-703 now states that each co-trustee shall exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach of trust if the serious breach is actually known to the co-trustee.

3. Effective September 24, 2024.

F. Limitation of Certain Trustees who are Beneficiaries [SB 435 (2023), RSA 564-B:8-818]

1. SB 435 adds RSA 564-B:8-818 as new section to Article 8 of the New Hampshire Trust Code relative to the Duties and Powers of Trustee to address the inherent conflict of interest that exists between a trustee who is a beneficiary and the other beneficiaries of the trust.

2. Unless the trust specifically refers to the new RSA-B:8-818 and expressly provides to the contrary, any power conferred upon a trustee shall not include the following:

    (i) To make discretionary distributions of either principal or income to or for the benefit of such trustee, except to provide for that trustee’s health, education, maintenance, or support as described under Internal Revenue Code sections 2041 and 2514.

    (ii) To make discretionary allocations of receipts or expenses as between principal and income, unless such trustee acts in a fiduciary capacity whereby such trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of such trustee’s fiduciary duties.

    (iii) To make discretionary distributions of either principal or income to satisfy any legal support obligations of such trustee.

3. This new provision does not apply when the trustee is the settlor of a revocable or amendable trust, or a decedent’s or settlor’s spouse who is a trustee of a testamentary or inter vivos trust for which a marital deduction has been allowed.

4. If the listed powers are held by two or more trustees, then such powers may be exercised by the non-beneficiary trustee. If there is no non-beneficiary trustee, then a non-beneficiary trustee may be appointed by unanimous vote of the interested parties or a court of competent jurisdiction.

5. Effective September 24, 2024.

G. Certification of Trust
[SB 435 (2023), RSA 564-B:10-1013]

1. SB 435 incorporates a new paragraph (k) to RSA 564-B:10-1013 which contains the language needed for a Certification of Trust when needed to convey any interest in real estate.

2. Prior to this change, this section contained an old reference to the necessary document needed to be provided when a third party is dealing with a trustee, which was repealed by SB 435.

3. The new paragraph (k) provides that a written certificate containing the following statement, signed by the trustee with the formalities required for a deed and recorded in the registry of deeds in the county in which the real estate lie, is to be conclusive evidence and notice to all third parties that the trustee and the trustee's successors have full and absolute power to convey any interest in real estate (or personal property) held by the trustee: "The undersigned trustee(s) as Trustee(s) under the __________ Trust created by __________ as grantor under trust agreement dated __________, and thereto have full and absolute power in said trust agreement to convey any interest in real estate and improvements hereon held in said trust and no purchaser or third party shall be bound to inquire whether the trustee has said power or is properly exercising said power or to see to the application of any trust asset paid to the trustee for a conveyance thereof."

4. A third person or purchaser is not obligated to further inquire as to the authority of the trustee to convey the real estate or confirm the application of the trust assets paid to the trustee, without actual knowledge to the contrary.

5. Effective September 24, 2024.

H. Uniform Real Property Transfer on Death Act
[HB 68 (2024), RSA 563-D]

1. HB 68 enacts the Uniform Real Property Transfer on Death Act by adding chapter RSA 563-D, which allows property owners to transfer real

property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

2. The new chapter applies to transfer on death deeds made on or after July 1, 2024, and does not affect any otherwise permitted method of transferring property.

3. A transfer on death deed is revocable regardless of whether the deed or other instrument contains a contrary provision, and does not preclude legal or equitable relief in the event the transferor repudiates a promise not to revoke a transfer on death deed.

4. To make or revoke a transfer on death deed, transferors are required to have the same requisite capacity to make a Will.

5. Transfer on death deeds are considered void unless: (i) the deed meets the requirements of a traditional deed (signed in the presence of a notary, and has the address of the grantee); (ii) the instrument is titled "Transfer on Death Deed;" (iii) the deed states that the transfer to designated beneficiary or beneficiaries is to occur upon the transferor's death; and (iv) the deed is recorded before the transferor's death, recorded within sixty (60) days after the date of execution, and properly recorded in the registry of deeds.

6. A transfer on death deed is effective without (i) notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or (ii) consideration.

7. A transfer on death deed may be revoked by an instrument executed with the formalities of a deed, only if the instrument is one of the following: (i) a transfer on death deed revoking the deed or part of it expressly or by inconsistency; (ii) an instrument of revocation that expressly revokes the deed or part of it; or (iii) a deed that expressly revokes the transfer on death deed or part of it. Any such instrument must also be acknowledged by the transferor after the acknowledgement of the deed being revoked and recorded in the registry of deeds for the county or counties in which the real estate lies by the earlier to occur of: (i) sixty (60) days from the execution of the instrument, and (ii) the transferor's death date.

8. A transfer on death deed of joint owners is revoked only if revoked by all living joint owners. Simply destroying the paper deed does not revoke the transfer on death deed.

9. During the transferor's lifetime, a transfer on death deed does not: (i) affect an interest or right of the transferor or any other owner, including

the right to transfer or encumber the property; (ii) affect an interest or a right of a transferee, even if they have actual or constructive notice; (iii) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if they have actual or constructive notice; (iv) affect the transferor's or designated beneficiary's eligibility for any form of public assistance; (v) create a legal or equitable interest in favor of the designated beneficiary; or (vi) subject the property to claims or process of a creditor of the designated beneficiary.

10. Beneficiaries of transfer on death deeds may disclaim all or part of their interest pursuant to RSA 563-B.

11. An estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed to the extent that the probate estate is insufficient to satisfy an allowed claim against the estate.

12. To contest the validity of a transfer on death deed or revocation of such a deed, an individual must commence such action within one (1) year after the transferor's death or six (6) months after the appointment of the administrator of the transferor's estate, if the administrator was appointed within one (1) year of the transferor's death.

13. An appointed conservator or guardian of the owner of the property may neither execute nor revoke a transfer on death deed unless court order expressly authorizes such action. Unless a power of attorney otherwise provides, an express grant of authority to create or change a beneficiary designation includes the authority to execute or revoke a transfer on death deed.

14. The chapter provides an optional form for a transfer on death deed and optional form of revocation.

15. HB 68 amended Chapter 78-B which contains the provisions related to the New Hampshire Transfer Tax to add to Section XXV to include a transfer on death deed as an exception to the real estate transfer tax.

16. HB 68 amended RSA 547:3 which addresses the areas where the probate court has concurrent jurisdiction with the superior court to include transfer on death deeds.

17. Effective as of July 1, 2024.

I. Deceased Employees [HB 1201 (2024), RSA 275:47, I]

1. HB 1201 increased the amount of wages an employer may pay the family of a deceased employee from $300 to $3,000.

2. This may only be done without actual notice of probate proceedings, and the employer may make payment according to New Hampshire intestacy laws under RSA 561:1.

3. The bill also amends the statute to include gender neutral language.

4. Effective September 10, 2024.

J. Reporting Death of Voters [SB 576 (2024), RSA 654:37]

1. SB 576 amends RSA 654:37 to require the executor of an estate to provide a notice of death of any person aged 18 or older to the town or city clerk within 30 days of their appointment.

2. The clerk must then provide notice to their supervisor at their next regular meeting.

3. If a supervisor neglects or refuses to remove the name of the deceased voter from the checklist, then the supervisor is to be guilty of a violation.

4. Effective September 1, 2024.

K. Estate Planning by Guardian [HB 1661 (2022), RSA 464-A:26-a, VII-VIII]

1. HB 1661 amends RSA 464-A:26-a, which addresses the process for estate planning by a guardian.

2. Specifically, HB 1661 revises the provisions which imposes the need for the probate court to notify the Department of Health and Human Services and the Department of Justice in a proceeding for estate planning by a guardian, and adds that the Department of Health and Human Services and Department of Justice may have the opportunity to address the probate court if there are concerns relative to the impact of the proposed planning on the ward's Medicaid eligibility and whether the ward has been a victim of a crime or has been or is at risk of being abused, neglected, or exploited.

3. HB 1661 added “or the department, upon motion to the court” in the introductory language of section VII and added section VIII which states “[n]o petition of spousal support shall be enforceable against the department as it relates to eligibility for medical assistance unless the petitioner provides a copy of the petition to the department at least 14 days prior to filing with the court.”

4. Effective as of June 24, 2022.

L. Trustee’s Power to Convert to Unitrust
[SB 435 (2023), RSA 564-C:1-106(d), (f), (g)]

1. SB 435 amends RSA 562-C, the Uniform Principal and Income Act, to simplify the provisions relative to unitrusts.

2. The definition of “net income” for unitrust was revised to remove the specific percentage range for determining net income, previously between 2-8%, and instead defines net income as the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

3. SB 435 adds a new section RSA 564-C:1-107 which outlines the creation and operation of a "total return unitrust" and applies to a trust that by its governing instrument or by a unitrust conversion by the trustee, requires or permits a distribution of a unitrust amount equal to a fixed percentage between 3-5% of the trust's fair market value, valued at least annually.

4. Distribution of the fixed percentage is considered the distribution of all the income of the total return unitrust.

5. Effective September 24, 2024.

M. System of Care for Health Aging
[HB 2 (2023), RSA 151-E]

1. HB 2 is a comprehensive bill that addresses a wide range of issues not relevant to these materials. Of note is the portion of HB 2 amending RSA 151-E which addresses Long-Term Care to add a new subdivision titled, “System of Care for Healthy Aging."

2. The new RSA 151-E:22 states the purpose of the subdivision is to: (i) build upon the existing infrastructure to establish a comprehensive and coordinated system of care to ensure older adults and adults with disabilities have access to and timely delivery of support and services and ensure that they have a meaningful range of options; (ii) reduce the cost of

providing long-term care by expanding the availability of less costly home and community-based services; (iii) require the Department of Health and Human Services to expand and improve access to home and community-based services for older adults and adults with disabilities; and (iv) streamline access to long-term care support and services.

3. RSA 151-E:25 outlines the duties of the Commissioner of Health and Human Services which includes the need to modify the current policies and practices, to coordinate with other state agencies, and to develop a plan for full statement and maintenance of a system of care.

4. The bill also sets deadlines for certain tasks. By example, the department must, on or before June 30, 2025, maintain an online portal for providers, case managers, navigators, and other long-term care providers to allow them to easily identify and access services and supports for older adults.

5. Effective July 1, 2023.

N. Access to Medical Records by Guardians [HB 1245 (2024), RSA 265:1 and RSA 464-A:9]

1. HB 1245 revises RSA 265:1 which outlines the rights of a ward under a guardianship of the person or estate.

2. HB 1245 adds that a ward is to have access to or to grant release of his or her confidential records and papers, to include medical records, except upon specific findings of the court.

3. RSA 464-A:9 is amended to add a new paragraph outlining the process and authority of the ward to access confidential records upon a termination of a guardianship.

4. Effective January 1, 2025.

O. Achieving a Better Life Experience (ABLE) accounts funds [SB 377-FN (2024), RSA 195]

1. SB 337-FN establishes the Achieving a Better Life Experience (ABLE) savings account program administrative fund in accordance with the Achieving a Better Life Experience Act of 2024 and Section 529A of the Internal Revenue Code.

2. Funds from these 529A ABLE accounts can help designated beneficiaries pay for qualified disability expenses, and distributions are tax-free if used for qualified disability expenses.

3. Effective June 14, 2024.

P. Director of Charitable Trusts
[2023 SB 59 (2023), RSA 7:24]

1. SB 59 amends RSA 7:24 which provides the authority of the New Hampshire attorney general to investigate, at any time, charitable trusts, charitable solicitations, and charitable sales promotions to determine if they are being administered in accordance with the law.

2. The attorney general may require a party related to administering a trust, charitable solicitation or charitable sale promotion to appear at a place and time as directed by the attorney general to allow the attorney general to review certain documentation related to the charity.

3. SB 59 adds a provision to RSA 7:24 to clarify the logistics of such a review and specifically stated that any person, agent, trustee, fiduciary, beneficiary, institution, association, corporation, or political agency administering a trust, charitable solicitation, or charitable sales promotion or having an interest therein or knowledge thereof, that is subject to an appearance by the attorney general has the right to have such appearance be in a physical location as determined by the office of the attorney general.

4. Effective on January 1, 2024.

Q. Requirement for Charitable Organizations
[SB 375-FN (2022); RSA 7:28 and RSA 7:29-a]

1. SB 375-FN amends RSA 7:28 III-b which addresses the reporting needed for charitable trusts.

2. The amendment increases the amount of revenue, gains, and other support required of charitable organizations for the filing of additional audited statements in addition to IRS Form 990 to the attorney general from to $1,000,000 to $2,000,000.

3. SB 375-FN amends RSA 7 to add a new section RSA 7:29a to enact the Charity Protection Act which provides that except where specifically required or authorized by federal law, no state agency or state official shall impose any annual filing or reporting requirement on a charitable organization that are more stringent, restrictive, or expansive than the requirements authorized by New Hampshire law.

4. The Act does not prohibit the attorney general from adopting rules related to charitable trusts, charitable solicitations, and charitable sales promotions under RSA 7:22, or limit or restrict the powers, duties, remedies, or penalties available to the attorney general, the state of New Hampshire, or any private person under any other provision of statutory or common law.

5. Effective August 6, 2022

R. Antenuptial Agreements
[HB 85 (2023), RSA 460:2-a]

1. HB 85 amends RSA 460:2-a, which is the statute allowing for antenuptial agreements in contemplation of marriage, to use gender neutral language.

2. RSA 460:2-a now states that two people in contemplation of marriage may enter into a written interspousal contract and the New Hampshire courts shall give the same effect to such contracts entered in other jurisdictions as would the courts of that other jurisdiction.

3. Effective June 25, 2023.

S. Interest and Dividends Tax
[HB 2 (2023); RSA 77]

1. New Hampshire does not have a broad income tax, but did historically imposed a 5% tax on interest and dividend income (referred to as the I & D tax).

2. In 2021, legislation was passed to phase out the I & D tax and to eliminate the tax after December 31, 2026. The relevant provisions of HB 2 accelerate the phase out for tax periods after December 31, 2024.

3. The I & D tax applies to the interest and dividend income of grantor trusts if the grantor is a New Hampshire resident. For non-grantor trusts, any interest and dividend income is not subject to I & D tax if the income is taxed in the trust at the federal level. However, if the interest and dividend income is included in a beneficiary’s federal personal income tax return, then that income is subject to the I & D tax at the level of the beneficiary. The I & D tax also applies to income tax generated in estates.

4. The 2021 legislation revised RSA 77 which provided for an annual tax at a 3% rate for interest and dividend income reportable for tax year 2024, a 2% rate for interest and dividend income reportable for tax year 2025, and a 1% rate for interest and dividend income reportable for tax year 2026.

5. HB 2 removes the provisions of RSA 77 which provided for the I & D tax in tax years 2025 and 2026, which results in the end of the I & D tax for taxable periods after December 31, 2024.

II. NEW HAMPSHIRE ADMINISTRATIVE REGULATIONS

A. Regulation of Charitable Trusts [Chapter JUS 400, pursuant to RSA 7:22]

1. The New Hampshire attorney general exercised its authority under RSA 7:22 to enact new rules applicable to all charitable trusts and charitable organizations.

2. The new regulations are under Chapter 400 of the New Hampshire Code of Administrative Rules and codify procedures of the Charitable Trust Unit and update the forms for such reporting.

3. The regulations are extensive, and the summary in these materials is limited to an outline of the provisions relating to charitable trusts.

4. Any charitable trust based in New Hampshire must register with the Charitable Trust Unit within 6 months of the time when any portion of the trust property is or may be distributed for a charitable purpose.

5. Charitable purpose is defined as an intention or mission that is benevolent, philanthropic, patriotic, educational, humane, recreational, scientific, public health, environmental conservation, civic, or otherwise beneficial to the public interest, and includes any purposes that could qualify for a determination of tax exempt status pursuant to 26 U.S.C. § 501(c)(3) of the Internal Revenue Code.

6. A charitable trust is defined under RSA 7:21, II(a) and (b) as any fiduciary relationship with respect to property subjecting the person by whom the property is held to fiduciary duties to deal with the property for any charitable, nonprofit, educational, or community purpose, and includes a charitable organization.

7. The registration requirement does not apply to:

   a. Revocable trusts;
   b. Trusts with a present obligation to make distributions to charitable beneficiaries if the charitable gift is distributed within one year from the date of the trigger of the gift;
   c. An irrevocable trust with no current obligation to make charitable distributions, but may have reminder charitable beneficiaries; and
   d. Estates that are subject to probate court administration.

Although the registration requirements do not apply to the above, all except the revocable trust must still comply with certain notice requirements.

8. Any registered charitable trust must submit an annual report to the Charitable Trusts Unit.

9. The Executor of a probate estate where the decedent's Will included a charitable bequest must file notice within 30 days of being appointed, and file a notice once the distribution is complete along with receipts from each charitable beneficiary.

10. For charitable trusts, notice must be made within 6 months of the charitable interest becoming irrevocable, and must include a copy of the trust agreement.

11. Effective October 7, 2022.

III. PUBLISHED DECISIONS OF THE NEW HAMPSHIRE SUPREME COURT

A. In re Robert T. Keller Maintenance Fund for the Hanover Country Club at Dartmouth College, No. 2022-0145, 176 N.H. 87, 306 A.3d 795 (N.H. Supreme Court July 13, 2023) [1]

1. Dartmouth College, with the assent of the Director of Charitable Trusts, brought a petition under the Uniform Prudent Management of Institutional Funds Act (UPMIFA) to modify the restrictions on an institutional fund created by a charitable gift pursuant to the Last Will of Robert T. Keeler.

2. The trial court denied the motion to intervene brought by the Robert T. Keeler Foundation and the Estate of Robert T. Keeler (collectively "the intervenors").

3. Robert T. Keeler's Will created the charitable gift to Dartmouth specifically stating the purpose of the gift was "for the sole purpose of upgrading and maintaining its golf course," but, if the Executor determined the golf course is adequately maintained, the excess funds were to go to the Robert T. Keeler Foundation.

4. The Executor of Robert's estate completed the gift after entering into an agreement with Dartmouth that provided the gift would be held by the Robert T. Keeler Maintenance Fund as a quasi-endowment made to

[1] I would like to thank Fellow Alyssa Graham Garrigan and her partner Fellow Christine Anderson for their assistance in sharing their material from the 2023 Developments in the Law NHCLE. The Supreme Court case summaries from 2023 are based on those materials.

support the golf course, mostly used for upgrades and maintenance of the course.

5. When Dartmouth permanently closed the golf course 15 years later, they brought a petition to modify the terms of the restrictions on the Robert T. Keeler Maintenance Fund to allow Dartmouth to use the funds to support the golf program in other ways, as it was impossible to use them for their original purpose.

6. The intervenors contend the funds should revert to the Robert T. Keeler Foundation and his Estate as Dartmouth frustrated the purpose of the fund.

7. The first issue before the Court was whether the Robert T. Keeler Foundation and the Estate of Robert T. Keeler had standing to intervene in a proceeding brought under the UPMIFA. On appeal, the intervenors argued that the doctrine of special interest standing, which the Court recognized in In re Trust of Eddy, 172 N.H. 266 (2019), extends to cases brought under the UPMIFA, but the Court declined to do so noting that In re Trust of Eddy concerned an ongoing charitable trust whereas the current case concerned a completed charitable gift.

8. The Uniform Trust Code, which was adopted by New Hampshire in 2014, modified the common law cy pres doctrine by eliminating the need for the court to specifically find general charitable intent. Rather, charitable intent is presumed with a charitable gift absent evidence otherwise. The court may modify a charitable gift to align with the charitable purpose unless there is evidence against general charitable intent, and no such evidence was presented here. This also applied to UPMIFA.

9. The Court, therefore, held that the intervenors had no such right in the funds and allowed Dartmouth to modify the terms of the gift.

B. Katherine Brady v. Lawrence P. Sumski, Chapter 13 Trustee, No. 2023-0023, 176 N.H. 163, 307 A.3d 1116 (August 17, 2023)

1. The United States District Court for the District of New Hampshire certified two questions for the New Hampshire Supreme Court to answer: "(1) assuming the homestead is real property, other than manufactured housing, does the non-owning, occupying spouse of one who holds a homestead right pursuant to RSA 480:1 also have a present, vested, non-contingent homestead right of his or her own, which is currently valued at $120,000? And (2) does a non-owning spouse who occupies (as a homestead) a manufactured housing unit with an owning spouse have a present, non-contingent homestead right with respect to that home, which is currently valued at $120,000?"

2. The Court concludes that ownership is required under RSA 480:1 and does not answer the second question.

3. The district court case began when the plaintiff filed a bankruptcy petition during which time the plaintiff lived with her spouse in Merrimack in a single-family residence which was titled in the plaintiff's name alone ("the property").

4. Plaintiff originally claimed a homestead exemption of $120,000, then later amended the petition to claim an additional $120,000 on behalf of her husband, who was not on the deed to the property.

5. The bankruptcy Trustee objected. After a hearing, the district court found that in order to claim a homestead exemption, a person must demonstrate both ownership and occupancy pursuant to RSA 480:1. Since the plaintiff's husband was not an owner, he was not entitled to a homestead exemption that the plaintiff could claim on his behalf.

6. The plaintiff appealed the court's order, and the district court certified these questions for the Supreme Court to decide.

7. The Court turned to precedent on statutory interpretation ultimately holding that RSA 480:1 does not give a non-owning spouse an independent homestead exemption because the phrase "his or her interest therein" requires both ownership and occupancy of the property.

8. The plaintiff and the State also noted RSA 529:20-a (2021) as evidence that both spouses have a homestead exemption, regardless of ownership. The statute reads, "If you or your spouse owns and resides in this property, you and/or your spouse may be entitled to a homestead exemption pursuant to RSA 480:1." The Court quickly disposes of this argument because of the statute's use of the words "may" and "and/or" in reference to the exemption. The Court concluded that RSA 529:20-a doesn't define the homestead right, as it simply sets forth notice requirements for creditors.

C. Gail C. Tremblay v Allan Bald, No. 2023-0022, 2024 N.H. 6, 320 A.3d 30 (January 30, 2024)

1. Plaintiff and decedent were in a romantic relationship and engaged for over 10 years prior to the decedent's death.

2. Decedent died intestate on July 26, 2020.

3. When they met, the plaintiff was living at 19 Spruce Street, and decedent lived at 16 Spruce Street, then plaintiff moved in with decedent at 16 Spruce Street.

4. In 2009, Decedent purchased the plaintiff's property at 19 Spruce Street.

5. In 2012, they executed a notarized agreement providing if the decedent died while they were living together, then plaintiff can keep either 16 or 19 Spruce Street, the contents and two vehicles, which was updated in 2015 to include that they must be living together and engaged.

6. Six months after the decedent's death, the plaintiff brought this action asserting that: (1) the agreements signed by her and the decedent are enforceable contracts entitling her to the property described in the agreements; (2) in the alternative, she is entitled to the property under theories of promissory estoppel, implied-in-fact contract, or, as to one particular vehicle, jointly purchased property; and (3) decedent is liable for certain rents and profits received from the property. The defendants counterclaimed, seeking unpaid rent from the plaintiff.

7. The trial court granted summary judgment in favor of the defendants finding the contract lacked consideration, and subsequently granted the plaintiff's motion for interlocutory appeal to ask “Did the trial court err in ruling that the signed, written, and notarized agreements between the Plaintiff and Decedent are not enforceable for lack of adequate consideration?”

8. The Court determined that the agreements are enforceable contracts as there was consideration for agreements.

9. The Court states that plaintiff would receive certain property if she and the decedent, who were engaged but never married, were living together in the same household at the time of his death, as continued cohabitation by adults was lawful consideration, and while the couple was already living together at the time the agreements were executed, plaintiff's continued cohabitation amounted to a benefit to the decedent, who desired that plaintiff continue to live with him; furthermore, the fact that either party could defeat the condition by ending the relationship had no bearing on whether, if the condition were satisfied, the decedent was required to perform, and while the consideration supporting the agreements was not specifically labeled, it could nonetheless be readily determined from the text of the agreements.

D. In re Estate of Barbara E. Colanton Gaul Anderson vs Brenda Grant, No. 2023-0389, 2024 N.H. 43, 2024 N.H. LEXIS 184 (August 14, 2024)

1. Anderson and Grant are the sole children of Barbara Grant.

2. Barbara and her husband initially established an estate plan in 1994, and amended it in 2001, and again in 2002, to provide a portion to her grandchildren and the balance to be allocated between her two children.

3. In 2015, Barbara, then 83 years old, revised her estate plan again providing for Barbara 90% to be distributed to Andreson and 10% to Grant, with no provisions for the grandchildren.

4. Upon Barbara's death in 2021, Grant filed the Will and petition for estate administration with the court, and in response Andersen filed a motion in the probate case to re-examine the probate of the Will and a petition in equity challenging the 2015 Trust amendment alleged that at the time the 2015 Will and Trust amendment were executed, Barbara was suffering from significant cognitive impairments and Grant exercised undue influence over her.

5. The trial court held that Barbara had the legal capacity to execute the Will and the remainder of her estate planning documents, but also stated that New Hampshire law was "not clear" on the standard to apply.

6. The trial court concluded that the preponderance of the evidence standard, rather than the clear and convincing evidence standard, should be applied.

7. However, the trial court went on to say where the law is not clear, to avoid the need for another trial, if the case was appealed and the Court determines that the trial court should have applied the clear and convincing evidence standard, then was further found that Grant did not meet her burden of proof by clear and convincing evidence.

8. The sole question before the Court is whether the trial court erred in applying the preponderance of the evidence standard, instead of the clear and convincing evidence standard, in determining that Grant did not exercise undue influence over Brabara.

9. The Court held that the trial court did not err in applying the preponderance of the evidence standard, instead of the clear and convincing evidence standard, in determining that the Will proponent did not exercise undue influence over the testator, as the preponderance of the evidence standard struck the best balance between respecting the decedent's wishes as stated in the instrument while protecting against potential overreaching by those closest to the decedent; adequate

protection for vulnerable testators was embedded in the mechanism in which the initial presumption of voluntary execution ceased to function and the Will's proponent was put to her proof.

10. Note that the Court included the following: "Given the policy considerations at issue, however, we note that if the legislature disagrees with our decision, it can establish a different burden of proof by legislative enactment."

IV. DECISIONS OF FEDERAL DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

A. Evan Gray v. Chester L. Gray, Trustee, No. 18-cv-522-JL (D.N.H. January 4, 2023), 20023 DNH 001 (Federal District Court for the District of New Hampshire)

1. This case is one of several cases arising from a dispute between two brothers, Chester ("Skip") Gray and Evan Gray regarding two trusts set up by their parents: the Barbara J. Gray Revocable Trust of 1996 ("BJG Trust") and the Chester L. Gray, Jr. Revocable Trust of 1996 ("CLG Trust").

2. During his life, Chester L. Gray, Jr. placed the couple's primary residence into his trust, the CLG Trust, which provided for the over 200 acres of land and large home to be held in a continuing trust along with a maintenance fund in the amount of $820,000, adjusted for inflation, to help their son Skip, who was named as Trustee and given preferential treatment for use of the property, in maintaining the property.

3. After allocation of the property and the maintenance fund to the continuing trust, then the balance of the trust property was to be allocated among the donor's three sons, Skip, Scott, and Evan.

4. Barbara's Trust, the BJG Trust also contained a provision that, if the liquid assets in the CLG Trust were insufficient to fund the maintenance fund with $820,000 as indexed for inflation, then the Trustees of the BJG Trust were to pour assets from the BJG Trust to the maintenance fund.

5. Barbara died in 2013, and Chester died in 2017. After Chester's death, Skip was the sole trustee of the CLG Trust. All three brothers were co-trustees of the BJG Trust.

6. After he was appointed as Trustee, Skip hired the attorneys who drafted the Trusts to assist with administration, an advisor to assist with finances, and an accountant to prepare the tax returns for the estate and trust.

7. In 2017, prior to the creation of the maintenance fund, Evan informed Skip that he was asserting a claim that their father, Chester, violated his fiduciary duties as Trustee prior to his death. Evan demanded $850,000 from the CLG Trust to be paid to BJG Trust. The parties were unable to engage in successful settlement negotiations. In late 2017, there were discussions between the three Trustees of the BJG Trust about distributing the Trust property before the end of the year, so the Trust wouldn't need to file additional tax returns. Ultimately, however, Skip refused to consent to the distribution over concerns that the CLG Trust would be under funded, and pursuant to the terms of the BJG Trust, there would need to be a distribution to the CLG Trust to create a fully funded maintenance fund.

8. Only two of four counts brought by Evan were discussed in the opinion (Count 3 and 4).

9. Count 3 alleged, in part, that Skip violated his fiduciary duty under the prudent investor rule when he sold certain investments held by the CLG Trust and later reinvested those same funds which resulted in a fee that would not have been generated if the assets where not sold. The Court found that the trust instrument modified the prudent investor rule to provide that the trustee would not be liable for acts or omission done in good faith, and so the Court evaluated Skip's conduct against this good faith modification to the rule. The Court found Skip's actions in selling the property were prudent and in good faith because Skip was under the reasonable belief that he and Evan were going to settle Evan's claims, thereby allowing Skip to place money into the maintenance fund and distribute the remaining assets to the beneficiaries.

10. The Court further noted Skip complied with his duties under the good faith standard in the trust agreement where Skip's sale of the investments complied with RSA 564-B:9-902(c), which directs trustees to consider the need for liquidity and the preservation or appreciation of capital, and it was reasonable for Skip, as Trustee, to sell assets in order to deliver distributions in cash, and it was reasonable for Skip to reinvest the funds when it became clear to him that he and Evan were going to be unable to settle the claims.

11. Evan then alleged that Skip violated his duties as Trustee when he failed to provide accountings to the beneficiaries. The Court found that while the New Hampshire Trust Code does require trustees to provide annual accounting to the beneficiaries, the CLG Trust modified the rule only to require accounting to beneficiaries who request it. The Court acknowledged that there was a delay in Skip providing an accounting to the beneficiaries, but he did not violate his fiduciary duties because when Evan did eventually make a request, he was provided with an accounting.

12. Under count 4, Evan claimed that there was an inherent conflict of interest which disqualified Skip from acting as trustee for both trusts. The Court rejected this argument, holding that Settlors were aware that the two trusts may have competing fiduciary duties, and thus they waived any conflicts of interest that may be present by appointing Skip as trustee for both trusts. Absent any other breach of the duty of loyalty or impartiality, the Court would not remove Skip simply because he was named as Trustee for both trusts.

13. The Court noted that not every breach of trust justifies the removal of a co-trustee, and that the Court will be less likely to remove a trustee appointed by the settlor than a trustee appointed by the court. The Court did not find Skip had committed any other serious breach of trust, which would justify his removal as Trustee for the BJG Trust.

14. Note, an appeal was filed on February 13, 2023, and no opinion has been released as of the date of these materials.

V. UNPUBLISHED DECISIONS OF THE NEW HAMPSHIRE SUPREME COURT

Under certain circumstances, the New Hampshire Supreme Court may decide a case by an Order but no formal opinion is issued. This is allowed under Supreme Court Rule 20 and such cases have no precedential value. However, such order may be cited and shall be controlling with respect to issues of claim preclusion, law of the case, and similar issues involving the parties or facts of the case in which the order was issued.

A. Gaetane Benner v Claudette Grenier, No. 2021-0506, 2022 N.H. LEXIS 142 (December 1, 2022)

1. Plaintiff filed suit in superior court requesting a jury trial and making certain allegations against her sister.

2. Mother died in July 2020 leaving two daughters, the plaintiff and defendant. In 1982, Mother executed a Will, which bequeathed her property to her children, and appointed her two daughters as co-executors. In January 2019, Mother signed and had notarized document titled "final instructions" as to the distribution of certain items of personal property upon her death.

3. Mother and the plaintiff had at least one joint account, and in January 2019, plaintiff alleges that defendant used a power of attorney to remove the plaintiff from the joint account.

4. Mother died in July 2020, defendant did not follow the mother’s instructions related to the tangible personal property or under her Will.

5. The plaintiff requested that the superior court order the defendant to give her the items of personal property under the final instructions and sought a sum of money representing the funds she claimed defendant took from the joint account and other of Mother's assets.

6. The superior court determined that it lacked subject matter jurisdiction, and they determined the allegations fell within the exclusive jurisdiction of the probate division of the circuit court pursuant to RSA 547:3, I, and, on that basis, dismissed the complaint.

7. Plaintiff filed a motion to reconsider asking the court to reinstate the case because she had requested a jury trial and "Superior Court is the only Court where trial by jury exists", and asserted that superior court had ancillary jurisdiction under RSA 547:3. The plaintiff asserted that, because the defendant had already liquidated her mother's assets, there was "now no Estate to Probate." The trial court denied the plaintiff's motion to reconsider.

8. The Court analyzed the subject matter jurisdiction of the superior court and the probate division of the circuit court to determine whether the plaintiff's claims fall exclusively within the probate division's jurisdiction.

9. The superior court is a court of general jurisdiction, and the powers of the circuit court probate division are limited to those conferred by statute.

10. The Court found that certain of the plaintiff's allegations fell within the jurisdiction of the superior court and some with the probate court depending on the nature of each claim.

11. Plaintiff's claim over the personal property allegedly bequeathed to her in Mother's purported Will or codicil was under the exclusive jurisdiction of the probate division under RSA 547:3.

12. By contrast, the plaintiff's claims regarding the joint accounts she held with Mother do not fall within the exclusive jurisdiction of the probate division where the joint accounts would not have been part of Mother's estate to be probated. The superior court has jurisdiction over the claims regarding the improper use of the power of attorney.

13. The Court affirmed the trial court's dismissal of the plaintiff's claims for return of items of personal property, reversed the court's dismissal of the plaintiff's claims related to the joint accounts she held with Mother and claims related to the power of attorney.

B. Estate of Bowen S. Downes v. Dennis Greenwood, No. 2021-0574, 2023 N.E. LEXIS (May 12, 2023)

1. Plaintiff is decedent's mother and was appointed as the administrator of his estate on April 2, 2018. As administrator, plaintiff filed an Inventory of Fiduciary with the court, which listed seven items of tangible personal property belonging to the Estate and their values. Estate was closed by summary administration on February 20, 2019.

2. Over a year later, in July 2020, plaintiff filed a small claim complaint against the defendant alleging that she and her son had been business partners; that, at the time of her son's death, the defendant had possession of certain business property which were listed on the inventory she filed with the probate court; and that, following her son's death, the defendant refused to return the property.

3. The defendant, in his closing statement, argued for the first time that the plaintiff's claim was barred by the statute of limitations. The court awarded judgment to the plaintiff.

4. The issues before the Court were: (1) whether the claim, made by the estate, was barred because the estate had been closed by summary administration prior the small claims suit being filed; and (2) whether the claim was barred by the applicable statute of limitations.

5. As to the first issue, the Estate had only one heir, which was the decedent's mother. The decedent's mother originally brought the suit in her individual capacity before filing an amended complaint to substitute the estate as the plaintiff. The Court held that there was no error in awarding judgment to the estate, which would ultimately benefit the decedent's mother as the sole heir. Therefore, the defendant was not prejudiced by the substitution because regardless of who the plaintiff was, the outcome would be the same.

6. As to the second issue, the defendant did not raise the statute of limitations defense until his closing argument at trial, so the plaintiff argued that the defense had been waived. The main contention between the parties was whether the defendant was required to raise the affirmative defense in accordance with the district division rules, since this was a small claims case. The Court stated that small claims cases are bound by district division rules, therefore the defendant waived the affirmative defense under New Hampshire common law.

7. The judgment for the estate was affirmed.

C. Albert Fisher Family Trust vs. Aletheia Fisher, No. 2023-07025, 2024 N.H. LEXIS 152 (June 28, 2024)

1. The defendant is the decedent's widow, and the plaintiff is the decedent's son from a previous marriage who in his capacity as trustee of the Family Trust brought an action for small claims over a $1,850 check.

2. A check for $1,850 was signed by decedent on September 9, 2021, and was intended to pay his share of certain closing costs for a real estate transaction.

3. As of September 16, it became known that the real estate transaction would not take place, and defendant testified decedent told her to put it in their joint checking account, which she did on September 20, before decedent's death on September 25.

4. The Court affirmed the trials court's holding for the defendant, citing RSA 383-B:4:405, which as outlined by the order provides: "In the absence of a written agreement, if 2 or more persons are named on a deposit account as owners, the account shall be payable to any owner, and in the event of death, to the survivor or survivors of them. The survivors shall be entitled to ownership of the account whether or not (i) the funds deposited were the property of only one or some of the owners, (ii) at the time of the making of such deposits there was any intention on the part of the owners making such deposit to vest the other owner or owners with a present interest therein, (iii) only one of the owners during their several lives had the right to withdraw such deposit, or (iv) there was any delivery of any bank book, account book, savings account book, certificate of deposit, or other evidence of such an account, by the owner or owners making such deposit to the other owner or owners."

5. The Court also noted that defendant and decedent did enter into antenuptial agreement that anticipated that the parties would open a joint checking account, where such agreement did not contain any provision providing that the survivor would not be entitled to ownership of that account upon death, the statute governs.

From:	Alison Wells Sherman
To:	Virna J. Tavarez
Subject:	RE: ACTEC 2024 New England Regional Meeting Non Fellow Speaker Information
Date:	Wednesday, August 28, 2024 5:02:01 PM
Attachments:	image001.png image002.png image003.png image004.png image005.png

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Hi Virna,

My apologies for the delay with my bio. Here it is!

Alison Sherman is an estate planning attorney at Downs Rachlin Martin PLLC in Burlington, Vermont. As a native Vermonter, she appreciates the opportunity to help her community achieve peace of mind with respect to estate planning matters. Alison engages with her clients to accomplish their sophisticated estate planning needs, including the implementation of tax, charitable giving, asset protection, and wealth preservation strategies for high net worth individuals, families and business owners. She also assists with a variety of corporate and real estate transactions, particularly with regard to family limited liability company and business succession planning matters. She has exclusively practiced in the estate planning field since graduating from law school in 2014, and is barred in Vermont, New Hampshire, and Massachusetts. Alison grew up in Lamoille County, Vermont and currently lives in Essex with her husband Cliff and son Logan.

Any news on the other power-points?

Thank you very much!

Alison

Alison Sherman | Director | Estate Planning Group
Direct: 603.442.4515 · Main: 603.448.2211 · Email: asherman@drm.com

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From: Virna J. Tavarez <vjtavarez@actec.org>
Sent: Friday, August 16, 2024 8:31 PM
To: Alison Wells Sherman <ASherman@drm.com>
Subject: [EXT] Re: ACTEC 2024 New England Regional Meeting Non Fellow Speaker Information

Hi Alison

You are right! If it’s a panel, I should be able to use a generic description.

Thanks for clarifying!

I will let you know about the power point.

Virna

Virna J. Tavarez, CMP
(She/Her)
Meetings Director
vjtavarez@actec.org
(M) 201-675-0600

On Aug 16, 2024, at 4:50 PM, Alison Wells Sherman <ASherman@drm.com> wrote:

Good afternoon, thank you for your email. I have filled out the speaker release form and wanted to follow up about the presentation title and description. I am giving the "New England Update" for Vermont – my understanding is that this update is given periodically and is not named anything differently. Can you please confirm? All of our presentations for that seminar will be the same – giving an update in relevant case and legislative law in our respective states throughout the past 2 years. If I need to send something more formal along just for Vermont, please let me know!

I was planning to prepare a power point, but if I am the only one in the group that will have a power point then I would prefer not to have one. Can you please let me know what the others decide?

And, I will have a bio for you shortly.

Kind regards,
Alison

Alison Sherman | Director | Estate Planning Group
Direct: 603.442.4515 • Main: 603.448.2211 • Email: asherman@drm.com

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From: Virna J. Tavarez <vjtavarez@actec.org>
Sent: Friday, August 16, 2024 12:48 PM
Cc: dtedford@mysticlaw.com; Danielle Kinney <DKinney@mysticlaw.com>
Subject: [EXT] ACTEC 2024 New England Regional Meeting Non Fellow Speaker Information

Hello!

Thank you for agreeing to participate in 2024 New England Regional Meeting Professional Program!

As non-Fellow program speakers, your registration fees will be waived and you will be reimbursed for reasonable travel expenses. Guest registration fees still apply.

I have reserved your hotel room for a Friday, October 18 check in and a Sunday, October 20 check out.
If you do **NOT** need a room, please let me know so we may offer the room to general attendees. Please save your receipts for your travel expenses and submit to me with the attached reimbursement form after the meeting.

Deadlines:
DUE NOW please submit an official title and short description of your talk, along with your bios and speaker releases. Please note that your timely response to this request ensures we can properly promote the meeting and get the CLE credit approved prior to the meeting itself.

Materials are due **Wednesday, September 25.** If you are planning on a power point presentation, please let me know as soon as possible, so I may order the proper equipment. Attached is what I have as scheduled.

To summarize

1. **Due now:** Official titles, seminar descriptions, bios, AV requests and **speaker release forms** .
2. **Wednesday, September 25.** Program materials and power point presentations are due – send to me: vjtavarez@actec.org

If you anticipate a delay in any of the deadlines, please let me know as soon as possible.

I look forward to receiving your writes up next week, along with your signed speaker release.
If you have any questions, please contact me.

Here is the meeting website: https://events.rdmobile.com/Events/Details/17244

Best,
Virna

Virna J. Tavarez, CMP, Meetings Director
(she/her)
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ACTEC New England Meeting
Mystic, Connecticut
October 19, 2024

RECENT DEVELOPMENTS IN VERMONT LAW

Alison Sherman, Esq.
Downs Rachlin Martin PLLC
Burlington, Vermont

I. FRAMEWORK

A. Vermont Estate Tax. Vermont collects a tax on the transfer of a Vermont estate of resident and nonresident decedents. Generally, a Vermont Estate Tax Return must be filed if the decedent has an interest in property located in Vermont and either (1) the decedent's federal gross estate plus federal adjusted taxable gifts made within two years of his or her death is valued at more than $5 million, or (2) the decedent is required to file federal Form 706. For Vermont resident decedents, property located in Vermont means all property interests, excluding real or tangible property located outside of Vermont at the time of death. For nonresident decedents, intangible property is also excluded.

1. Tax Rate. Generally, the Vermont estate tax applies to decedents at a rate of 16% on the amount exceeding over the $5 million exemption.[1] The exemption is not adjusted for inflation. The law currently also does not consider incorporating a state level QTIP election, nor does it adopt portability.

2. Form of Return. The Vermont estate tax is calculated on Vermont Form EST-191, which begins its calculation based on the "Federal tentative taxable estate" from Federal Form 706, Line 3a. This means that all deductions attributable to the estate are included on a pro-forma 706, which is then used to calculate the tax in Vermont.

3. Nonresidents. For a nonresident, Vermont estate taxes will be due if the decedent owns real or tangible personal property sited[2] in Vermont at death. As a result, it is the general position of Vermont T&E attorneys that if a non-resident taxpayer transfers Vermont real estate or other Vermont-sited tangible property to a limited liability company, that interest will not be subject to Vermont estate tax because it is an intangible

[1] 32 V.S.A. § 7442a

[2] 32 V.S.A. § 7402(15) "Situs of property" means, with respect to: (A) real property, the state or country in which it is located; (B) tangible personal property, the state or country in which it was normally kept or located at the time of the decedent's death or for a gift of tangible personal property within two years of death, the state or country in which it was normally kept or located when the gift was executed; (C) a qualified work of art, as defined in 26 U.S.C. § 2503(g)(2), owned by a nonresident decedent and that is normally kept or located in this State because it is on loan to an organization, qualifying as exempt from taxation under 26 U.S.C. § 501(c)(3), that is located in Vermont, the situs of the art is deemed to be outside Vermont; and (D) intangible personal property, the state or country in which the decedent was domiciled at death or for a gift of intangible personal property within two years of death, the state or country in which the decedent was domiciled when the gift was executed.

property interest subject to estate tax in the taxpayer's domicile. Notably, this has not been challenged or ruled on by the Tax Department or in any case law.

i. Remember that any time a taxpayer sells or transfers a controlling interest (50% or more) in a legal entity that holds real estate, property transfer tax will be due.[3]

4. Due Date. The estate tax return is due within nine months of the death of the decedent. Prior to the expiration of the filing period, an executor may apply for a six-month extension.[4] The tax is due and payable nine months after the death of the decedent, without extension.[5]

5. Gift Tax. Vermont does not have a gift tax, but gifts in excess of the annual exclusion ($18,000 in 2024) made within two years of death are included in the decedent's estate for Vermont estate tax purposes.

B. Vermont Application for Tax Clearances. The probate court requires a tax clearance from the Vermont Department of Taxes to close an estate. The Department will not issue a tax clearance until all required Vermont tax returns are filed.

C. Probate. As a reminder, a simplified probate procedure is only available in Vermont for estates of less than $45,000 with no real property (other than a time-share).[6] Vermont has not enacted the Uniform Probate Code. As a result, probate avoidance is a usual and important facet of estate planning for clients in Vermont.

II. LEGISLATIVE DEVELOPMENTS

A. Vermont Uniform Power of Attorney Act. The Vermont Uniform Power of Attorney Act was enacted on July 1, 2023. Several revisions were made during the 2024 legislative session which were effective upon passage on June 6, 2024. The Vermont Uniform Power of Attorney Act can be found at 14 V.S.A. Chapter 127.

1. Background. AARP introduced the Uniform Act, without any amendments, to the House Judiciary in Spring 2023, and the Judiciary requested that the Probate and Trust Section of the Vermont Bar Association review the statutes. Representatives from the Elder Law section, Real Estate Law section, and Trust Committee of Vermont Bankers were also included on the drafting committee.

2. Concept of "Unavailability". The legislature included an edit that separated the definition of "incapacity" and "unavailability." As a result, many of the statutes reference these concepts separately when determining the capacity or availability of the principal.

[3] 32 V.S.A. § 9603(26)
[4] 32 V.S.A. § 7446
[5] 32 V.S.A. § 7447
[6] 14 V.S.A. § 1901

3. Revocation. The Vermont statutes specifically provide that the principal of a power of attorney may not revoke the power of attorney if the principal is determined to be incapacitated.

4. Agent Duties. An agent does not have any obligation to act under the power of attorney under Vermont law. If the agent does act, the agent must act in good faith; with loyalty, must avoid conflicts, and act with care, competence, and diligence.

5. Agent Exoneration. The Vermont statutes impose a more detailed list of situations where the agent cannot be exonerated by the terms of a power of attorney than those set forth in the Uniform Act.

6. Agent Liability. Agents who are liable under Vermont's Power of Attorney act are subject to a wider range of penalties than in the Uniform Act, including reimbursement of attorneys' fees and any other damages the court may award.

7. "Hot Powers". The powers that require a specific grant of authority in Vermont also include the ability to exercise a waiver of spousal rights, authority with respect to intellectual property, and to convey property by an enhanced life estate deed.

8. Gifting. Vermont followed in New Hampshire's footsteps regarding the gifting power, and includes a requirement that the agent only make a gift if consistent with the principal's objectives, if known by the agent, or if in the principal's best interests, based on various factors outlined in the statute.

9. Methods of Creating Trust. Section § 401 of the Vermont Trust Code was also updated to reference the new uniform law and to remove references to Vermont's prior power of attorney statute.

10. 2024 Updates[7]. Several updates to the Vermont Uniform Power of Attorney Act were made in the subsequent 2024 legislative session. These edits corrected a scrivener's error in the gifting statute, and changed the following:

i. Liability for Refusal to Accept Power of Attorney. The Uniform Act imposes liability on any person or entity that refuses to accept the statutory power of attorney that is contained in subchapter 3 of the Act. Vermont amended this statute to remove the requirement that the form must be the statutory form. Now, a person or entity faces liability for refusal to accept any power of attorney executed in accordance with the Act (not just the statutory form).

ii. Statutory Form. Speaking of the statutory form, the 2024 updates also removed the requirement that the principal must initial each power the principal wants to give his or her agent, and instead requires the principal to "~~cross out~~" any power that the

[7] Please note that as of September 25, 2024, these updates have not yet been incorporated online on the Vermont Judiciary website.

principal does not want the agent to utilize. While this hypothetically makes it more difficult for a bad actor to forge the principal's intent, this does run contrary to the use of the statutory form as being "uniform" across all jurisdictions that have passed the Uniform Act.

B. Vermont Directed Trust Act. Vermont passed its version of the Uniform Directed Trusts Act, which became effective on May 13, 2024. The Vermont Directed Trust Act can be found at 14A V.S.A. Chapter 13. The drafting committee and legislature only made minor changes to the Uniform Act, largely in the definitions section, by referring to the definition of a term as the definition already set forth under Vermont's uniform trust code. The definitions set forth in Vermont's trust code are identical to the definitions set forth in the Uniform Directed Trusts Act. Other changes from the uniform law include using the language "intentional misconduct" instead of "willful misconduct" in sections setting forth the duties and liabilities of the directed trustee.

C. Vermont Uniform Trust Decanting Act. Vermont passed its version of the Uniform Trust Decanting Act, which became effective July 1, 2024. The Vermont Uniform Trust Decanting Act can be found at 14A V.S.A. Chapter 14. The drafting committee and legislature only made minor changes to the Uniform Act, largely in the definitions section, by referring to the definition of a term as the definition already set forth under Vermont's uniform trust code.

1. Definition of Beneficiary. Note that the Uniform Trust Decanting Act defines "beneficiary" to include a charity while the Vermont version does not include charity.

2. Definition of Person. The definition of "person" in Vermont's trust decanting act is broader than the Uniform Act's definition of the same.

3. Definition of Qualified Beneficiary. The Vermont version is structured into tiers while the Uniform Act is not.

4. Required Notice. The authorized fiduciary planning to decant must also give notice to any trust director, if applicable. This is not required by the Uniform Act.

5. Disabled Beneficiary. With respect to a trust for the benefit of a beneficiary with a disability, the Vermont statute states that the "best interests" of the beneficiary require consideration of the financial impact to the family of the beneficiary. Also, the beneficiary may be subject to a guardianship or a protective arrangement, and need not be adjudicated incompetent.

D. Proposed Legislation

1. H.397 – Medicaid estate recovery. Introduced on February 28, 2023, currently in committee on Health Care. The bill's purpose is to "further limit circumstances under which Medicaid may recover medical expenses from the estate of a Medicaid beneficiary."

2. H.444 – Long-term care trust fund. Introduced on March 1, 2023, currently in committee on Human Services. The bill's purpose is to "require the "Secretary of Administration to (1) study and design a trust fund that will provide for long-term care for certain Vermont residents, and (2) propose legislation to statutorily create this fund."

3. H.827 – Personal income tax applied to unrealized gain/loss of assets. Introduced on January 16, 2024, currently in committee on Ways and Means. The bill's purpose is "to apply income tax to 50 percent of the unrealized gain or loss of a taxpayer's assets. This … would only apply to individuals with a net worth of [over $10M]." "The bill would cap the amount of unrealized gains subject to taxation at 10 percent of the worth of a taxpayer's net assets in excess of [$10M] in a tax year."

4. S.268 – Baby bond trust program. Introduced on January 16, 2024, currently in committee on Government Operations. The bill's purpose is to "establish a baby bond trust fund for children with low income [who are eligible at birth for the Dr. Dynasaur Medicaid program] to spend on education, housing, business, or certain investment accounts upon reaching adulthood." The funds are exempt from taxation and are not considered assets or income for purposes of determining eligibility for another human services program.

E. Recent Updates in Related Areas of Law

1. Property Transfer Tax. Act 181 (H.687) of 2024 made certain changes to the Property Transfer Tax rates and exemptions, as well as the Clean Water Surcharge. The most notable change is the transfer tax rate for a non-principal residence (for a non-long-term rental residence fit for habitation), which increased from 1.25% to 3.4%. This does not apply to bare land and non-residential properties.[8]

2. Flood Disclosure. The Vermont legislature has also introduced new requirements for property sellers to disclose whether the property is located in a flood zone or if the property was subject to flood damage while the seller possessed the property.[9]

3. Death with Dignity Act. At 10 (H.190) eliminates the residency requirement for a patient with a terminal condition to be eligible for medication to hasten the patient's death, as permitted by Vermont's "Death with Dignity Act"[10]. Vermont is only the second state to allow nonresidents to take this medication (Oregon was the first). The medication must be administered in Vermont and there is a three-day minimum stay requirement, together with a series of meetings that have to be conducted in person over several weeks. The patient must be able to self-administer. There is no timeframe for administering the dose, although to proscribe it, the patient must be deemed within six months of death. The patient must be legally competent to make the decision – it cannot be made by the patient's healthcare agent under current law.

[8] 32 V.S.A. § 9602(4); effective August 1, 2024.
[9] See H.639
[10] Vermont's "Death with Dignity" Act can be found in Title 18, Chapter 113 of the Vermont Statutes Annotated.

4. An act relating to public health outreach programs regarding dementia risk. Act 164 (S.302) requires the Departments of Health; Mental Health; Disabilities, Aging, and Independent Living to provide education to health care providers on Alzheimer's disease and dementia to ultimately increase public awareness. The Departments of Health also must provide a presentation to the General Assembly about the impact of such diseases and the Department's role in addressing them.

III. JUDICIAL DEVELOPMENTS

A. *In re Estate of Crofut*, 312 A.3d 1002 (Vt. 2024).

1. Key Facts: Donald Crofut (the "Testator") met Sean Hammond (the "Beneficiary") when the Beneficiary was a teenager. The two formed a bond, and their relationship grew to mirror a father-son connection. When the Testator was diagnosed with cancer in 2018, the Beneficiary moved into his home and cared for him. In 2021, the Testator signed his final will which included a provision allowing the Beneficiary to purchase the Testator's home for $40,000, which was well below market value. The Beneficiary was given nine months to exercise the option, during which he would bear "the costs of all ordinary maintenance, repairs, taxes, utilities, insurance and other operational costs" of the home. The Beneficiary was not present at the signing and the Testator was competent when he signed his will. Testator passed away two months later.

After Testator's death, neighbors of the Testator discovered that Beneficiary had been stealing from Testator by using his debit card and consistently withdrawing cash from his bank account in the months preceding the Testator's death. Testator was unaware of the withdrawals and purchases. The neighbors' discovery resulted in both a criminal investigation for elder abuse and a probate proceeding to strike the Beneficiary's bequest of the house under the will as a result of undue influence.

The civil division ultimately held that the provision granting the Beneficiary the option to purchase the house was the result of undue influence, because if the Testator had known about the deceitful conduct, he would have terminated his relationship with the Beneficiary. The court ruled that the Testator was a "penny pincher" and had explicitly disinherited his daughter after feeling like she only contacted him when she needed money. The court determined that, had the Testator known about the theft, he never would have included the option provision in his will and that "[s]ubverting the sound judgment and genuine desire of the individual, is enough to constitute undue influence."

Finally, the civil division concluded that the undue influence could be purged by voiding the bequest to the Beneficiary without invalidating any other part of the will because the undue influence affected only that specific portion. The Beneficiary appealed, arguing that the there was no undue influence since the Testator was of sound mind when he signed his will. Further, there was no evidence that Beneficiary had pressured or coerced the Testator, nor had he engaged in a "false persona" in order to

deceive the Testator. Beneficiary also claimed that the civil division erred by voiding the grant to the Beneficiary and not the entire will.

2. Governing Law: Vermont case law provides that, in construing a will, "the intent of the testator as expressed in a valid will must be enforced unless it is shown to be the product of undue influence."[11] Undue influence is "whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammeled desire."[12] This includes "[a]ny species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual" and can be "exerted either at the time of the act in question or over an indefinite prior period."[13] Finally, undue influence "may result from conduct designed to create an irresistible ascendancy by imperceptible means" or "deceptive devices without actual fraud."[14]

With respect to the partial voidance issue, Vermont case law holds that a Court's overarching purchase in construing a will "is to ascertain the intention of the testator"[15], and that it is the Court's duty to "enforce the intent of the testator"[16].

3. Holding. The Supreme Court held that undue influence was present in this case between the Beneficiary and Testator, and invalidated the provision granting the Beneficiary the option to purchase the house. The Court also allowed the partial voidance of only the provision affecting the Beneficiary, and found the remaining terms of the Will valid and enforceable.

4. Analysis: A key element of the Court's holding is the Court's handling of the burden of proof. Typically, the party claiming undue influence carries the burden of proof. However, the burden shifts to the proponent of the will when suspicious circumstances arise around the execution of a will, which shall be determined by the Court on a case-by-case basis, and may be based on the relationship between the testator and beneficiary.[17] The Court found that the Testator and Beneficiary were engaged in a "confidential relationship" because the Beneficiary played a role similar to fiduciary and guardian to the Testator. As such, the burden fell on the Beneficiary to prove that undue influence was not present in this case.

Further, though this is not be the conventional case of a beneficiary whispering into a testator's ear, the Court found that the "record is sufficient to show that beneficiary influenced testator in lying by omission". The Beneficiary was in a position of power over the Testator due to his physical condition, with the opportunity to deceive Testator and convert his property, which the Beneficiary acted upon. Further, if not for Testator's health challenges, the Court opined that the Beneficiary would likely have been unable to

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[11] In re Est. of Raedel, 152 Vt. 478, 481, 568 A.2d 331, 332 (1989).
[12] In re Everett's Will, 105 Vt. 291, 315, 166 A. 827, 836 (1933).
[13] In re Est. of Rotax, 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981).
[14] Everett's Will, 105 Vt. at 315, 166 A. at 836.
[15] Est. of Holbrook, 2016 VT 13, ¶ 29, 201 Vt. 254, 140 A.3d 788.
[16] Est. of Raedel, 152 Vt. at 481, 568 A.2d at 332.
[17] Est. of Rotax, 139 Vt. at 392, 429 A.2d at 1305.

steal from the Testator due to Testator's diligent financial record-keeping. Beneficiary concealed his theft from the Testator because he likely knew that Testator would disapprove. The Beneficiary's "argument that this conduct falls outside of undue influence employs too narrow a reading of the law and would unjustly enrich the Beneficiary in the face of egregious conduct."

The Court distinguished between "undue influence" and "lack of testamentary capacity," finding that evidence of decreased mental capacity is not required for a finding of undue influence. Instead, there are other considerations including the testator's affection for the beneficiary, attitude toward the beneficiary, and ability to resist the beneficiary that are relevant to undue influence. The Court noted that at the core of undue influence is the notion that through words and conduct the testator is deceived into acting in a manner that is outside of the testator's "normal tendencies and plans" and "may result from conduct designed to create an irresistible ascendancy by imperceptible means". While "the condition of a person's mind ... is always an important question" when undue influence is asserted, "the mental condition of the testator... may be used as the basis" for determining whether the testator was constrained to do "that which is contrary to his own untrammeled desire". Here, the Court found that the civil division properly considered all the facts and concluded that testator's normal tendency was controverted in this case by beneficiary's deceitful acts.

With respect to the partial voidance issue, the Court held that partial voidance is an acceptable remedy when undue influence is found because it best preserves the testator's intent and effectuates the testator's desires. The provision at issue was a small part of a much larger will that included bequests to approximately twenty other individuals and entities, and the evidence of undue influence was disconnected from those bequests. Further, if the entire will was invalidated, the laws of intestacy would likely direct the estate to be distributed to the Testator's daughter, whom he explicitly disinherited. The Court explained that invalidating an entire testamentary instrument based on the deficiency of one particular portion contravenes the desires of the testator and does not fulfill the testator's intent.

5. Dissent. The dissenting opinion asserts that the Beneficiary did not unduly influence the Testator in creating his will, because prior Vermont case law requires a showing that the "beneficiary destroyed the testator's free agency and, in effect, replaced it with the beneficiary's own at the time the will was executed", which did not occur in this case.

The dissent argues that the burden of proof should rest with the will contestants (the neighbors), not with the Beneficiary, as there is no evidence of a "confidential relationship" justifying a shift in burden, as the Beneficiary was not the Testator's fiduciary or guardian but rather a longtime friend and caretaker. The dissent emphasizes that mere friendship does not equate to undue influence, since Beneficiary was not Testator's fiduciary, not his guardian, not his doctor or nurse, and not his spiritual advisor. Being a caretaker had also not justified the shift in burden of proof in prior Vermont case law.

The dissent also pointed out that an in depth review of Vermont case law also shows that undie influence requires "volitional conduct to achieve specific ends – a benefit in the will created by a testator whose own free agency has been destroyed and has therefore done something which is contrary to his own untrammeled desire".[18] The dissent notes that the record shows the Testator had the capacity to make the will and was aware of his intentions. There is no evidence that the Beneficiary exerted any coercive power over the Testator during the will's execution. The dissent states "Beneficiary's conduct was certainly odious, but only conduct amounting to an influence sufficient to destroy testator's free agency can void a will". There was no connection between the Beneficiary's apparent covert misuses of the Testator's debit card and the Testator's devise to him of a purchase option of his house. Further, the language in the will does not reflect a momentary rash decision, but instead a rational and thought out decision, as the will provision gave the beneficiary only nine months to exercise the option, during which he would bear "the costs of all ordinary maintenance, repairs, taxes, utilities, insurance and other operational costs." The dissent noted that "This hardly has the appearance of a sophisticated, frugal, wealthy, and careful testator's will being overborne by this particular beneficiary."

The dissent concludes that without any evidence or factual findings connecting beneficiary's conduct to testator's free agency on the day he signed his will, mere conduct that the beneficiary wished to keep hidden is not the kind of coercive conduct that Vermont courts have long held constitutes undue influence. "Lying by omission and incredible testimony, as our case law bears out, do not void a will by themselves." The court's overriding objective is to give effect to the intent of testators wherever possible, which is why Vermont law requires testators to state their "dispositive wishes clearly and appropriately." As Testator has done so in this case, the Court argues his will should be enforced as written.

B. *In re Kulig*, 282 A.3d 926 (Vt 2022). An estate planning attorney violated the rules of professional responsibility when his client conveyed her property to him. The Court rejected the attorney's argument that the client "insisted" on listing him as the beneficiary, even though they were close family friends, since he had a duty to give independent, sound estate planning advice. He should have advised the client to seek independent legal advice. The Court issued a five month suspension as a result.

C. *In re Estate of Miriam Thomas*, 295 A.3d 850 (Vt 2022). The probate division issued an order concluding that Thomas, the financial guardian of his mother prior to her death, was liable to his mother's estate for damages incurred during his time as her guardian. The order also provided that after the court determined "reasonable fees and costs, the court will enter a consolidated final judgment". Without waiting for the final judgment, Thomas appealed, and the civil division dismissed the decision of the probate court, finding that the probate court lacked standing to adjudicate damage claims against financial guardians. The Supreme Court held that the civil division did not have subject matter jurisdiction to dismiss the probate court order because the order was not a final judgment.

[18] *In re Everett's Will*, 105 Vt. 291, 315, 166 A. 827, 836 (1933).

D. *In re Manby*, 308 A.3d 465 (Vt 2023). The Court ordered that an estate planning attorney be suspended for one year due to his failure to reasonably assess an elderly client's mental capacity while drafting her estate plan, and for taking instruction from the client's son without discussing the matters with his client. The attorney also notarized various documents produced by the client's son without discussing the legal ramifications of the documents with his client. The son also provided the attorney with a cash gift for his help, which was not credited to his client's account.

E. *In re Taub*, 292 A.3d 1238 (Vt 2023). An attorney was denied admission to the Vermont Bar because he embezzled clients' money as an estate planning attorney in California in the 1990s. The attorney argued that it was inappropriate for the Committee to consider his past behavior since it occurred decades ago, and that he had since been rehabilitated. The Supreme Court found that the Board of Bar Examiners Character and Fitness Committee's consideration of past conduct was appropriate because the fact that time had passed since the crimes did not make the crimes themselves irrelevant. Further, the attorney did not disclose many of the facts of his past conduct on his application, despite an unequivocal question seeking that information.

F. *In re Guardianship of Black*, No. 22-AP-153, 2023 WL 2866215 (Vt. Apr. 7, 2023). This case results from two daughters' dispute regarding the appropriate guardian for their mother. The probate court ruled that one daughter would be the mother's guardian, and the other daughter appealed, contending that the trial judge had improper motivation for awarding the guardianship to her sister. The Court declined to change the trial court's findings since adverse judicial rulings do not in themselves amount to evidence of bias or partiality, and the trial court's findings will be upheld "unless they are clearly erroneous."

VERMONT UNIFORM POWER OF ATTORNEY ACT

14 V.S.A. Chapter 127
Vermont Revisions to 2006 Uniform Act in Blue
2024 Revisions in Red
Effective July 1, 2023 / June 6, 2024

Subchapter 1. General Provisions

§ 4001. SHORT TITLE

This chapter may be cited as the Vermont Uniform Power of Attorney Act.

§ 4002. DEFINITIONS

As used in this chapter:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity or unavailability.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(5) "General power of attorney" means a power of attorney that is not limited by its terms to a specified transaction or series of transactions, to a specific purpose, or to a specific asset or set of assets, or a power of attorney that grants an agent the authority to do any one or more of the acts described in subsection 4031(e) of this title.

(6) "Good faith" means honesty in fact.

(7) (A) "Incapacity" means the inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.

(B) "Unavailability" means the inability of an individual to manage property or business affairs because the individual is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(8) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; public corporation; government or governmental subdivision, agency, or instrumentality; or any other legal or commercial entity.

(9) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(10) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(11) "Principal" means an individual who grants authority to an agent in a power of attorney.

(12) “Property” means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(13) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(15) “State” means a state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) “Stocks and bonds” means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

§ 4003. APPLICABILITY

This chapter applies to all powers of attorney except:

(1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) a power to make health-care decisions;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; ~~and~~

(4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.; and

(5) a power of reciprocal insurers under 8 V.S.A. § 4838.[1]

§ 4004. POWER OF ATTORNEY IS DURABLE

A power of attorney created under this chapter is durable unless it expressly provides that it is terminated by the incapacity or unavailability of the principal.

§ 4005. EXECUTION OF POWER OF ATTORNEY

A power of attorney shall be signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

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[1] 8 V.S.A. § 4838. Power of attorney

(a) The rights and powers of the attorney of a reciprocal insurer shall be as provided in the power of attorney given it by the subscribers. A valid power of attorney shall be in writing, executed by the subscriber, and duly executed by the attorney-in-fact.

(b) The power of attorney must set forth: (1) the powers of the attorney; (2) the general services to be performed by the attorney; (3) the maximum amount to be deducted from advance premiums or deposits to be paid to the attorney and the general items of expense in addition to losses, to be paid by the insurer; and (4) except as to nonassessable policies, a provision for a contingent several liability of each subscriber in a specified amount.

(c) The power of attorney may: (1) provide for the right of substitution of the attorney and revocation of the power of attorney and rights thereunder; (2) impose such restrictions upon the exercise of the power as are agreed upon by the subscribers; (3) provide for the exercise of any right reserved to the subscribers directly or through their advisory committee; and (4) contain other lawful provisions deemed advisable.

(d) The terms of any power of attorney or agreement collateral thereto shall be reasonable and equitable, and no such power or agreement shall be used or be effective in this State until approved by the Commissioner.

§ 4006. VALIDITY OF POWER OF ATTORNEY

(a) A power of attorney executed in this State on or after July 1, 2023 is valid if its execution complies with section 4005 of this title.

(b) A power of attorney executed in this State before July 1, 2023 is valid if its execution complied with the law of this State as it existed at the time of execution.

(c) A power of attorney executed other than in this State is valid in this State if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 4007 of this title; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. § 1044b, as amended.

(d) Except as otherwise provided by statute other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

(e) Except as otherwise provided by statute other than this chapter, a power of attorney that complies with this chapter is valid.

§ 4007. MEANING AND EFFECT OF POWER OF ATTORNEY

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

§ 4008. NOMINATION OF GUARDIAN; RELATION OF AGENT TO COURT-APPOINTED FIDUCIARY

(a) In a power of attorney, a principal may nominate a guardian of the principal's estate or a guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

(b) If, after a principal executes a power of attorney, a court appoints a guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated, and the agent's authority continues unless limited, suspended, or terminated by the court.

§ 4009. WHEN POWER OF ATTORNEY EFFECTIVE

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity or unavailability and the principal has not authorized a person to determine whether the principal is incapacitated or unavailable, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a licensed health care professional working within the professional's scope of practice, including a physician licensed pursuant to 26 V.S.A. chapter 23 or 33 and a psychologist licensed pursuant to 26 V.S.A. chapter 55, that the principal is incapacitated within the meaning of subdivision 4002(7)(A) of this chapter; or

(2) an attorney at law, a judge, or an appropriate governmental official that the principal is ~~incapacitated~~ unavailable within the meaning of 4002(7)(B) of this chapter.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated or unavailable may act as the principal's personal representative pursuant to the Health

Insurance Portability and Accountability Act; Sections 1171 through 1179 of the Social Security Act; 42 U.S.C. § 1320d,as amended; and applicable regulations to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

§ 4010. TERMINATION OF POWER OF ATTORNEY OR AGENT'S AUTHORITY

(a) A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated or unavailable, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated or unavailable, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated or unavailable, or resigns;

(3) ~~an action is filed~~ a petition for ~~the dissolution of~~ divorce, annulment, separation, or a decree of nullity is filed with respect to the agent's marriage to the principal ~~or their legal separation~~ unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b) of this section, notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity or unavailability of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity or unavailability, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

(g) The principal of a power of attorney may not revoke the power of attorney if the principal has been determined to be incapacitated.

§ 4011. CO-AGENTS AND SUCCESSOR AGENTS

(a) A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated or unavailable, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated or unavailable, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and subsection (d) of this section, an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated or unavailable, take any action reasonably appropriate in the circumstances to safeguard the principal's best interests. An agent who fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

§ 4012. REIMBURSEMENT AND COMPENSATION OF AGENT

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

§ 4013. AGENT'S ACCEPTANCE

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

§ 4014. AGENT'S DUTIES

(a) Notwithstanding provisions in the power of attorney, an agent who has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and otherwise in the principal's best interests;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney or other provision of this chapter, an agent that has accepted appointment shall have no further obligation to act under the power of attorney. However, with respect to any action taken by the agent under the power of attorney, the agent shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interests;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person who has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interests; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interests based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent who acts with care, competence, and diligence for the best interests of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent who exercises authority to delegate to another person the authority granted by the principal or who engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

§ 4015. EXONERATION OF AGENT

A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) relieves the agent of liability for breach of duty committed:

(A) dishonestly, ~~with an improper motive; or~~

(B) in bad faith;

(C) with reckless indifference to the purposes of the power of attorney;

(D) through willful misconduct;

(E) through gross negligence; or

(F) with actual fraud; ~~or the best interests of the principal; or~~

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

§ 4016. JUDICIAL RELIEF

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian or other fiduciary acting for the principal, including an executor or administrator of the estate of a deceased principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as ~~a presumptive~~ heir of the principal under the laws of intestacy;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal who has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare; and

(9 a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

§ 4017. AGENT'S LIABILITY

An agent who violates this chapter is liable to the principal or the principal's successors in interest for the amount required to:

(1) restore the value of the principal's property to what it would have been had the violation not occurred; ~~and~~

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf;

(3) reimburse the reasonable attorney's fees and costs incurred by the principal or the principal's successor in interest in pursuing rectification of the violation by the agent; and

(4) pay such other amounts, damages, costs, or expenses that the court may award.

§ 4018. AGENT'S RESIGNATION; NOTICE

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving written notice to the principal and, if the principal is incapacitated or unavailable:

(1) to the guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(2) if there is no person described in subdivision (1) of this section, to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

§ 4019. ACCEPTANCE OF AND RELIANCE UPON ACKNOWLEDGED POWER OF ATTORNEY

(a) As used in this section and section 4020 of this title, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(b) A person who in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under section 4005 of this title that the signature is genuine.

(c) A person who effects a transaction in ~~good faith accepts~~ reliance upon an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated; that the purported agent's authority is void, invalid, or terminated; or that the agent is exceeding or improperly exercising the agent's authority ~~is fully exonerated from any liability for effecting the transaction in reliance~~ may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect; the agent's authority were genuine, valid, and still in effect; and the agent had not exceeded and has properly exercised the authority.

(d) A person who is asked to accept an acknowledged power of attorney may request and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney; or

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(e) A certification presented pursuant to subsection (d) of this section shall state that:

(1) the person presenting themselves as the agent and signing the affidavit or declaration is the person so named in the power of attorney;

(2) if the agent is named in the power of attorney as a successor agent, the circumstances or conditions stated in the power of attorney that would cause that person to become the acting agent have occurred;

(3) to the best of the agent's knowledge, the principal is still alive;

(4) to the best of the agent's knowledge, at the time the power of attorney was signed, the principal was competent to execute the document and was not under undue influence to sign the document;

(5) all events necessary to making the power of attorney effective have occurred;

(6) the agent does not have actual knowledge of the revocation, termination, limitation, or modification of the power of attorney or of the agent's authority;

(7) if the agent was married to or in a state-registered domestic partnership with the principal at the time of execution of the power of attorney, then at the time of signing the affidavit or declaration, the marriage or state-registered domestic partnership of the principal and the agent has not been dissolved or declared invalid, and no action is pending for the dissolution of the marriage or domestic partnership for legal separation; and

(8) the agent is acting in good faith pursuant to the authority given under the power of attorney.

(f) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

(g) For purposes of this section and section 4020 of this title, a person who conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

§ 4020. LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED ~~STATUTORY FORM~~ POWER OF ATTORNEY

~~(a) As used in this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in section 4051 or 4052 of this title or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. § 1044b, as amended.~~

(a) Except as otherwise provided in subsection (b) of this section:

(1) a person shall either accept an acknowledged ~~statutory form~~ power of attorney or request a certification, a translation, or an opinion of counsel under subsection 4019(d) of this title not later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under subsection 4019(d) of this title, the person shall accept the statutory form power of attorney not later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(b) A person is not required to accept an acknowledged ~~statutory form~~ power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal or state law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under subsection 4019(d) of this title is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under subsection 4019(d) of this title has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the Adult Protective Services program or other appropriate entity within the Department of Disabilities, Aging, and Independent Living or to a law enforcement agency stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(c) A person who refuses in violation of this section to accept an acknowledged ~~statutory form~~ power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

§ 4021. PRINCIPLES OF LAW AND EQUITY

Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.

§ 4022. LAWS APPLICABLE TO FINANCIAL INSTITUTIONS AND ENTITIES

This chapter does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this chapter.

§ 4023. REMEDIES UNDER OTHER LAW

The remedies under this chapter are not exclusive and do not abrogate any right or remedy under the law of this State other than this chapter.

Subchapter 2. Authority

§ 4031. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF GENERAL AUTHORITY

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke, or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

(7) authorize another person to exercise ~~fiduciary powers that the principal has~~ the authority ~~to delegate~~ granted under the power of attorney;

(8) exercise authority over the content of an electronic communication of the principal in ~~18 U.S.C. Section 2510(12)[, as amended,] sent or received by the principal[; or~~ accordance with chapter 125 of this title[2];

(9) disclaim property, including a power of appointment;

(10) exercise a written waiver of spousal rights under section 323 of this title;

[2] This cite refers to the Vermont Revised Uniform Fiduciary Access to Digital Assets Act

(11) exercise authority with respect to intellectual property, including copyrights, contracts for payment of royalties, and trademarks; or

(12) convey, or revoke or revise a grantee designation, by enhanced life estate deed pursuant to chapter 6 of Title 27 or under common law.

(b) Notwithstanding a grant of authority to do an act described in subsection (a) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in sections 4034–4046 of this title.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 4047 of this title.

(e) Subject to subsections (a), (b), and (d) of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this State and whether or not the authority is exercised or the power of attorney is executed in this State.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

§ 4032. INCORPORATION OF AUTHORITY

(a) An agent has authority described in this chapter if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in sections 4034–4047 of this title or cites the section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in sections 4034–4047 of this title or a citation to a section of sections 4034–4047 of this title incorporates the entire section as if it were set out in full in the power of attorney.

(c) A principal may modify authority or a writing or other record incorporated by reference.

§ 4033. CONSTRUCTION OF AUTHORITY GENERALLY

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in sections 4034–4047 of this title or that grants to an agent authority to do all acts that a principal could do pursuant to subsection 4031(c) of this title, a principal authorizes the agent, with respect to that subject, to:

(1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality on behalf of the principal;

(9) access communications intended for and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(10) do any lawful act with respect to the subject and all property related to the subject.

§ 4034. REAL PROPERTY

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) sell; exchange; convey, with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) selling or otherwise disposing of them;

(B) exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property; ~~and~~

(9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest; and

(10) relinquish any and all of the principal's rights of homestead under 27 V.S.A. § 105 and elective share under section 323 of this title.

§ 4035. TANGIBLE PERSONAL PROPERTY

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) sell, exchange, or convey, with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a security interest, lien, or other claim on behalf of the principal with respect to tangible personal property or an interest in tangible personal property;

(5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(D) moving the property from place to place;

(E) storing the property for hire or on a gratuitous bailment; and

(F) using and making repairs, alterations, or improvements to the property; and

(6) change the form of title of an interest in tangible personal property.

§ 4036. STOCKS AND BONDS

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

(1) buy, sell, and exchange stocks and bonds;

(2) establish, continue, modify, or terminate an account with respect to stocks and bonds;

(3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(4) receive certificates and other evidences of ownership with respect to stocks and bonds; and

(5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

§ 4037. COMMODITIES AND OPTIONS

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

(1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(2) establish, continue, modify, and terminate option accounts.

§ 4038. BANKS AND OTHER FINANCIAL INSTITUTIONS

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

(1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) enter a safe deposit box or vault and withdraw or add to the contents;

(7) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(8) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order; transfer money; receive the cash or other proceeds of those transactions; and accept a draft drawn by a person upon the principal and pay it when due;

(9) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

§ 4039. OPERATION OF ENTITY OR BUSINESS

Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) with respect to an entity or business owned solely by the principal:

(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried; and

(v) the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) put additional capital into an entity or business in which the principal has an interest;

(9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) sell or liquidate all or part of an entity or business;

(11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

§ 4040. INSURANCE AND ANNUITIES

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents and select the amount, type of insurance or annuity, and mode of payment;

(3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) apply for and receive a loan secured by a contract of insurance or annuity;

(5) surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) exercise an election;

(7) exercise investment powers available under a contract of insurance or annuity;

(8) change the manner of paying premiums on a contract of insurance or annuity;

(9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

§ 4041. ESTATES, TRUSTS, AND OTHER BENEFICIAL INTERESTS

(a) As used in this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) conserve, invest, disburse, or use anything received for an authorized purpose; and

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor.~~; and~~

~~(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest.~~

§ 4042. CLAIMS AND LITIGATION

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) make or accept a tender, offer of judgment, or admission of facts; submit a controversy on an agreed statement of facts; consent to examination; and bind the principal in litigation;

(5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) waive the issuance and service of process upon the principal; accept service of process; appear for the principal; designate persons upon which process directed to the principal may be served; execute and file or deliver stipulations on the principal's behalf; verify pleadings; seek appellate review; procure and give surety and indemnity bonds; contract and pay for the preparation and printing of records and briefs; and receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the principal in property or other thing of value;

(8) pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

§ 4043. PERSONAL AND FAMILY MAINTENANCE

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

~~(A) the principal's children;~~

(A) other individuals legally entitled to be supported by the principal; and

(B) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in subdivision (1) of this subsection by:

(A) purchase, lease, or other contract; or

(B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in subdivision (1) of this subsection;

(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in subdivision (1) of this subsection;

(6) act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act; Sections 1171–1179 of the Social Security Act; 42 U.S.C. § 1320d, as amended; and applicable regulations in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this State to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in subdivision (1) of this subsection;

(8) maintain credit and debit accounts for the convenience of the individuals described in subdivision (1) of this subsection and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this chapter.

§ 4044. BENEFITS FROM GOVERNMENTAL PROGRAMS OR CIVIL OR MILITARY SERVICE

(a) As used in this section, "benefits from governmental programs or civil or military service" means any benefit, program, or assistance provided under a statute or regulation, including Social Security, Medicare, Medicaid, and the Department of Veterans Affairs.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in subdivision 4043(a)(1) of this title and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

(4) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in subdivision (4) of this subsection and conserve, invest, disburse, or use for a lawful purpose anything so received.

§ 4045. RETIREMENT PLANS

(a) As used in this section, "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Internal Revenue Code § 408, 26 U.S.C. § 408, as amended;

(2) a Roth individual retirement account under Internal Revenue Code § 408A, 26 U.S.C. § 408A, as amended;

(3) a deemed individual retirement account under Internal Revenue Code § 408(q), 26 U.S.C. § 408(q), as amended;

(4) an annuity or mutual fund custodial account under Internal Revenue Code § 403(b), 26 U.S.C. § 403(b), as amended;

(5) a pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code § 401(a), 26 U.S.C. § 401(a), as amended;

(6) a plan under Internal Revenue Code § 457(b), 26 U.S.C. § 457(b), as amended; and

(7) a nonqualified deferred compensation plan under Internal Revenue Code § 409A, 26 U.S.C. § 409A, as amended.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal's name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to, or purchase assets from a retirement plan.

§ 4046. TAXES

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns; claims for refunds; requests for extension of time; petitions regarding tax matters; and any other tax-related documents, including receipts; offers; waivers; consents, including consents and agreements under Internal Revenue Code § 2032A, 26 U.S.C. § 2032A, as amended; closing agreements; and any power of attorney required by the Internal Revenue Service or other taxing authority, including an internal revenue service form 2848 in favor of any third party with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

(2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

§ 4047. GIFTS

(a) For purposes of this section, "gift" includes a gift for the benefit of a person ~~includes~~ including a gift to a trust, an account under chapter 115 of this title (Vermont Uniform Transfers to Minors Act), and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code § 529, 26 U.S.C. § 529, as amended

~~(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:~~

~~(1) make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and (2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, [as amended,] to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.~~

(b) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent ~~and~~ or, if unknown, as the agent determines is consistent with the principal's best ~~interest~~ interests based on all relevant factors, including:

(1) evidence of the principal's intent;

(2) the principal's personal history of making or joining in the making of lifetime gifts;

(3) the principal's estate plan;

(4) the principal's foreseeable obligations and maintenance needs and the impact of the proposed gift on the principal's housing options, access to care and services, and general welfare;

(5) the income, gift, estate, or inheritance tax consequences of the transaction; and

(6) whether the proposed gift creates a foreseeable risk that the principal will be deprived of sufficient assets to cover the principal's needs during any period of Medicaid ineligibility that would result from the proposed gift.

~~(c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interests based on all relevant factors, including:~~

~~(1) the value and nature of the principal's property;~~

~~(2) the principal's foreseeable obligations and need for maintenance;~~

~~(3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;~~

~~(4) eligibility for a benefit, a program, or assistance under a statute or regulation; and~~

~~(5) the principal's personal history of making or joining in making gifts.~~

Subchapter 3. Statutory Forms [*omitted from this handout*]

Subchapter 4. Miscellaneous Provisions

§ 4061. UNIFORMITY OF APPLICATION AND CONSTRUCTION

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

§ 4062. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede subsection 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in subsection 103(b) of that act, 15 U.S.C. § 7003(b).

§ 4063. EFFECT ON EXISTING POWERS OF ATTORNEY

Except as otherwise provided in this chapter, on July 1, 2023:

(1) this chapter applies to a power of attorney created before, on, or after July 1, 2023;

(2) this chapter applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2023;

(3) this chapter applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2023 unless the court finds that application of a provision of this chapter would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(4) an act done before July 1, 2023 is not affected by this chapter.

14A V.S.A. § 401 is amended to read:

§ 401. METHODS OF CREATING TRUST

A trust may be created:

(1) by transfer of property to another person as trustee or to the trust in the trust's name during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) by declaration by the owner of property that the owner holds identifiable property as trustee;

(3) by exercise of a power of appointment in favor of a trustee;

(4) pursuant to a statute or judgment or decree that requires property to be administered in the manner of an express trust; or

(5)~~(A)~~ by an agent or attorney-in-fact under a power of attorney that expressly grants authority to create the trust; ~~or~~

~~(B) by an agent or attorney in fact under a power of attorney that grants the agent or attorney in fact the authority to act in the management and disposition of the principal's property that is as broad or comprehensive as the principal could exercise for himself or herself and that does not expressly exclude the authority to create a trust, provided that any trust so created does not include any authority or powers that are otherwise prohibited by 14 V.S.A. § 3504. An agent or attorney in fact may petition the Probate Code]~~

VERMONT UNIFORM DIRECTED TRUST ACT

14A V.S.A. Chapter 13
Vermont Revisions to Uniform Act in Blue
Effective May 13, 2024

§ 1301. SHORT TITLE
This chapter may be cited as the Uniform Directed Trust Act.

§ 1302. DEFINITIONS
As used in this chapter:

(1) "Breach of trust" ~~includes~~ means a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this chapter, or law of this State other than this chapter pertaining to trusts.

(2) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(3) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(4) "Person" means an individual; estate; business or nonprofit entity; public corporation; government or governmental subdivision, agency, or instrumentality; or other legal entity.

(5) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in subsection 1305(b)
of this title.

(6)"Settlor" ~~means a person, including a testator, that creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.~~ has the same meaning as in subdivision 103(20) of this title.[1]

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(8) "Terms of a trust" means:

(A) except as otherwise provided in subdivision (B) of this subdivision (8), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law;

(ii) a court order; or

(iii) a nonjudicial settlement agreement under section 111 of this title.

(9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(10) "Trustee" ~~includes an original, additional, and successor trustee, and a cotrustee~~ has the same meaning as in subdivision 103(20) of this title.[2]

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[1] The correct cite is actually subdivision 103(15) of the title, which states: "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

[2] (20) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

§ 1303. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION

(a) Notwithstanding section 1204 of this title[3], this chapter applies to a trust, whenever created, that has its principal place of administration in this State, subject to the following rules:

(1) If the trust was created before the effective date of this chapter, this chapter applies only to a decision or action occurring on or after the effective date of this chapter.

(2) If the principal place of administration of the trust is changed to this State on or after the effective date of this chapter, this chapter applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust that designate the principal place of administration of the trust are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction;

(2) a trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

§ 1304. COMMON LAW AND PRINCIPLES OF EQUITY

The common law and principles of equity supplement this chapter, except to the extent modified by this chapter or laws of this State other than this chapter.

§ 1305. EXCLUSIONS

(a) As used in this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(b) This chapter does not apply to a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

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[3] § 1204. Application to existing relationships
(a) Except as otherwise provided in this title, on the effective date of this title:
(1) this title applies to all trusts created before, on, or after its effective date;
(2) this title applies to all judicial proceedings concerning trusts commenced on or after its effective date;
(3) this title applies to judicial proceedings concerning testamentary trusts commenced before its effective date except that accountings shall continue to be due from the trustees of such trusts in the same manner and in the same frequency as required by the Probate Division of the Superior Court prior to this title unless otherwise ordered by the Probate Division of the Superior Court;
(4) this title applies to all other judicial proceedings concerning trusts commenced before its effective date unless the Probate Division of the Superior Court finds that application of a particular provision of this title would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this title does not apply and the superseded law applies;
(5) any rule of construction or presumption provided in this title applies to trust instruments executed before the effective date of this title unless there is a clear indication of a contrary intent in the terms of the trust; and
(6) an act done before the effective date of this title is not affected by this title.
(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of this title, that statute continues to apply to the right even if it has been repealed or superseded.

(B) another beneficiary represented by the beneficiary under chapter 3 of this title with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986 and regulations issued thereunder.

(c) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

§ 1306. POWERS OF TRUST DIRECTOR.

(a) Subject to section 1307 of this title, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (a) of this section; and

(2) trust directors with joint powers must act by majority decision.

§ 1307. LIMITATIONS ON TRUST DIRECTOR

A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under subdivision 1306(b)(1) of this title regarding:

(1) a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A), and regulations issued thereunder; and

(2) a charitable interest in the trust, including notice regarding the interest to the Attorney General.

§ 1308. DUTY AND LIABILITY OF TRUST DIRECTOR

(a) Subject to subsection (b) of this section, with respect to a power of direction or further power under subdivision 1306(b)(1) of this title:

(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(2) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this chapter to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this chapter.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

§ 1309. DUTY AND LIABILITY OF DIRECTED TRUSTEE

(a) Subject to subsection (b) of this section, a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision 1306(b)(1) of this title, and the trustee is not liable for the action.

(b) A directed trustee shall not comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision 1306(b)(1) of this title to the extent that by complying the trustee would engage in ~~willful~~ intentional misconduct.

(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(1) the breach involved the trustee's or other director's ~~willful~~ intentional misconduct;

(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or

(3) at the time of the release, the director did not know the material facts relating to the breach.

(d) A directed trustee that has reasonable doubt about its duty under this section may petition the Probate Division of the Superior Court for instructions.

(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

§ 1310. DUTY TO PROVIDE INFORMATION TO TRUST DIRECTOR OR TRUSTEE

(a) Subject to section 1311 of this title, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the trustee; and

(2) the powers or duties of the director.

(b) Subject to section 1311 of this title, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the director; and

(2) the powers or duties of the trustee or other director.

(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in ~~willful~~ intentional misconduct.

(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in ~~willful~~ intentional misconduct.

§ 1311. NO DUTY TO MONITOR, INFORM, OR ADVISE

(a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) by taking an action described in subdivision (1) of this subsection, a trustee does not assume the duty excluded by subdivision (1) of this subsection.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in subdivision (1) of this subsection, a trust director does not assume the duty excluded by subdivision (1) of this subsection.

§ 1312. APPLICATION TO COTRUSTEE

The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under sections 1309–1311 of this title.

§ 1313. LIMITATION OF ACTION AGAINST TRUST DIRECTOR

(a) An action against a trust director for breach of trust must be commenced within the same limitation period applicable to an action for breach of trust against a trustee in a like position and under similar circumstances.

(b) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances.

§ 1314. DEFENSES IN ACTION AGAINST TRUST DIRECTOR

In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

§ 1315. JURISDICTION OVER TRUST DIRECTOR

(a) By accepting appointment as a trust director of a trust subject to this chapter, the director submits to personal jurisdiction of the courts of this State regarding any matter related to a power or duty of the director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

§ 1316. OFFICE OF TRUST DIRECTOR

Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:

(1) acceptance under section 701 of this title;
(2) giving of bond to secure performance section 702 of this title;
(3) reasonable compensation section 708 of this title;
(4) resignation section 705 of this title;
(5) removal section 706 of this title; and
(6) vacancy and appointment of successor section 704 of this title.

§ 1317. UNIFORMITY OF APPLICATION AND CONSTRUCTION

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 1318. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, but does not modify, limit, or supersede Section 101(c) of that Act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that Act, 15 U.S.C. Section 7003(b).

<u>VERMONT UNIFORM TRUST DECANTING ACT</u>

14A V.S.A. Chapter 14
Vermont Revisions to Uniform Act in Blue
Effective July 1, 2024

§ 1401. SHORT TITLE
This chapter may be cited as the Uniform Trust Decanting Act.

§ 1402. DEFINITIONS
As used in this chapter:

(1) "Appointive property" means the property or property interest subject to a power of appointment.

(2) "Ascertainable standard" ~~means a standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A)[, as amended,] or 26 U.S.C. Section 2514(c)(1)[, as amended,] and any applicable regulations~~ has the same meaning as in subdivision 103(2) this title.[1]

(3) "Authorized fiduciary" means:

(A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;

(B) a special fiduciary appointed under section 1409 of this title; or

(C) a special-needs fiduciary under section 1413 of this title.

(4) "Beneficiary~~" means a person that:~~

~~(A) has a present or future, vested or contingent, beneficial interest~~

~~(B) holds a power of appointment over trust property; or~~

~~(C) is an identified charitable organization that will or may receive distributions under the terms of the trust~~ has the same meaning as in subdivision 103(3) of this title.[2]

(5) "Charitable interest" means an interest in a trust that:

(A) is held by an identified charitable organization and makes the organization a qualified beneficiary;

(B) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(C) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(6) "Charitable organization" means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes; or

(B) a government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

(7) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose the achievement of which is beneficial to the community.

(8) "Court" means the court in this State having jurisdiction in matters relating to trusts.

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[1] (2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this title.

[2] (3) "Beneficiary" means a person that:
(A) has a present or future beneficial interest in a trust, vested or contingent; or
(B) in a capacity other than that of trustee, holds a power of appointment over trust property.

(9) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(10) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this chapter to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

(11) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(12) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.

(13) “First-trust instrument” means the trust instrument for a first trust.

(14) “General power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the powerholder’s estate.

(15) “Jurisdiction,” with respect to a geographic area, includes a state or country.

(16) ~~“Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.~~ “Person” has the same meaning as in section 103 of this title.[3]

(17) “Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.

(18) “Powerholder” means a person in which a donor creates a power of appointment.

(19) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. The term:

(A) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(i) the occurrence of the specified event;

(ii) the satisfaction of the ascertainable standard; or

(iii) the passage of the specified time; and

(B) does not include a power exercisable only at the powerholder’s death.

(20) “Qualified beneficiary” ~~means a beneficiary that on the date the beneficiary’s qualification is determined:~~

~~(A) is a distributee or permissible distributee of trust income or principal;~~

~~(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or~~

~~(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date~~ has the same meaning as in section 103 of this title.[4]

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[3] The cite is 14A V.S.A. § 103(10): “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

[4] The cite is 14A V.S.A. § 103(13): (A) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined, is:

(i) a “first tier” beneficiary as a distributee or permissible distributee of trust income or principal;

(ii) a “second tier” beneficiary who would be a first tier beneficiary of trust income or principal if the interests of the distributees described in subdivision (A)(i) of this subdivision (13) terminated on that date without causing the trust to terminate; or

(iii) a “final beneficiary” who would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(21) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. § 674(b)(5)(A) and any applicable regulations.

(22) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(23) "Second trust" means:

(A) a first trust after modification under this chapter; or

(B) a trust to which a distribution of property from a first trust is or may be made under this chapter.

(24) "Second-trust instrument" means the trust instrument for a second trust.

(25) "Settlor", ~~except as otherwise provided in Section 25, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion~~ has the same meaning as in section 103 of this title.[5]

(26) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(27) "State" ~~means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States~~ has the same meaning as in subdivision 103(17) of this title.[6]

(28) "Terms of the trust" ~~means:~~

~~(A) Except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:~~

~~(i) expressed in the trust instrument; or~~

~~(ii) established by other evidence that would be admissible in a judicial proceeding; or~~

~~(B) the trust's provisions as established, determined, or amended by:~~

~~(i) a trustee or other person in accordance with applicable law; [or]~~

~~(ii) a court order[[; or]~~

~~(iii) a nonjudicial settlement agreement under [Uniform Trust Code Section 111]]~~

has the same meaning as in subdivision 103(18) of this title.[7]

(B) Notwithstanding subdivisions (A)(ii) and (iii) of this subdivision (13), a second tier beneficiary or a final beneficiary shall not be a "qualified beneficiary" if the beneficiary's interest in the trust:

(i) is created by the exercise of a power of appointment and the exercise of the power of appointment is not irrevocable; or

(ii) may be eliminated by an amendment to the trust.

[5] The cite is 14A V.S.A. § 103(15): "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

[6] (17) "State" means a state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a Native American tribe or band recognized by federal law or formally acknowledged by a state.

[7] (18) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(29) "Trust instrument" ~~means a record executed by the settlor to create a trust or by any person to create a second trust which contains some or all of the terms of the trust, including any amendments~~ has the same meaning as in subdivision 103(19) of this title.[8]

§ 1403. SCOPE

(a) Except as otherwise provided in subsections (b) and (c) of this section, this chapter applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(b) This chapter does not apply to a trust held solely for charitable purposes.

(c) Subject to section 1415 of this title, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This chapter does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this State other than this chapter, common law, a court order, or a nonjudicial settlement agreement.

(e) This chapter does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

§ 1404. FIDUCIARY DUTY

(a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(b) This chapter does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this chapter.

(c) Except as otherwise provided in a first-trust instrument, for purposes of this chapter and section 801 and subsection 802(a) of this title, the terms of the first trust are deemed to include the decanting power.

§ 1405. APPLICATION; GOVERNING LAW

This chapter applies to a trust created before, on, or after the effective date of this act that:

(1) has its principal place of administration in this State, including a trust whose principal place of administration has been changed to this State; or

(2) provides by its trust instrument that it is governed by the law of this State or is governed by the law of this State for the purpose of:

(A) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this State;

(B) construction of terms of the trust; or

(C) determining the meaning or effect of terms of the trust.

§ 1406. REASONABLE RELIANCE

A trustee or other person who reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this chapter, law of this State other than this chapter, or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

§ 1407. NOTICE; EXERCISE OF DECANTING POWER

(a) In this section, a notice period begins on the day notice is given under subsection (c) of this section and ends 59 days after the day notice is given.

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[8] (19) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument.

(b) Except as otherwise provided in this chapter, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(c) Except as otherwise provided in subsection (f) of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to:

(1) each settlor of the first trust, if living or then in existence;

(2) each qualified beneficiary of the first trust;

(3) each holder of a presently exercisable power of appointment over any part or all of the first trust;

(4) each person who currently has the right to remove or replace the authorized fiduciary;

(5) each other fiduciary of the first trust;

(6) each fiduciary of the second trust;

(7) the Attorney General, if subsection 1414(b) of this title applies; and

(8) each person acting as a trust director, as defined in section 1302 of this title, of the first trust.

(d) An authorized fiduciary is not required to give notice under ~~subsection (c) to a qualified beneficiary who is a minor and has no representative or]~~ subsection (c) of this section to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(e) A notice under subsection (c) of this section shall:

(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(2) specify the proposed effective date for exercise of the power;

(3) include a copy of the first-trust instrument; and

(4) include a copy of all second-trust instruments.

(f) The decanting power may be exercised before expiration of the notice period under subsection (a) of this section if all persons entitled to receive notice waive the period in a signed record.

(g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under section 1409 of this title asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with this chapter or was an abuse of discretion or breach of fiduciary duty; or

(2) section 1422 of this title applies to the exercise of the decanting power.

(h) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (c) of this section if the authorized fiduciary acted with reasonable care to comply with that subsection~~ (c).~~

§ 1408. REPRESENTATION

(a) Notice to a person with authority to represent and bind another person under a first trust instrument or the Vermont Trust Code has the same effect as notice given directly to the person represented.

(b) Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or the Vermont Trust Code is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(c) A person with authority to represent and bind another person under a first-trust instrument or the Vermont Trust Code may file an application under section 1409 of this title on behalf of the person represented.

(d) A settlor shall not represent or bind a beneficiary under this chapter unless the settlor represents a minor or unborn child under subdivision 303(6) of this title.

§ 1409. COURT INVOLVEMENT

(a) ~~On~~ The court may, upon application of an authorized fiduciary, a person

entitled to notice under subsection 1407(c) of this title, a beneficiary, or, with respect to a charitable interest, the Attorney General or ~~other~~ another person ~~that has~~ with standing to enforce the charitable interest, ~~the court may:~~

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this chapter and consistent with the fiduciary duties of the authorized fiduciary;

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this chapter and to exercise the decanting power;

(3) approve an exercise of the decanting power;

(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

(A) after applying section 1422 of this title, the proposed or attempted exercise does not or did not comply with this chapter; or

(B) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which section 1422 of this title applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of section 1422 of this title to a prior exercise of the decanting power; or

(7) order other relief to carry out the purposes of this chapter.

(b) On application of an authorized fiduciary, the court may approve:

(1) an increase in the fiduciary's compensation under section 1416 of this title; or

(2) a modification under section 1418 of this title of a provision granting a person the right to remove or replace the fiduciary.

§ 1410. FORMALITIES

An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by section 1407 of this title, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

§ 1411. DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION

(a) As used in this section:

(1) "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(2) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(3) "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(4) "Vested interest" means:

(A) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(B) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(C) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(D) a presently exercisable general power of appointment; or

(E) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) Subject to subsection (c) of this section and section 1414 of this title, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Subject to section 1413 of this title, in an exercise of the decanting power under this section, a second trust shall not:

(1) include as a current beneficiary a person who is not a current beneficiary of the first trust, except as otherwise provided in subsection (d) of this section;

(2) include as a presumptive remainder beneficiary or successor beneficiary a person who is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (d) of this section; or

(3) reduce or eliminate a vested interest.

(d) Subject to subdivision (c)(3) of this section and section 1414 of this title, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(e) A power of appointment described in subdivisions (d)(1)–(4) of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

(f) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

§ 1412. DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION

(a) As used in this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(b) An authorized fiduciary who has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Under this section and subject to section 1414 of this title, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.

(d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(1) the distribution is applied for the benefit of the beneficiary;

(2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under the Vermont Trust Code; or

(3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

(e) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

§ 1413. TRUST FOR BENEFICIARY WITH DISABILITY

(a) As used in this section:

(1) "Beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual ~~who has been adjudicated incompetent~~ is subject to a guardianship or a protective arrangement.

(2) "Best interests" of a beneficiary with a disability include, without limitation, consideration of the financial impact to the family of the beneficiary who has a disability.

(3) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(4) "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

(A) a trustee or other fiduciary, other than a settlor, who has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(B) if no trustee or fiduciary has discretion under subdivision (A) of this subdivision (4), a trustee or other fiduciary, other than a settlor, who has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(C) if no trustee or fiduciary has discretion under subdivision (A) or (B) of this subdivision (4), a trustee or other fiduciary, other than a settlor, who is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(5) "Special-needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special-needs fiduciary may exercise the decanting power under section 1411 of this title over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this section, the following rules ~~shall~~ apply:

(1) Notwithstanding subdivision 1411(c)(2) of this title, the interest in the second trust of a beneficiary with a disability may:

(A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. § 1396p(d)(4)(C); or

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).

(2) Subdivision 1411(c)(3) of this title shall not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

§ 1414. PROTECTION OF CHARITABLE INTEREST

(a) As used in this section:

(1) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes.

(2) "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the U.S. Internal Revenue Code of 1986 on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(b) If a first trust contains a determinable charitable interest, the Attorney General shall have the rights of a qualified beneficiary and may represent and bind the charitable interest.

(c) If a first trust contains a charitable interest, the second trust or trusts shall not:

(1) diminish the charitable interest;

(2) diminish the interest of an identified charitable organization that holds the charitable interest;

(3) alter any charitable purpose stated in the first-trust instrument; or

(4) alter any condition or restriction related to the charitable interest.

(d) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (c) of this section.

(e) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection (c) of this section shall be administered under the law of this State unless:

(1) the Attorney General, after receiving notice under section 1407 of this title, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) the Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

(3) the court approves the exercise of the decanting power.

(f) This chapter shall not limit the powers and duties of the Attorney General under the law of this State other than as provided in this chapter.

§ 1415. TRUST LIMITATION ON DECANTING

(a) An authorized fiduciary shall not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of:

(1) the decanting power; or

(2) a power granted by State law to the authorized fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power is subject to any restriction in the first trust instrument that expressly applies to exercise of:

(1) the decanting power; or

(2) a power granted by State law to an authorized fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(d) Subject to subsections (a) and (b) of this section, an authorized fiduciary may exercise the decanting power under this chapter even if the first trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

(e) If a first-trust instrument contains an express prohibition described in subsection (a) of this section or an express restriction described in subsection (b) of this section, the provision shall be included in the second trust instrument.

§ 1416. CHANGE IN COMPENSATION

(a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

(b) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the Vermont Trust Code unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

(c) A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (a) and (b) of this section.

§ 1417. RELIEF FROM LIABILITY AND INDEMNIFICATION

(a) Except as otherwise provided in this section, a second-trust instrument shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust instrument.

(b) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(c) A second-trust instrument shall not reduce fiduciary liability in the aggregate.

(d) Subject to subsection (c) of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve an authorized fiduciary from liability for an act or failure to act of another fiduciary as permitted by the law of this State other than this chapter.

§ 1418. REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY

An authorized fiduciary shall not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

(1) the person holding the power consents to the modification in a signed record and the modification applies only to the person;

(2) the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

(3) the court approves the modification and the modification grants a substantially similar power to another person.

§ 1419. TAX-RELATED LIMITATIONS

(a) As used in this section:

(1) "Grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. §§ 671–677 or 26 U.S.C. § 679.

(2) "Internal Revenue Code" means the U.S. Internal Revenue Code of 1986.

(3) "Nongrantor trust" means a trust that is not a grantor trust.

(4) "Qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. § 401(a)(9) and any applicable regulations, or subject to any similar requirements that refer to 26 U.S.C. § 401(a)(9) or any applicable regulations.

(b) An exercise of the decanting power is subject to the following limitations:

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for the exclusion from the gift tax described in 26 U.S.C. § 2503(b), the second-trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. § 2503(b). If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for the exclusion from the gift tax described in 26 U.S.C. § 2503(b) by application of 26 U.S.C. § 2503(c), the second-trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. § 2503(c).

(4) If the property of the first trust includes shares of stock in an S corporation as defined in 26 U.S.C. § 1361 and the first trust is, or but for provisions of this chapter other than this section would be, a permitted shareholder under any provision of 26 U.S.C. § 1361, an authorized fiduciary may exercise the power with respect to part or all of the S corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. § 1361(c)(2). If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this chapter other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. § 1361(d), the second-trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. § 2642(c), the second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. § 2642(c).

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument shall not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. § 401(a)(9) and any applicable regulations, or any similar requirements that refer to 26 U.S.C. § 401(a)(9) or any applicable regulations. If an attempted exercise of the decanting power violates this subsection, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and section 1422 of this title shall apply to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. § 672(f)(2)(A), the second trust shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. § 672(f)(2)(A).

(8) As used in this subdivision, "tax benefit" means a federal or state tax deduction, exemption, exclusion, or other benefit not ~~otherwise~~ listed in this section, except for a benefit arising from being a grantor trust. Subject to subdivision (9) of this subsection (b), a second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(A) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument is clearly designed to enable the first trust to qualify for the benefit; and

(B) the transfer of property held by the first trust or the first trust qualified or, but for provisions of this chapter other than this section, would have qualified for the tax benefit.

(9) Subject to subdivision (4) of this subsection:

(A) except as otherwise provided in subdivision (7) of this subsection (b), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(B) except as otherwise provided in subdivision (10) of this subsection (b), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(10) An authorized fiduciary shall not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(A) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(B) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(ii) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

§ 1420. DURATION OF SECOND TRUST

(a) Subject to subsection (b) of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

(b) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to property of the first trust.

§ 1421. NEED TO DISTRIBUTE NOT REQUIRED
An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

§ 1422. SAVINGS PROVISION

(a) If exercise of the decanting power would be effective under this chapter except that the second-trust instrument in part does not comply with this chapter, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) a provision in the second-trust instrument that is not permitted under this chapter is void to the extent necessary to comply with this chapter; and

(2) a provision required by this chapter to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this chapter.

(b) If a trustee or other fiduciary of a second trust determines that subsection (a) of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

§ 1423. TRUST FOR CARE OF ANIMAL

(a) As used in this section:

(1) "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals.

(2) "Protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

(b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this chapter if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

(c) A protector for an animal has the rights under this chapter of a qualified beneficiary.

(d) Notwithstanding any other provision of this chapter, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

§ 1424. TERMS OF SECOND TRUST
A reference in the Vermont Trust Code to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

§ 1425. SETTLOR

(a) For purposes of the law of this State other than this chapter and subject to subsection (b) of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

§ 1426. LATER-DISCOVERED PROPERTY

(a) Except as otherwise provided in subsection (c) of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subsection (c) of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

§ 1427. OBLIGATIONS

A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

§ 1428. UNIFORMITY OF APPLICATION AND CONSTRUCTION

In applying and construing this Uniform Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 1429. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., but does not modify, limit, or supersede subsection 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in subsection 103(b) of that act, 15 U.S.C. § 7003(b).

~~[SECTION 30. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]~~

312 A.3d 1002

Supreme Court of Vermont.

IN RE ESTATE OF Donald CROFUT (Sean Hammond, Appellant)

No. 23-AP-011

June Term, 2023

February 23, 2024

Background: Probate proceeding was commenced to strike, for undue influence, will provision granting beneficiary the option to purchase testator's residence for $40,000. The Superior Court, Chittenden County, Probate Division, determined that the option bequeathed to beneficiary was the result of undue influence and struck that provision from the will. Beneficiary appealed, and, following a de novo bench trial, the Superior Court, Chittenden County, Civil Division, Helen Toor, J., 2022 WL 18794398, affirmed. Beneficiary appealed.

Holdings: The Supreme Court, Waples, J., held that:
1 evidence was sufficient to support finding that beneficiary stole from testator;
2 evidence was alleged was sufficient to support finding that testator would not have made bequest to beneficiary had testator known about beneficiary's theft from testator;
3 trial court was not required to find that testator had a decreased mental capacity in order to determine that there was undue influence;
4 beneficiary and testator were in a confidential relationship, which shifted the burden to beneficiary to prove lack of undue influence;
5 beneficiary failed to rebut the presumption of undue influence; and
6 as a matter of first impression, partial voidance of will to eliminate bequest to beneficiary was appropriate remedy.

Affirmed.
Carroll, J., dissented with opinion.

Procedural Posture(s): On Appeal; Judgment.
On Appeal from Superior Court, Chittenden Unit, Civil Division, Helen M. Toor, J.
Brian P. Hehir of Hehir Law Office, PLLC, Burlington, for Plaintiff-Appellant.
Daniel L. Burchard of McCormick, Fitzpatrick, Kasper & Burchard, P.C., Burlington, for Defendant-Appellee.
PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

OPINION

WAPLES, J.
¶ 1. Beneficiary, Sean Hammond, challenges the civil division's decision to invalidate a portion of the will of testator, Donald Crofut, which granted beneficiary an option to purchase testator's residence for $40,000. Because we conclude that the underlying evidence supported the holding that the bequest was the result of undue influence and that a partial invalidation of the will was an appropriate remedy, we affirm.

I. Factual Background and Procedural History

¶ 2. The civil division found the following. Testator met beneficiary when testator was a volunteer at Allenbrook Home and beneficiary was a teenager residing there. Their encounter spawned a lifelong relationship in which testator served as a mentor and friend to beneficiary. Testator visited beneficiary while beneficiary attended college out of state. When beneficiary was incarcerated, testator brought care packages and funded beneficiary's prison account. After beneficiary's release, testator helped him find a residence, purchase a car, and manage his finances. They spent time hiking and traveling together, with beneficiary viewing testator as a father figure. Beneficiary moved into testator's home in 2018.

¶ 3. That same year, testator was diagnosed with cancer, and while still active, became less able to care for himself over time due to his illness. Following the diagnosis, beneficiary took on additional responsibilities such as cleaning the house and running errands. Long-time neighbors Richard and Tracy Kozlowski also assisted testator with his medical appointments, groceries, and other tasks. Richard, a lawyer, served as testator's estate planning attorney, prepared testator's final and former wills, and was co-executor of testator's estate along with his wife, Tracy.

¶ 4. Testator made three successive wills beginning in 2020, each providing some option for beneficiary to purchase testator's Burlington home. Testator executed his final will from his bed on February 7, 2021, outside of the presence of beneficiary, and the civil division found testator was competent at the time. This will bequeathed to beneficiary an option to purchase testator's home for $40,000, well below the market value. The will specified that if beneficiary declined to exercise the option, the house would be sold, and the proceeds donated to a scholarship fund established in testator's name. If beneficiary bore the costs of upkeep, the will allowed him to live in the house until either the sale was completed or sixty days passed after he declined to exercise the option. Although beneficiary testified that he was unaware testator planned to provide such an option to him in the will, the civil division did not credit this testimony.

¶ 5. Testator passed away in April 2021. After testator's death, Tracy entered testator's residence with beneficiary's permission, seeking a container in which to store testator's ashes. While there, Tracy discovered that beneficiary's bedroom was filled with a considerable amount of recently purchased consumer goods, many of which were left unopened in their packaging. These included sneakers, vacuums, lights, printers, and piles of clothes with store tags still attached. She also found buckets filled with cash, which beneficiary claimed came from years of tips, but that the court did not credit. Finally, Tracy discovered piles of receipts indicating beneficiary had used testator's debit card to make purchases, including on the day of testator's death, when beneficiary spent $1200 after learning of testator's passing. These receipts also showed that for the last three months of testator's life beneficiary had been withdrawing $400 each day from testator's checking account using the debit card provided by testator. Neighbors testified that they confronted beneficiary about what they found and he admitted that he had stolen money from testator. Testator was unaware of beneficiary's cash withdrawals and purchases.

¶ 6. Neighbors' discovery about beneficiary's use of testator's money resulted in both a criminal investigation for elder abuse and a probate proceeding to strike beneficiary's bequest under the will for undue influence. Following a hearing, the probate division determined that the option bequeathed to beneficiary was the result of undue influence and struck that provision from the will. Beneficiary then appealed to the civil division, where a two-day de novo bench trial was held. The evidence presented at trial consisted of photographs taken by neighbors of the consumer goods in beneficiary's room, photographs of the cash, photographs of various receipts and ATM withdrawals, months of testator's bank statements, and a forensic accounting analysis performed by a special administrator. The bank statements reflected daily withdrawals of cash, purchases aligning with the receipts found in beneficiary's bedroom, and wire transfers. Some of the bank statements contained handwritten notations from when testator balanced his account, but later statements, from after testator's immobility, did not contain such markings.

The accounting analysis depicted how spending patterns related to testator's checking account increased exponentially around the time he became immobile.

¶ 7. During the trial, the court took testimony from several witnesses, including testator's neighbors, beneficiary, and beneficiary's character witnesses. Neighbors testified as follows. Neighbors frequently heard beneficiary discuss how the house would be bequeathed to him in the will. Beneficiary had pressured testator to also bequeath him testator's car, and this upset testator who believed beneficiary merely wanted to sell the car. Although the will did not grant beneficiary the car, after testator's death, beneficiary claimed ownership of testator's car. When neighbors confronted beneficiary about what they had found in his room, he admitted that he had “fucked up” and had stolen from testator.

¶ 8. In his testimony, beneficiary presented a different view of the preceding events. Beneficiary claimed that testator had a tenuous relationship with neighbors, and that Tracy was an unwelcome and meddlesome annoyance. Beneficiary denied that he knew he was going to inherit from testator in the future and denied that he had stolen from testator. Beneficiary claimed that testator gave beneficiary a debit card and PIN to purchase items for the home but told beneficiary that he was free to use it for whatever he wanted. Beneficiary asserted that the cash found in his room was from previous employment. Beneficiary stated he could not remember why he withdrew money in $400 increments or whether that coincided with the withdrawal limit of the ATM. The civil division did not find this testimony credible considering the documentary evidence and neighbors’ testimony. Beneficiary also presented witnesses that testified to beneficiary's honesty and his efforts to care for testator, but the court was not persuaded of beneficiary's honesty when compared to the numerous untruths beneficiary told during his own testimony.

¶ 9. The civil division ultimately held that the provision granting beneficiary the option to purchase testator's home for well below its market value was the result of undue influence. The civil division found that testator was “extremely careful with money,” “known for his penny-pinching,” had “high moral and ethical standards,” and would have terminated his relationship with beneficiary if he had discovered beneficiary's deceitful conduct. The civil division noted that testator had cut out his own daughter from his will because he believed all she was interested in was his money. The court determined that beneficiary “created an irresistible ascendancy by imperceptible means” by stealing from testator for months, even before the final will was signed. The court determined that, had testator known about the theft, he never would have included the option provision in his will and that “[s]ubverting the sound judgement and genuine desire of the individual, is enough to constitute undue influence.” Finally, the civil division concluded that the undue influence could be purged by voiding the bequest to beneficiary without invalidating any other part of the will because the undue influence affected only that specific portion. Thus, the civil division affirmed the probate division and struck the provision of the will granting beneficiary the option to purchase testator's home at substantially below market value. This appeal followed.

II. Legal Analysis

¶ 10. On appeal, beneficiary challenges the civil division's factual findings and legal conclusions. He alleges that the record does not support the civil division's findings that he stole from testator and that testator would have removed the option to buy the home if he had learned of beneficiary's theft. He next argues that the civil division erred in finding undue influence because testator was of sound mind and there was no evidence that he pressured or coerced testator. Beneficiary also claims the civil division committed legal error by voiding the grant to beneficiary instead of voiding the entire will. Finally, beneficiary claims the civil division's “affirmance” of the probate court decision illustrates its failure to engage in de novo review.

A. Undue Influence

¶ 11. We first address beneficiary's arguments regarding undue influence. Beneficiary claims that the evidence does not support the civil division's conclusion that the bequest to him was the product of undue influence. He also asserts that there could be no undue influence because he did not engage in deception, did not steal from testator, and that testator was of sound mental and emotional condition. We give deference to the trial court's factual findings and will only set them aside if they are clearly erroneous. Town of Bethel v. Wellford, 2009 VT 100, ¶ 5, 186 Vt. 612, 987 A.2d 956 (mem.). "A trial court's findings will not be overturned merely because it is contradicted by substantial evidence; rather, [a beneficiary] must show there is no credible evidence to support the finding" at all. Id. (quotation omitted). "When reviewing the superior court's conclusions as to issues of law, our review is de novo." In re Soon Kwon, 2011 VT 26, ¶ 7, 189 Vt. 598, 19 A.3d 139 (mem.).

¶ 12. In construing a will, the intent of the testator as expressed in a valid will must be enforced unless "it is shown to be the product of undue influence." In re Est. of Raedel, 152 Vt. 478, 481, 568 A.2d 331, 332 (1989). Undue influence can take the form of "whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammeled desire." In re Everett's Will, 105 Vt. 291, 315, 166 A. 827, 836 (1933). This includes "[a]ny species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual" and can be "exerted either at the time of the act in question or over an indefinite prior period." In re Est. of Rotax, 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981) (quotation omitted). In summation, undue influence "may result from conduct designed to create an irresistible ascendancy by imperceptible means" or "deceptive devices without actual fraud." Everett's Will, 105 Vt. at 315, 166 A. at 836.

¶ 13. Beneficiary argues that the civil division's factual findings are unsupported by the record and are insufficient to support the existence of undue influence. Beneficiary first challenges the civil division's finding that he stole from testator. There is ample evidence in the record to support the civil division's findings that beneficiary made unauthorized purchases with testator's debit card and unauthorized withdrawals from testator's bank account. See In re Est. of Doran, 2010 VT 13, ¶ 17, 187 Vt. 349, 993 A.2d 436 (citing Mullin v. Phelps, 162 Vt. 250, 260, 647 A.2d 714, 720 (1994)) (A "trial court's findings of fact will stand unless the [beneficiary] can show that there is no credible evidence to support them."). This evidence included photographs of the consumer goods and cash, the bank records indicating excessive spending and cash withdrawals, the forensic account audit, and the testimony of neighbors as well as a special administrator. Testator's neighbor Richard testified that when confronted, beneficiary admitted to stealing from testator. The special administrator testified that the spending patterns of testator's bank account trended upward after he became homebound, including cash withdrawals in the amount of $400 a day, up to and after testator's death. Further, beneficiary's own testimony supports the civil division's determination that he was incredible. He contradicted his prior testimony on the issue of whether he had left his job to care for testator, and when questioned about the cash withdrawals, he frequently refused to answer the question or stated he could not remember. The trial court was free to weigh the credibility of his testimony against the circumstantial evidence and testimony of other witnesses in making its determination. See id. ¶ 17 ("[I]t is for the fact-finder to assess the credibility of witnesses and to weigh the evidence, and we will not reweigh the evidence on appeal.").

¶ 14. Beneficiary also argues that the civil division's finding that testator would not have made the bequest at issue had he known about beneficiary's theft was erroneous, but this too is supported by the record. Beneficiary himself characterized testator as a "penny pincher" and admitted that if testator did not respect you, he would "give you nothing like he gave his daughter nothing in his will." Testator's neighbor and estate-planning attorney, Richard, testified that testator had explicitly disinherited his daughter after feeling like she only contacted him when she needed money. Testator's neighbor Tracy testified that beneficiary made comments to testator about being left his car in the will, making testator

upset. Beneficiary denied that this conversation took place, but still claimed testator's car was his to testator's neighbors upon testator's death. Thus, the record supports the civil division's findings that beneficiary withdrew and used testator's funds without permission and that testator would not have bequeathed the option to beneficiary if he had known about the theft. See Creed v. Clogston, 2004 VT 34, ¶ 18, 176 Vt. 436, 852 A.2d 577 ("We review the trial court's findings of fact under the clearly erroneous standard.").

¶ 15. Thus we turn to the question of whether this conduct amounts to undue influence. Beneficiary argues that a necessary element of undue influence is the testator's unsound mind. Because the civil division found testator was mentally competent at the execution of the will, he claims it erred in finding undue influence here. He further argues that there is no evidence that he engaged a "false persona" with the explicit intent of deceiving testator to benefit under his will, which beneficiary claims is required to show undue influence.

¶ 16. At the core of undue influence is the notion that through words and conduct the testator is deceived into acting in a manner that is outside of the testator's " 'normal tendencies and plans.' " Everett's Will, 105 Vt. at 300, 166 A. at 830 (quoting 3 J. Wigmore, Wigmore on Evidence § 1738(b) (1st ed. 1904). This Court noted, "[t]he influence can be exerted either at the time of the act in question or over an indefinite prior period," Est. of Rotax., 139 Vt. at 392, 429 A.2d at 1305, and "may result from conduct designed to create an irresistible ascendancy by imperceptible means," Everett's Will, 105 Vt. at 315, 166 A. at 836. The testator's " 'mental and emotional condition' " is relevant to this determination along with several other considerations. Id. at 299, 166 A. at 830 (quoting Wigmore, supra, § 1738(a). Mental infirmity is certainly not, however, a requirement for undue influence. In Everett's Will, we recognized that "undue influence and lack of testamentary capacity are separate and distinct issues," and while "the condition of a person's mind ... is always an important question" where undue influence is asserted, "the mental condition of the testator... may be used as the basis" for determining whether the testator was constrained to do "that which is contrary to his own untrammeled desire." Id. at 299-300, 315, 166 A. at 829-30, 836. Other considerations include the testator's affection for the person, the testator's general testamentary attitude toward the person, and the testator's ability to resist the person. Here, the civil division properly considered all the facts and concluded that testator's normal tendency was controverted in this case by beneficiary's deceitful acts. No concurrent finding of decreased mental capacity was required.

¶ 17. The party claiming undue influence ordinarily carries the burden of proof. Est. of Raedel, 152 Vt. at 481, 568 A.2d at 333. However, the burden shifts to the proponent of the will when suspicious circumstances arise around the execution of a will. Est. of Rotax, 139 Vt. at 392, 429 A.2d at 1305. The sufficiency of evidence giving rise to suspicious circumstances is usually evaluated by the trial court on a case-by-case basis. Est. of Raedel, 152 Vt. at 482, 568 A.2d at 333. Suspicious circumstances may arise based on the relationship between the testator and beneficiary: "[U]ndue influence may be presumed when relations between testator and beneficiary are suspect, such as those of guardian and ward, attorney and client, spiritual advisers and persons looking to them for advice—in fact, all relations of trust and confidence in which the temptation and opportunity for abuse would be ... great ...." Landmark Tr. (USA), Inc. v. Goodhue, 172 Vt. 515, 525, 782 A.2d 1219, 1228 (2001) (quoting Raedel, 152 Vt. at 483, 568 A.2d at 334).

¶ 18. We conclude that there was undue influence in this case. First, beneficiary and testator were in a confidential relationship, shifting the burden to beneficiary to prove lack of undue influence. Here, the relationship between beneficiary and testator is "suspect, such as those of guardian and ward, attorney and client," etc., because it is a relationship "of trust and confidence in which the temptation and opportunity for abuse would be too great" were the beneficiary not required to prove their worthiness. Est. of Raedel, 152 Vt. at 483, 568 A.2d at 334. This gives rise to a presumption of undue influence which beneficiary

must then rebut. See Landmark Tr. (USA), Inc., 172 Vt. at 525, 782 A.2d at 1228. The dissent disagrees with this conclusion, positing that mere friendship of the type here falls short of the requirements of a confidential relationship. Because beneficiary was not testator's fiduciary, guardian, medical provider, spiritual advisor, or the like, the dissent argues that their relationship does not justify shifting the burden of proof. While our case law has previously determined that residence in the same home, friendship, and good neighborliness do not illustrate the existence of a confidential relationship, the facts here are distinguishable because beneficiary played the role of all the above. See In re Est. of Burt, 122 Vt. 260, 266, 169 A.2d 32, 36 (1961); Kendall's Adm'r v. Roseberry, 120 Vt. 498, 503, 144 A.2d 836, 839 (1958).

¶ 19. Far from "mere friendship," beneficiary served as testator's friend and confidant, he lived with testator in testator's home, and he helped provide care for testator during his immobility. Beneficiary not only understood that he would be left the house by testator, but also advocated for additional bequests such as testator's car. See In re Moxley's Will, 103 Vt. 100, 112, 152 A. 713, 717 (1930) (noting in cases of undue influence typically "it appears that the beneficiary has procured the will to be made or has advised to its provisions"). Further, while this Court has never required the presence of a fiduciary relationship to initiate burden shifting in cases of suspected undue influence, such a relationship arguably existed here where testator provided authority to beneficiary to act as agent in utilizing his debit card to procure household goods, a duty beneficiary violated. See Est. of Kuhling by Kuhling v. Glaze, 2018 VT 75, ¶ 17, 208 Vt. 273, 196 A.3d 1125 (explaining the elements of an agency relationship). Because "the doctrine is applicable where a relationship of trust and confidence obtains between the testator and the beneficiary," and such characteristics are present here as articulated above, we determine the burden must shift to beneficiary to rebut the presumption of undue influence. See Moxley's Will, 103 Vt. at 112, 152 A. at 717.

¶ 20. Beneficiary has failed to rebut the presumption of undue influence against his bequest because the civil division did not find his explanations for his conduct credible. When faced with the considerable evidence showing beneficiary stole large amounts of money from testator while he lay dying, beneficiary had little to say in response aside from "if that's what the record shows" and "I don't remember." The court similarly found beneficiary's response that the large amount of cash in his bedroom was from years of tip wages and that testator permitted beneficiary to use the debit card for whatever he wanted to be incredible, especially in light of the photographs, bank statements, forensic auditing, and testimony of testator's neighbors. Beneficiary pretended to be a helpful friend, all the while stealing from testator when he was at his most vulnerable, conduct testator would surely not have rewarded with a bequest. Beneficiary notes that "the law does not infer undue influence from the mere fact that one who is to profit by the instrument had the opportunity to impress his will upon the mind of the testator." Est. of Burt, 122 Vt. at 266, 169 A.2d at 36. However, the distinguishing factor here is that the suspicious circumstances arose from more than the fact that beneficiary would profit from the will.

¶ 21. The dissent disagrees with this analysis on the grounds that there is no direct link between beneficiary's theft from testator and the bequest at issue, arguing that beneficiary here did not supplant testator's true desires for the explicit purpose of taking under the will. We believe this to be too narrow an application of the law. While this may not be the conventional case of a beneficiary whispering into a testator's ear, the record is sufficient to show that beneficiary influenced testator in lying by omission. The dissent points out that testator had a history of frugality and resistance to influence, but this only strengthens our conclusion. The record was sufficient to support the inference that beneficiary, knowing he would take under the will, and knowing that testator would disapprove of his theft, lied by omission. We agree with the dissent that this Court's "overriding objective is to give effect to the intent of testators wherever possible," post, ¶ 35, which is why we refuse to sanction a bequest that contravenes this intent, as illustrated by the evidence. Further, where, as here, a testator includes a residual clause to a specific bequest, the concern of contradicting testator's intent through voidance of a specific provision is much less consequential because testator has presented an alternative of intents. In re Est. of Holbrook, 2016

VT 13, ¶ 29, 201 Vt. 254, 140 A.3d 788 (noting courts evaluate instrument as a whole in determining testamentary intent).

¶ 22. Beneficiary was in a position of power over testator due to his physical condition, with the opportunity to deceive testator and convert his property, which beneficiary acted upon. Indeed, if not for testator's health challenges, beneficiary would likely have been unable to steal from testator due to testator's diligent financial record-keeping. Because there were suspicious circumstances, beneficiary bore the burden of demonstrating a lack of undue influence. Beneficiary did not meet that burden. Beneficiary concealed his theft from testator because he likely knew that testator would disapprove, and his argument that this conduct falls outside of undue influence employs too narrow a reading of the law and would unjustly enrich beneficiary in the face of egregious conduct.

B. Partial Voidance

¶ 23. Beneficiary next argues that the court committed legal error in voiding just the portion of the will related to him. With no citation, beneficiary claims that the practice of Vermont courts is to not allow partial voiding of certain will provisions.

¶ 24. We conclude that partial voidance is an acceptable remedy when undue influence is found in that it best preserves the testator's intent and effectuates the testator's desires. Our overarching purpose in construing a will is to "is to ascertain the intention of the testator." Est. of Holbrook, 2016 VT 13, ¶ 29, 201 Vt. 254, 140 A.3d 788. The provision at issue in this case is a small part of a much larger will that includes bequests to approximately twenty other individuals and entities, and amounts to between one and five million dollars. The evidence of undue influence is disconnected from these other bequests and individuals. If the entire will was invalidated, testator's wishes would be wholly ineffectual. Therefore, invalidating an entire testamentary instrument based on the deficiency of one particular portion contravenes the desires of the testator. See Est. of Raedel, 152 Vt. at 481, 568 A.2d at 332 (noting "courts are bound to enforce the intent of the testator"). If we were to invalidate testator's entire will here, the laws of intestacy would likely direct his estate to be descended to his daughter, whom he explicitly disinherited from his will. It cannot be said that doing so here would live up to testator's intent.

¶ 25. This conclusion is in keeping with many of our northeastern sister jurisdictions that have also allowed preservation of parts of a will. See, e.g., Edgerly v. Barker, 66 N.H. 434, 31 A. 900, 910 (1891) ("Courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator." (quotation omitted)); In re Carothers' Est., 300 Pa. 185, 150 A. 585, 586 (1930) ("Where a provision in a will which gives a legacy is void because of undue influence, the will itself is not necessarily void nor are other legacies, unless such influence directly or impliedly affects them."); In re Hitchcock's Will, 222 N.Y. 57, 118 N.E. 220, 223 (1917) ("The principle is now well settled that the courts lean in favor of the preservation of such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator."); Wellman v. Carter, 286 Mass. 237, 190 N.E. 493, 498-99 (1934) (noting "only parts of the instrument affected by the undue influence of a named person are to be set aside"). The primary reason stated for allowing this was to ensure enforcement of the general intent of the testator, especially where, like here, a residual clause follows the invalidated provision. See Carothers' Est., 150 A. at 586 ("Where legacies or bequests are declared void for any reason, and the will contains a residuary clause disposing of the residue of an estate, the bequests invalidated pass under the residuary clause, unless the scheme of the will or testator's intention provides otherwise."). Therefore, we join those courts in holding that as a general matter, portions of a will may be invalidated to remedy a bequest that is the result of undue influence. We conclude that this remedy was appropriate here.

C. Review by Civil Division

¶ 26. Finally, beneficiary argues that the civil division's order "affirming" the decision of the probate division renders its decision infirm because the civil division was required to engage in de novo review. See 12 V.S.A. § 2553; see also In re Peter Val Preda Trusts, 2019 VT 61, ¶ 5, 210 Vt. 607, 218 A.3d 27 (noting civil division has jurisdiction of probate appeals unless otherwise provided). Use of the word "affirm" does not vitiate the court's de novo review of the probate division ruling. Here, the civil division held a two-day bench trial, taking evidence and testimony in supplementation of the record, and fashioning an order without reliance on the probate court ruling. It is clear from the record that the civil division undertook an independent review of the evidence and law before coming to its conclusion, without deference to the probate division's order. Thus, the civil division employed the correct standard of review, and its order is free from error based on such a challenge.

Affirmed.

DISSENT

CARROLL, J., dissenting.

¶ 27. To prove that a will beneficiary unduly influenced a testator in creating a will, our case law requires a showing that the beneficiary has destroyed the testator's free agency and, in effect, replaced it with the beneficiary's own at the time the will was executed. Based on the facts found below and applying the correct legal standard, beneficiary Hammond did not unduly influence testator Crofut to devise an option to purchase testator's house for $40,000, an amount below fair-market value. Accordingly, I respectfully dissent.

¶ 28. As an initial matter, the majority incorrectly concludes that beneficiary bears the burden to prove that he did not unduly influence testator's February 7, 2021, will. Ante, ¶¶ 17-18. He does not. Will contestants—neighbors here—ordinarily carry the burden to prove undue influence. In re Est. of Raedel, 152 Vt. 478, 481, 568 A.2d 331, 332 (1989). However, that burden shifts to will proponents when suspicious circumstances are present. Id. We have identified that certain relationships between testator and beneficiary can give rise to suspicious circumstances. Examples include relationships "such as those of guardian and ward, attorney and client, spiritual advisors and persons looking to them for advice," or indeed "all relations of trust and confidence in which the temptation and opportunity for abuse" is great.[1] Landmark Tr. (USA), Inc. v. Goodhue, 172 Vt. 515, 525, 782 A.2d 1219, 1228 (2001) (quotation omitted).

¶ 29. The majority concludes that beneficiary had a "confidential relationship" with testator giving rise to suspicious circumstances, which shifts the burden to beneficiary to disprove undue influence. Ante, ¶ 18. The record is bereft of any evidence indicating that this relationship was "confidential" in the manner intended by our case law. Beneficiary was not testator's fiduciary, not his guardian, not his doctor or nurse, and not his spiritual advisor. After decades of friendship, and a relationship in which beneficiary viewed testator as a "father figure," beneficiary was one of testator's caretakers once testator became homebound in the final stages of his illness.[2] But this hardly, without more, amounts to a privileged relationship justifying the burden shift. See Est. of Raedel, 152 Vt. at 483-84, 568 A.2d at 334 (holding that nonfiduciary beneficiaries who were testator's nieces and who inherited farm, expressed interest in inheriting farm, did not assist in preparing will, helped care for testator during illness, urged testator to seek legal advice regarding estate, and discouraged other nieces and nephews from contacting testator did not amount to suspicious circumstances); see also In re Moxley's Will, 103 Vt. 100, 112-13, 152 A. 713, 717 (1930) (holding that no suspicious circumstances existed between nurse-beneficiary and testator where testator was of sound mind at time of will execution, nurse not present at will execution, and had

nothing to do with will preparation). Mere friendship is not enough to raise the presumption of suspicious circumstances either. In re Est. of Burt, 122 Vt. 260, 266, 169 A.2d 32, 36 (1961) (stating that "[g]ood-neighborliness or mere friendship is not sufficient" to show existence of confidential relationship and that "[i]n a testamentary disposition, the law does not infer undue influence from the mere fact that one who is to profit by the instrument had an opportunity to impress his will upon the mind of the testator. It must appear that undue influence was actually exerted."). The burden to prove beneficiary unduly influenced testator should have remained with neighbors.

¶ 30. Even if neighbors were required to bear the burden to prove undue influence, their claim still fails on this record. Our leading case on the issue of undue influence explains that:
[U]ndue influence ... means whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammeled desire. It may be caused by physical force, by duress, by threats, or by importunity. It may arise from persistent and unrelaxed efforts in the establishment or maintenance of conditions intolerable to the particular individual. It may result from conduct designed to create an irresistible ascendency by imperceptible means. It may be exerted by deceptive devices without actual fraud. Any species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential as long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person signing the instrument. The nature of undue influence is such that it often works in veiled and secret ways hence it is impossible to lay down any hard and fast rule by which its exercise must or may be manifested. Direct evidence of it is seldom available. Nor is this necessary, since it may be shown by circumstances which have a legitimate tendency to prove that it was used. The nature of the testamentary disposition as we have seen whether natural or unnatural, may be considered in connection with other evidence under the issue of undue influence. Opportunity must necessarily be shown, but opportunity alone does not justify the inference of undue influence. Furthermore, influence by whatever means exerted, and however urgent and persistent, will not suffice to [ ]void a will unless carried to the point of destroying the free agency of the testator. Neither suggestion, solicitation, advice, nor importunity, unless carried to the extent indicated, will [ ]void a will. In re Everett's Will, 105 Vt. 291, 315, 166 A. 827, 836 (1933) (citations omitted). As is clear from that discussion, undue influence requires volitional conduct to achieve specific ends—a benefit in the will created by a testator whose own free agency has been destroyed and has therefore done something "which is contrary to his own untrammeled desire." Id.

¶ 31. There is no evidence that beneficiary's conduct destroyed testator's free agency and supplanted it with beneficiary's own. The majority holds, without citation, that beneficiary's conduct, including stealing money and enjoying a position of physical power over testator, when viewed in light of the "suspicious circumstances" of their "confidential" relationship, amounts to undue influence. Ante, ¶ 18. But the majority, in my opinion, misapplies the legal question it correctly cites elsewhere: whether beneficiary's conduct constitutes "[a]ny species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual" at the time the individual executed the will in question. In re Est. of Rotax, 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981) (quotation omitted); see In re Soon Kwon, 2011 VT 26, ¶ 7, 189 Vt. 598, 19 A.3d 139 (mem.) ("When reviewing the superior court's conclusions as to issues of law, our review is de novo."). Beneficiary's conduct was certainly odious, but only conduct amounting to an influence sufficient to destroy testator's free agency can "[ ]void a will." Everett's Will, 105 Vt. at 315, 166 A. at 836.

¶ 32. The trial court found that testator had the requisite capacity to execute the February 2021 will, which was videotaped. Beneficiary was not present. The court found credible that beneficiary knew about testator's intention to devise to beneficiary the house in some respects, but no evidence suggests that he knew about the precise terms of the purchase option or that he ever specifically discussed the topic with testator. Nor is there any "evidence that [beneficiary] exercised any influence or ascendancy over ...

testator.” Est. of Burt, 122 Vt. at 266, 169 A.2d at 36. Testator was “extremely frugal,” had “ ‘high moral and ethical standards,’ and did not tolerate any deceit or deception.” For example, in the summer of 2020, testator became upset after beneficiary pressured testator to leave testator's car to beneficiary because testator thought beneficiary “just wanted to sell the car for cash.” Testator did not bequeath the car to beneficiary. Testator had cut his daughter out of his will because he thought she only cared about money. He had once evicted a tenant because the tenant did not repay a loan. The majority also characterizes beneficiary's relationship to testator as one “in a position of power” due to testator's physical condition. Ante, ¶ 22. However, this does not amount to “influence or ascendancy” to such an extent that testator's free agency was destroyed on February 7, 2021. See Moxley's Will, 103 Vt. at 112, 152 A. at 717. There is no evidence that beneficiary used his relative strength to coerce testator in any respect, including executing any will or provision of a will, and neighbors do not dispute that beneficiary continued to perform caretaking duties for testator throughout testator's illness.3

¶ 33. Even if, as the majority concludes and the trial court found, testator would have cut beneficiary out of his will if testator had known about beneficiary's conduct, that counterfactual fails to demonstrate that beneficiary's conduct destroyed testator's free agency and resulted in testator signing a will that expressed an intent other than his “untrammeled desire.” Cf. Everett's Will, 105 Vt. at 319-20, 166 A. at 836-38 (holding that wife unduly influenced husband by creating an “irresistible ascendancy by imperceptible means” where wife benefitted under the will after influencing husband to terminate contact with daughters, isolated and manipulated husband over a period of years, and arranged very large sums of capital including cash, real estate, and stocks in multiple corporations to be gifted to her and her children from a previous marriage during husband's life and with husband's knowledge). Beneficiary's conduct was hardly “an irresistible ascendency by imperceptible means”—there is simply no connection between his apparent covert misuses of testator's debit card and testator's devise to him of a purchase option of his house for $40,000, an amount beneficiary clearly did not possess of his own accord.4 Indeed, the will provision gave beneficiary only nine months to exercise the option, during which he would bear “the costs of all ordinary maintenance, repairs, taxes, utilities, insurance and other operational costs.” This hardly has the appearance of a sophisticated, frugal, wealthy, and careful testator's will being overborne by this particular beneficiary.5

¶ 34. “The undisputed evidence is that ... testator was not a person to be easily influenced or swayed.” Est. of Burt, 122 Vt. at 266, 169 A.2d at 36. “There is no evidence that” beneficiary “exercised any influence or ascendancy over” testator. Id. “Nothing appears to show that” beneficiary “advised ... testator to make a will.” Id. This was not a confidential relationship. It was a decades-long friendship, and the two men lived together. Beneficiary visited testator daily when testator was hospitalized for several months in early 2020. Beneficiary was one of testator's caretakers when testator returned home from the hospital, and testator apparently trusted beneficiary to such an extent that he let beneficiary use his debit card for at least several months before testator executed the February 2021 will.

¶ 35. Whatever one thinks of beneficiary's conduct, the question is whether, taken together, it supplanted testator's free agency on February 7, 2021. See, e.g., Everett's Will, 105 Vt. at 319-20, 166 A. at 838 (“While [the evidence] did not tend to show that at the time the instrument in question was made [the testator] lacked testamentary capacity in the sense that he was incapable of making a will if left to his own untrammeled wishes in the matter, it did tend to show that [the beneficiary] had succeeded in implanting in his mind a feeling of ill will, bordering on hatred, towards his older daughters, which continued to the time the instrument was made, and that she, by various means, had acquired such control over him that his acts and conduct regarding his business affairs, whether large or small, reflected her will respecting the same, whenever she sought to exert it, rather than his own.”). I cannot conclude as a matter of law that testator's free will was destroyed by beneficiary's fraudulent conduct when he executed his final will on February 7, 2021. Without any evidence or factual findings connecting beneficiary's conduct to testator's free agency on February 7, 2021, mere conduct that the beneficiary wished to keep hidden is not the kind

of volitional or coercive conduct that we have long held constitutes undue influence. See, e.g., id. at 315, 166 A. at 836. Lying by omission and incredible testimony, as our case law bears out, do not void a will by themselves. Our overriding objective is to give effect to the intent of testators wherever possible, which is why we require testators to state their "dispositive wishes clearly and appropriately." In re Est. of McCoy, 126 Vt. 28, 30, 220 A.2d 469, 471 (1966). Testator has done so, and I would enforce his will as written.

¶ 36. Accordingly, I respectfully dissent.

All Citations

312 A.3d 1002, 2024 VT 8

Footnotes

1

The trial court compared beneficiary's and testator's relationship to a doctor and patient.

2

Testator was visited by nurses several times per week until he entered round-the-clock, home-hospice care before his death in April 2021.

3

Whether, as the trial court found, beneficiary "pretended to be a selfless assistant" or not does not change the fact that beneficiary was not using his position of power to coerce or influence testator on the basis of beneficiary's relative strength.

4

The trial court did not suggest that beneficiary was misappropriating cash from testator in order to obtain the $40,000 to purchase the house. In fact, it found that beneficiary had been spending a great deal of the money on personal property including at Best Buy, Kohl's, Old Navy, and Walmart.

5

As the trial court noted, no property assessment was submitted. Accordingly, though the court found that the house is "undoubtedly worth significantly more than" $40,000, it is not possible to discern precisely how much more.

Directed Trusts in New England and Beyond: A Comparison of Sample Approaches

Saturday, October 19

<u>Speakers:</u>

Megan C. Knox, Concord, NH

Suma V. Nair, Boston, MA

AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
2023 ANNUAL MEETING
March 4, 2023
New Orleans, LA

It's Not My Fault…. They Made Me Do It: An Update on Directed Trusts[1]

The Uniform Directed Trust Act is now five years old with 16 jurisdictions enacting it. This panel will discuss the latest lay of the land for directed trusts from the perspectives of trustee, planner, and litigator. The panel will review the risks of taking direction from third-party investment and distribution advisers and their practical experiences with this very popular planning technique.

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[1] **Disclaimer**: This paper only scratches the surface of the covered topic because the intersection between drafting and litigation-risk is incredibly varied and complex and, therefore, it is for educational and informational purposes only. All analyses, exhibits, hypotheticals, language, or drafting concepts are presented for illustration and do not necessarily reflect specific strategies that may have been developed for particular clients. They are for illustrative and discussion purposes only. They certainly are not intended to serve as specific legal or tax advice, because the availability and effectiveness of any strategy is dependent upon your individual facts and circumstances. Results will vary and no guarantee or suggestion is made about how any specific solution, analysis, or strategy will perform in reality.

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I. Introduction

Directed trusts are wildly popular for at least two reasons: they typically result in lower trustee fees, and they enable the beneficiaries or the settlor to retain control over key aspects of trust administration – investment decisions and/or distribution decisions. Directed trusts can afford greater flexibility in trust management through the bifurcation of fiduciary duties among various parties, but also can result in a complicated intersection of roles, duties and undefined liability. An essential component of managing directed trusts is determining the roles and authority of the advisor/ trust director[3] and the directed trustee. Each party's status as a fiduciary or nonfiduciary is a foundational step in determining the scope of each role and who owes what duties to the beneficiaries. Closely related to a party's status as a fiduciary is whether a directed trust act imposes a mandatory minimum standard of conduct on advisors and directed trustees.

First, we will highlight key provisions in the Uniform Trust Code ("UTC"), the Uniform Directed Trust Act ("UDTA") and selected state directed trust laws. Then, we will point out what these provisions do not cover including gaps in coverage highlighted through litigated cases. We also included sample trust language for consideration when drafting directed trusts.

II. Uniform Laws and State Statute Comparisons

A. Fiduciary Status and Minimum Standard of Conduct

1. Uniform Trust Code and Restatement of Trusts Applicable Provisions

The UTC was the original uniform act that incorporated a directed trust concept.[4] Section 808 of the UTC is now "reserved,"[5] and has been replaced by the UDTA. Historically, Section 808(b) provided as follows:

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

The UTC was expanded to include paragraphs (c) and (d) to Section 808:

> (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
>
> (d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the

---

[3] The term "trust director" will be used to refer to advisors and trust directors except where statutes use the term advisor.

[4] Mary C. Downie, ACTEC State Laws Presentation, November 4, 2022, "Variations in Directed Trust Statutes".

[5] The UTC legislative note states that "*A state that has enacted the Uniform Directed Trust Act (UDTA) should repeal Section 808 and revise certain other provisions of the UTC as indicated in the legislative notes to the UDTA.*"

> trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

Restatement (Third) of Trusts, Section 75 provides as follows:

> Except in cases covered by Section 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.

Restatement (Second) of Trusts Section 185 provides as follows:

> If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.

a. Fiduciary status. Former Section 808 of the UTC adopted a similar approach to the Restatement (Third) of Trusts. It contained a presumption that a powerholder was a fiduciary. In addition, the language was clear that any party with a power to direct was liable for losses resulting from a breach of fiduciary duty. The Prefatory Note to the UTC references former Section 808(d) in support of this point. In 2018, the UTC was amended to recognize the promulgation of the UDTA, and Section 808 was superseded.

b. Mandatory minimum standard of conduct. Neither the UTC nor the Restatement expressly addresses the standard of conduct for a trust director or a directed trustee. Given the limitations of the UTC and Restatements precluding a directed trustee from complying with a direction that would be in violation of the terms of a trust or would violate a fiduciary duty, the standard of conduct likely would be gross negligence or possibly negligence. While most of the default provisions of the UTC can be overridden by the terms of a trust there are certain mandatory rules relating to the duties and powers of a trustee and rights of a beneficiaries. UTC Section 105(b)(2) sets forth the mandatory rules that a trustee must act in good faith, in accordance with the purposes of the trust and in the interests of the beneficiaries. In the wake of the UDTA, UTC Section 105 (b)(2) was amended so that these mandatory rules are now expressly subject to certain sections in the UDTA (Sections 9, 11 and 12).[6] In addition, UTC Section 1008 (2000) and Restatement (Third) of Trusts Section 96 (2012), provide that an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference.

[6] Uniform Trust Code, Section 105 (b) (2).

2. Uniform Directed Trust Act Applicable Provisions[7]

The UDTA Section 8 focuses on the status of the trust director. UDTA Section 8 defines the scope of a trust director's duty and liability as follows:

> (a) Subject to subsection (b), with respect to a power of direction or further power under Section 6(b)(1):
>
> > (1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:
> >
> > > (A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or
> > >
> > > (B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and
> >
> > (2) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.
>
> (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].
>
> (c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

UDTA Section 9 addresses the status of the trustee. It provides:

> (a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.
>
> (b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct…

a. Fiduciary status. The foregoing provisions make it clear that a trust director is a fiduciary, as is a directed trustee.

b. Mandatory minimum standard of conduct. The UDTA expressly states that it imposes mandatory minimum fiduciary duties on trust directors and trustees alike for public policy reasons.[8] The drafting committee for the Uniform Directed Trust Act contemplated that Section 8 (Duty and Liability of a Trust Director), Section 9 (Duty and Liability of Directed Trustee), along

[7] 16 states have adopted the Uniform Directed Trust Act as of 2022.
[8] Uniform Directed Trust Act, Section 8.

with Section 10 (governing information sharing among directed trustees and trust directors), and Section 11 (eliminates certain duties to monitor, inform or give advice), would prescribe the mandatory minimum standard of conduct for a trust director and a directed trustee. The comments emphasize that the trust director duties are defaults and minimums, not ceilings. Based on Sections 8 and 9 and UDTA comments noted below, the minimum standard of conduct for a directed trustee is the "willful misconduct" standard (discussed further below), and the minimum standard of conduct for a trust director is whatever that standard is for non-directed trustees under applicable state law. The comments to UTC Section 1008 confirm that "a trustee must always comply with a certain minimum standard" even where the terms of a trust attempt to completely exculpate a trustee.[9]

The Prefatory Note to the UDTA observes the lack of uniformity among the states as to whether advisors are deemed fiduciaries and who is ultimately liable for breaches of fiduciary duties owed to the beneficiaries, noting:

> There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an 'administrative trustee' or 'directed trustee', with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

The Comments to UDTA Section 8 clarify that by making a trust director a fiduciary it followed many existing statutes but improved upon existing statutes which used the term "fiduciary" without specifying which fiduciary duties apply. Section 8(a) absorbs existing state trust fiduciary law that would apply to a trustee and applies it to a trust director.

The third paragraph of the Prefatory Note makes the following point on mandatory minimum fiduciary duties:

> Enabling Settlor Autonomy Consistent with Fiduciary Minimums. By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition. At the same time, the act imposes a mandatory minimum of fiduciary duty on both a directed trustee and a trust director in accordance with the traditional principle that a trust is a fiduciary relationship. See, e.g., Restatement (Third) of Trusts Section 96 cmt. c (2012) ('[F]or reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.)

The drafting committee noted that it was heavily influenced by the prominent Delaware directed trust statute which imposes a standard on a directed trustee to avoid "willful misconduct" and that this standard has proven to be workable in practice. It further noted that "a beneficiary's main recourse for misconduct by a director is an action against the director for breach of the director's fiduciary duty to the beneficiary." The drafting committee concluded that by preserving all of the usual duties of a trustee appointment in a trust director and a minimum standard of conduct in a trustee to avoid willful misconduct the Act provides more "aggregate fiduciary duties" being

[9] Uniform Trust Code Section 1008,cmt.

owned to a beneficiary. The Prefatory Note is clear that the drafting committee declined the suggestion that the Uniform Directed Trust Act should eliminate the fiduciary duty of a directed trustee completely.[10]

Another example discussed in the comments is the alignment between the fiduciary duties of trust directors and trustees is the inclusion of terms such as "sole/absolute/uncontrolled" in describing a trust director's discretion. The drafting committee was clear that these terms would have the same effect as if the extended power were given to a trustee noting: "A trust director could not act in bad faith or take actions that do not further the purposes of the trust".[11] Additionally, a trust agreement cannot exonerate a trust director or a directed trustee beyond the minimum standard of liability.

The comments to Section 8 note the following on exoneration clauses in trusts:

> A trust director is likewise subject to the same rules as a trustee with regard to an exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code Section 1008 (2000) and Restatement (Third) of Trusts Section 96 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference. Under subsection (a)(2) of this section, the same rules would apply to an exculpation or exoneration clause for a trust director. Thus, if the terms of a trust provide that a director can never be liable to a beneficiary, then the trust director would have the same liability as a trustee would have under a similar exculpatory clause.

3. State Law Provisions

States have different approaches on the fiduciary status of trust directors. There are at least three approaches to the issue: (1) the trust director is a fiduciary under the statute unless the terms of the trust override the default fiduciary status; (2) trust directors are deemed to be fiduciaries and this status cannot be overridden by the terms of the trust; or (3) trust directors are fiduciaries with the same duties as trustees due to enactment of UDTA or some version of it.

Many states have in effect imposed mandatory minimum standards of conduct on trust directors through the application of common law and establishing a willful misconduct standard for directed trustees. A minority of states continue to follow the former Section 808 of the Uniform Trust Code where the trust director is a fiduciary with liability for a breach of trust.[12]

a. Select state law approaches to fiduciary status. Delaware and Nevada are examples of states where an advisor is deemed to be a fiduciary, but a nonfiduciary status can be conferred on an advisor by the terms of a trust. Illinois appears to take this approach also.

Delaware Section 3313:[13]

> (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed

[10] Uniform Directed Trust Act, Prefatory Note, Fiduciary Duty in a Directed Trust.
[11] Uniform Directed Trust Act, Section 8, cmt.
[12] Alabama, District of Columbia, Maryland, Massachusetts, Mississippi, Oregon and Pennsylvania.
[13] 12 Del. C. Section 3313 (a) (1) (i)

investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.

Nevada Section 163.5551:[14]

> If one or more trust advisers are given authority, by the terms of an instrument, to direct, consent to or disapprove a fiduciary's investment decisions, the investment trust advisers shall be considered fiduciaries when exercising that authority unless the instrument provides otherwise.

The Illinois Trust Code provides, in pertinent part:[15]

> A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee.

In Illinois the above section does not fall within the mandatory sections of the Illinois Trust Code which cannot be overridden by the terms of a trust. In theory, a directing party could be deemed a nonfiduciary under the terms of a trust in Illinois.[16]

The Texas directed trust statute, excerpted below, is an example of a statute where the fiduciary status of trust directors cannot be superseded by the terms of a trust.

Texas requires an advisor to serve in a fiduciary capacity regardless of the terms of the trust with limited exceptions relating to removal and appointment of other fiduciaries and powers which are conferred to create a grantor trust for income tax purposes.

Texas Section 114.003 (e):[17]

> (e) If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
>
> > (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
> >
> > (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision (1).

[14] 760 ILCS Section3/808 (e).
[15] 760 ILCS Section3/808 (h)
[16] 760 ILCS Section3/105
[17] Texas Prop. Code Section 114.0031 (e).

(e-1) Subsection (e) does not prohibit the exercise of a power in a nonfiduciary capacity as required by the Internal Revenue Code for a grantor or other person to be treated as the owner of any portion of the trust for federal income tax purposes.

The ability to override the fiduciary status of an advisor under Tennessee's statute is less clear. Under Section 35-15-1202 (a) an advisor is deemed to be a fiduciary, with the imposition of mandatory minimum fiduciary duties consistent with common law duties.[18] Comments to Section 35-15-1202, however, state that the trustor may exclude a trust advisor from being a fiduciary at all, with or without a duty of good faith, provided only that a trust advisor cannot be exculpated from reckless indifference to the purposes of the trust or the interests of the beneficiaries.[19]

Section 35-15-1202 (a):

> A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust advisor or trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

The Florida and Washington directed trust statutes, excerpted below, are examples of states that have adopted the UDTA mandatory minimum fiduciary duties.

Florida:[20]

> (1) Subject to subsection (2), with respect to a power of direction or further power under s. 736.1406(3)(a), relating to additional power granted to a trust director in furtherance of an express power of direction:
>
> > (a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:
> >
> > 1. If the power is held individually, as a sole trustee in a like position and under similar circumstances; or
> >
> > 2. If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.
> >
> > (b) The terms of the trust may vary the trust director's duty or liability to the same extent the terms of the trust may vary the duty or liability of a trustee in a like position and under similar circumstances.
>
> (2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a

[18] Tenn. Code Ann. Section 35-15-105 (b).
[19] Tenn. Code Ann. Section 35-15-1202, cmts (2013).
[20] Fla. Stat. Section 736.1406

profession, to the extent the trust director acts in that capacity the trust director has no duty or liability under this part.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Washington:[21]

(1) Subject to subsection (2) of this section, with respect to a power of direction or further power under RCW 11.98B.050(2)(a):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(i) If the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(ii) If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(b) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this chapter to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this chapter.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

b. Mandatory minimum standard of conduct. The states that have adopted the UDTA have incorporated the same minimum fiduciary standard of conduct with respect to the trust director as would apply to a trustee. In other words, if, under state law, a trustee would breach the minimum standard of conduct by acting with gross negligence, under the state UDTA, the trust director would be subject to the same minimum standard of conduct. The willful misconduct standard (discussed below) would be applicable to the directed trustee.

All of the other state statutes cited above which provide that a trust director is a fiduciary also impose some form of a mandatory minimum standard of conduct through affirmation of certain common law fiduciary duties such as the duty to act in good faith, adhere to the terms of the trust and a duty to act in the interests of the beneficiaries. Furthermore, adoption by a state of a willful misconduct standard for a directed trustee arguably should result a similar minimum standard of conduct for a trust director acting in a fiduciary capacity.

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[21] RCW 11.98B.070

For example, Illinois subjects the directed trustee (called an "excluded trustee") to a willful misconduct standard.

ILCS Section 3/808(f):

> Except as otherwise provided in this Section or the trust instrument, an excluded fiduciary is not liable, either individually or as a fiduciary, for any action, inaction, consent, or failure to consent by a directing party, including, but not limited to, any of the following:
>
>> (1) if a trust instrument provides that an excluded fiduciary is to follow the direction of a directing party, and such excluded fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following any such direction, including but not limited to compliance regarding the valuation of assets for which there is no readily available market value.

In addition, Illinois holds trust directors to the same standard of conduct as trustees and under Section 105(b)(2) of the Illinois Trust Code, the terms of a trust cannot override the duty of a trustee to act in good faith.

Texas also has adopted a willful misconduct standard for directed trustees.

Section 114.0031(f):[22]

> A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.

The Texas Trust Code requires that trustees act in good faith and in accordance with trust terms and that absent a contrary provision in the trust instrument a trustee is subject to all common law duties applicable to trustees. The mandatory minimum standard of conduct for a trust director in Texas is good faith and adherence to the terms of a trust.

Section 113.051:

> The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.[23]

While Tennessee provides that the terms of a trust can vary or eliminate the duties of a trustee and statutes in derogation of common law shall be strictly construed and that courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust

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[22] Texas Prop. Code Section 114.0031 (f).

[23] Texas Prop. Code Section113.051.

instruments, it excludes from these provisions the mandatory duties for trustees to act in accordance with the terms of the trust and in the interests of the beneficiaries.

Section 35-15-105 includes among its mandatory provisions: "The duty of a trustee to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries…"[24]

At a minimum, trust directors in Tennessee must act in accordance with the terms of a trust and in the interests of the beneficiaries. Whether trust directors in Tennessee could be relieved of the duty to act in good faith could be open to debate.

Delaware provides a mandatory minimum "wilful misconduct" standard for both the directed trustee and any other fiduciary.[25] Pursuant to Section 3303(a), a trust agreement can override common law duties, but it cannot exculpate or indemnify a fiduciary for its own willful misconduct.[26]

Nevada adopts a "no liability" standard for the directed trustee and appears to provide that a directed trustee is not liable as a fiduciary as to those acts with respect to which it is being directed.[27] Notwithstanding the "no liability" standard, a directed trustee may be subject to a minimum fiduciary duty to act in the interests of the trust purpose or beneficiaries with respect to the directed act.[28] Nevada has adopted a statute (NRS Section 163.004) that allows a trust agreement to expand, restrict, eliminate or otherwise vary a fiduciary's powers, duties, standard of care, etc. Notwithstanding, NRS Section 163.004 does not "[a]uthorize the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or gross negligence." In theory, if a directed trustee is considered a non-fiduciary with respect to a directed act, then it should be able to be indemnified under the terms of a trust agreement for complying with a directed act, including where its compliance was itself an act of willful misconduct or gross negligence (but this is not recommended).

With respect to both Section 3303(a) under Delaware law and Section 163.044 under Nevada law, where a trust director is a fiduciary, those statutes would allow a trust agreement to vary its duties, but not beyond the willful misconduct standard (or the gross negligence standard, in Nevada). Where a trust director is not a fiduciary, it appears that a trust agreement might permit indemnification for the non-fiduciary trust director's acts of willful misconduct (but this is not recommended).

Comment: In states where a trust director can serve as a nonfiduciary the question then becomes who is the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the directing party's instructions and the trust director is not a fiduciary?

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[24] Tenn. Code Ann. Section 35-15-105 (b) (2) (3).

[25] 12 Del. C. Section 3303(a), 3313

[26] 12 Del. C. Section 3303(a)

[27] NRS Section 163.5549(1) ("A directed fiduciary is not liable, individually or *as a fiduciary* for any loss…")

[28] None of the authors of these materials practices law in Nevada, and accordingly, this statement is the opinion of two Nevada practitioners consulted in preparation of these materials.

In *McLean Irrevocable Trust v. Patrick Davis, P.C., et. al.*,[29] the Missouri Court of Appeals addressed the issue of a trust protector's liability for failing to remove a trustee who purportedly was damaging the trust. There was no dispute that the trust agreement vested the trust protector with the authority to remove and replace a trustee, or that the defendant trust protector accepted his appointment as such.[30] Instead, the defendant trust protector argued that because neither Missouri law nor the trust agreement created any duty for a trust protector to "monitor or supervise" trustees, he could not be liable for not doing so. The Court, noting that the issue was one of first impression in Missouri, pointed to: (1) existing law regarding the voluntary assumption of duties and potential liability stemming from the same; and (2) the inference of specific duties that might reasonably follow from a fiduciary relationship.[31] Because the trust agreement was created for the purpose of investing "settlement proceeds in a prudent manner," the Court found it possible that a trust protector owed duties to the "trust itself" and "might include a duty to protect the trust itself from foreseeable injury."[32] The Court also found, by extension, that the power to remove and replace trustees (which was in held in a fiduciary capacity) meant that the "grantor expected the Trust Protector to exercise his power of trustee removal if the trustee at issue was acting against the purpose of the trust."[33] Ultimately, the Court found such inference a sufficient basis to allow the claim of fiduciary duty to go forward; however, the Court recognized the determination of the ultimate issues of breach and damage were not before it.[34]

4. Sample Language, Fiduciary Status of Investment Advisor [emphasis added][35]

Appointment of Investment Advisor. In reliance on the provisions of 12 *Del. C.* Section 3313, the Grantor hereby appoints ___________________________ (the "Investment Advisor") as Investment Advisor. If at any time ___________________ is unwilling or unable to act, then the Investment Advisor of such trust shall be such individual or entity appointed by ___________________. By accepting an appointment to serve or act hereunder, such Investment Advisor (or any successor Investment Advisor) shall be deemed to have consented to submit to the jurisdiction of each court in which jurisdiction and venue are proper to review the administration of the Trust and to be made parties to any proceedings in each such court that place in issue the decisions or actions of the Investment Advisor. *The Investment Advisor shall exercise the Investment Advisor's functions in a fiduciary capacity and in a manner that the Investment Advisor reasonably believes to be in accordance with the purposes of this Trust Agreement. The Investment Advisor shall be deemed to have acted within the scope of its authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all persons interested unless the contrary be proven by affirmative clear and convincing evidence, and in the absence of such proof the Investment Advisor shall not be liable for loss arising from depreciation or reduction in value of any property authorized to be held or acquired.* Each successor Investment Advisor shall have all of the powers and discretions conferred in this Trust Agreement upon the original Investment Advisor.

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[29] *McLean Irrevocable Trust v. Patrick Davis, P.C., et. al.*, 283 S.W.3d 786 (Mo. App., 2009).
[30] *Id.* at 793.
[31] *Id.* at 794.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 795; *see also*, *McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482 (Mo. App., 2013) (affirming the trial court's dismissal of the trustees' claims against the trust protector because of the failure to establish damages).
[35].

B. Scope of Trust Director's Investment Authority

1. UDTA Applicable Provisions

The Uniform Directed Trust Act does not contain default statutory powers for trust directors. Instead under Section 6 the existence and scope of a power of direction must instead be specified by the terms of a trust.[36] Section 6(b) grants a trust director those further powers which are appropriate for the exercise of powers granted under the trust instrument.

Comments to Section 6 indicate that the drafting committee contemplated the terms of a trust would validate a trust director's power to engage in a broad array of powers and specifically mentions powers to: acquire, dispose of, exchange, or retain an investment; make or take loans; vote proxies for securities held in trust; adopt a particular valuation of trust property or determine the frequency or methodology of valuation; and manage a business held in the trust, among other powers.[37]

Two ACTEC Fellows, David Diamond and Todd Flubacher, in a published article commented on this point:

> The rubber meets the road when the trustee must determine whether the direction language covers the investment powers being exercised. The best solution is to provide a broad and inclusive description of investment activities, plus a specific cross-reference to all of the detailed investment powers granted to the trustee in the trust instrument.[38]

Likewise, the comments specifically mention that it would be expected for the terms of a trust to grant a trust director the power to prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust. In fact, the drafting committee observed that it would normally be "appropriate," for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction. From a drafting perspective, it may be advisable for the terms of the trust to confer on a trust director a power to participate or even direct litigation.

In *Schwartz v. Wellin, et. al.,*[39] the U.S. District Court in South Carolina dismissed a complaint filed by the plaintiff trust protector against the defendant children of the grantor (in their capacities as trustees, beneficiaries, and managers of an LLC owned by the trust) for breach of fiduciary duty, conversion, and restitution based on the allegation that the defendant children of the grantor "frustrated the intent and purposes of the trust." The defendant children of the grantor filed a motion to dismiss the plaintiff trust protector's complaint based on the "real party in interest" requirements. The Court, applying South Dakota law, looked at whether a trust protector can qualify as a real party in interest under the facts at hand.[40] The plaintiff trust protector argued that the trust agreement, which he purportedly amended in his capacity as trust protector, expressly authorized his complaint because such amendment granted a the trust protector "the power to

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[36] Uniform Directed Trust Act, Section 6.
[37] Uniform Directed Trust Act,Section6 cmt.
[38] David A. Diamond and Todd A. Flubacher, *The Trustee's Role in Directed Trusts,* Trusts & Estates (2010).
[39] *Schwartz v. Wellin, et. al.*, 2:13–cv–3595–DCN, 2014 WL 1572767 (D. S.C., April 17, 2014).
[40] *Id.* at 6.

represent the Trust with respect to any litigation brought by or against the [t]rust if any [t]rustee is a party to such litigation" and "to prosecute or defend such litigation for the protection of trust assets."[41] Even so, the Court held that the real party in interest test is a matter for the courts to decide, "not one for private parties to decide."[42] The Court found that South Dakota law did not address a trust protector's authority to bring a lawsuit on a trust's behalf, there only were references to "trustees" and not trust protectors.[43] So, because the plaintiff trust protector did not demonstrate that he personally suffered an actual or threatened injury, he was not a real party in interest.[44] Notably, although it is unclear if the language in the referenced trust amendment would have change the Court's mind, the Court found that the plaintiff trust protector lacked the authority to amend the trust agreement to expand the trust protector's powers to include litigation against a trustee.[45]

2. State Law Provisions

Not all directed trust statutes are clear as to the scope of the trust director's authority and what actions constitute an "investment" and therefore can be directed by the trust director. Many directed trust statutes do address valuation of nonpublicly traded assets as part of the investment advisor's authority but stop there.

While at first it would seem obvious what actions would be subject to the investment trust director's direction, many directed trusts have complex structures (LLCs and partnerships with multiple layers) and hold operating businesses or alternative investments, making it difficult to determine the scope of a trust director's investment authority. Ambiguities can and often do arise in connection with the investment and management of complex assets in directed trusts.

Mennen v. Wilmington Trust Company is a case involving a directed trust with ambiguous directed powers. This case generated two major opinions -- one finding the individual trustee – Jeff Mennen ("Jeff") – liable for the trust's losses as a result of his bad faith and willful misconduct,[46] and one refusing to pierce a spendthrift trust to pay damages occasioned by Jeff's liability.[47] This is a summary of the final Master's Report on Jeff's liability.

In 1970, patriarch of the Mennen family, George Mennen, settled four inter vivos irrevocable trusts, one for each of his children, and funded each of them with stock in the Mennen Company. The Mennen Company made a personal hygiene product known as "Speed Stick." Almost two decades later, the Mennen Company was acquired by Colgate-Palmolive and the trusts, referred to as the "1970 trusts," became essentially liquid.

[41] *Id.*
[42] *Id.* at 7.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 8.
[46] *Mennen v. Wilmington Trust Co. et al*, 2015 WL 1914599 (Master's Final Report, Del. Ch. Apr. 24, 2015), adopted by court, 2015 WL 4935373 (Del. Ch. Aug. 18, 2015), affirmed, 166 A.3d 102 (Del. 2017).
[47] *Mennen v. Wilmington Trust Co. et al*, C.A. No. 8432-ML Master's Report (Trustee Roberts's Motion for Summary Judgment) (Final Master's Report April 24, 2015), affirmed on remand, (Del. Ch. Feb. 27, 2017).

Each of the 1970 trusts benefited the child for whom it was settled, along with his or her living descendants. In each of these trusts, an individual trustee served as cotrustee with the corporate trustee, Wilmington Trust Company. The corporate trustee could only make investments upon receiving direction from the individual trustee. Until the Mennen Company stock was acquired by Colgate-Palmolive, very little investment activity occurred, but after the 1970 trusts became liquid, this all changed. At that time, the settlor's oldest son, Jeff, served as the individual trustee for the trust established for the settlor's youngest son, John Mennen ("John"). It was in this capacity as individual trustee of John's trust that Jeff directed several catastrophic investments in private companies which ultimately cost the trust nearly $100 million over a twenty-year period.

Some of Jeff's more notable investment failures included an investment in beeper technology ($10 million loss); an investment in wireless technology based on a bad patent ($40 million loss); and an investment in an on-site oil change company ($30 million loss). Jeff had a personal stake in each of those companies. From this conflicted position, Jeff directed that loans be made to them from John's trust, or that the trust's assets be used to secure loans to such companies by third party lenders or that trust funds be used to directly purchase an equity position in such companies. The court summed up Jeff's pattern of misconduct as "(i) markedly increasing the Trust's exposure at the same time the subject company's insolvency deepened, (ii) using the Trust's money to rescue himself from personal guarantees, (iii) risking substantial portions of the Trust's diversified portfolio to bail out a small number of companies unable to turn a profit or repay debts in the ordinary course, and (iv) allowing the companies to use new infusions of capital from the Trust to service the Trust's existing debt."[48]

Jeff claimed that he engaged in a due diligence review before directing the trust's investments, but was unable to produce any documentary evidence of due diligence for any of the failed investments. Further, in a few instances, the trust loans or purchases of company equity were used by the borrowing company to relieve Jeff from his own personal liability to the company.

Because the trust did not have the millions of dollars of cash needed to make loans to the start-up companies, the trust borrowed money from either the trustee or a third party lender, securing the loans that it owed with trust assets. Eventually, almost all of the remaining liquid assets in John's trust were liquidated to pay off the trust's obligations, following which, the corporate trustee petitioned the court to remove Jeff as trustee. The beneficiaries eventually filed claims against both trustees.

The corporate trustee vigorously disputed its liability for the trust's losses based on the fact that it was a directed trustee. The trust, being drafted in 1970, lacked the nuances of modern directed trusts. Article Second of John's trust set forth 18 trustee powers. Article Third limited four of those trustee powers, by providing that actions falling under those powers were to be exercised by the corporate trustee upon the direction of the individual trustee. The four "directed" powers were: [i] a power to sell and exchange; [ii] a power to invest funds; [iii] a power to participate in, among other things, a refunding, readjustment of stocks, bonds, or other securities or other obligations, enforcement of obligations or security, or reorganization of a company; and [iv] a power to vote

[48] *Id*. at *29.

on a variety of matters. While this provision was likely intended to encompass all investment decisions, the powers to lend funds, borrow or to secure loans with trust property were not expressly on the list of directed powers. Ultimately, the corporate trustee settled out of the case.

Jeff had his day in court. The Master in Chancery's introductory paragraphs sum up the court's reasoning behind its decision. Concluding that Jeff engaged in non-exculpated breaches of trust in the nature of disloyalty to the trust, the Master explained:

> Interestingly, the bulk of the transactions tainted by the trustee's bad faith were not – as one might expect – directly intended to confer an immediate pecuniary benefit on the trustee. Although a handful of investments directly relieved the trustee from personal guarantees or loans he made to these companies, or – on one notable occasion – were used as leverage to ensure a company paid the trustee's consulting fees, most of the transactions were motivated by something far more amorphous, but much more pervasive: pride. That is, because most of the trustee's personal fortune was out-of-reach in his own trust, the trustee turned to his brother's trust as a piggy bank he readily opened to fund a few private companies in which the trustee had invested his time and on which he had staked a claim that he was uniquely skilled at selecting and advising small fledgling companies that he could turn into the "next big thing." Certain that fortune and acclaim were around the bend, the trustee eschewed the interests of the beneficiaries in favor of subsidizing his self-aggrandized standing as a financier.[49]

The court's analysis turned on whether the trust agreement exonerated Jeff from liability.

One potential barrier to liability were three exculpatory clauses in the trust. Article Sixth provided that the trustees were exonerated from responsibility for loss to the trust fund so long as they acted in "good faith, notwithstanding that they may be an officer, director, shareholder, partner or otherwise financially interested in his [sic] individual capacity in any business, company or real property in which the Trust Estate has an interest."[50] Article Seventh provided an additional exoneration clause exculpating the trustees from liability so long as they "acted in good faith" including for "'any loss or depreciation in the value of the Trust Estate occurring by mistake in, or error of, judgment in the purchase or sale of any investment or the retention of any investment…so long as the same be made or done in good faith.'"[51] Trustees were further excused from liability for acts taken on the advice of counsel.[52]

The court recognized that a trustee would be absolved of liability for loss so long as he acted in good faith and did not engage in willful misconduct.[53] The "willful misconduct" standard is the minimum standard of conduct required by Section 3303 of Title 12 of the Delaware Code. It was enacted more than 30 years after John's trust was created. The beneficiaries argued for a more stringent minimum standard of conduct, being gross negligence, based on cases decided before

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[49] *Mennen, supra.* at *1.
[50] *Mennen, supra.* at *3.
[51] *Id.*
[52] *Id.* at *4.
[53] Id. at *21.

Section 3303 was enacted. The court held that it would be bound by the legislature's instruction that Section 3303 applies to all trusts whenever created.[54]

Expounding on the difference between bad faith and willful misconduct, the court acknowledged that "it is not easy to delineate a precise distinction between the two, and one might credibly argue that willful misconduct is one subset of bad faith conduct."[55] The term "wilful misconduct" is defined under Delaware law as "intentional wrongdoing, not mere negligence, gross negligence or recklessness and 'wrongdoing' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[56] Good faith is defined as "honesty in fact and the observance of reasonable standards of fair dealing."[57] The court defined "bad faith" as the absence of "good faith."[58]

Jeff's argument was that good faith should be determined with reference to his state of mind. He said he never meant for the trust to lose money. The court rejected the purely subjective interpretation of "good faith" proffered by Jeff. Instead, the court read into the definition of "good faith" a part objective/part subjective interpretation. The objective part relates to the "observance of reasonable standards of fair dealing."[59] This is where Jeff's conduct failed to meet the good faith standard. The court found that some of Jeff's investment decisions were motivated by his personal interests – which is the very definition of bad faith, if not willful misconduct.[60] Additionally, a centerpiece of Jeff's argument that he acted in good faith was his insistence that he conducted extensive and continuous due diligence before making investments. But Jeff kept no records to support this position, and the court found his testimony to be self-serving.

The trust agreement waived liability for the trustee's conflict of interest – which meant that it was not a breach of duty for Jeff to direct the trust to enter into transactions with companies in which he had a financial interest. However, it would be a breach of trust for Jeff to direct such conflicted transactions in order to advance his own interests. There was evidence that in some instances, Jeff caused the trust to borrow funds and lend the funds to companies in order to relieve his personal loans. Where Jeff acted for his pecuniary self-interest, the court held that he acted with willful misconduct.[61] The court acknowledged that many of the investments did not result in direct pecuniary benefit to Jeff. Instead, Jeff's improvident investments stemmed from the need to prove himself – a motivation that the court found to constitute, at a minimum, bad faith.[62]

As to those investment losses that did not bear the hallmark of Jeff's pride or direct self-interest, the court dismissed the breach claims.[63]

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[54] Id. at *22.
[55] Id. at *23.
[56] Id. citing 12 Del. C. § 3301(g).
[57] Id., *citing* 12 Del. C. § 101(2)
[58] Id. at *23.
[59] Id. at *23.
[60] Id at *24.
[61] Id at 27, 28.
[62] Id.
[63] Id at 29.

The court held Jeff liable for overcharging the trust for his "expenses." Jeff relied on a letter he procured from an attorney explaining which trustee expenses could be reimbursed, coupled with the trust's exoneration for a trustee's reliance on advice of counsel. The attorney letter advised Jeff to keep records of his time and to fairly allocate his time, but Jeff disregarded the advice and did not keep records. The court rejected the advice of counsel defense.[64]

Jeff raised the defense of laches because all of the transactions occurred more than three years before the action was filed. The beneficiaries countered that the limitations period was tolled by Jeff's fraudulent concealment of problems. Rather than address this argument, the court found that the limitations period for John's children was tolled until they reached the age of majority, because, even if John was on notice of claims, the court found that he could not virtually represent his minor children. [65] The court held that John had a material conflict with his children that precluded his virtual representation of them because "(1) he placed nearly complete emphasis on the present income of the Trust, without any apparent regard for the capital growth or long-term stability of the Trust, and (2) he was beholden to Jeff to the point that John could not himself take action to remedy Jeff's bad faith conduct."[66] In the end, the court ordered Jeff to pay nearly $100 million in damages, less set off for the corporate trustee's settlement, plus interest.[67]

In practice, many questions arise as to an investment advisor's authority and the directed trustee's ability to rely upon trust directors' directions. A sampling of such questions are as follows:

- Can an investment trust director direct the trustee to make loans and pledge trust assets as collateral?
- Can investment trust directors direct no interest loans?
- Can an investment trust director direct that loans be made to beneficiaries or is that within a distribution trust director's authority if one is named, or is that within the trustee's authority to make distributions?
- Does a directed trustee have any responsibility to enforce repayment of loans where it has been directed to make the loan?
- What if the loan is being made by the corporate trustee's banking department and the bank is acting in two capacities: lender and trustee?
- Can the beneficiaries waive the potential conflict of interest of the trustee (see sample waiver language below)?
- Can the investment trust director direct formation of new entities and open accounts in the name of the entities? (See specific powers granted to investment advisor in sample language below).

[64] Id at 29.
[65] Id at 31.
[66] Id at 32.
[67] Id at 37.

- Can the trustee be directed to finance and pledge assets of entities held in trust (see specific powers granted to investment advisor sample language below?
- Can the investment trust director delegate its powers to third parties?
- Who directs liquidation of entities?
- What if the investment trust director is an interested party in an entity or other trust investment?
- What are the responsibilities of the investment trust director and directed trustee when litigation arises in connection with an investment or entity (e.g., shareholder litigation)? Is the directed trustee as the named party able to take direction from the investment trust director? Can the investment trust director be designated as the named party?

3. Selected State Statutes

For states which have adopted the UDTA (16 as of 2022), clear and robust provisions defining the scope of the trust director's authority and defining what actions constitute "investments" is important given that there are no statutory definitions under the UDTA.

Even in states where the statute includes provisions pertaining to a trust director's investment authority/powers (e.g., Nevada, Illinois), the term "investment" may not be defined or may include general references to "purchases, sales and retention" of assets.

Examples of different state statutes, namely, Delaware, Nevada, Illinois, Tennessee, Texas, are excerpted below.

Delaware has a comprehensive definition of the term "investment" in 12 Delaware Code Section 3313(d):

> For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes, provided, however, that the power to lend for investment purposes shall be considered an investment decision only with respect to loans other than those described in § 3325(19)b. and c. of this title), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

Nevada's directed trust statute provides:[68]

> (1) An instrument may provide for the appointment of a person to act as an investment trust adviser or a distribution trust adviser with regard to investment decisions or discretionary distributions.
>
> (2) An investment trust adviser may exercise the powers provided to the investment trust adviser in the instrument in the best interests of the trust. The powers exercised by an investment trust adviser are at the sole discretion of the investment trust adviser and are binding on all other persons. The powers granted to an investment trust adviser may include, without limitation, the power to:
>
> a. Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust.
>
> b. Vote proxies for securities held in trust.
>
> c. Select one or more investment advisers, managers or counselors, including the trustee, and delegate to such persons any of the powers of the investment trust adviser.
>
> d. Value non-publicly traded investments held in trust that are subject to the investment management authority of the investment trust adviser.

The Illinois directed trust statute defines the powers of an investment trust director:

> (b) An investment trust advisor may be designated in the trust instrument of a trust. The powers of an investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including, but not limited to, each beneficiary, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The trust instrument may use the title "investment trust advisor" or any similar name or description demonstrating the intent to provide for the office and function of an investment trust advisor. Unless the terms of the trust provide otherwise, the investment trust advisor has the authority to:
>
> > (1) direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;
> >
> > (2) direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including, but not limited to, voting proxies for securities held in trust;
> >
> > (3) select and determine reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them

[68] Nevada Rev Stat Section 163.5557.

any of the powers of the investment trust advisor in accordance with Section 807; and

(4) determine the frequency and methodology for valuing any asset for which there is no readily available market value.

The Texas Directed Trust Act [69]defines investment, but does not expressly address voting powers, lending, creation of entities or delegation of an investment trust director's powers.

> "Investment decision" means, with respect to any investment, the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of the investment or rights in the investment and, with respect to a nonpublicly traded investment, the valuation of the investment.

With respect to investment powers, Tennessee [70] grants advisors the authority to direct the "acquisition, disposition or retention of any trust investment" and among other powers grants investment advisors:

> (1) The power to make loans out of trust property, including but not limited to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances;
>
> (2) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust;
>
> (3) The power to select one (1) or more investment advisors, managers or counselors, including but not limited to, a trustee and delegate to them any of its powers;

4. Sample Form Language, Definition of Investment[71]

In addition to defining the scope of a trust director's investment authority, certain other investment decisions may put the trustee in a conflicted position. Accordingly, the following provisions are samples of The Northern Trust Company of Delaware's form language defining the scope of investment authority and related exoneration and waiver of conflict provisions.

a. Scope of investment powers [emphasis added]:

> Directed as to Investment Powers. Notwithstanding any other provision of this Trust Agreement, so long as an Investment Advisor is acting, the Trustee shall only have the duty to act with respect to all any matters relating to the management and investment of Trust assets only upon the written direction of the Investment Advisor. The Trustee shall exercise the powers granted to it under this Trust Agreement, by statute relating or by other applicable law, including (but not limited to) (i) to buying, selling, retaining, managing,

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[69] Texas Prop. Code Section114.0031 (a) (2).

[70] Tenn. Code Ann. Section35-15-1201 (a)

[71].

leasing, exchanging*, borrowing, leveraging, lending, guaranteeing, mortgaging, pledging or, encumbering or otherwise disposing of or acquiring property held in any trust hereunder*, (ii) *participation in voting trusts, incorporations, reorganizations, consolidations, liquidations or, mergers or divisions*, (iii) *the acquisition, creation and/or retention of partnerships, (whether general, limited or otherwise), limited liability companies, corporations, statutory or business trusts or other business enterprises or entities (including the transfer of any portion of the Trust estate to any such enterprise or entity) and the management of such partnerships, limited liability companies, corporations, statutory or business trusts or other business enterprises or entities, (iv) voting and exercising all rights of an equity holder or , shareholder, partner, member or manager of any entity or enterprise owned (in whole or in part) or managed, directly or indirectly, by the trust , including without limitation, subscription, conversion, option and similar rights, and* (v) *opening accounts of the trust or an entity owned, in whole or in part, by the trust, only upon receiving the written direction of the Investment Advisor of such trust and the Trust.* The Trustee shall have no other duties to the trust, the beneficiaries of the trust or the Investment Adviser of the trust or the Investment Advisor relating to the exercise of such powers and the Trustee shall have no authority with respect to any action or inaction as to any asset held in any Trust under this Trust Agreement except as may be necessary from time to time to carry out the directions of the Investment Advisor.

Other Duties of the Investment Advisor. With regard to [Trust assets] [Special Assets] and liabilities over which the Investment Advisor has responsibility and in addition to the Investment Advisor's duties under this Trust Agreement, the Investment Advisor shall have the duty (i) to confirm to the Trustee, in writing, the value of [Trust assets] [Special Assets] and liabilities at least annually and upon request by the Trustee, (ii) to direct the Trustee with respect to any representation, warranty or covenant required to be made in order to maintain any [investment] [Special Asset] held in the Trust, (iii) to direct and instruct the Trustee on future actions, if any, to be taken with respect to such representations, warranties and covenants and (iv) to direct the Trustee to sign agreements and any other documentation required in connection with the management and investment of [Trust assets] [Special Assets].

Alternate version with specific directed powers identified. Each Trust created hereunder is intended to be a directed trust under Section 3313 of Title 12 of the Delaware Code. The Investment Adviser shall have the exclusive authority to make investment decisions for the Trust, and notwithstanding any other provision of this Agreement, the Trustees shall exercise all authority to make investment decisions only upon the written direction of the Investment Adviser. The Trustees shall follow each direction of the Investment Adviser which is authorized by this Agreement. The Trustee's investment powers set forth in Paragraphs B and K of this Article shall be made expressly subject to this Paragraph C. In particular, the Trustee shall exercise the powers hereinbefore granted to it in subparagraphs B(1), B(2), B(3), B(4), B(5), B(6), B(7), B(8), B(9), B(10), B(12), B(13), B(14), B(15), B(19), B(20), B(21), B(22), B(23) and B(24) of this Article, in subparagraphs K(1) and K(8) of this Article (to the extent involving investment decisions), and all other powers relating to the acquisition, disposition, retention, exchange, change in character, lending, borrowing, pledging, mortgaging, managing, voting, leasing, granting of options with respect to, insuring, abandoning, or in any other way relating to the management or investment of

the assets of the trust estate, with respect to each Trust hereunder, only upon the written direction of the Investment Adviser of such Trust...

a. Reliance on valuation provided by trust director

Under the terms of the Trust agreement, the Trustee shall be entitled to rely upon the valuation provided by the Investment Adviser for all purposes in administering the trust, without incurring any liability to any party, and shall be under no obligation to inquire or to make any independent verification of the information provided to the Trustee by the Investment Adviser.

b. Waiver of conflict for loans by corporate trustee to trust and entities in trust [72]

Disclosure of Loan Conflict of Interest. From time to time, one or more of the Trust, the Grantor, the Grantor's spouse, an individual, entity or institution acting as Trustee and/or one or more entities the interests in which are held directly or indirectly by the Trust, may have or wish to enter into a loan ("Loan") with the Corporate Trustee, or an Affiliate of the Corporate Trustee, in its corporate (rather than fiduciary) capacity (in such capacity, the "Lender"). Having the Corporate Trustee acting as both Trustee and Lender or having the Corporate Trustee act as Trustee and an Affiliate of the Corporate Trustee act as Lender poses a conflict of interest for the Corporate Trustee because as Trustee, the Corporate Trustee has a fiduciary duty to preserve the Trust property for the beneficiaries, while as Lender, the Corporate Trustee or an Affiliate of the Corporate Trustee will be a direct or indirect creditor of the Trust and in the position of seeking repayment on favorable terms of the Loan from the Trust and therefore from the Trust property. These competing interests as Lender and as Trustee shall be referred to as the "Loan Conflict of Interest."

Waiver of Loan Conflict of Interest. The Grantor hereby specifically waives, on behalf of [himself/herself] and all beneficiaries hereunder, the Corporate Trustee's Loan Conflict of Interest, and authorizes the Corporate Trustee as Trustee, [subject to the direction of the Investment Advisor/Empowered Trustee, if applicable], without notice to or consent by any beneficiary or court and without any disclosure otherwise required pursuant to 12 *Del. C.* Section 3312(c) or other applicable law, to take any action or omit to take any action in good faith related to the Loan, including but not limited to any participation as Trustee in any decision as to when and whether to enter into and repay the Loan or to deal with the collateral and any security interest in such collateral, as though the Loan Conflict of Interest did not exist. Notwithstanding any duty otherwise existing hereunder or at law or in equity, the Corporate Trustee (i) shall have no greater burden to justify its acts as a fiduciary by reason of conflict of interest than it would have in the absence of any conflict and (ii) shall not be liable for any action or omission taken by the Corporate Trustee as Trustee in good faith with respect to the Loan, or any action or omission taken by the Corporate Trustee or an Affiliate of the Corporate Trustee as the Lender pursuant to the Loan or any security interest related thereto while the Loan is outstanding, including but not limited to any

decision to pursue the Lender's rights as a creditor, generally, of the Trust or as a security interest holder in the event of any default.

C. Exoneration and Waiver of Duties

The flexibility inherent in a directed trust may persuade a hesitant settlor to create a trust, and in many cases, may make it more palatable to engage a professional trustee. But what's in it for the trustee? The trustee may be willing to reduce its fee provided that its risk of liability is commensurately reduced. One key measure of whether the risk of liability is reduced sufficiently, from a trustee's perspective, is the degree to which it is exonerated for following directions of the trust director. Related to the degree of exoneration, is the presence or absence of a duty of a trustee to monitor, supervise or be responsible for, the acts of the trust director. If a directed trustee must monitor the acts of the trust director to avoid liability, it may put a directed trustee into the position of uncertainty regarding the directed action.[73]

There are at least four different approaches to trustee exoneration.[74] At one end of the spectrum are statutes which completely exonerate a directed trustee from liability related to the directed act, or exonerate subject to an exception for willful misconduct, and at the other end of the spectrum are statutes (or uniform acts) which impose some degree of duty on the directed trustee to monitor the trust director. Each of the approaches will be reviewed below.

1. UTC/Restatement Applicable Provisions

The UTC and Restatement provide the least amount of protection from liability for the directed trustee.

UTC Section 808(b) provided as follows (emphasis added):

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is *manifestly contrary to the terms of the trust* or the trustee knows the attempted exercise would constitute a *serious breach of a fiduciary duty* that the person holding the power owes to the beneficiaries of the trust.

The Restatement (Third) of Trusts, Section 75 provides as follows (emphasis added):

> Except in cases covered by Section 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is *contrary to the terms of the trust* or power or the trustee knows or has reason to

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[73] References herein to a "directed action" also include directions to refrain from acting.
[74] Mary C. Downie, ACTEC State Laws Committee presentation, November 4, 2022 "Variations in State Directed Trust Statutes."

believe that the attempted exercise *violates a fiduciary duty* that the power holder owes to the beneficiaries.

Restatement (Second) of Trusts Section 185 provides as follows (emphasis added):

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power *violates the terms of the trust* or is a *violation of a fiduciary duty* to which such person is subject in the exercise of the power.

a. Scope of exoneration. UTC Section 808 does not expressly state that a directed trustee is not liable for complying with the directed act. This is implied, subject to the requirement that the directed trustee determine if the directed act is a "serious breach" of the trust director's duties or is "manifestly contrary" to the terms of the trust instrument. The Restatement versions are similar to the UTC.

b. Scope of duty to monitor. Under UTC Section 808, Restatement (Third) of Trusts Section 75 and Restatement (Second) of Trusts Section 185 the directed trustee must determine whether the directed act is a breach of the trust director's duties. Because the directed trustee is responsible for its decision to comply with the directed act, the trustee has an implicit duty to monitor the trust director. The framing of the UTC/Restatement approach was seemingly perceived as un-workable by experts in the field. The drafting committee for the UDTA reported, in a comment to Section 9(b) of the UDTA, that "a review of every existing specialized state statute on directed trusts showed that no state that has legislated specifically on the issue of directed trustee fiduciary duties has chosen to follow [UTC Section] 808.

2. UDTA Applicable Provisions

The UDTA eliminates a directed trustee's liability except for its own willful misconduct and ostensibly the trust director's willful misconduct.

UDTA Section 9 provides in pertinent part (emphasis added) as follows:

(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in *willful misconduct*…

The UDTA comment to Section 9(a) provides the following explanation of the duty to reasonably comply with directions:

The duty to take reasonable action under subsection (a) does not, however, impose a duty to ensure that the substance of the direction is reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule of subsection (b), a trustee is liable only for

its own breach of trust in executing a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to execute the purchase reasonably.

UDTA Section 11 waives the directed trustee's duty to monitor, inform and advise as follows:

(a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).

a. Scope of exoneration. The UDTA approach is to exonerate the directed trustee except where it does not reasonably comply with the direction or where its compliance would constitute willful misconduct. The prefatory note to the UDTA states that "[i]n complying with a trust director's exercise of a power of direction, a directed trustee is liable only for the trustee's own 'willful misconduct.'" However, leading practitioners have observed that the focus on carrying out the directed act potentially imposes associative liability on the directed trustee for the trust director's willful misconduct.[75] Additionally, there is an affirmative duty on the directed trustee (discussed below) to share pertinent trust information with the trust director, which may expose the trustee (or trust director to liability).

The UDTA incorporates a concept found in the Nevada (and similar) directed trust statutes that addresses what happens when a directed trustee fails to carry out a directed act. The Nevada directed trust statute (discussed below) provides for no liability where a trustee fails to comply

[75] Richard W. Nenno, *Directed Trusts: Making Them Work*, 45 Tax Mgmt. Est., Gifts & Tr. J. 247, ¶ E (Sept. 10, 2020), *citing* Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee Under the Uniform Directed Trust Act*, 44 ACTEC L.J. 207 (Spring 2019).

with a direction if it was subject to a condition that did not occur. The UDTA requires a directed trustee to take reasonable action to comply with the direction, and by implication exonerates the directed trustee from liability if it took reasonable action to comply with the direction but failed to carry out the directed act. The Nevada statute does not have a "reasonable action" provision. This provision, or lack thereof, could play out in different ways under the Nevada statute compared to the UDTA. For example, if a directed act is contingent upon a third-party providing consent or authorization, the Nevada statute does not appear to require the trustee to seek the consent or authorization. In contrast, the UDTA implies that the trustee should solicit compliance with the condition precedent to the directed act in order to take "reasonable action" to comply. Overall, the "reasonable action" requirement may inject uncertainty into the UDTA, from the directed trustee's vantage point.

b. Scope of duty to monitor. The UDTA waiver of duties is similar to the Delaware statute. Subsection (e) of the Delaware directed trust statute lists three separate but related duties that are waived: the duty to monitor the conduct of the adviser; the duty to provide advice to, or consult with, the adviser; and the duty to warn the beneficiary or others about the directed act. UDTA Section 11(a)(1)(B) waives the duty to monitor the adviser and the duty to inform or give advice to a settlor, beneficiary, trustee, or trust director about the directed act. Although UDTA Section 11 waives the duty to monitor the trust director, UDTA Section 9(b) implicitly requires the directed trustee to monitor the directions it receives from the trust director to confirm that compliance with the direction would not be an act of willful misconduct.

Subsection (a)(2) provides that if a directed trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not assume a continuing duty to provide advice to a settlor, beneficiary, trustee, or another trust director. The same rules apply for a trust director.[76]

However, the decision in *Rollins v. Branch Banking, Trust Co. of Va.*,[77] suggests that judges may resist the notion that a trustee can have zero responsibility with respect to a particular matter of trust administration. There, the plaintiff beneficiaries asserted that the defendant trustee consulted with the grantors concerning investment decisions, including the decision to over-concentrate the trust's portfolio, but failed to communicate those decisions or their justification with the beneficiaries. Beneficiaries claimed a resulting diminution in the value of the trusts of $25,000,000.00. Notably, the trust instrument vested the beneficiaries with the exclusive authority to make investment decisions and craft investment strategy.

The Court applied the "basic principle" that a court cannot hold a trustee liable for decisions that it did not and could not have made. That principle was codified in Virginia under what was then Va. Code Ann. § 26-5.2.[78] The then-existing and applicable Virginia statute prohibited a finding of liability against a trustee for failing to do what he had no ability to do. However, while the Court found no breach of a duty for the directed trustee's failure to question an investment director's

[76] Uniform Directed Trust Act, Section11 (b) (2).
[77] *Rollins v. Branch Banking, Trust Co. of Va*., 56 Va. Cir. 147 (Cir. Ct. Roanoke City 2001).
[78] Virginia has since adopted the Uniform Directed Trust Act's provision on the liability of directed trustees, providing that a directed trustee is ordinarily not liable for acting on a direction unless the trustee's action amounts to willful misconduct. Va. Code Ann. § 64.2-779.32.

concentration of the trust's portfolio, the Court did hold the directed trustee liable for failing to inform the trust's beneficiaries of the risks of the director's over-concentration.

c. Duty to share information. As noted above, one of the duties imposed by the UDTA is a duty to share information.[79] It runs in all directions. Accordingly, the directed trustee must share information with the trust director, the trust director must share information with the trustee and trust directors must share information with each other, all to the extent that the information is reasonably related to their powers or duties. This duty is an affirmative duty to provide information even in the absence of a request for information and is another potential avenue for liability. Section 10 contains safe harbors for trustees and trust directors who act in reasonable reliance on information provided by the other party.[80] The safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct.

3. Selected State Statutes

An example of the "no liability" approach can be found in Nevada Revised Statute (NRS) Section 163.5549.[81] It provides as follows:

> 1. A directed fiduciary is not liable, individually or as a fiduciary for any loss which results from:
>
> > (a) Complying with a direction of a directing trust adviser, whether the direction is to act or to not act; or
> >
> > (b) Failing to take any action proposed by a directed fiduciary if the action:
> >
> > > (1) Required the approval, consent or authorization of a person who did not provide the approval, consent or authorization; or
> > >
> > > (2) Was contingent upon a condition that was not met or satisfied.
>
> 2. A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.
>
> 3. The provisions of this section do not impose an obligation or liability on a custodian of a custodial account for providing any authorization.

a. Scope of exoneration. The exoneration provided by this statute applies to [1] loss resulting from compliance with a direction to act or refrain from acting; and [2] loss resulting from

[79] Uniform Directed Trust Act, Section 10.
[80] Uniform Directed Trust Act, Section 10 (c) and (d).
[81] Alaska, Idaho, Kentucky, New Hampshire, Ohio, South Dakota, Tennessee and Wyoming generally follow the no liability approach. Todd A. Flubacher, ACTEC State Surveys, "Overview of State Direct Trust Statutes" (Sept. 20, 2019)

the trustee failing to act when the direction was subject to a condition that was not met or did not occur.

b. Scope of duty to monitor. Subsection 2. of NRS Section 163.5549 appears to waive the trustee's duty to evaluate the merits of an investment made by a trust director or provide advice to the trust director with respect to an investment.

c. Duty to share information. Nevada does not appear to have a statute requiring the sharing of information among trustees and trust directors.

An example of the "no liability" except for the directed trustee's own willful misconduct approach can be found in 12 Delaware Code Section 3313, providing in pertinent part as follows:

> (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act…
>
> (e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:
>
> > (1) Monitor the conduct of the adviser;
> >
> > (2) Provide advice to the adviser or consult with the adviser; or
> >
> > (3) Communicate with or warn or apprise any beneficiary or third-party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.
>
> Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

a. Scope of exoneration. Subsection (b) of 12 Delaware Code Section 3313 exonerates the directed trustee for loss resulting from compliance with the trust director's directions except for the trustee's own willful misconduct. Note that this is different from the UDTA standard of liability – which does not exonerate a trustee where its compliance with the direction is itself an act of willful misconduct.

b. Scope of duty to monitor. Subsection (e) of 12 Delaware Code Section 3313 waives the directed trustee's duty to monitor the trust director's conduct, waives the duty to provide advice or consult with the adviser and waives the duty to warn a beneficiary or third party about the direction.

c. Duty to share information. Delaware imposes a duty to keep co-fiduciaries informed, upon request, in 12 Delaware Code Section 3317.[82] The duty applies to aspects of trust administration that relate to the specific duty or function of the fiduciary or nonfiduciary requesting such information provided that it is reasonably necessary for such fiduciary or nonfiduciary requesting the information to perform its duty. This is subject to the same waiver of duty to monitor, advise and warn that applies in Section 3313 to directed trustees.[83] Section 3317 does not provide an express safe harbor from liability for a trustee who relies on information provided by a third party, but the trust agreement may provide such exoneration. Section 3586 provides that a "trustee who acted in good faith reliance on the terms of a written governing instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."[84]

4. Excluded trustee:

What is an "excluded trustee?" The term "excluded trustee" appears to be synonymous with "directed trustee" in several states, but under Delaware law, an excluded trustee is not equivalent to a "directed trustee."

The New Hampshire statute[85] provides:

> (c) A trustee is an excluded fiduciary to the extent that the terms of the trust vest a power or duty exclusively in a trust advisor, trust protector, cotrustee, or other person. (d) A trustee is an excluded fiduciary to the extent that: (1) under the terms of the trust, the trustee must follow the direction of a trust advisor, trust protector, cotrustee, or other person; and (2) the trustee acts in accordance with that direction.

The Nevada statute[86] provides:

> a fiduciary is a "directed fiduciary" with respect to any action that the fiduciary:
>
> (1) Has no power to take under the terms of the governing instrument;
>
> (2) Is mandated by the governing instrument and for which the fiduciary has no discretion to act otherwise; and
>
> (3) Is directed to take or prohibited from taking by a directing trust adviser.

[82] 12 Del. C. Section 3317
[83] Id.
[84] 12 Del. C Section 3586.
[85] New Hampshire Rev Stat Ann Section 564-B:7-711
[86] Nevada Rev Stat Section 163.5548.

The Alaska Statute[87] provides:

> (c) Notwithstanding the other provisions of this section, if the terms of a trust instrument provide for the appointment of more than one trustee but confer on one or more of the trustees, to the exclusion of other trustees, the power to direct or prevent specified actions of other trustees, the excluded trustees shall act in accordance with the exercise of the power. An excluded trustee under this subsection is not liable, individually or as a fiduciary, for a consequence that results from complying with the exercise of the power, regardless of the information available to the excluded trustee. An excluded trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. A trustee having the power is liable to the beneficiaries as a fiduciary with respect to the exercise of the power as if the excluded trustees were not in office and has the exclusive obligation to account to and to defend an action brought by the beneficiaries with respect to the exercise of the power. In this subsection, "power" means the power to direct or prevent specified actions by other trustees.

South Dakota and Idaho describe a fiduciary who is directed to take or refrain from taking an action as an "excluded fiduciary."[88] The Wyoming statute treats a trustee that is directed by an adviser as an excluded fiduciary, as well as a trustee where fiduciary duties of a trustee are performed by an adviser.[89]

Ohio recognizes an "administrative trustee" arrangement where the fiduciary is responsible for a limited set of ministerial acts.[90]

Delaware's excluded trustee statute[91] provides as follows:

> (a) If the terms of a governing instrument confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duty and liability of the excluded trustee is as follows:
>
>> (1) If the terms of the governing instrument confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes wilful misconduct on the part of the directed cotrustee;
>>
>> (2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by

[87] Alaska Stat. Section 13.36.072(c)
[88] Idaho Code Section 15-7-501(1)(b); Section 15-7-501(2); South Dakota Cod. Laws Ann Section 55-1B-2(1)
[89] Wyo. Stat Ann. Section 4-10-718(a)
[90] Ohio Rev Code Ann 5815.25(b)
[91] 12 Delaware Code Section 3313A

the cotrustee in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee; and

(3) The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

(b) The cotrustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

The difference between a directed trustee and an excluded cotrustee under Delaware law, is that a directed trustee takes direction from a trust director, whereas in an excluded cotrusteeship, one or more trustees exercise full authority and retain full responsibility for certain trust acts, and the excluded cotrustee is precluded from participating in such acts. The excluded cotrustee is, in effect, not a fiduciary with respect to the excluded actions.

a. Scope of liability. In all of the foregoing states, the "excluded" trustee or fiduciary is not liable for loss. In particular, the foregoing statutes provide in pertinent part:

- Alaska: "An excluded trustee under this subsection is not liable, individually or as a fiduciary, for a consequence that results from complying with the exercise of the power, regardless of the information available to the excluded trustee."[92]

- Delaware: "If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or

[92] Alaska Stat. 13.36.072(c)

other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee."[93]

Comment: The Delaware statute provides that an excluded cotrustee is not even a fiduciary with respect to the authority as to which it is excluded. To the extent that one trustee directs another trustee, the directed trustee would be considered a fiduciary and would be subject to the willful misconduct standard.

- Idaho: "An excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following: (a) Any loss that results from compliance with a direction of the trust advisor; (b) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization."[94]

- Ohio: "As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the administration of the trust."[95]

- South Dakota: "An excluded fiduciary is not liable, either individually or as a fiduciary, for any of the following: (1) Any loss that results from compliance with a direction of the trust advisor, including any loss from the trust advisor breaching fiduciary responsibilities or acting beyond the trust advisor's scope of authority; (2) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization; (3) Any loss that results from any action or inaction, except for gross negligence or willful misconduct, when an excluded fiduciary is required, pursuant to the trust agreement or any other reason, to assume the role of trust advisor or trust protector; (4) Any loss that results from relying upon any trust advisor for valuation of trust assets; or (5) Any loss that results from any tax filing made or tax position taken based on the recommendations or instructions received from a tax preparer or professional used by the excluded fiduciary at the direction of the grantor or of another trust fiduciary."[96]

- Wyoming: "Unless the trust instrument appointing, designating or providing for a method for appointing a trust protector or trust advisor or the court order appointing a trust protector states otherwise, the excluded fiduciary is not liable for any loss resulting from any action or inaction of the trust advisor or protector."[97]

b. Scope of duty to monitor. Each of the foregoing states waives some combination of the duty to monitor the trust director, perform an investment review, value trust assets, provide

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[93] 12 Del. C. Section 3313A(a)(2)
[94] Idaho Code Section 15-7-501(2)
[95] Ohio Rev Code Ann Section 5808.08(B)
[96] South Dakota Codified Laws Ann Section 55-1B-2(1)
[97] Wyo. Stat Ann Section 4-10-717

advice to the trust director or warn a beneficiary or others about the trust director's exercise of its discretion.[98]

5. Recent Developments: Use of Special Purpose Entities as Trust Directors

An interesting recent development in directed trust law is the use of special purpose entities as trust directors in directed trusts. Both South Dakota and Tennessee have enacted new statutes related to special purpose entities that allows such entities to be designated as advisors and trust protectors within directed trusts. [99]

Both states' legislation is intended to provide liability protection for individuals serving as investment advisors, distribution advisors or trust protectors under directed trust structures. The difficulty in acquiring liability insurance coverage for individuals serving as cotrustees or investment and/or distribution advisers is cited as a reason for using the special purpose entity structure. Several South Dakota trust companies also claim that the special purpose entity structure within a directed trust maximizes trust situs for income tax, asset protection and trust law purposes.

The typical structure is an LLC as a "housing" structure with a Board of Managers overseeing Investment Committees, Distribution Committees and Trust Protectors. The special purpose entity must be created for the specific purpose of acting as the trust protector or trust advisor, *exclusive to all other purposes*.

Both states have some restrictions on the use of special purpose entities and have specified state regulatory filing requirements.[100] Special Purpose entities are not to provide fiduciary services outside the context of a specific directed trust structure and cannot engage in fiduciary business with the general public or with a family as part of a private trust company . Under the Tennessee statute, the special purpose entity can only be used where the trusts are held for family members.[101]

South Dakota:

> (1) The entity is established for the exclusive purpose of acting as a trust protector, investment trust advisor, or distribution trust advisor, as defined by Section 55-1B-1;
>
> (2) The entity is acting in such capacity under a trust instrument which names a South Dakota trust company, a South Dakota bank with trust powers, or a national bank with trust powers as trustee;

[98] Alaska Stat. Section 13.36.072; 12 Del. C. Section 3313A(a)(3); Idaho Code Section 15-7-501(2)(b); Nevada Rev. Stat. Section 163.5549; Ohio Rev Code Ann Section 5815.25(B); SDCL Section 55-1B-2(1); Wyo Stat. Section 4-10-715

[99] Tenn. Code Ann. Section 35-15-1301(b); SDCLSection 51A-6A-66

[100] SDCL Section 51A-6A-66

[101] Tenn. Code Ann. Section 35-15-1301 (a) (5) (defines family members).

(3) The entity is not engaged in trust company business with the general public as a public trust company or with any family as a private trust company;

(4) The entity does not hold itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company;

(5) The entity files an annual report with the South Dakota secretary of state and provides a copy to the Division of Banking; and

(6) The entity agrees to be subject to examination by the Division of Banking at the discretion of the director.

The governing documents of any such excluded entity shall limit its authorized activities to the functions permitted to a trust protector, investment trust advisor, or distribution trust advisor pursuant to chapter 55-1B and limit the performance of those functions with respect to a specifically named trust or family of trusts.

An entity complying with this section shall notify the director of its existence, capacity to act, and the name of the trustee for the trust or family of trusts.

Tennessee[102]:

(a) "Special purpose entity" means an entity that meets the requirements provided under subsection (b).

(b) A special purpose entity shall not be subject to chapters 1 and 2 of title 45 regulating fiduciary activity if:

(1) The entity is established for the exclusive purpose of acting as a trust protector or trust advisor as defined by Section 35-15-1201, or any combination of such purposes;

(2) The entity is acting in such capacity solely under the terms of trusts in which the grantor or beneficiary is a family member, and under which a corporate trustee is serving as trustee;

(3) The entity is not engaged in trust company business as a private trust company under title 45, chapter 2, part 20, or with the general public as a public trust company;

(4) The entity does not hold itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company;

(5) The entity files an annual report with the secretary of state and provides a copy to the department;

[102] Tenn. Code Ann. Section 35-15-1301 (b).

> (6) The entity agrees to be subject to examination by the department at the discretion of the department solely for the purpose of determining whether the entity satisfies all requirements for qualification under this part;
>
> (7) The entity agrees to pay the department the actual expenses of the examination at the time of the examination described in subdivision (b)(6);
>
> (8) The entity does not use the word "trust" or "trustee" in the entity's name in any manner;
>
> (9) The governing documents of the entity, as such governing documents may be amended from time to time, limit the entity's authorized activities to the functions permitted to a trust protector or trust advisor, or any combination of such functions, and limit the performance of those functions with respect to trusts in which a grantor or beneficiary of such trust is a family member with respect to a designated ancestor specifically named in the entity's governing documents;
>
> (10) The entity does not act as a fiduciary other than as provided in this part . . .

6. Limits of Statutory Exoneration and Waiver of Duties for Directed Trustees.

a. Exoneration is narrow in scope. The directed trust statutes generally exonerate a trustee for loss for complying with the trust director's direction, but the term "loss" is yet to be defined by courts. The term "loss" could be understood to mean a financial loss. It is unknown whether the term "loss" would refer to a distribution of trust principal where a beneficiary objects to a trust distribution.

Some of the foregoing directed trust statutes explicitly waive the duty to do an investment review or provide advice in the context of an investment decision, but do not waive the duty to warn the beneficiary about the directed act.

None of the directed trust statutes reviewed herein expressly waives the common law duty to prevent or redress a known breach. If the trust director makes a bad investment decision, would the directed trustee breach its duty if it fails to redress a breach? UDTA Section 4 confirms that common law and equitable principles apply to directed trusts unless otherwise modified by the act of the other applicable laws of the state. It provides in pertinent part as follow:

> The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Presumably, the common law duty to prevent or redress a breach known to the directed trustee would apply to any trust governed by a state that has adopted the UDTA.

If not inconsistent with applicable state law, a trust agreement might expand the scope of the exoneration or waiver of duties. However, as noted above most, if not all state directed trust statutes have a mandatory minimum beyond which a directed trustee and trust director may not be exonerated.

b. Powers are not directed. If a trust agreement does not clearly delineate which trustee powers are directed by a trust adviser, and the state law governing the trust does not provide a default definition, the trustee might lose the statutory protection of being a directed trustee.

c. Act or omission is addressed by other common law duties. Where the trustee is directed as to investments, most directed trust statutes waive the duty on the trustee to evaluate the merits of the investment. However, the trustee remains subject to common law duties in most states, even where the state has a directed trust statute. As previously noted, UDTA Section 4 expressly incorporates other common law duties. Accordingly, if the directed trust statute does not waive a particular trustee duty, it may still apply to the directed trust. Where the trustee has full authority over trust investments, it is normally subject to the duty to act prudently and the duty to act in the sole interest of the beneficiaries.[103] If a trust director has full authority over trust investments, the duty to act prudently would apply to the trust director. A separate duty of disclosure exists to keep beneficiaries informed about significant changes in investments.[104] The trustee also must act impartially as to the beneficiaries, it must administer the trust in accordance with its terms, in the best interest of the beneficiaries, and generally to act in good faith. A trust director acting in a fiduciary capacity would be subject to the duty to avoid conflicts of interest. Such conflicts should be expressly waived in the trust agreement where the trust director serves as investment trust director and also serves on the board of directors or as an officer of a company, an interest in which is held in the trust.

d. Courts may find "willful misconduct" in bad facts cases. In the *Mennen* case, discussed above, the court found that a trust director who invested the trust assets in insolvent or nearly insolvent companies in order to prove that he could pick the next winner, acted out of pride, and that such misconduct amounted to "bad faith" and in some instances it also amounted to "willful misconduct."

7. Sample Exoneration Language for a Directed Trustee

Trustee Liability. Each person acting as Trustee shall be presumed to have acted within the scope of its authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all persons unless it be proven by clear and convincing evidence in the court then having primary jurisdiction over the trust that such person acted in a manner that constitutes willful misconduct. Except as otherwise provided in this Trust Agreement, the Trustee shall be personally liable only for its own willful misconduct. No Trustee shall be liable for making any delegation with reasonable care. The Trustee shall have no duty to offer to the trust any business opportunities that become available to it, in its individual or corporate capacity or in any other capacity. The Trustee shall not be liable for its reliance on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Trustee by any entity in which the Trust holds an ownership interest; (ii) the opinions of counsel or any accountant or advisor to any trust; and (iii) any valuation of trust assets (including any supporting documentation for such valuation) provided by the Investment Advisor.

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[103] UDTA cmt to Section 10, citing Restatement (Third) of Trusts Section Section 77-79, 90-92 (2007).

[104] Restatement (Third) of Trusts Section 82 cmt. d (2007)

The Trustee shall have no duty to determine whether the Investment Adviser has breached or might breach any of its duties, or to warn any beneficiary, or to seek redress, petition the court for instruction, with respect to any such breach.

Trustor acknowledges that the same person may act as an Investment Adviser of a trust held hereunder and also as a director, officer, manager or similar position of a company, an interest in which is held in such trust. In such event, Trustor waives any inherent conflict of interest, and intends that the standard of conduct and threshold for liability of an Investment Adviser and duty of loyalty owed by the Investment Adviser to the trust shall be applicable to such person only when acting in the capacity as Investment Adviser and not when acting in the capacity as director, officer, manager or similar position of such a company.

Trustee Indemnification. Each person acting as Trustee (or any officer, affiliate, director, employee, or agent of a Trustee, each an ("Indemnified Person")) shall be entitled to indemnification from the Trust, to the fullest extent permitted by law, from and against any and all losses, claims, taxes, fines, penalties, judgements, amounts paid in settlement, damages, reasonable expenses, and liabilities (including liabilities under state or federal securities or tax laws) of any kind and nature whatsoever (collectively, "Expenses"), to the extent that such Expenses arise out of or are imposed upon or asserted against such Indemnified Persons, whether in their fiduciary, corporate or individual capacity or otherwise, with respect to the 23 creation, operation, administration or termination of the Trust, the execution, delivery or performance of this Trust Agreement or the transactions contemplated hereby, except as a result of the willful misconduct of such Indemnified Person.

Payment of Trustee Expenses. Without limiting the right to indemnification provided in Section __ above, the Trustee's right to indemnification for its Expenses under Section ___ above need not await the resolution of any judicial or nonjudicial proceeding or any judicial determination that such Trustee is entitled to indemnification under this Trust Agreement. The Trustee shall have the right to have such Expenses advanced from the trust fund [as such Trustee incurs them][on an ongoing and periodic basis] without the approval of any court, party, person, or entity and regardless of whether the Trustee is adverse or nonadverse to an Advisor, the Grantor, any beneficiary or any other interested party of the Trust with respect to such action, proceeding or matter; provided, however, that, if a court of competent jurisdiction subsequently determines that the actions or failure to act of the Trustee constituted willful misconduct or such other standard of liability provided under this Trust Agreement, such Trustee shall repay to the trust fund the amount expended from the trust fund for such Expenses of the Trustee in connection with such action, proceeding or matter. Such Expenses may include, without limitation, professional fees and expenses of counsel, accountants, and expert witnesses. This provision shall survive the termination of each such Trustee's services under this Trust Agreement.

III. Looking at Directed Trust Concepts Where the Rubber Meets the Road

The discussion up to this point demonstrates and emphasizes the need for careful drafting not only of directed trust provisions, but the overall trust instrument, all while taking into account the laws of the applicable jurisdiction. In theory, this task may seem rather straightforward – we all draft carefully, right? Yet, if we are honest with ourselves, and our clients, we must acknowledge that:

(1) we cannot anticipate every situation that might arise during a trust administration; and (2) things do not always work in the way we intended them to work. The reasons underlying the failure of a trust instrument in application, whether in whole or in part, may be varied and many because not every fact-pattern is neat and tidy.

Moreover, because of the variations between state statutes on directed trusts, along with the enhanced mobility of a trust's principal place of administration under situs provisions, the level of protection afforded to a directed trustee (or a trust director) may not be quite as extensive as it appears at first blush. So, in the beginning, it probably is a good idea to think about the end – in particular, where things might go badly in litigation – and temper our expectations accordingly as we draft for the practical and efficient administration of the trust at hand.

A. Things that Make You Go Hmmm

Below is a non-exclusive list of things to think about, both in drafting and administering an instrument with directed trust provisions:

- Make sure the directed trust provisions are "woven" into the overall trust instrument and not inherently, or even impliedly, inconsistent with other provisions regarding a trustee's powers and duties.

- Do not overreach in drafting where you know your directed trust provisions, particularly those dealing with exoneration and indemnification, go beyond what is allowed under the law of the jurisdiction. In fact, if your settlor wants maximum protection for the directed trustee or trust director, even consider abandoning the use of specific terms or limits of liability (e.g., bad faith, reckless indifference, willful misconduct) and, instead, using something like "to the fullest extent allowed under the law of jurisdiction governing the trust administration."

- Consider addressing the reasons underlying the use of directed trust provisions in a "statement of intent" at the beginning of the trust instrument. This also puts the issue front-and-center for the settlor and may bolster a defense against a claim by a beneficiary that the settlor did not intend the harshness that might attend a particular circumstance.

- Consider limiting change of situs provisions to jurisdictions that afford the same or greater protections for directed trusts as the initial jurisdiction.

- Make sure the trust instrument clearly defines and delineates the authority and responsibility of the directed trustee and the trust director.

- Consider whether, in following the direction of the trust director, the information the directed trustee is required or allowed to receive is at odds with the directed trustee's overall duties to the beneficiaries under the trust instrument or applicable law. Similarly, consider whether allowing the directed trustee the ability to conduct any form of due diligence might create an implied obligation to do so (even if there are statements to the contrary) and potentially undermine liability protection.

- Ensure the directed trustee is not given any discretion in deciding whether to follow the direction of the trust director – the requirement to follow such direction must be absolute. However, you also must be aware of any limits to the protection afforded to a directed trustee under applicable law (e.g., willful misconduct).

- Do not confuse a “delegated” power with a “direction to act.”

- Require that all directions from the trust director must be in writing and be: (a) clear and unambiguous; (b) complete on its face; (c) devoid of any suggestion that the directed trustee has discretion about how to take the directed action; and (d) devoid of any “catch-all” provision.

- Likewise, the directed trustee should ensure that all related communications with the trust director are in writing, as well as indicate that any request by the directed trustee for information does not constitute a waiver of any protection afforded under the trust instrument or applicable law and that such communications are only “administrative” steps necessary for the directed trustee to follow the direction.

- Differentiate between the potential liability for acting upon the direction of a trust director and potential liability for failing to follow or properly execute such direction. For example, the UDTA applies a willful misconduct standard for acting upon the direction of a trust director but requires that a directed trustee take “reasonable action to comply with a trust director’s exercise or non-exercise of a power of direction.”[105]

- For states that have adopted a "willful misconduct" standard, how does your state define "willful misconduct?" In other words, will the standard differ in practice from state to state even if the language of those states' statutes is identical? For example, the UDTA does not define "willful misconduct," but Delaware's statute defines it as "intentional wrongdoing, not mere negligence, gross negligence or recklessness" and further defines "wrongdoing" as "malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[106] The Delaware standard therefore presents a high burden to any person seeking to hold a directed trustee liable for directed actions, but other states may lack a working definition of “willful misconduct.”[107]

- Does your directed trustee possess “special skills” that might make it more susceptible to a claim of willful misconduct?

- Some state legislatures have adopted a "no duty" standard for the directed acts of directed trustees (including Alaska, New Hampshire, Nevada, and South Dakota).

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[105] Uniform Directed Trust Act, § 9.
[106] Del. C. 12 § 3301(g).
[107] Alternative interpretations of “willful misconduct” are discussed, *infra*.

- o If your state has adopted a "no duty standard," are you confident that courts will reliably apply it?
- o Or do you fear that courts in your state will be too squeamish to find that a trustee has no duty as to some aspect of trust administration and that courts may instead apply some other standard (perhaps borrowing from equity or common law) to hold the directed trustee accountable?
- o Is it possible that a "no duty" standard could present greater uncertainty for directed trustees?

B. A Few More Words About "Willful Misconduct"

Throughout this paper, there are references to the "willful misconduct" standard of liability for a directed trustee under the UDTA and certain other state statutory schemes. However, except for Delaware, which appears to require an element of scienter in its statutory definition, the meaning of "willful misconduct" is not entirely clear in other jurisdictions because the term is not statutorily defined and the issue of directed trustee liability has been litigated very little (or, at least, written court decisions are few and far between).

Although it is safe to say that "willful misconduct" is a lower standard than "reckless indifference,"[108] it is difficult to define just how much lower. This is evident from cases in other contexts:

> While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is "willful" on the part of the responsible person. While it is difficult to define that degree of carelessness which the Legislature must have had in mind, it is my opinion that it must be held that willful misconduct is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable. Of course, willful misconduct may be inferred from the circumstances surrounding the accident.
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> *Walker v. Bacon*, 132 Cal. App. 625, 629–30, 23 P.2d 520, 522 (Cal. Ct. App. 1933).

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[108] *Newcomer v. Natl. City Bank*, 19 N.E.3d 492, 504 (Ohio App. 2014) (holding that "bad faith, willful default, or reckless indifference constitute distinct and separate bases of liability"). Although "reckless indifference" is not a standard of liability found in the various directed trust statutes, it does typically demark the outer limit of trustee exoneration under the variations of the UTC. The court in *Newcomer* equated "reckless indifference" with "reckless conduct," which is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." 19 N.E.3d 505 (citations and quotations omitted).

* * *

> The TCA does not define "willful misconduct." Our Supreme Court has cautioned against simply importing definitions of the term applied in contexts not involving sovereign immunity and the TCA.
>
> "Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." *Fielder v. Stonack*, 141 N.J. 101, 124 (1995). Even within the context of the TCA, the concept may vary, depending on the nature of the public employee's activity.
>
> [W]ithin a statute like the Tort Claims Act, the precise definition might differ where the role of willful misconduct is to impose liability in numerous situations where it would otherwise not exist, for the reasons and purposes of imposing liability may differ in those situations and call for differences in the definition and application of willful misconduct." Id. at 125.
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> *Brightwell v. Off. of Licensing*, No. A-4262-17T1, 2020 WL 412903, at *3 (N.J. Super. Ct. App. Div. Jan. 27, 2020).

Certainly, some UDTA courts may choose to adopt Delaware's definition of "willful misconduct." However, others may not be willing to go so far as to require scienter and, instead, adopt a slightly softer interpretation. In this regard, the court's rather lengthy discussion in *Harvey v. Guaranty Trust Co. of N.Y.*[109], on the topic may prove enlightening, if not controlling:

> It remains in this connection to consider the effect, if any, of the so-called exculpatory provisions of article XVI of the indenture. Fairly construed, the exemption of the trustee in the first paragraph of that article from liability 'for anything whatever in respect to the premises or the trust hereby created, except its own fraud or willful misconduct' appears to apply only to those matters specifically referred to in the instrument itself. The indenture under consideration contained no provision requiring or permitting the trustee to satisfy it. On the contrary, it expressly dispensed with the necessity of a formal satisfaction. Nor was there any authority granted to authenticate duplicate bonds or coupons. Assuming, however, that the exemption clause is regarded as applicable to the situation here presented, I am of opinion that it cannot properly be given effect. The tendency of our courts appears to be in the direction of refusing to permit such an exculpatory provision to prevail where the misconduct of the trustee is so repugnant to the trust as to defeat its very purpose. The language quoted from the *Green Case, supra*, affords an excellent illustration. In a recent article in the Harvard Law Review, December, 1928, there appears the following apposite statement (page 244): 'It is therefore apparent that not every obligation of a corporate trustee is found expressed or implied in the covenants of the indenture, but that inherent in the relation there

[109] 236 N.Y.S. 37 (Sup. Ct. 1929), *aff'd* 242 N.Y.S. 905 (1930).

are duties which, even if they may admit of something less than full performance, rise beyond their disavowal and demand at least a reasonable measure of responsibility for their discharge. The requirement that the trustee must record or file the mortgage seems to be clearly such a duty. The duties assumed by a trustee have been declared to be not only those defined by the instrument but also those 'superimposed upon the trustee, created by the relation of the parties and the situation of the trust fund.' It is not the intention of the parties that the trustee shall be 'a mere dummy,' and concerning matters which go directly to the integrity of the security, the trustee must expect to be held to the exercise of the care and diligence which would naturally be expected of one acting in like circumstances to protect his own property. Such is the plain implication of the *Rhinelander Case*, 172 N. Y. 519, 65 N. E. 499. That case stands in striking contrast to the *Browning Case* (C. C. A.) 250 F. 321, where the court, relying directly upon the contract construction, declared that the responsibility of the trustee should be 'determined from the provisions of the mortgage which constitute the contract of the bondholders with the trustee * * *.''

Even if the view be taken that the exculpatory provision is not only applicable here but also effective, it seems to me that it is not going too far to characterize the trustee's action as 'willful misconduct' within the meaning of the indenture. It was certainly 'willful misconduct' in the sense of an unauthorized and wrongful act, deliberately and intentionally done, with knowledge that not all the original bonds and coupons had been surrendered, and with an appreciation of the possibility that they might be in the hands of innocent holders for value. The trustee appears to have been cognizant of the fact that it was doing something irregular, calculated to imperil the rights of possible bona fide holders of the missing originals and quite likely to result in its being held liable to the latter. This recognition by the trustee of the doubtful propriety of its conduct is indicated by its exaction of the indemnity agreement previously referred to. In connection with this phase of the case it is interesting to observe that in *Warren v. Pazolt*, 203 Mass. 328, at page 347, 89 N. E. 381, 388, the court said: 'Wilful default means intentionally making away with the trust property and a wilful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a wilful violation of duty.' The term 'willful' does not imply the existence of actual malice or evil design. Thus in *Boyce v. Greeley Square Hotel Co*., 228 N. Y. 106, at page 111, 126 N. E. 647, 649, the Court of Appeals said, per Collin, J.: 'A willful injury means intentionally doing the act which is calculated or adapted to cause the injury, with design to inflict injury or *with disregard of the natural consequences of the act. The willful injury is in law malicious, although no malevolent purpose to cause it nor any notive of spite is imputed.* 'Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious' (*Wills v. Noyes*, 12 Pick. [Mass.]

324).' (Italics mine.) In *May v. New York Motion Picture Corporation*, 45 Cal. App. 396, 187 P. 785, the court declared that a 'willful' disobedience was an intentional disobedience and did not 'necessarily imply any evil intent on the part of the servant or malice toward his master. *In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness, or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent* (*Benkert v. Benkert*, 32 Cal. [467], 470; *Towle v. Mathews [Matheus]* 130 Cal. [574], 577 [62 P. 1064]; 40 Cyc. 944).' (Italics mine.) In *Roseville Trust Co. v. American Surety Co*., 91 N. J. Law, 588, the court said at page 591, 103 A. 182, 183: 'By the term 'willfully' is meant purposely or designedly. The intent to injure and defraud, which is necessary to constitute a willful misapplication, does not necessarily involve any malice or ill-will, but merely that general intent to injure and defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal and fraudulent, and which, in its necessary and natural consequences must injure another. *Agnew v. United States*, 165 U. S. 36 [17 S. Ct. 235, 41 L. Ed. 624]; *Walsh v. United States* [C. C. A.] 174 F. 615; *Pearce v. United States* [C. C. A.] 192 F. 561.' In the recent case of *Thompson v. Hays* (C. C. A.) 11 F.(2d) 244, the court had before it for construction a clause exempting a trustee from liability for anything but 'his own willful default.' The court said at page 248: 'What is 'willful default,' as the term is used in the instrument of May 1, 1914? It means more than involuntary, inadvertent, negligent, mistaken, careless, or accidental default. It means an intentional designing failure to do or not to do something required—an affirmative wrong. *Van Siclen v. Bartol et al*. (C. C.) 95 F. 793; *In re Mallon's Estate*, 89 N. Y. S. 554, 43 Misc. Rep. 569; *Winslow Warren and others, trustees, v. Elizabeth B. Pazolt and others*, 89 N. E. 381, 203 Mass. 328. In *Van Siclen v. Bartol et al.*, supra, the Court refers to willful misfeasance as 'a conscious, deliberate breach of trust.' *In re Mallon's Estate*, 89 N. Y. S. 554, 43 Misc. Rep. 569, where a trustee had been relieved from liability except for willful default, the court said: 'The words 'willful default' imply more than negligence or carelessness. The word 'willful' means intentional, while the word 'default' means transgression.' * * * *It is doubtless true that a trustee may be guilty of such wanton or willful neglect of his duties, such reckless indifference to and disregard of the interests and rights of the beneficiary, that the law will hold him guilty of a 'willful default.' Henry L. Doherty & Co. v. Rice et al*. (C. C.) 186 F. 204; *Kessler & Co. et al. v. Ensley Co. et al*. (C. C.) 129 F. 397.' (Italics mine.)

Harvey v. Guar. Tr. Co. of N.Y., 134 Misc. 417, 425–27, 236 N.Y.S. 37, 50–53 (Sup. Ct. 1929), *aff'd* 242 N.Y.S. 905 (1930).

C. What Roles Do Common Law and Equity Play?

Both the UTC and the UDTA contain provisions preserving the role and application of common law and principles of equity to the extent not modified by the respective acts (and other state statutes).[110] Still, although the subject matter covered by the UTC and UDTA is extensive, neither fully occupies the space covered by the common law of trusts, let alone principles of equity.[111] So, as we struggle to determine the relative liability between a directed trustee and a trust director in a particular circumstance, particularly the interplay between UTC § 105(b)(2) and UDTA §§ 9, 11, and 12, we are well-served to remember and understand what the common law provides regarding a trustee's fiduciary duties and liabilities and the courts in which we may find ourselves always have the tools of equity available to provide a remedy we might not expect from a strict reading of the statutes presented.[112]

Perhaps the most important general aspects of the common law that might affect a court's determination and allocation of liability in a directed trust setting are: (1) the definition of a "trust;" and (2) the unifying characteristic of all fiduciary relationships:

> A trust. . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, as least one of whom is not the sole trustee.[113]
>
> * * *
>
> Despite the differences in the legal circumstances and responsibilities of various fiduciaries, one characteristic is common to all: a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship.[114]

Additionally, equitable doctrines may allow courts of equity, in the appropriate circumstances, to craft remedies that avoid the harsh application of liability protection or exoneration stated in the UDTA (or other states' directed trust statutes or under a particular trust instrument):

> Equitable doctrines are grounded in fairness and justice, and their application implies the occurrence of atypical circumstances. Courts of equity have the power, where necessary, to pierce rigid statutory rules to prevent injustice. They possess broad powers and should exercise them so as to do substantial justice. Equity is not a rigid concept, and its principles are not applied in a vacuum; rather, equity is determined on a case-by-case basis when justice and fairness so require. A court of equity has the power to prevent legal rules from

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[110] Uniform Trust Code § 106; Uniform Directed Trust Act § 4.
[111] *See* Uniform Trust Code Prefatory Note; Uniform Directed Trust Act Prefatory Note. Notably, the Uniform Trust Code "was drafted in close coordination with the writing of" the Restatement (Third) of Trusts.
[112] Most, but not all, states provide that statutes in derogation of the common law are to be strictly construed.
[113] Restatement (Third) of Trusts § 2 (2003).
[114] Restatement (Third) of Trusts § 2 (2003), comment (b).

> working an injustice, and will depart therefrom whenever it is necessary to accomplish the ends of justice. Equitable doctrines are generally designed for relief from the harshness of strict legal rules.[115]

Perhaps, the most important principle of equity that might attend liability questions between a directed trustee and a trust director, and the ability of a beneficiary to recover for a breach of fiduciary duty, is that "equity will not suffer a wrong to be without a remedy:"

> It has been frequently stated that equity will not suffer a wrong, or, as sometimes stated, a right, to be without a remedy. This maxim includes the whole theory of equity jurisdiction and affords relief wherever a right exists and no adequate remedy at law is available. The function of equitable relief is to supplement the law where the law is insufficient to remedy a wrong. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. The remedy to be enforced must suit the facts of the particular case in question.[116]

If nothing else, the availability of equitable relief, particularly in light of common law provisions related to the purpose of trusts and fiduciary relationships, should cause directed trustees to be extremely fastidious in evaluating and following direction given by a trust director, even if such direction might seem routine. Moreover, if the directed trustee reasonably believes that the direction given could result, even if only in a very limited set of circumstances, to substantial harm to a beneficiary's interest, then the directed trustee would be wise to seek instruction from the court.[117]

D. General Rules of Statutory Interpretation and Construction

It also is important to remember that none of the various directed trust statutes is an island or otherwise sits in a vacuum, so it is dangerous to assume that nothing relevant exists outside of text of UDTA §§ 9, 11, and 12 (or your particular state's version of the same). As such, general rules of statutory interpretation and construction should be kept in mind when advising a directed trustee or trust director on the propriety of a proposed direction, including the following:[118]

- Statutes in derogation of the common law are strictly construed.[119]

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[115] 30A C.J.S. Equity § 98 (internal citations omitted).
[116] 30A C.J.S. Equity § 132 (internal citations omitted).
[117] Uniform Directed Trust Act § 9(d).
[118] These are only very general statements of certain rules and not specific to any particular jurisdiction. For a far more detailed discussion, *see* Reading Law: The Interpretation of Legal Texts, Scalia & Garner (2011).
[119] *But see,* Tenn. Code Ann. § 35-15-105(a): "The rule of statutory construction that states that statutes in derogation of the common law are to be strictly construed shall have no application to this section. Except as restricted by subsection (b), pursuant to this section, courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments."

- The primary purpose of statutory construction is to determine and carry out the intent of the legislature.

- Courts are to assume the legislature intends a statute to be applied as written and give effect to the statute's plain meaning, based on the statute's language and context.

- A statute will be interpreted based on the circumstances existing at the time of enactment.

- A statute is ambiguous if it is susceptible to more than one reasonable interpretation.

- Definition sections and interpretation clauses are to be followed carefully.

- Words used in a statute are to be given their ordinary, everyday meanings, unless defined or the context otherwise indicates that they are technical.

- A word used in the same statute should be interpreted consistently. If different words are used in different parts of the statute, the presumption is that each word has a different meaning.

- The meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context (*noscitur a sociis*).

- Where general words or phrases follow a number of specific words or phrases, the general words are construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned (*ejusdem generis*).

- Every word and every provision is to be given effect, if possible (*verba cum effectu sunt accipienda*).

- When one or more things of a class are expressly mentioned others of the same class are excluded (*expressio unius est exclusio alterius*).

- When possible, separate statutes must be read together and harmonized.

- Statutes enacted at different times, but pertaining to the same subject matter, must be read together as if they were one (*in pari materia*).

- Where a conflict exists between statutes, the more specific statute prevails over the general statute, unless the legislature intended otherwise (*generalia specialibus non derogant*).

- Where a conflict exists between statutes enacted at different times, the later statute prevails, unless the earlier statute is clearer and more explicit.

- The repeal or amendment of a statute by implication is not favored.

- A statute is to be construed to avoid an absurd result (i.e., that no reasonable person could approve).
- The legislature is presumed to be aware of the rules of interpretation and construction.

E. Other Relevant Cases of Interest

***In re Rivas*, 30 Misc.3d 1207 (A), 2011 WL 32792 (N.Y. Sur. Ct. January 5, 2011).**

Facts**:** Bank of America served as Trustee of a trust that had existed for over 60 years. Pursuant to the Deed of Trust and Agreement, the Settlor directed that income generated by the Trust be used to operate and maintain the Helen Woodward Clinic at the University of Rochester (the "Clinic"). Further, the Trust Agreement created an Investment Advisory Committee (the "Committee") consisting of three people who had sole and exclusive power and control over the Trust's investments and included explicit language that "The Trustee shall be charged with no responsibility or duties with respect to the investment or reinvestment of trust funds, other than to carry out the written directions or communications received by it from the Committee." In a 2009 meeting, the Committee directed the Trustee to invest all of the trust assets in the University of Rochester's long-term investment pool. In response to the Trustee's stated concerns, the Committee drafted up a contract with additional terms that further concerned the Trustee. Accordingly, the Trustee sought an interpretation from the Court as to whether the contract drawn up by the Committee was consistent with the Settlor's intent and the provisions of the original Trust Agreement.

Standard**:** Despite clear language in the Trust Agreement absolving the Trustee from liability for carrying out the written duties of the Committee, the Court held that accountability is an essential element of all fiduciary relationships that cannot be waived. Thus, in a situation where a Trustee is concerned that following directions of an advisory committee may result in a breach of fiduciary duty, the Trustee is required to come before the Court for instruction, in a similar manner to when two fiduciaries do not agree upon how to administer an estate.

Analysis**:** As it pertains to the directed trust component of this case, the Court reiterated that the Trustee correctly brought the issue before it and would have been liable for a breach of fiduciary duty had it failed to do so. Ultimately, the Court did agree with the Trustee that the proposed instructions violated the Settlor's intent and ruled that the provisions of the Trust must be executed pursuant to the initial Trust Agreement.

Note: New York does not currently have a directed trust statute.

***Shelton v. Tamposi*, 164 N.H. 490 (2013).**

Facts**:** This matter concerned an action for declaratory judgment where a trustee and investment directors sought a ruling that the trustee was required to act in accordance with the written directions of the investment directors, and that, in doing so, the trustee would incur no liability. The provisions at issue state:

> (c) The trustee shall make purchases, pledges, sales or other dispositions of securities, real estate interests and other operating entities only as the investment directors from time to time may direct in writing.
>
> (d) The trustee shall entrust to the investment directors the management, control, handling, financing, refinancing and structuring of any and all real estate interests and other operating entities from time to time include in the trust property. In no event shall the trustee assume any responsibility in connection with the management, control and handling of such real estate interests or other operating entities.
>
> (e) The investment directors shall have full power and authority to direct the retention or sale of all other assets from time to time included in the trust property and to direct the purchase of property with any principal cash included in the trust property. The trustee shall have no responsibility for any loss that may occur by reason of acting without question upon any such direction by the investment directors.

Standard**:** When courts construe a trust instrument, the intent of a settlor is paramount, and that intent is determined, whenever possible, from the express terms of the trust instrument itself.

Analysis**:** In each of the three provisions, the authority of the trustee is subordinate to that of the investment directors. The trustee has authority to make dispositions of trust property *only* as directed in writing by the investment directors. The trustee is specifically prohibited from assuming any responsibility for the management, control, and handling of the trust assets. Thus, the trustee is an "excluded fiduciary" with respect to the investment of trust assets. The full power and authority to direct the retention or sale of assets and to direct the purchase of property with any principal cash reserves is vested exclusively in the investment directors.

Note: New Hampshire has adopted a "no duty" statute with respect to "excluded fiduciaries." N.H. RSA § 564-B:12-1205.

***Jo Ann Howard and Associates, P.C. v. Cassity,* 868 F.3d 637 (8th Cir. 2017).**

Facts: This matter arose from a nationwide fraud scheme concerning sales of pre-need funeral contracts. PNC Bank served as the successor trustee of certain "pre-need trusts," which held the funds that the contract seller ("NPS") was statutorily obligated to pay into trust. PNC was sued on the grounds that its predecessor breached its fiduciary duties as trustee, was negligent, and aided and abetted a fraud when it allowed NPS to take policy loans on the trust-owned insurance policies, failed to ensure that the loans were adequately secured, neglected to account adequately for the funds in the NPS pre-need trusts, and failed to verify trust account records. As part of its defense, PNC argued that once NPS had hired an investment advisor, PNC's predecessor was relieved of all liability relating to investment decisions for trust property.

Standard: Relative to PNC's "investment advisor argument," the Court applied then-Mo. Rev. Stat. § 436.031.2 which provided that, for pre-need trusts, investment decisions could be made by a qualified investment advisor but that in "no case were control of said assets to be divested from the trustee nor may said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in." The Court also relied upon Restatement (Third) of Trusts §§ 90, 91 (2007), which provides that a trustee always has a duty to ensure that

trust assets are invested prudently, whether the trustee is investing the assets himself or monitoring the investment decisions of an investment advisor.

Analysis: Investment advisor or not, the Court held that the trustee could not be relieved of liability because the trustee had an ongoing duty to monitor and ensure that the trust assets were prudently invested. PNC's predecessor failed to do so.

Important Note: Missouri has a adopted a new directed trustee liability standard that provides, in part, that "[a]ny trustee of a directed trust shall not be accountable under the law or equity for any act or omission of a trust protector and shall stand absolved from liability for executing the decisions or instructions from a trust protector or for monitoring the actions or inactions of a trust protector."

***Ron v. Ron*, No. 3:19-CV-00211, 2020 WL 1426392 (S.D. Tex. Feb. 4, 2020).**

Facts**:** Settlor created a trust and appointed her husband to serve as Trustee and Defendant as Trust Protector. The settlor delegated to the Trust Protector the authority to add or remove beneficiaries to the trust. Under this provision, the Trust Protector appointed the husband as beneficiary of the trust. Settlor alleges that appointment of the Trustee as a beneficiary was done to complete the Trustee's fraud and fraudulent transfers of various assets. The Settlor brought three claims against the Trust Protector, including a claim for breach of fiduciary duty.

Standard**:**

1. Section 114.0031(a) of the Texas Trust Code states:

> If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
>
> > (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
> >
> > (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision.

2. Under Texas law "to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to and apart from the agreement made the basis of the suit

Analysis**:** The Court concluded that the Texas Trust Code only discusses a trust protector in their role as an advisor to the trustee. The Court interpreted this as suggesting that the fiduciary relationship is between the trust protector and the trustee rather than the trust protector and the trust. In other words, Texas law does not create a formal fiduciary relationship between a settlor and a trust protector, but ostensibly does create one between the trust protector and the trustee.

In Court noted that in the complaint, the Settlor makes no mention of a special relationship of trust and confidence that existed prior to, and apart from, the trust at issue and fails to allege facts to support an inference that there was such an informal fiduciary relationship. Accordingly,

under Texas law, the Settlor had not alleged the existence of an informal fiduciary relationship between herself and the Trust Protector.

Note: This case is particularly interesting because it reads as if the Court is feeling its way through this new statutory scheme and acknowledging the dearth of case law bearing on the relationships between directed trustees and trust directors. Further, the statute relied upon by the Court also contains the standard for determining the liability of a directed trustee for following the instructions of a trust director. Tex. Prop. Code § 114.0031(i) (applying a "willful misconduct" standard).

***Rogers v. Wilmington Trust Co.,* 2022 WL 621690 (3rd Cir. March 3, 2022):**

Facts: Plaintiffs asserted that defendant trust company breached its fiduciary duties when, *inter alia*, it served as both trustee and investment advisor to the trust.

Standard: The Court applied Delaware's statute concerning the authority and obligations of trust "advisers" (Del. C. 12 § 3313(a)), which provides that an "advisor may be 'given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions."

Analysis: Here, neither the trust agreement nor the statutory authority prohibited the trustee from serving as an investment advisor to the trust. Thus, the trustee's act of serving in both roles did not amount to the breach of a fiduciary duty.

Note: Subsection (b) of the statute the court relied upon codifies the Delaware standard, stating that "[i]f a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act."

***Accident Insurance Co. v. U.S. Bank National Assoc*., No. 21-1504, 2022 WL 3713512 (4th Cir. Aug. 29, 2022).**

Facts**:** U.S. Bank was serving as Trustee for deposits made by Grantor for the benefit of Plaintiff. The Grantor appointed an Administrative Agent to manage certain securities being held under trust. The Administrative Agent had the exclusive responsibility to value the units, maintain the official book of registered unitholders, and had the sole discretion to approve all unit transfers and unitholders. Grantor became insolvent and the Plaintiff assumed all liabilities. Plaintiff sent a withdrawal notice to the Bank, seeking transfer of all trust assets. The Bank informed Plaintiff that withdrawal of the securities would require approval from the Administrative Agent, and the assets remained in trust. Plaintiff asserted claims against the Bank for, *inter alia*, breach of fiduciary duty. The thrust of Plaintiff's complaint was that the Bank had improperly accepted the securities in violation of the Trust Agreement because they were non-transferable.

Standard**:** The Trust Agreement absolved the Bank of any "duty or responsibility" involving the qualification, character, or valuation of trust assets. The Bank could also follow and rely upon all instructions from Plaintiff and Grantor unless the Trust Agreement provided

otherwise. Paragraph 8(b) required the Bank, before accepting any asset for deposit, to determine that such asset is in such form that plaintiff or the Bank could negotiate without consent or signature from any other entity. The Bank wouldn't incur any liability for actions it took in “good faith reliance” on such instructions. Nor would the Bank be liable for any loss arising out of performance of its contractual duties unless its own negligence, willful misconduct, or lack of good faith caused the loss (this was the standard appearing in the Trust Agreement).

Analysis**:** Under the Trust Agreement there were situations where the Bank would not be acting as a directed trustee. Both provisions the Bank relied on explain that its directed-trustee role was subordinate to contract terms providing otherwise. Therefore, the trust agreement obliged the Bank to reject any proposed asset that it determined was nonnegotiable (i.e., nontransferable) without third-party consent.

***Hurtado v. Rainbow Disposal Co.*, No. 817CV01605JLSDFM, 2018 WL 3372752 (C.D. Cal. July 9, 2018)**

**This is an ERISA case but is useful by way of analogy.*

Facts: Employer established the Rainbow Employee Stock Ownership Plan. A committee appointed by Employer’s Board of Directors (“ESOP Committee”) was to serve as fiduciary of the Plan with authority to control and manage its operation and administration, while a Trustee retained the authority to invest the assets. GreatBanc served as Trustee during the events giving rise to this litigation. The plan’s assets were invested in companies owned by Employer’s Executive Chairman and President, respectively, which resulted in decreased stock value. Plaintiffs, beneficiaries under the Plan, sued GreatBanc for, *inter alia*, failure to manage a “chose in action.” Plaintiffs allege that as Trustee, GreatBanc had a fiduciary duty to bring a shareholder action against the Chairman and President for investing assets in companies for which they personally held ownership interests.

Analysis: GreatBanc argued it could not be liable because it did not have the power to bring a derivative action absent direction from the ESOP committee. The Court rejected this argument finding that even if GreatBanc could not act without direction from the ESOP committee, “directed trustees” remain subject to the “duty of prudence.” Under the duty of prudence, a directed trustee can disobey the named fiduciary or director’s directions when it is plain that the directions are imprudent. Thus, Plaintiffs plausibly alleged that GreatBanc violated its fiduciary duty by failing to act in the face of a self-dealing transaction. Even if a derivative suit would not ultimately have been the appropriate remedy, GreatBanc nevertheless had a duty to investigate the relevant facts to explore alternative courses of action. Thus, directed trustees may be subject to liability for breach of the duty of prudence even where they do not have authority to act or are only acting pursuant to the direction of a director with authority.

Making Directed Trusts Work: The Uniform Directed Trust Act*

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Abstract

Directed trusts have become a familiar feature of trust practice in spite of considerable legal uncertainty about them. Fortunately, the Uniform Law Commission has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that offers clear solutions to the many legal uncertainties surrounding directed trusts. This article offers an overview of the UDTA, with particular emphasis on four areas of practical innovation. The first is a careful allocation of fiduciary duties. The UDTA's basic approach is to take the law of trusteeship and attach it to whichever person holds the powers of trusteeship, even if that person is not formally a trustee. Thus, under the UDTA the fiduciary responsibility for a power of direction attaches primarily to the trust director (or trust protector or trust adviser) who holds the power, with only a diminished duty to avoid "willful misconduct" applying to a directed trustee (or administrative trustee). The second innovation is a comprehensive treatment of non-fiduciary issues, such as appointment, vacancy, and limitations. Here again, the UDTA largely absorbs the law of trusteeship for a trust director. The UDTA also deals with new and distinctive subsidiary problems that do not arise in ordinary trusts, such as the sharing of infor-

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mation between a trustee and a trust director. The third innovation is a reconciliation of directed trusts with the traditional law of cotrusteeship. The UDTA permits a settlor to allocate fiduciary duties between cotrustees in a manner similar to the allocation between a trust director and directed trustee in a directed trust. A final innovation is a careful system of exclusions that preserves existing law and settlor autonomy with respect to tax planning, revocable trusts, powers of appointment, and other issues. All told, if appropriately modified to fit local policy preferences, the UDTA could improve on the directed trust law of every state. The UDTA can also be used by practitioners in any state to identify the key issues in a directed trust and to find sensible, well-drafted solutions that can be absorbed into the terms of a directed trust.

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Introduction

Across the centuries, the law of trusts evolved on the assumption that the power to administer a trust would belong to a trustee. The investment, distribution, and management of a trust's property were all the responsibility of a trustee, rather than of a beneficiary, settlor, or anyone else who was not formally a trustee. This tradition is being challenged, however, by the growing trend toward drafting the terms of a trust to grant a power over the trust to a person who is not a trustee. In

such a trust, commonly known as a *directed trust*,[1] a person known as a *trust director*[2] (or, alternately, as a *trust protector* or *trust adviser*) does not hold legal title to the trust property and is not a trustee, but nevertheless may hold a power over the trust that might otherwise belong to a trustee. The powers and duties of a trustee in a directed trust, who may be known as a *directed trustee* or an *administrative trustee*,[3] are to varying degrees subject to the supervening power of the non-trustee trust director.

The fundamental policy question posed by directed trusts is how to divide the law of trusteeship between a trust director and a trustee.[4] When the power to administer a trust belongs exclusively to a trustee, there seems little question that the fiduciary duties and subsidiary rules of trusteeship should apply exclusively to the trustee. But when the terms of a trust divide power between a trustee and a trust director, applying the law of trusteeship becomes much harder. There is disagreement, for example, whether a trust director should be subject to the fiduciary duties of trusteeship, and whether a directed trustee should be subject to reduced fiduciary duties—or no fiduciary duties at all.[5] The case law is sparse, and notwithstanding the success of the Uniform Trust Code, existing statutes are in disarray.

Fortunately, the Uniform Law Commission (ULC) has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that offers clear solutions to the many legal uncertainties surrounding

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[1] The Uniform Directed Trust Act [UNIF. DIRECTED TRUST ACT (UNIF. LAW COMM'N 2017)], hereinafter "UDTA," defines a "directed trust" in § 2(2).

[2] The UDTA defines a "trust director" in § 2(9).

[3] The UDTA defines a "directed trustee" in § 2(3).

[4] We will examine this point more deeply in a scholarly project tentatively entitled *The Rise of Directed Trusts: Unbundling Title, Power, and Fiduciary Duty*.

[5] *See, e.g.*, Alexander A. Bove, Jr., *A Protector by Any Other Name . . .*, 8 EST. PLAN. & CMTY. PROP. L.J. 1 (2015); Alexander A. Bove, Jr., *Trust Protectors in the United States. A Step Behind the Rest of the World*, 22 TR. & TR. 737 (2016); Matthew Conaglen & Elizabeth Weaver, *Protectors as Fiduciaries: Theory and Practice*, 18 TR. & TR. 17 (2012); William S. Echols, *Action in the Chasm: Defining Duties of the Trustee's Delegates*, 6 EST. PLAN. & CMTY. PROP. L.J. 397 (2014); David A. Diamond & Todd A. Flubacher, *The Trustee's Role in Directed Trusts*, 149 TR. & EST., Dec. 2010, at 24; Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing,"* 50 REAL PROP. TR. & EST. L.J. 267 (2015); Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, 31 PROB. & PROP. 1 (2017); R. Hugh Magill, *Allocating Fiduciary Responsibility*, 154 TR. & EST., May 2015, at 36; Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIPIAC PROB. L.J. 261 (2016); Charles A. Redd, *Directed Trusts - Who's Responsible?*, 154 TR. & EST., Sept. 2015, at 11; Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?,* 59 DRAKE L. REV. 67 (2010); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2005).

directed trusts.[6] The UDTA was approved by the ULC in 2017 after several years of drafting in consultation with a committee of nationally recognized experts in trust law from law practice, banks and trust companies, and academia.[7] The UDTA provides clear, practical, and comprehensive solutions to the major legal difficulties in a directed trust. At the same time, the UDTA offers a host of practical innovations that improve on the statutes that many states have already enacted to deal with directed trusts.

Specifically, the UDTA offers four areas of innovation. The first concerns the fiduciary duties of a trust director and a directed trustee. The basic approach of the UDTA is to take the law of trusteeship and attach it to whichever person holds the powers of trusteeship, even if that person is not a trustee. Thus, under the UDTA the fiduciary responsibility for a power of direction attaches primarily to the trust director who holds the power, rather than to the directed trustee who facilitates the director's exercise of the power. A directed trustee is thus relieved from the full panoply of fiduciary duties of a unitary trusteeship, and has only a diminished duty to avoid "willful misconduct" in deciding whether to comply with a director's directions.[8]

This simple and intuitive approach to dividing duties has already proven successful and workable in Delaware.[9] The UDTA improves on the Delaware model, however, by providing greater clarity in specifying the duties of a trust director. In prescribing the duties of a trust director, the UDTA provides that a director bears the same fiduciary duties as a trustee "in a like position and under similar circumstances."[10] The comparison to a trustee in a like position and under similar circumstances adds specificity while also preserving flexibility and sensitivity to context

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6 For enactment and other information, see ULC, ACTS, DIRECTED TRUST ACT, http://www.uniformlaws.org/Act.aspx?title=directed%20Trust%20Act (last visited, Oct. 9, 2018).

7 For the committee roster and iterative development, see UNIF. LAW COMM'N, *Committees*, *Directed Trust Act*, http://www.uniformlaws.org/Committee.aspx?title=directed%20Trust%20Act (last visited, Oct. 9, 2018).

8 UDTA §§ 8–9. The UDTA also requires a trustee to "take reasonable action" to comply with a director's exercise or nonexercise of its powers. UDTA § 9(a). However, as the comments to § 9 make clear, the duty to take reasonable action is a duty to act reasonably in carrying out the acts necessary to comply with a director's action, not a duty to ensure that the substance of the direction is reasonable. *See infra* Part II.B.4.

9 *See* DEL. CODE ANN. tit. 12, § 3313 (2018); *see also* Diamond & Flubacher, *supra* note 5; Mary Clarke & Diana S.C. Zeydel, *Directed Trusts: The Statutory Approaches to Authority and Liability*, 35 EST. PLAN. 9 (2008); Magill, *supra* note 5; Richard W. Nenno, *Can Directed Trustees Limit Their Liability?*, 21 PROB. & PROP. 45 (2007); Redd, *supra* note 5.

10 UDTA § 8(a). The phrasing derives from MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS'N 2017).

in addressing the immense variation among the powers that may be given to a trust director.[11]

A second innovation is to address non-fiduciary matters in the subsidiary law of trust administration. Although many directed trust statutes address fiduciary duties, no existing statute comprehensively addresses subsidiary matters such as acceptance, compensation, vacancy, and limitations periods. Unlike existing statutes, the UDTA anticipates these subsidiary issues and adopts the same basic solution that it applies to fiduciary duties—it takes the law of trusteeship and applies it to trust directors.[12] Thus, for example, the law of succession is the same for a trust director as it is for a trustee in a like position and under similar circumstances.[13] In addition to absorbing the law of trusteeship for trust directors in this way, the UDTA also deals with new and distinctive subsidiary problems that do not arise in ordinary trusts, such as the sharing of information between a trustee and a trust director.[14]

A third innovation is to reconcile the traditional law of cotrusteeship with the broader settlor autonomy recognized in a directed trust.[15] The UDTA expands the settlor's autonomy in designing a cotrusteeship by authorizing the terms of a trust to allocate fiduciary responsibility among cotrustees in a way that mirrors the allocation among a trust director and a directed trustee.[16] Thus, under the UDTA, a cotrustee who is subject to direction by another cotrustee can be relieved of fiduciary responsibility in the same way that the UDTA relieves a directed trustee who is directed by a trust director. The UDTA does not apply this treatment by default, but rather it gives a settlor the freedom to do so by choice.

A fourth and final innovation is a carefully thought-out system of exclusions that preserves existing law and settlor autonomy with respect to a host of issues that are collateral to the emergence of directed trusts.[17] Among other things, the UDTA preserves tax planning in existing trusts by excluding from the act any power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[18] The UDTA also preserves existing plans by preventing the settlor of a revocable trust or the donee of a power of appointment from being unintentionally characterized as a trust director by virtue of having a power

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[11] *See infra* Part II.A.
[12] UDTA §§ 13, 14, 16; *infra* Part III.
[13] *See* UDTA § 16(4)–(6).
[14] UDTA § 10; *see infra* Part II.C.
[15] UDTA § 12; *see infra* Part IV.
[16] UDTA § 12.
[17] *Id.* § 5; *see infra* Part I.D.
[18] *See* UDTA § 5(b)(5).

over the trust.[19] This exclusion is important, because it corrects an unacknowledged drafting error in many existing directed trust statutes, including the Delaware statute, which, if read literally, would make the settlor of a revocable trust and the donee of a power of appointment into trustee-like fiduciaries by virtue of their powers over the trust.[20] The UDTA anticipates and corrects this error.

These and other practical improvements in the UDTA are so significant that the UDTA is appropriate for adoption by every state. Although some states may wish to change the standard for the fiduciary responsibility of a directed trustee or trust director,[21] no other provisions of the UDTA should provoke serious controversy. A state that wishes to modify the fiduciary duty of a directed trustee or trust director could easily do so while leaving the rest of the UDTA intact and gaining its benefits. The UDTA is so much simpler, more comprehensive, and more practically adept than the existing statutes that, with a few small adjustments, every state could use the UDTA to improve its law while still remaining consistent with its distinctive policy preferences.

The UDTA can also serve as a resource for drafters of directed trusts even in states that have not adopted in at least two ways. First, the extensive provisions of the UDTA, which address numerous issues not touched on by the existing state statutes, can serve as a guide or a checklist for issues a drafter should address expressly in the terms of a directed trust. Second, the solutions to those issues provided by the UDTA offer a model—and indeed, even model language—for how to address them in the terms of a directed trust.

Let us now turn to the details. Part I examines the scope of the UDTA and its careful system of exclusions that preserve existing law and settlor autonomy with respect to collateral matters—that is, the fourth of the four innovations noted above. We will then consider the other three innovations in the order given above. Thus, Part II examines the UDTA's answer to the core question of allocating fiduciary responsibility among a trust director and a directed trustee and the deeply intertwined questions of information sharing and cross-monitoring among trust directors and directed trustees. Part III examines the UDTA's coverage of the various non-fiduciary matters in the subsidiary law of trust administration that might be overlooked in drafting a directed trust and that for the most part are not addressed by the existing statutes. Part IV examines the UDTA's reconciliation of the law of cotrusteeship with the

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19 *See id.* § 5(b)(1), (3).

20 *Id.* § 5(b)(3); *infra* Part I.D.1, I.D.3.

21 We discuss below the different standards of fiduciary duty prevailing among existing state statutes. *See infra* Part II.A (trust directors); Part II.B.1 (directed trustees).

broad settlor autonomy permitted with respect to a directed trust. A short conclusion follows.

I. Scope and Exclusions

A. A Capacious Scope

We begin our tour through the UDTA by considering the statute's scope. In accordance with the principle of freedom of disposition,[22] the UDTA promotes settlor autonomy by validating a grant of a power of direction.[23] Accordingly, the scope of the statute depends largely on which powers qualify as a "power of direction." If the terms of a trust are found to include a power of direction, then the statute applies.[24]

1. *Defining a "Power of Direction"*

Section 2(5) of the UDTA defines a "power of direction" as "a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee."[25] The heart of this definition is the broadly worded phrase "power over a trust." Though it consists of a mere four words, this phrase was the subject of intense care and discussion in the drafting process, and it counts as one of the UDTA's many practical innovations.

The phrase is innovative because of its great breadth. It is capacious enough to cover all of the conventional powers of trusteeship, such as a power to invest or distribute the trust property, as well as other powers that may not conventionally belong to a trustee, such as a power to amend or terminate the trust. The phrase is also broad enough to cover every form that such a power might take. The term "power of direction" includes both a power to direct a trustee to act (such as when a director tells a trustee to invest in particular assets) and a power in a director to act on his or her own (such when the terms of a trust permit a director to sign an investment subscription agreement without the trustee's par-

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22 *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 St. Louis L.J. 643 (2014).

23 *See* UDTA, Prefatory Note ("By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition."). The UDTA defines a "power of direction" in § 2(9).

24 The definition of "terms of a trust" in UDTA § 2(8) accounts for the possibility of changes to those terms owing to court order or nonjudicial settlement agreement. *See* Todd A. Flubacher & Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper*, 152 Tr. & Est., Dec. 2013, at 1. In 2018, the ULC amended the definition of "terms of a trust" in the Uniform Trust Code accordingly. *See* Unif. Trust Code § 103(18) (Unif. Law Comm'n, amended 2018).

25 UDTA § 2(5).

ticipation). The term also covers powers to veto or consent to a trustee's actions in advance or a power to release a trustee from liability for prior conduct. The only types or kinds of powers over a trust that do not qualify as powers of direction are those covered by the categorical exclusions from the statute prescribed by § 5, to which we turn below.[26]

To avoid any doubt about the capaciousness of the definition of a power of direction, the drafting committee took two further steps to clarify. First, within the blackletter statutory language of the definition of "power of direction," the drafting committee included the further statement that "[t]he term includes a power over the investment, management, or distribution of trust property or other matters of trust administration." The accompanying comment explains that

> a power of direction may include a power over "matters of trust administration" as well as a power over "investment, management, or distribution of trust property." These examples are meant to illustrate the potential scope of a power of direction rather than to limit it. In using the term "administration," the drafting committee intended a meaning at least as broad as that found in the context of determining a trust's "principal place of administration," such as under Section 3(b). The drafting committee also intended the terms "investment, management, or distribution" to have a meaning at least as broad as that found in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee's default powers.[27]

As a second measure for the avoidance of doubt about the UDTA's scope, the drafting committee elsewhere in the comments provided a non-exclusive but detailed list of the types or kinds of specific powers that the committee contemplated would fall within the definition of a power of direction. Those further comments explain that term includes a power to:

- acquire, dispose of, exchange, or retain an investment;
- make or take loans;
- vote proxies for securities held in trust;
- adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
- adjust between principal and income or convert to a unitrust;
- manage a business held in the trust;
- select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;

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26 *See infra* Part I.D.
27 UDTA § 2 cmt.

- direct a trustee's or another director's delegation of the trustee's or other director's powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.[28]

The drafting committee based this list on a comprehensive review of every existing state directed trust statute and on a sampling of directed trust provisions provided by multiple trust lawyers and bankers who served as observers and advisers to the drafting committee.[29] The list therefore covers every power that is specifically enumerated as a power of direction in an existing directed trust statute as well as every example that the drafting committee and its numerous observers and advisers could conjure up. The capacious wording in the blackletter definition of a power of direction plus the broad inclusiveness of the examples in the comments make the UDTA the most comprehensive directed trust statute yet written.

2. *Excluding a Serving Trustee*

Having broadly equated a "power of direction" with any "power over a trust," the drafting committee took care to ensure that the definition would not swallow the law of trusteeship by transforming the powers over a trust that belong to a trustee into powers of direction. The definition of a "power of direction" in § 2(5) provides that a "power over a trust" is a "power of direction" only "to the extent the power is exercisable while the person" who holds the power "is not serving as a trustee."[30] The comment explains that "[t]he purpose of this limitation is to exclude a person serving as trustee from the definition of a trust di-

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[28] *Id.* § 6 cmt. The comment indicates that this list was meant to be illustrative rather than limiting.

[29] *See* UNIF. LAW COMM'N, DIRECTED TRUST ACT, MARCH 2015 COMMITTEE MEETING – APPENDIX A, http://www.uniformlaws.org/shared/docs/divided%20trusteeship/Appendix%20A%20-%20UDTA%20Spring%202015.pdf (last visited Oct. 9, 2018).

[30] UDTA § 2(5).

rector, even though as trustee the person will inevitably have a 'power over a trust.'"[31] The purpose of the UDTA is "to address the complications created by giving a person other than a trustee—that is, a trust director—a power over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law."[32]

3. *Defining a "Directed Trust," "Directed Trustee," and "Trust Director"*

The UDTA defines its other key terms in relation to the definition of a power of direction. A "directed trust" is "a trust for which the terms of the trust grant a power of direction."[33] A "trust director" is "a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee."[34] And a "directed trustee" is "a trustee that is subject to a trust director's power of direction."[35]

Crucially, these definitions are functional, rather than formal, and they apply without regard to the terminology used by the terms of particular a trust. The definition of a "trust director," for example, expressly provides that a person who satisfies the functional definition of a trust director "is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust."[36] So long as the functional criteria prescribed by the UDTA's definitions are satisfied, a power will be treated as a power of direction even if it is labeled as a "power of protection," "power of investment," or "power of administration." Thus, a person who holds a power of direction is a trust director even if the terms of the trust label the person as a "trust adviser" or "trust protector." And a trustee is treated as a directed trustee even if the terms of the trust label the trustee as an "administrative trustee." The UDTA applies to a "power of direction," a "trust director," and a "directed trustee" in a "directed trust" in accordance with function not form, and even if the terms of a trust disclaim this vocabulary.[37]

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[31] *Id.* § 2 cmt.
[32] *Id.*
[33] *Id.* § 2(2).
[34] *Id*. § 2(9).
[35] *Id*. § 2(3).
[36] *Id*. § 2(9).
[37] The clarity in the UDTA's definitions represents a significant improvement on the confusing and clumsy definitions in many existing state statutes. In South Dakota, for example, the definition of a "trust protector" is circular: a trust protector is "any person whose appointment as a protector is provided for in the instrument." S.D. Codified Laws § 55-1B-1(2) (2017). In other words, a trust protector is a trust protector. Elsewhere, the South Dakota statute provides examples of powers that might be granted to a

B. An Enabling Statute

The UDTA expressly confirms the validity of a trust with a power of direction, and therefore the validity of a directed trust with a trust director and a directed trustee. Section 6(a) provides that "the terms of a trust may grant a power of direction to a trust director."[38] Thus, although a trust with a power of direction would almost certainly be valid under the common law,[39] the UDTA resolves any doubt with statutory certainty.

1. *Enabling versus Off-the-Rack*

Validating a power of direction, and therefore a directed trust with a trust director and a directed trustee, raises the further question of what exactly such a power entails. As we have just seen, the term "power of direction" is defined capaciously to include *any* power over a trust.[40] But this definition does not answer the question of *which* powers over a particular trust are granted to a particular trust director. The definition identifies the concept of a power of direction generally but does not supply the content of a particular power of direction specifically.

The approaches to this problem in the existing statutes can be divided roughly into two categories: "enabling" and "off-the-rack." The *enabling* statutes, typified by the Delaware statute,[41] validate terms of a trust that grant a power of direction, but they do not prescribe any specific powers by default. A settlor has the freedom to grant a power of direction, but must specify which powers, if any, she will grant to a particular director.

For example, the Delaware statute provides that a person other than a trustee may be "given authority by the terms of a governing in-

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protector. *Id.* § 55-1b-6. But the statute does not say whether granting one of these powers necessarily makes a person into a protector or specify what else might make a person into a protector either.

[38] UDTA § 6(a).

[39] *See, e.g.*, *In re* Eleanor Pierce (Marshall) Stevens Living Trust, 159 So. 3d 1101, 1106, 1110-11 (La. Ct. App. 2015) (validating terms of a trust creating a trust director even in the absence of specific statutory authorization); *see also* RESTATEMENT (THIRD) OF TRUSTS § 75 (AM. LAW INST. 2007) (recognizing a third party power to control a trustee); RESTATEMENT (SECOND) OF TRUSTS § 185 (AM. LAW INST. 1959) (same).

[40] *See* UDTA § 2(5); *supra* Part I.A.

[41] *See* DEL. CODE ANN. tit. 12, § 3313 (2018); *see also* ARIZ. REV. STAT. ANN. § 14-10818(A) (2018); COLO. REV. STAT. § 15-16-801 (2016) ("Trust Advisor"); MICH. COMP. LAWS § 700.7809 (2010); MISS. CODE ANN. § 91-8-1201(a) (amended 2016); MO. REV. STAT. § 456.8-808-(2) (2018); MONT. CODE ANN. § 72-38-808 (2017); N.H. REV. STAT. ANN. § 564-B:7-711(a) (2017); N.C. GEN. STAT. § 36C-8A-1 (2017); OHIO REV. CODE ANN. § 5808.08(d) (LexisNexis 2013); TENN. CODE ANN. § 35-15-1201 (2018); VA. CODE ANN. § 64.2-770(E)(1) (2014).

strument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary."[42] Beyond this broad grant of authorization, however, the Delaware statute does not provide further guidance on which powers are included in a particular power of direction in a particular trust.[43] Accordingly, under an enabling statute like Delaware's, the scope of a trust director's power of direction is determined by the terms of the trust. In other words, the content of a power of direction must be supplied by the terms of the trust. The statute provides no standard powers by default.

By contrast, an *off-the-rack* statute provides for one or more standard categories of trust director, with various sets of powers given to each category by default.[44] The South Dakota statute, for example, provides for the appointment of an "investment trust advisor" and a "distribution trust advisor," each with a different set of default powers.[45] An investment trust advisor has powers by default to direct the trustee with respect to the retention, purchase, or sale of trust property and to vote proxies for securities held in trust.[46] Likewise, a distribution trust adviser has the power to "direct the trustee with regard to all discretionary distributions."[47]

In addition to these standard categories, the South Dakota statute also has a general category of director called a "trust protector." The statute defines a protector in circular fashion as "any person whose ap-

[42] Del. Code Ann. tit. 12, § 3313(a).

[43] The Delaware statute distinguishes between a trust "adviser" and trust "protector," but merely to say that the term "adviser" includes a "protector." *Id.* § 3313(f). The statute specifies a set of powers that a protector may possess, but the statute does not provide any of those powers to a protector by default and does not limit a protector to possessing only those powers. *Id.* The statute similarly identifies an "investment adviser" as a person with various powers related to investment, but does not limit such a person's powers or supply the person with any powers by default. *Id.* § 3313(d). The closest the statute comes to providing default terms for a directed trust is a presumptive definition of the term "investment decision" that applies unless the terms of the trust provides otherwise. *Id*.

[44] *See, e.g.*, S.D. Codified Laws §§ 55-1B-1, 55-1B-4 (2018) (protectors, advisors, investment advisors, distributions advisors); *see also* Alaska Stat. §§ 13.36.370, 13.36.375 (amended 2013) (protectors and advisers); Idaho Code § 15-7-501(1) (2018) (investment advisors, distribution advisors, protectors); 760 Ill. Comp. Stat. 5/16.3(a)-(d) (2018) (investment advisors, distribution advisors, protectors); Nev. Rev. Stat. §§ 163.55533, 163.5537, 163.5543, 163.5545, 163.5547 (2009) (distribution advisers, investment advisers, trust adviser, protectors, custodial account owner); Wis. Stat. §§ 701.0808, 0818 (2014) (directors and protectors); Wyo. Stat. Ann. §§ 4-10-710, 712, 718 (2018) (protectors and advisors).

[45] S.D. Codified Laws §§ 55-1B-9, 55-1B-10, 55-1B-11.

[46] *See id.* § 55-1B-10(1)-(2).

[47] *Id.* § 55-1B-11.

pointment as protector is provided for in the instrument,"[48] and it provides that "the powers and discretions of a trust protector are as provided in the governing instrument."[49] The statute includes a menu of powers that the terms of a trust may grant to a protector, but the statute does not provide any of those powers by default, nor does it limit a trust protector to those powers.[50] The principal substantive difference between a trust protector and the other two categories of directors appears to be that a trust protector is not a fiduciary by default,[51] whereas an investment trust advisor and distribution trust adviser are required to be fiduciaries.[52]

Other states have other systems of categorization for off-the-rack powers. Alaska has separate categories for a "trustee adviser," who may be given the power to direct a trustee's actions, and a "trust protector," who has the power to (among other things) remove a trustee or modify a trust instrument.[53] A trust adviser may be required to be a fiduciary,[54] but a trust protector by default is not.[55] Nevada has four categories: a trust protector, a distribution trust adviser, an investment trust adviser, and a directing trust adviser.[56]

In sum, under an off-the-rack statute, a trust director tends to fall into one or more statutory categories with a predetermined set of default powers and fiduciary duties. A settlor can tailor the powers of a director in the terms of the trust by adding or subtracting powers and adjusting the fiduciary duties as the settlor likes. Under an enabling statute, by contrast, the scope of a trust director's powers and duties is set by the terms of the trust.

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48 *Id.* § 55-1B-1(2). This circular definition leaves open myriad questions, such as what exactly a protector is and whether the category of protector includes a trustee who exercises one of the powers that can be given to a protector.

49 *Id.* § 55-1B-6.

50 *Id.* § 55-1B-6(1)-(18).

51 *Id.* § 55-1B-1(2).

52 *Id.* § 55-1B-1(6)-(7). The South Dakota statute also includes a definition of the term "family advisor." *Id.* § 55-1B-1(10). The definition declares a family advisor to be "any person whose appointment is provided for in the governing instrument or by court order who is authorized to consult with or advise a fiduciary with regard to fiduciary or nonfiduciary matters and actions, and who may also be authorized by the governing instrument or court order to otherwise act in a nonfiduciary capacity." *Id.* The exact significance of this definition is unclear, because the term "family advisor" never appears again in the statute. One possible interpretation is that a person who holds the powers of a "family advisor"—i.e., a power to "consult with or advise a fiduciary"—is not a fiduciary.

53 Alaska Stat. §§ 13.36.370 (amended 2013) (protector), 13.36.375 (advisor).

54 Nev. Rev. Stat. § 163.5553 (2009) (protector).

55 Alaska Stat. § 13.36.370(d).

56 Nev. Rev. Stat. §§ 163.5536 ("directing trust adviser"); 163.5537 ("distribution trust adviser"); 163.5543 (investment trust adviser"); 163.5547 ("trust protector").

2. *The UDTA is an Enabling Statute*

After carefully considering both models, the UDTA drafting committee opted for an enabling structure. Section 6(a) provides that the terms of a trust may grant a power of direction to a trust director. However, with just one exception to which we will turn below,[57] the UDTA does not prescribe any powers for a trust director by default and does not segregate trust directors into distinct categories. The UDTA treats any power over a trust that is granted to a person other than a serving trustee as a power of direction, with the scope of that power prescribed by the terms of the trust, as under the Delaware statute. As the comment to § 6 explains, the UDTA "does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust."[58]

The drafting committee favored an enabling model for several reasons. To begin with, an enabling model is simpler. Providing for only a single class of trust director with only a single set of governing rules avoids the complexity attendant to the off-the-rack models. Because the categories in the off-the-rack statutes tend to operate by classifying directors rather than by classifying powers, the contents of the categories are people, rather than powers. For example, South Dakota has a category for "trust investment advisers" rather than a category for "trust investment powers." An awkward consequence of fixating on people rather than powers in this way is that a single person can occupy several categories simultaneously—she can be a "trust investment adviser," a "distribution trust advisor," and a "trust protector" all at once, with correspondingly inconsistent and confusing results. The simpler, enabling approach of the UDTA reduces the risk of litigation about categorization. Under the UDTA, there is only one category of trust director, and the only powers of a director are those granted by the terms of the trust.

Another problematic consequence of supplying powers by default, as under the off-the-rack models, is that the powers might come in awkward bundles that frustrate rather than facilitate a settlor's intent. Under the South Dakota statute, for example, multiple powers come bundled together by default, so that an accountant who is granted a power to direct the trustee "as to the value of nonpublicly traded trust investments" would by reason of that express power be classified as an "investment trust adviser." And as an investment trust adviser, the accountant would have several different powers, including the the power to direct the trustee "with respect to the retention, purchase, sale," or

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[57] *See infra* Part I.C.

[58] UDTA § 6 cmt. (Unif. Law Comm'n 2017).

"exchange" of the trust assets.[59] Although some settlors might like this outcome, it seems likely that many would not. True, a settlor could avoid the awkward bundling of the South Dakota statute by drafting around it—but only if the settlor or her lawyer is awake to the issue. Under the UDTA, by contrast, the problem is avoided in all cases by providing that a trust director has only those powers granted by the terms of the trust.

Two further points follow. First, the transaction costs savings of an off-the-rack statute are likely to be illusory. Relative to an enabling statute, an off-the-rack statute could minimize the costs of drafting a directed trust by allowing a drafter to invoke a pre-existing statutory form of directed trust. In practice, however, a directed trust under an off-the-rack statute will almost always require tailoring by the terms of the trust to adapt the statutory form to the particulars of the situation. As the example of the South Dakota accountant shows, a drafter will need to specify both the nondefault powers that a trust director holds and the default powers that the director does not hold. In the meantime, as the directed trust concept becomes more familiar, formbook boilerplate will become readily available, simplifying the process of drafting a directed trust under an enabling statute. In a related vein, an enabling statute will not require periodic amendments to update its categories and default powers within those categories to reflect changes in practice.

Second, an enabling statute is less disruptive for existing trusts, because such a statute would not expand a director's default powers after the fact in a way that a settlor might not have intended or even contemplated. Consider again the South Dakota statute, which like the UDTA applies to all trusts regardless of when they were created.[60] Suppose an existing trust that gives a committee of the settlor's family the power to vote the trust's interest in a family business. Under the South Dakota statute, this power would make the family members into a committee of "investment trust advisors" with all of the default powers of investment trust advisors, even if the terms of the trust did not expressly provide those powers.[61] Thus, in addition to having the power to vote the family shares (as provided by the terms of the trust), the family members would also have the power to sell those shares.[62] The UDTA avoids this

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[59] S.D. Codified Laws § 55-1B-10(1), (5) (2014).

[60] *See Id.* § 55-1B-1(1); UDTA § 3(a). We discuss UDTA § 3(a) *infra* Part I.E.2.

[61] *See* S.D. Codified Laws §§ 55-1B-1(6), 55-1B-10.

[62] *Id.* § 55-1B-10. South Dakota and other off-the-rack statutes do not attempt to address this problem. To do so would be immensely difficult and complex. Consider, for example, the recently adopted Uniform Trust Decanting Act (Unif. Law Comm'n 2015). The decanting act is similar to an off-the-rack directed trust statute in that it grants a new power to trustees of existing trusts. By default, the act recognizes in certain trustees a power to decant the trust property even if the terms of the trust do not grant that power

kind of disruption to existing trusts by leaving the content of a director's powers to the terms of the trust.

C. Further Powers

Although the UDTA does not generally supply powers by default, the act does contain one important exception. Section 6(b)(1) provides that, "[u]nless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director" by the terms of a trust.[63] In other words, if the terms of a trust supply an express power, then by default the UDTA supplies further powers as "appropriate" to the exercise or nonexericse of that expressly granted power.

Colloquially speaking, § 6(b)(1) operates as a kind of "necessary and proper" clause, granting additional powers as appropriate to carry out a settlor's intent. Following the Uniform Trust Code, the UDTA uses the term "appropriate" to avoid the narrowing implication sometimes associated with the term "necessary and proper."[64] The comment explains the meaning of appropriateness thus: "Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director."[65] The comment elaborates by way of examples:

> [F]urther powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the

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expressly. In so doing, the decanting act runs the risk of upsetting a settlor's planning objectives just as the South Dakota directed trust statute does for a directed trust.

Unlike the drafters of off-the-rack directed trust statutes, the drafters of the decanting act foresaw this problem and tried to address it. However, doing so required a long list of limits on the newly recognized default decanting power. Section 19 of the act imposes a variety of limits on the decanting power. But this provision is long and complicated (it even has its own definitions subsection), and it runs the risk of being incomplete—no one can be certain whether the decanting act has addressed every possible problem that a default power to decant might create. Off-the-rack directed trust statutes that supply powers by default pose a similar risk of upsetting a settlor's plan, and they do so without any similar saving provisions.

[63] UDTA § 6(b)(1).

[64] *See* UDTA § 6(b)(1) cmt. ("The term 'appropriate' is drawn from Uniform Trust Code § 815(a)(2)(B) (2000).").

[65] *Id.*

director in the exercise or nonexercise of the director's powers.[66]

Suppose, for example, that the terms of a trust grant a trust director a power to direct investments. If the trustee refuses to comply with the director's exercise of this power, § 6(b)(1) would supply the director with a further power to bring an action to redress the trustee's noncompliance, even if the terms of the trust do not expressly supply the power.[67] Manifestly, such an action would be "appropriate" to the director's exercise of the expressly granted power to direct investments.[68]

The further powers supplied by § 6(b)(1) count as a major practical innovation on existing statutes, including the enabling statutes, which tend not to include such a provision.[69] It also offers yet another motivation for the UDTA's enabling approach, because the further powers in the UDTA accomplish many of the same objectives as the default powers in off-the-rack statutes, but with greater precision. The UDTA's further powers are at once less over-inclusive and less under-inclusive than the default powers in off-the-rack statutes. The UDTA is less over-inclusive, because it includes only those powers "appropriate" to the director's express powers. Thus, unlike the South Dakota statute, the UDTA would not tie a power to sell investments to a power to value investments unless tying the two powers together would be appropriate to a particular settlor's intent.[70]

The UDTA's further powers are also less under-inclusive than the off-the-rack powers under the statutes, because the UDTA's further

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[66] *Id.*

[67] *Id.*

[68] *See id.* The comment explains: "It would normally be 'appropriate,' for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction." UDTA § 6(b)(1) cmt. The UDTA thus resolves the situation that arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The comment describes the case and the UDTA's response:

> The court held that a trust director, which the terms of the trust referred to as a "trust protector," lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.
>
> In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is "authorized by statute." Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be "appropriate" to a director's exercise or nonexercise of a power granted by the terms of the trust under subsection (a).

UDTA § 6(b)(1) cmt.

[69] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3313 (2018).

[70] *See supra* note 59 and text accompanying.

powers include every power appropriate to a particular trust, and not just the handful of powers bundled in the off-the-rack provision. The South Dakota statute, for example, grants an "investment trust advisor" the power to sell investments by default, but not the power to sue a trustee who refuses to comply with a direction to sell investments.[71]

D. The Exclusions

Because the term "power of direction" is so broad, it might swallow some matters collateral to the emergence of directed trusts, inadvertently disrupting estate planning practices unrelated to directed trusts by subjecting them to the fiduciary and other rules of the UDTA. As we have already seen, every power of trusteeship is literally a "power over a trust,"[72] so the UDTA drafting committee took care to exclude powers in a serving trustee from the scope of the act.[73] In addition to this carve-out for serving trustees, the UDTA includes a carefully thought-out system of five other carve-outs as well.[74] These exclusions count as a major practical innovation of the UDTA, for as we shall see, they correct unacknowledged drafting errors in many existing directed trust statutes, including the Delaware statute, that could disrupt a variety of typical estate planning practices.

1. *Nonfiduciary Powers of Appointment*

The first exclusion is for nonfiduciary powers of appointment, which are an entrenched feature of the background law of trusts that the UDTA does not attempt to change.[75] Under a *power of appointment*, the person who holds the power, commonly known as a donee, may appoint the property to one or more persons known as the objects of the power, in accordance with the power's terms. Consider a typical example: *H* devises property to *X* in trust to distribute the income quarterly to *W* for life, and on *W*'s death to distribute the principal to one or more of *H*'s descendants as *W* shall appoint by will. *H* is the donor of a power of appointment, *W* is the donee, and *H*'s descendants are the objects. By

[71] *See* S.D. Codified Laws § 55-1B-10 (2014).

[72] *See supra* Part I.A.1.

[73] *See supra* Part I.A.2.

[74] In addition to entirely exempting certain powers from the act's coverage, the UDTA also singles out one particular power for exemption from the fiduciary obligations imposed on trust directors. Section 8(b) provides that if a trust director is a medical professional and acts in that capacity, the director will have no duty or liability under the act. The power otherwise remains subject to the terms of the act, however, including the provisions that diminish the liability of a trustee. *See infra* Part II.A.3.

[75] *See, e.g.*, Unif. Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013); Restatement (Third) of Prop.: Wills and Other Donative Transfers §§ 17.1, 17.5 (Am. Law Inst. 2011).

this power, which *H* intends *W* to hold in a nonfiduciary capacity, *W* may decide who among *H*'s descendants will take the trust property at her death. In this way, *H* empowers *W* to deal flexibly with changing circumstances in the interim between their deaths, which may span years or even decades.[76]

Powers of appointment provide benefits beyond building flexibility into an estate plan. They are also commonly used for tax planning and asset protection. In the example just given, because *W* cannot appoint the trust property for her own benefit (in the jargon, the power is *nongeneral*), no estate or gift tax will be due upon *W*'s exercise of the power,[77] and no creditor of *W* will have recourse against the property.[78] It would be difficult to overstate the importance of powers of appointment in contemporary estate planning.[79]

Without an exclusion for nonfiduciary powers of appointment, the risk that the UDTA could disrupt countless estate plans is readily apparent. In the example just given, the power granted to *W* would arguably satisfy the UDTA's definition of a power of direction, because it is "a power over a trust granted to [*W*] by the terms of the trust."[80] Without an exclusion, therefore, a court applying the UDTA might treat *W* as a trust director subject to all the fiduciary and other rules applicable to a director, and might treat the trustee as a directed trustee, with a lower standard of fiduciary duty than a non-directed trustee.

This problem is not limited to the UDTA. The same disruptive result would obtain under a literal reading of the Delaware and other enabling directed trust statutes. Under the Delaware statute, arguably *W* was "given authority by the terms of a governing instrument to direct . . . a fiduciary's . . . distribution decisions," with the consequence that under the statute *W* would be a trust adviser presumptively subject to fiduciary duty "when exercising such authority."[81]

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[76] Portions of this and the next paragraph are adapted without further citation or acknowledgment from ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 807, 812 (10th ed. 2017).

[77] *See id.* at 809–10, 813–15.

[78] *See id.* at 815–16.

[79] "The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." W. Barton Leach, *Powers of Appointment*, 24 A.B.A. J. 807, 807 (1938).

[80] UDTA § 2(5).

[81] DEL. CODE ANN. tit. 12, § 3313(a) (2018). Under the Delaware statute, fiduciary status is presumptive rather than mandatory. The statute says that "the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity." *Id.* Thus, in the case posited, *W* could argue that the terms of the trust impliedly granted the power in a nonfiduciary capacity. Putting to the side the question of whether the text of the statute allows for implied waiver of fiduciary status, the broader point is that, owing to the overbreadth of the Delaware statute, the default treatment of

The drafting committee for the UDTA anticipated this problem, providing a categorical exclusion for nonfiduciary powers of appointment in § 5(b)(1). The exclusion works as follows. UDTA § 5(b)(1) provides that the act "does not apply to a . . . power of appointment." Section 5(a) defines a "power of appointment" as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property."[82] Accordingly, if the terms of a trust grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under the UDTA that power will be construed as a power of appointment rather than as a power of direction and will not be subject to the act. The holder of the power will not be a trust director, and a trustee subject to the power will not be a directed trustee.

The exclusion prescribed by § 5(b)(1) applies only to a power of appointment held in a nonfiduciary capacity. It does not apply to a power of distribution held in a fiduciary capacity. Thus, if the terms of a trust grant a person a power to direct a distribution of trust property while the person is not serving as trustee, and the person holds the power in a fiduciary capacity, then under the UDTA the power is a power of direction and the person is a trust director.

To resolve doubt about whether a power over distribution is a nonfiduciary power of appointment or a fiduciary power of direction, UDTA § 5(c) prescribes a rule of construction under which a power over distribution in a person not serving as a trustee is presumptively a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust indicate otherwise.[83] This rule of construction codifies the typical expectation that would have informed the drafting of existing trusts. For example, if the terms of a trust give the spouse of the settlor a power to distribute trust property to the settlor's descendants without specifying whether the power is held in a fiduciary capacity, under the rule of construction in UDTA § 5(c) the presumption is that

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W as a fiduciary gives rise to litigation risk and potentially disrupts *H*'s plan. Under the UDTA, by contrast, *W*'s nonfiduciary power of appointment is protected by a categorical exclusion.

[82] This definition of "power of appointment" is based on Uniform Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013) ("UPAA") and is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (Am. Law Inst. 2011) refers to as a "discretionary" power of appointment, that is, one in which "the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power."

[83] *See* UDTA § 5(c) ("Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.").

the power is a nonfiduciary power of appointment, exempting the spouse and the power from the act. Further, a power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because as we have seen, a serving trustee can never be a trust director.[84]

Two other points about this exclusion merit further discussion. First, as a planning matter, the § 5(b)(1) exclusion for a nonfiduciary power of appointment ensures that a settlor may grant to a person or a committee of persons a power over distribution of the trust property in *either* a fiduciary capacity (i.e., a power of direction subject to the UDTA) *or* a nonfiduciary capacity (i.e., a nonfiduciary power of appointment excluded by § 5(b)(1)). The drafting committee reasoned that, whatever the merits of the argument that all powers over distribution should be held in a fiduciary capacity, history has settled the question decisively in favor of allowing a settlor to grant a power over distribution in a nonfiduciary capacity. This settled principle underpins countless estate plans and is central to contemporary trust practice.

Second, the § 5(b)(1) exclusion for a nonfiduciary power of appointment fits tightly with the Uniform Powers of Appointment Act ("UPAA"), which excludes fiduciary powers over distribution and applies only to a nonfiduciary power of appointment.[85] Under the UPAA, the definition of a power of appointment includes only powers that are nonfiduciary, and a trustee or other person who has a fiduciary power over distribution holds a fiduciary power that is distinct from a power of appointment.[86] Accordingly, within the uniform trusts and estates acts,

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84 *See supra* Part I.A.2. Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity, making it a fiduciary distributive power held in the person's capacity as trustee, or is instead a nonfiduciary power of appointment held by the person individually, is governed by background law. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a (AM. LAW INST. 2003). By way of illustration, *H* might devise a fund in trust to *W*, granting *W* both fiduciary distributive powers in *W*'s capacity as trustee as well as one or more lifetime or testamentary nonfiduciary powers of appointment.

85 *See* UPAA § 102(13). The comment explains:

> In this act, a fiduciary distributive power is not a power of appointment. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for some other individual, or to pay income or principal to a designated beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee.

Id. cmt.

86 *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a.

the UPAA governs a nonfiduciary power of appointment; the UDTA governs a fiduciary power over distribution in a person not serving as trustee; and the Uniform Trust Code governs a fiduciary power over distribution in a person serving as trustee.

2. *Power to Appoint or Remove a Trustee or Trust Director*

UDTA § 5(b)(2) excludes "a . . . power to appoint or remove a trustee or trust director."[87] The drafting committee intended this exclusion to address the concern that a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. "Professionally drafted trusts commonly include a provision that overrides the default law of trustee removal by authorizing the beneficiaries or a third party to remove the trustee and appoint a successor (perhaps limited to an independent corporate trustee)."[88] Under the exclusion of § 5(b)(2), such a power is not a power of direction, and the person holding the power is not a trust director. In consequence, a person who holds a power to appoint or remove a trustee is not subject to the fiduciary duties of a trust director.

Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it "must conform to any valid requirements or limitations imposed by the trust terms."[89] If the terms of the trust do not impose any requirements or limitations on the power to remove, then "it is unnecessary for the holder to show cause" before exercising the power.[90]

3. *Power of Settlor Over a Revocable Trust*

Under modern law, a trustee of a revocable trust owes its duties to the settlor rather than to the beneficiaries.[91] Moreover, because the settlor may at any time revoke the trust and take back the trust property, the trustee must "comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee's normal fiduciary duties."[92] In other words, under modern law every revocable trust includes an implied term under which the trustee must comply with

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87 UDTA § 5(b)(2).

88 Sitkoff & Dukeminier, *supra* note 76, at 751.

89 Restatement (Third) of Trusts § 37 cmt. c.

90 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

91 *See, e.g.*, Unif. Trust Code (hereinafter "UTC") § 603(a) (2010) (Unif. Law Comm'n, amended 2018); David Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 Elder L.J. 1 (2016).

92 Restatement (Third) of Trusts § 74(1)(a)(i) (Am. Law Inst. 2007); *see also* UTC § 603(a) (amended 2018) ("To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor that is contrary to the terms of the trust.").

a direction from the settlor about how to administer the trust. And as a matter of normal and customary drafting practice, this implied term is express in many revocable trusts. A typical professionally drafted revocable trust will provide that the settlor "may direct the trustee to distribute to the settlor so much or all of the income and principal as the settlor wishes and to invest the trust property as the settlor directs."[93]

A revocable trust poses a challenge under the UDTA and other directed trust statutes, because without a specific exclusion, a power to revoke is arguably a power of direction. As we have seen, the UDTA defines a "power of direction" to include any "power over a trust,"[94] and since a power to revoke is a "power over a trust," a power to revoke would also be a power of direction. A revocable trust would therefore become a directed trust, and a settlor would have the fiduciary duties of a trust director while a trustee would have the lightened fiduciary duties of a directed trustee. The drafting committee worried that transforming revocable trusts into directed trusts in this way would upset existing practice by upending the way settlors and trustees in these trusts relate to each other. Accordingly, UDTA § 5(b)(3) excludes "a . . . power of a settlor over a trust to the extent the settlor has a power to revoke the trust."[95]

Conceptually, this exclusion has much in common with the exclusion under § 5(b)(1) for a nonfiduciary power of appointment.[96] A settlor's power to revoke a revocable trust is functionally not very different from a nonfiduciary general power of appointment.[97] Moreover, as with the § 5(b)(1) exclusion for a nonfiduciary power of appointment, the § 5(b)(3) exclusion for a settlor's power over a revocable trust corrects an unacknowledged drafting error in many existing enabling directed trust statutes, including the Delaware statute. Under the Delaware statute, the settlor of a typically drafted revocable trust would be "given authority by the terms of a governing instrument to direct . . . a fiduciary's actual or proposed investment decisions, distribution decisions or

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93 Feder & Sitkoff, *supra* note 91, at 10 (giving Northern Trust formbook as an example).

94 UDTA § 2(5); *see also supra* Part I.A.1.

95 UDTA § 5(b)(3). The comment explains that the "drafting committee intended that this exception would apply only to that portion of a trust over which the settlor has a power to revoke, that is, 'to the extent' of the settlor's power to revoke." *Id.* cmt. With respect to an agent or conservator of the settlor, the comment elaborates thus: "To the extent that a conservator or agent of the settlor may exercise the settlor's power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), subsection (b)(3) of this section would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1)." *Id.*

96 *See* UDTA § 5(b)(1); s*upra* Part I.D.1.

97 *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 74(2) (AM. LAW INST. 2007).

other decision of the fiduciary," with the consequence that under a literal reading of the statute the settlor would be a trust adviser subject by default to fiduciary duty "when exercising such authority."[98]

4. *Power of a Beneficiary*

The definition of a "trust director" in UDTA § 2(9) includes a person who is granted a "power of direction . . . whether or not the person is a beneficiary."[99] The definition includes a beneficiary to ensure that a power over a trust that affects another beneficiary is not exempt from the UDTA merely because the person who holds the power happens also to be a beneficiary. Otherwise, the mandatory fiduciary duties of a trust director under § 8(a)(2), discussed below,[100] could be circumvented by giving the director a peppercorn beneficial interest in the trust.

Including a beneficiary in the definition of a trust director, however, creates the possibility that a beneficiary who holds a power over a trust might be subjected to the fiduciary duties and other obligations of a trust director even if the power does not affect anyone other than the beneficiary. Though it might make sense to treat a beneficiary as a trust director when the beneficiary's powers affect others, it does not make sense to treat a beneficiary as a director when the beneficiary's powers affect only that beneficiary. To resolve this problem, UDTA § 5(b)(4) excludes "a . . . power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of . . . (A) the beneficiary[,] or (B) another beneficiary represented by the beneficiary [under applicable virtual representation law] with respect to the exercise or nonexercise of the power."[101]

Subparagraph (A) of this exclusion is consistent with traditional law, under which "[a] power that is for the sole benefit of the person holding the power is not a fiduciary power."[102] For example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded by § 5(b)(4)(A). To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Accordingly, a power over a trust held by a beneficiary may be a "power of direction" if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by § 5(b)(4) unless the

98 Del. Code Ann. tit. 12, § 3313(a) (2018).
99 UDTA § 2(9).
100 *See infra* Part II.A.1.
101 UDTA § 5(b)(4).
102 Restatement (Third) of Trusts § 75 cmt. d; *see also* Restatement (Second) of Trusts § 185 cmt. d (Am. Law Inst. 1959) (similar).

power to bind the other beneficiary arises by reason of virtual representation so that subparagraph (B) applies.

The same rules apply if the beneficiary's power is jointly held. For example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries other than by virtual representation. In this respect the UDTA would reverse the result in *Vena v. Vena*,[103] in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under UDTA § 8, discussed below, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without subparagraph (B), the capacious definition of "power of direction" in Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.[104]

Like the exclusions for powers of appointment and revocable trusts,[105] this exclusion for the self-affecting power of a beneficiary represents a practical improvement on existing statutes. Many existing statutes fail to exclude these kinds of powers. In Delaware, for example, any beneficiary who has a power "to direct, consent to or disapprove a fiduciary's actual or proposed . . . decision" is presumed to be a trust advisor, even if the beneficiary's powers affect no one other than the beneficiary and even if the power arises by reason of virtual representation.[106]

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[103] 899 N.E.2d 522 (Ill. App. Ct. 2008).

[104] The comment elaborates:

> By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer's disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer's from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer's disease must have "a substantially identical interest with respect to the particular question or dispute," and have "no conflict of interest" with each other.

UDTA § 5(b)(4) cmt.

[105] *See supra* Part I.D.1, 3.

[106] DEL. CODE ANN. tit. 12, § 3313(a) (2018).

5. *The Settlor's Tax Objectives*

The final exclusion in UDTA § 5 protects against disruption of normal and customary tax planning. UDTA § 5(b)(5) excludes "a . . . power over a trust if . . . the terms of the trust provide that the power is held in a nonfiduciary capacity . . . and the power must be held in a nonfiduciary capacity to achieve the settlor's [federal] tax objectives."[107] The drafting committee intended this exclusion to address the concern that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor's federal tax objectives.[108]

Perhaps the most salient example is a power to substitute assets meant to ensure grantor trust tax status. To ensure that a trust is a grantor trust for federal income tax purposes, planners commonly include in the terms of the trust a provision that allows the settlor to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity.[109] The power to substitute assets must be held in a nonfiduciary capacity to ensure grantor trust status. If the power is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust.

The problem is that, as we shall see below, UDTA § 8 mandates that all trust directors are fiduciaries.[110] Without the exclusion under § 5(b)(5), therefore, the common drafting practice of a nonfiduciary power to substitute assets would be impossible. The tax status of existing trusts with such a provision would be thrown into disarray. The exclusion solves this problem by ensuring that any power over a trust that is nonfiduciary under the terms of the trust and must be nonfiduciary to

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107 UDTA § 5(b)(5) (bracketed text in original).

108 *See* UDTA § 5(b)(5) cmt. The comment explains why the limitation covers only federal tax objectives and not state tax objectives:

> The drafting committee deliberately opted to reference tax objectives only under federal law, thereby excluding tax objectives under state law. The concern was that some states levy a tax on income in a trust if the trust has a fiduciary in the state. If this exclusion reached state tax law, then in such a state a trust director could argue that the director is not a fiduciary, because the settlor would not have wanted the trust to pay income tax. The consequence would be to negate fiduciary status for virtually all trust directors in those states. The purpose of this exception is to protect normal and customary estate planning techniques, not to allow circumvention of the central policy choice encoded in Section 8 that a trust director is generally subject to the same default and mandatory fiduciary duties as a similarly situated trustee.

109 *See, e.g.*, David R. York & Eric B. Whiting, *Basis Basics and Beyond: Strategies for Estate Planners*, 44 EST. PLAN. 14, 19 (2017) ("In most IDGTs [i.e., intentionally defective grantor trusts], the grantor retains the ability to substitute assets of equivalent value.").

110 UDTA § 8(a); *infra* Part II.A.1.

achieve the settlor's federal tax objectives will remain nonfiduciary even after adoption of the UDTA.

In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor's federal tax objectives was preferable to a prescribed list of sections of the tax code.[111]

This exclusion is also a significant practical innovation on existing statutes. None of the leading directed trust jurisdictions—Alaska, Delaware, Nevada, New Hampshire, or South Dakota—has an exclusion for a power that would upset a settlor's tax planning. Some states, such as Missouri, have tried to solve tax problems by prohibiting a trust director from exercising certain powers.[112] But a statutory list may not be complete and can swiftly be rendered stale by changes in the tax law.

E. Choice of Law and Prospective Application

Two final practical details regarding the scope of the UDTA merit attention: (1) choice of law, and (2) prospective application.

1. *Choice of Law*

On the reasoning that powers and duties in a directed trust are matters of trust administration,[113] UDTA § 3(a) follows the prevailing conflict of laws rule by linking application of the UDTA to a trust's principal place of administration.[114] If a trust's principal place of administration is in state *X* and state *X* has enacted the UDTA, then the UDTA as enacted in *X* applies to the trust. But how is a trust's principal place of administration to be determined?

Under UDTA § 3(b), terms of a directed trust that "designate the principal place of administration of the trust are valid and controlling" if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. This provision establishes a safe harbor for a settlor's designation of the principal place of administration for a directed trust. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of

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111 *See* UDTA § 5(b)(5) cmt.

112 *See* MO. REV. STAT. § 456.8-808(4), (5) (2018).

113 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 271 cmt. a (AM. LAW INST. 1971).

114 *See* UDTA § 3(a) ("This [act] applies to a trust . . . that has its principal place of administration in this state.").

§ 108(a) to add the presence of a trust director as a sufficient connection with the designated jurisdiction.

Other than the expansion in UDTA § 3(b)(2) of the Uniform Trust Code's safe harbor for a settlor's designation of a trust's principal place of administration, the drafting committee did not undertake to prescribe rules for ascertaining a trust's principal place of administration. In this respect, the drafting committee followed the Uniform Trust Code in "not attempt[ing] to further define principal place of administration."[115] Accordingly, for a directed trust in a state that enacts the UDTA, just as for all trusts in a Uniform Trust Code state, if the safe harbor does not apply, the question of a trust's principal place of administration will be governed by the state's existing law on principal place of administration.[116]

2. *Prospective Application*

UDTA § 3(a) applies the act to all trusts administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under § 3(a)(1)-(2), the act applies only with respect to a decision or action occurring on or after the effective date or, if the trust's principal place of administration was changed to the enacting state after the effective date, only with respect to a decision or action occurring on or after that change. As we will see, some of the standards of conduct prescribed by the UDTA depart from the common law as reflected in the Restatements of Trusts and from the standards prescribed by the Uniform Trust Code.[117] The drafting committee therefore reasoned in accordance with due process norms that the act should not apply to actions undertaken in reliance on prior law.[118]

II. Allocating Fiduciary Responsibility in a Directed Trust

The core of the UDTA's contribution appears in §§ 8 through 11 of the Act, which allocate fiduciary responsibility among trust directors and directed trustees. The UDTA's basic approach is to place the primary fiduciary responsibility for a power on the person who holds the power. If a power belongs to a trust director, then the primary fiduciary responsibility for that power belongs to the director, rather than the directed trustee who merely facilitates the director's exercise of the

115 UTC § 108 cmt.

116 *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 271–72, 279 (Am. Law Inst. 1971).

117 *See, e.g.*, *infra* Part II.A–B.

118 In this respect the UDTA follows Unif. Prudent Inv'r Act § 11 (Unif. Law Comm'n 1994). The UDTA also minimizes disturbance of existing trusts by not creating new powers by default, as we have seen. *See supra* Part I.B.2.

power. The UDTA thus relieves a directed trustee from the full fiduciary duties of a unitary trusteeship, and leaves a directed trustee with only a reduced duty to avoid "willful misconduct" in deciding whether to comply with a director's directions.

In making a trust director the primary bearer of fiduciary responsibility for his or her power, the UDTA employs the novel and technically innovative strategy of absorbing the existing fiduciary law of trusteeship. In most instances, the UDTA applies to a trust director the same fiduciary duties that would apply to a trustee in a like position and under similar circumstances. In addition, the UDTA prescribes clear rules that negate any duty of cross-monitoring among trust directors and trustees while at the same requiring trust directors and trustees to share information.

In its overarching concept and the details of its execution, the UDTA represents a dramatic improvement on the fiduciary rules of the existing directed trust statutes. The UDTA is both more complete and more precise in its fiduciary regime than Delaware or any other state. The UDTA's fiduciary regime is also adaptable to every state. Although the UDTA follows the Delaware model of applying a standard of "willful misconduct" to a directed trustee, the provision that applies the willful misconduct standard could be altered to meet the policy desires of states that prefer no fiduciary duty for a directed trustee, such as South Dakota, New Hampshire, and Nevada. Similarly, states that want to eliminate the mandatory minimum duties of a trust director can do so. Regardless of its preferences on the allocation of fiduciary duties, any state can achieve its preferences with a few modifications while still enjoying the many practical innovations of the UDTA.

A. Trust Directors (UDTA § 8)

The first issue the drafting committee took up in the UDTA was the fiduciary duty of a trust director. Should a trust director's duty in the exercise or nonexercise of its powers be the same as a trustee? Some different level or form of duty? Or perhaps no duty at all? In answering these questions, the drafting committee was deeply influenced by a survey of the existing directed trust statues, which showed a remarkable unanimity on these questions. The great majority of state directed trust statutes treat a trust director as a fiduciary of some kind.[119]

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[119] Many states treat a trust director as a fiduciary by mandate, while others only impose fiduciary status by default. Still others impose fiduciary duties on some categories of directors by default and on other categories of directors by mandate. For states that impose fiduciary duties by mandate, *see, e.g.*, 760 ILL. COMP. STAT. 5/16.3(e) (2015) ("A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument

Treating a trust director as a fiduciary makes sense, because a trust director is, by definition, a person with a power over a trust. Power and duty are deeply connected in trust fiduciary law,[120] and it seems self-evident that the person who has a power over a trust is in the best position to bear the primary fiduciary responsibility for that power. Accordingly, the UDTA's basic approach is to treat a trust director like a trustee with respect to the director's powers. A trust director bears the

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provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust."); N.H. Rev. Stat. Ann. § 564-B:12-1202(a) (2014) ("Notwithstanding the breadth of discretion granted to a trust advisor or trust protector under the terms of the trust, including the use of such terms as 'absolute,' 'sole,' or 'uncontrolled,' a trust advisor or trust protector must exercise a discretionary power and otherwise act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries."); Va. Code Ann. § 64.2-770(E)(1) (2014) ("Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.").

Other states impose fiduciary duties on trust directors only by default. Delaware, for example, makes a trust director a fiduciary by default, but also permits a "governing instrument [to] provide that any such [director] shall act in a nonfiduciary capacity." Del. Code Ann. tit. 12, § 3313(a) (2018); *see also In re* Ronald J. Mount, 2012 Irrev. Dynasty Tr. U/A/D Dec. 5, 2012, No. CV 12892-VCS, 2017 WL 4082886 (Del. Ch. Sept. 7, 2017) (dismissing a complaint against a trust director after finding that the terms of the trust provided that the director acted in a nonfiduciary capacity). One strange (and possibly unintended) consequence of making a director's duties a default is that the terms of a trust can give a trust director even less fiduciary duty than it can give the directed trustee who carries out the director's directions. Under a literal reading of Delaware's statute, a trust director can be freed from fiduciary duty entirely, but a directed trustee is subject to a mandatory minimum duty to avoid "wilful misconduct" even when the directed trustee is merely complying with the director's directions. Del. Code Ann. tit. 12, § 3313(b), (c); *see also* Del. Code Ann. tit. 12, § 3303(a) (prohibiting exculpation or indemnification for "wilful misconduct").

Some states impose fiduciary duties by default on some directors and by mandate on others. *See, e.g.*, S.D. Codified Laws §§ 55-1B-1(2), (6), (7) (2018) (imposing no fiduciary duties on a "trust protector" by default while imposing fiduciary duties on an "investment trust advisor" and "distribution trust advisor" by mandate).

120 The Restatement characterizes this as "a basic principle of trust administration," namely, that "a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations." Restatement (Third) of Trusts § 70 cmt. a (Am. Law Inst. 2007). Thus, "even a power expressly conferred by the trust instrument, or by statute, is subject to the fundamental duties of prudence, loyalty, and impartiality, to a duty to adhere to the terms of the trust, and to the other fiduciary duties of trusteeship." *Id.*; *see also* UTC § 815(b) ("The exercise of a power is subject to the fiduciary duties prescribed by this [article].").

same default and mandatory fiduciary duties as a trustee in a like position and under similar circumstances.

1. *Absorption of Trustee Duties*

The UDTA implements the policy that a trust director is a fiduciary in § 8. The basic rule of § 8(a) is that "a trust director has the same fiduciary duty and liability" as a "trustee in a like position and under similar circumstances."[121] If the director holds the power individually, then the director bears the fiduciary duty of a sole trustee.[122] If the director holds the power jointly with a trustee or another director, the director bears the fiduciary duty of a cotrustee.[123]

With respect to the default or mandatory character of a trust director's duties, UDTA § 8(a)(2) provides that "the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances."[124] In other words, duties that are default for a trustee are default for a similarly situated trust director, and duties that are mandatory for a trustee are mandatory for a similarly situated trust director. If the terms of a trust include an exoneration clause or grant of extended discretion, those terms would have the same effect on the duty and liability of the director as they would for a trustee. If they go too far, they would be ineffective.[125]

The strategy of trust director fiduciary duty under the UDTA is thus one of absorption. The UDTA absorbs for a trust director the same law of fiduciary duty that would apply to a similarly situated trustee. Because a trust director exercises a power over a trust like a trustee, a trust director bears the same fiduciary duties as a trustee in the exercise of those powers.

In absorbing the fiduciary law of trusteeship, the UDTA offers a practical improvement on the existing statutes. Although almost all states treat a trust director as a fiduciary (at least by default), they neglect to specify which kind of fiduciary a trust director is supposed to be. They tend to say that a trust director is a "fiduciary" without saying whether a trust director bears specifically the fiduciary duties of a trus-

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[121] UDTA § 8(a)(1).

[122] *Id.* § 8(a)(1)(A).

[123] *Id.* § 8(a)(1)(B).

[124] *Id.* § 8(a)(2).

[125] On extended discretion, see UTC § 814(a) (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (AM. LAW INST. 2003). On exoneration, see UTC § 1008 (amended 2010); RESTATEMENT (THIRD) OF TRUSTS § 96 (AM. LAW INST. 2012). Of course, the UDTA allows the terms of a trust to impose additional duties on a trust director. *See* UDTA § 8(c).

tee.[126] Most states thus leave open the question of what the fiduciary duties of a trust director will entail and how a settlor, trust director, directed trustee, or judge might discern them.

The UDTA solves these problems by expressly analogizing a trust director to a trustee.[127] The duty of a trust director is the duty of a trustee in a like position and under similar circumstances. The fiduciary duties of trusteeship apply to a trust director, provided that they would apply to a trustee with similar powers under similar circumstances.

Specifically absorbing the fiduciary duties of a trustee offers several advantages. The first is certainty. Under the UDTA, courts and the parties to a trust will not have to guess about which fiduciary law applies to a directed trustee, because the statute expressly absorbs the fiduciary duties of trusteeship. A closely related advantage is that absorbing the fiduciary duties of trusteeship avoids the need to spell out an entire fiduciary law for trust directors in complete detail. By drawing on the fiduciary duties of trusteeship, the UDTA avoids the need to duplicate for trust directors something like Article 8 of the Uniform Trust Code.

Another advantage of absorbing the fiduciary law of trusteeship is to accommodate variation across the states in the particulars of a trustee's default and mandatory fiduciary duties, such as the duties to diversify and to give information to beneficiaries, both of which have become increasingly differentiated across the states.[128] Thus, in a state that allows the terms of a trust to negate a trustee's duty to give information to a beneficiary, the terms of a trust could likewise negate that duty for a trust director.[129] Absorption also allows for changes to the duties of a trustee to be applied automatically into the duties of a trust director. State legislatures will face no need for regular conforming revisions to the UDTA.

2. *Sensitivity to Context*

Although the UDTA absorbs the fiduciary duties of a trustee, those duties apply to a trust director as they would to a trustee "in a like position and under similar circumstances."[130] Rather than treating all trust directors identically, therefore, a court must be sensitive to the peculiar circumstances of each. In some circumstances, applying the fiduciary law

[126] *See, e.g.*, MISS. CODE ANN. § 91-8-1202(a) (1972 annotated) ("A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to the trust advisor or trust protector.").

[127] UDTA § 8.

[128] *See* SITKOFF & DUKEMINIER, *supra* note 76, at 653–54 (diversification), 681–82 (information).

[129] This result obtains under UDTA § 8(a)(2).

[130] *Id.* § 8(a)(1).

of trusteeship will require sensitivity to the position of a director who may be required by the terms of a trust to act differently from a conventional trustee. The comment to § 8 gives this guidance: "In assessing the actions of a director that holds a power to modify a trust, . . . a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers."[131] The comment elaborates:

> Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Fiduciary principles are thus amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust.[132]

As part of this flexibility and sensitivity to context, the drafting committee contemplated that a settlor could construct a trust director's power to be springing. That is, a trust director's duties could arise at a particular moment, rather than applying continuously, such that the director would not be under a constant obligation to monitor the administration of a trust. By way of example, the comment to § 8 explains that "a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary."[133]

3. *Exclusions*

Recall that UDTA § 5 excludes certain powers from the scope of the act: a power of appointment, a power to remove a trustee or trust director, a power in a settlor in a revocable trust, a power in a beneficiary that affects only that beneficiary's interest, and a power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[134] Because the UDTA does not apply to these powers, the holder of such a power is not a trust director subject under § 8 to the fiduciary duties of a similarly situated trustee.

In addition to these categorical exclusions, UDTA § 8(b) carves out from fiduciary duty and liability under the act a trust director who is a

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131 *Id.* cmt.
132 *Id.*
133 *Id.*
134 *See supra* Part I.D.

medical professional acting in the professional's capacity as such.[135] For example, a power in a physician to determine a settlor's mental capacity or a beneficiary's sobriety is a power of direction, and the physician is a trust director, but the physician would have "no duty or liability under" the UDTA in exercising this power.

This exclusion should offer significant comfort to doctors and other medical professionals who might be asked by a settlor to exercise a power over a trust and might otherwise "refuse appointment as a trust director if such service would expose the professional to fiduciary duty under this act."[136] Crucially, however, "the professional would remain subject to any rules otherwise applicable to the professional, such as the rules of medical ethics. . . . Moreover, a trustee subject to a direction by a health-care professional is still subject to the duties under § 9 to take reasonable action to comply with the professional's direction and to avoid willful misconduct in doing so."[137]

The exclusion for a medical professional from duty or liability under the UDTA is yet another of the UDTA's many practical innovations. Many existing state statutes have unwittingly created liability risk for family physicians and other actors unintentionally swept into the definition of trust director.[138] The UDTA avoids such overbreadth.

4. *Rules for Charitable and Supplemental Needs Trusts*

The UDTA also addresses "a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law" as well as "a charitable interest in the trust." For these matters, § 7 imposes all the same "rules" that would apply to "a trustee in a like position and under similar circumstances."[139]

This provision counts as yet another practical refinement of the UDTA, one that protects against avoidance of state-level policy limits on trustee action in such a trust. For example, many states require a trustee to give notice to the Attorney General before taking certain ac-

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135 The relevant provision is as follows:

> Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].

UDTA § 8(b).

136 *Id.* § 8 cmt.

137 *Id.*

138 *See, e.g.*, Feder & Sitkoff, *supra* note 91, at 31–32 (noting the typicality of trust provisions naming a physician to determine capacity, quoting Northern Trust formbook as an example).

139 UDTA § 7.

tions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.

The drafting committee referenced "rules" rather than "duties" in § 7 to make clear that the section absorbs every provision of state law in the areas specified, regardless of whether the law in these areas is classified as a duty, a limit on a trustee's powers, a regulation, or otherwise. In referencing rules, rather than duties, § 7 stands in contrast to § 8. Whereas the use of the term "duty" in § 8 is intended to absorb only obligations of a fiduciary nature, § 7 absorbs all rules, whether fiduciary, regulatory, or otherwise—but only in the two limited subject areas enumerated in § 7, rather than the whole range of a director's possible conduct.

5. *Potential for Adaptation*

Although the UDTA makes the duties of a trust director mandatory, the mandatory character of those duties is not central to the UDTA's architecture. The broader structure of the UDTA is also consistent with the desire of some states to make the duty of a trust director into a default.[140] A state that wishes to make the duty of a trust director into a default rule could adapt the UDTA with just a few small modifications.

Modifying the UDTA in this way might be appealing because it would allow a state to benefit from the many practical innovations in the UDTA without compromising on the state's basic policy preferences. There is little else about the UDTA that should be controversial besides the fiduciary liability of a trust director and directed trustee. The many innovations canvassed in Part I in the scope and exclusions of the UDTA, for example, are beneficial no matter how a state wishes to structure the duty of a directed trustee.

B. Directed Trustees (UDTA § 9)

In a directed trust, the trust director is not the only fiduciary at work. A directed trust also includes a directed trustee—and the fiduciary duty of a directed trustee is perhaps the most controversial issue in the law of directed trusts. The duty of a directed trustee has attracted immense debate, because the appropriate level of duty is not obvious.[141] On the one hand, the authority to exercise a power of direction belongs to a trust director, not a trustee. On the other hand, the actions that

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140 *See* UDTA § 8 cmt.; *supra* note 119 and text accompanying.

141 *See supra* note 5 and text accompanying.

make the power of direction effective must often be taken by the trustee. If a director decides to sell trust property, for example, typically it is the trustee, as legal title holder, who must execute the transaction. The question thus arises, what is the fiduciary responsibility, if any, of a directed trustee in taking a directed action?

1. *Existing Standards*

When the drafting committee surveyed the approaches of existing directed trust statutes, a few trends emerged. The first was that the approach of Uniform Trust Code § 808, which has since been withdrawn as superseded by the UDTA, had failed.[142] UTC § 808(b) provided,

> If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.[143]

The failure of this provision, which was an effort to weaken somewhat the common law duties of a directed trustee,[144] is evident in its profound

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142 In April of 2018, the ULC amended the UTC to delete § 808(b) and replace it with a legislative note pointing to the UDTA. *See* UTC § 808 (amended 2018).

143 UTC § 808(b) (amended 2010).

144 On the common law, see Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007) ("[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries."); Restatement (Second) of Trusts § 185 (Am. Law Inst. 1959) ("If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.").

The prevailing view in practice is that the common law as typified by the Restatements "is not comforting to directed trustees because they must devote resources to ensure that the directing person is not violating the terms of the trust or a fiduciary duty." Nenno, *supra* note 9, at 46 (emphasis removed). Under the common law, "the trustee has a duty to police the actions of the holder of a power in a fiduciary capacity. . . . The trustee has a duty to investigate whether the adviser is violating his duty or breaching the trust. Thus, a trustee should not adopt an attitude of complaisance and patient waiting." Peter J. Brennan, *Trustee and Investment Adviser: Some Dangers and Alternatives in Relationship*, Tr. & Est., Mar. 1961, at 243.

unpopularity. Although § 808(b) remains in force in various states that adopted it as part of a wholesale enactment of the Uniform Trust Code,[145] the UDTA drafting committee found that no state that had undertaken to legislate specifically on the topic of directed trusts had adopted the § 808(b) standard, and many states that had adopted the UTC had altered § 808(b) to provide for a different standard.[146] In other words, every state that had legislated specifically on the duty of a directed trustee had chosen a standard other than that prescribed by UTC § 808(b).

The UTC § 808(b) standard was therefore not a serious contender for the UDTA. Instead, the debate within the UDTA drafting committee centered on two possibilities that had clearly emerged as the main alternatives in the state directed trust statutes.

One alternative provides that a directed trustee has no duty or liability for complying with an exercise of a power of direction. If we read this kind of statute literally, a directed trustee is never liable for complying with a trust director's exercise of a power of direction, even if the exercise constitutes a breach of the trust director's fiduciary duties, and even if the directed trustee knows this.[147] For example, if a trust director has a power to sell certain trust property and the director orders the trustee to sell the property to the director's spouse at a bargain price in breach of the director's duty, then under a literal reading of the statutes that impose no duty on a directed trustee, the trustee faces no liability for deeding the property to the director's spouse, even if the trustee knows that the sale is a breach of the director's duty. The states that adopt this no-duty form of statute include Alaska, New Hampshire, Nevada, and South Dakota.[148]

The policy rationale for this first group of statutes is that duty should follow power. If a director has the exclusive authority to exercise

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The drafters of UTC § 808(b) qualified the common law as reflected in the Restatements by adding the terms "manifestly" and "serious." UTC § 808(b) (amended 2010). The official comment to UTC § 808 explains that it was meant to impose "only minimal oversight responsibility on the trustee." *Id.* § 808 cmt. Nevertheless, as received in practice, this provision—specifically the added qualifiers of "manifestly" and "serious"—were feared to offer only illusory protection. "For the most part, UTC § 808(b) . . . is no more helpful to directed trustees than [the] Restatement." Nenno, *supra* note 9, at 46 (emphasis removed).

[145] *See, e.g.*, OR. REV. STAT. § 130.685 (2017); 20 PA. CONS. STAT. § 7778 (2006); TEX. PROP. CODE. ANN. § 114.003 (West 2018).

[146] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10808 (2018); MO. REV. STAT. § 456.8-808(8 (2018); UTAH CODE. ANN. § 75-7-906 (LexisNexis 2018).

[147] There is reason to doubt that courts will read such a statute literally. *See infra* notes 153-154 and accompanying text.

[148] ALASKA STAT. § 13.36.375(c) (2013); NEV. REV. STAT. § 163.5549 (2009); N.H. REV. STAT. ANN. § 564-B:8-808 (2008); S.D. CODIFIED LAWS § 55-1B-2 (2018).

a power of direction, then the director should be the exclusive bearer of fiduciary duty for the power. Advocates of this approach say that placing the exclusive duty on a director does not diminish the total duty owed to a beneficiary, because a settlor of a directed trust could have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor who could have named a trust director to serve instead as a trustee should also be able to give the trust director the duties of the trustee. Under these no duty statutes, a beneficiary's only recourse for misconduct by a trust director is an action against the director.

In the second group of statutes, a directed trustee is not liable for complying with a direction of a trust director unless by doing so the directed trustee would personally engage in "willful" or "intentional" misconduct. Whether a trustee is liable for selling trust property at a bargain price to a director's spouse, for example, depends on whether the sale would count as "willful misconduct" on the part of the directed trustee. The group of states with a willful misconduct or similar standard includes Delaware, Illinois, Texas, and Virginia.[149]

The policy rationale for the willful misconduct statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a trust director. Although a settlor could have made a trust director the sole trustee, the settlor of a directed trust did not actually do so—and under traditional understandings of trust fiduciary law, a trustee must always be accountable to a beneficiary in some way.[150]

The states in this second group also recognize, however, that to facilitate a settlor's intent that a trust director rather than a directed trustee is to be the primary or even sole decision-maker regarding a power of direction, it is appropriate to reduce the level of a directed trustee's duty below the level that would usually apply to a non-directed trustee to the extent the directed trustee acts subject to a power of direction. Accordingly, under the "willful misconduct" statutes, a beneficiary's main recourse for misconduct by a trust director is an action against the director. But the beneficiary also has recourse against the trustee to the extent that the trustee's compliance with the director's exercise of his powers amounted to "willful misconduct" by the trustee.

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[149] Del. Code Ann. tit. 12, § 3313 (2018); 760 Ill. Comp. Stat. 5/16.3(f) (2015); Tex. Prop. Code. Ann. § 114.003; Va. Code Ann. § 64.2-770 (2014).

[150] *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (Am. Law Inst. 2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.").

Relative to a non-directed trust, this second approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, but in addition, the directed trustee is under a duty to avoid willful misconduct.

2. *The UDTA's Willful Misconduct Standard*

After extensive debate, the drafting committee opted to follow the second group of statutes. UDTA § 9(a) provides that "the trustee is not liable" for taking "reasonable action to comply with a trust director's exercise or nonexercise of a power of direction" except as provided in § 9(b).[151] Section 9(b), in turn, provides that a "directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction . . . to the extent that by complying the trustee would engage in willful misconduct."[152] The UDTA thus generally requires a trustee to comply with a director's direction and relieves the trustee from liability for so doing, unless by complying with the direction the trustee would engage in willful misconduct, in which case the trustee has a duty not to comply.

The drafting committee opted for the willful misconduct standard over a complete abolition of duty for several reasons. One was that the committee considered willful misconduct more consistent with traditional fiduciary policy. The willful misconduct standard preserves a minimum of duty for a trustee and thus maintains the traditional notion that a trustee is a fiduciary.

The committee also feared that the promise of the no duty statutes might ultimately prove false. Even if a statute provides no fiduciary duty for a directed trustee, a court can almost always find some source of duty otherwise, as judges may resist the notion that a trustee can have zero responsibility with respect to some matter of trust administration. In *Rollins v. Branch Banking & Trust Company of Virginia,* for example, the court found no breach of a duty for a directed trustee's failure to question an investment director's concentration of the trust's portfolio, but the court still held the directed trustee liable for failing to inform the trust's beneficiaries of the risks of the director's concentration.[153] Like many other directed trust statutes, the UDTA specifically disavows the

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[151] UDTA § 9(a).

[152] *Id.* § 9(b).

[153] 56 Va. Cir. 147 (2002); *see also* Jo Ann Howard & Assoc., P.C. v. Cassity, 868 F.3d 637, 647 (8th Cir. 2017) (holding that, although applicable statute contained language that purported to "relieve[ ]" trustee of "all liability regarding investment decisions" by investment advisor, a "trustee always has a duty to ensure that trust assets are invested prudently, whether the trustee is investing the assets himself or monitoring the investment decisions of an investment advisor").

Rollins duty to inform.[154] But the court's resistence to a trustee without fiduciary duty is telling. The committee thus decided that the more honest approach, and possibly the more protective of a directed trustee, was to mandate a willful misconduct standard, rather than inviting judges to search for substitute kinds of duties ad hoc.

The drafting committee was also persuaded by the popularity of directed trusts in Delaware, which pioneered the willful misconduct standard. Delaware's success with the willful misconduct standard establishes that a directed trust regime that preserves a willful misconduct safeguard is workable and does not excessively interfere with settlor autonomy. A total elimination of duty in a directed trustee is unnecessary to satisfy the needs of directed trust practice.

In adopting a "willful misconduct" standard, the UDTA drafting committee made the further decision not to define the standard. The UDTA therefore does not provide a definition of what "willful misconduct" means. In this regard, the UDTA stands in contrast to Delaware, which provides that "wilful misconduct shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and 'wrongdoing' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[155]

The UDTA drafting committee chose not to define the standard for two main reasons. First, the committee took notice of the great variation in definitions of "willful misconduct" across the states and across legal contexts. Second, the committee concluded that, given that directed trusts vary widely and trust directors' real-world exercises of their powers may vary even more widely, the fleshing out of the meaning of "willful conduct" should be left open for the courts. The drafting committee thus decided to preserve room for judges to elaborate the willful misconduct standard in application—perhaps (but not necessarily) by defining it the same way as Delaware. In choosing not to include an express definition of willful misconduct, the UDTA keeps company with most of the existing state statutes that provide for a willful misconduct or similar standard, which likewise do not provide an express definition.[156] Even Delaware did not define willful misconduct when it first adopted the standard, adding it later and applying it to the use of that standard across its trust code.[157]

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154 UDTA § 11; *see infra* Part II.D.1.

155 DEL. CODE ANN. tit. 12, § 3301(g) (2018).

156 *E.g.*, COLO. REV. STAT. § 15-16-807(1) (2015); UTAH CODE ANN. § 75-7-906(4), 5(b) (LexisNexis 2004); VA. CODE ANN. § 64.2-770(E)(2) (2014); WIS. STAT. § 701.0808 (2014).

157 Delaware adopted the willful misconduct standard for directed trusts in 1994, 69 Del. Laws 279 (1994), and the definition for all uses of the term across its trust code in 2010. 77 Del. Laws 330 (2010).

The UDTA also provides a safe harbor for a directed trustee that is uncertain how the willful misconduct standard applies in a particular situation. In accordance with traditional trust law,[158] § 9(d) provides that "[a] directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions."[159] The availability of such relief is limited by the requirement that the trustee's doubt about its duty must be "reasonable"—a trustee cannot petition when its duty is obvious—but the express recognition of a safe harbor for a proper petition for instructions should provide comfort to directed trustees. In providing this safe harbor, the UDTA again innovates on existing state statutes. Delaware, for example, makes no express provision for the right to petition,[160] leaving the matter to background law.

3. *Potential for Adaptation*

The UDTA's fiduciary standard for a directed trustee could be modified in the same way as its standard for a trust director.[161] Although the UDTA adopts a willful misconduct standard, the architecture of the UDTA can be adapted to some other standard of duty, including no duty. Thus, South Dakota, New Hampshire, Nevada or another state that desires no duty for a directed trustee could adapt the UDTA by passing the act as it now stands, with the one alteration of eliminating the willful misconduct standard and replacing it with language that waives a directed trustee's liability entirely.[162]

4. *Reasonable Action*

Although the willful misconduct standard is perhaps the most salient of the UDTA provisions governing the fiduciary duty of a directed trustee, § 9 also contains other important provisions. Section 9(a) provides that subject to the prohibition on willful misconduct in subsection (b), "a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) and the trustee is not liable for the action."[163] In other words, unless complying with a direction would cause

[158] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 71 (AM. LAW INST. 2007) ("A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions.").

[159] UDTA § 9(d).

[160] DEL. CODE ANN. tit. 12, § 3313.

[161] *See infra* Part II.A.5.

[162] To clarify, the willful misconduct standard would need to be changed to no duty in both UDTA § 9 and § 10. We discuss § 10 *infra* Part II.C.

[163] UDTA § 9(a).

a trustee to engage in willful misconduct, the trustee has an affirmative duty to comply.

This duty to comply depends on context and requires compliance with the terms of the trust. A power of direction under which a trust director may give a trustee an express direction will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes on the trustee a duty to take reasonable action to facilitate the amendment and then comply with its terms.

A trustee's duty to comply is also limited by the scope of the trust director's power of direction. A directed trustee does not have to comply with a direction that is outside of the director's power of direction. Indeed, under § 9(a), the trustee has a duty not to comply, since doing so would breach the trustee's duty to act in accordance with the terms of the trust.[164] For example, a trustee should not follow a direction to make a distribution given by a trust director with a power only over investment. Likewise, an attempt by a director to exercise a power of direction in a form contrary to that required by the terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within the trust director's power and does not require compliance by a trustee.

In addition to imposing a duty to comply with a trust director's valid exercise or nonexercise of the director's powers, UDTA § 9(a) provides a standard for assessing a trustee's compliance. A trustee must "take *reasonable* action" to comply.[165] If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure that he or she purchases the security within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action thus preserves the conventional duties of trusteeship regarding the execution of a trust director's orders. The duty to take reasonable action does not, however, impose a duty to ensure that the substance of a direction is reasonable. To the contrary, subject to the willful misconduct rule of UDTA § 9(b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule, a trustee is liable only for its own breach of trust in the ministerial execution of a direc-

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164 *See, e.g.*, UTC § 105(b)(2) (amended 2005) (making mandatory "the duty of a trustee to act . . . in accordance with the terms . . . of the trust"); RESTATEMENT (THIRD) OF TRUSTS § 76 (AM. LAW INST. 2007) ("The trustee has a duty to administer the trust . . . in accordance with the terms of the trust.").

165 UDTA § 9(a) (emphasis added).

tion, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio. The trustee is only required (i) to exercise reasonable care in discerning whether the direction to purchase the security was within the director's power, and (ii) to employ reasonable care in executing the purchase at a reasonable price, time, and manner, unless by doing so the trustee would engage in willful misconduct.

The affirmative duty to comply and the reasonability standard for execution in compliance both count as major practical innovations in the UDTA that improve substantially on existing statutes. The Delaware statute, for example, neglects to impose an affirmative duty of compliance, leaving some doubt about whether a trustee even has a duty to comply with a director's direction.[166] More worrisome, a literal reading of the Delaware statute would suggest that a directed trustee does not have to act reasonably even when it chooses to comply. Under the Delaware statute, a trustee might not face any liability for its own negligence in executing a direction, so long as the negligence does not rise to willful misconduct. A trustee who unreasonably delays in executing a trust director's order to sell property, for example, would arguably not be liable so long as the delay was merely negligent or imprudent, rather than willful.[167] The UDTA's solution of requiring a trustee to take reasonable action is thus intent-implementing. Manifestly, a settlor would not want an appropriately exercised power of direction to be undermined by a trustee's sloppy execution.

5. *Limits on a Power to Release a Trustee From Liability*

The UDTA offers yet another practical innovation in the form of the limits it imposes on a trust director's power to release a trustee from liability. Because a power of direction can include any "power over a

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[166] *See* DEL. CODE ANN. tit. 12, § 3313 (2018). The duty to comply would have to be found in the background rule of trust law that a trustee must administer the trust in accordance with its terms. *See supra* note 164 and text accompanying.

[167] Delaware provides that "If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act." DEL. CODE ANN. tit. 12, § 3313(b). One could arguably read a duty of reasonable action into the phrase "in accordance with such a direction," by saying that a trustee who executes a direction negligently is not acting "in accordance" with the direction. But this puts considerable pressure on vague statutory language that was probably not designed to bear it.

trust,"[168] one possible form of a power of direction is to empower a director to release a trustee or another director from liability for acts done in the past or the future. Such a power, although apt in some circumstances, is nevertheless vulnerable to manipulation and abuse. Suppose, for example, a trustee lies to a trust director to induce the director to release the trustee from liability. Should such a release be effective?

To address these problems, UDTA § 9(c) provides that a power to release a trustee or another trust director from liability for breach of trust is not effective under three circumstances: "(1) the breach involved the trustee's or other director's willful misconduct; (2) the release was induced by improper conduct of the trustee or other director in procuring the release; or (3) at the time of the release, the director did not know the material facts relating to the breach." The drafting committee based the second and third of these safeguards on Uniform Trust Code § 1009.[169] These two provisions thus apply to a release given by a trust director the same safeguards applicable to a release given by a beneficiary. The first limit is an innovation of the UDTA. Consistent with the mandatory minimum duty of a directed trustee under § 9(b) to avoid willful misconduct, § 9(c)(1) prohibits release by a trust director of a trustee or other director for willful misconduct.

C. Information Sharing Among Trustees and Trust Directors (UDTA § 10)

Another question in a directed trust is how much information a trust director and a directed trustee must share with each other. If a director has a power to invest trust assets and a trustee has a power to distribute them, how much must the director and the trustee tell each other about how they carry out their respective responsibilities? What if a trust director has the power to amend the trust? Does the director have a duty to inform the trustee of an amendment? The question of what information a trustee and director must share is important, because the various fiduciaries in a directed trust often cannot sensibly exercise their powers without information from the other fiduciaries. A trustee tasked with tax filings and other administrative tasks cannot function without a valuation of trust property invested by a trust director in nonmarket assets.

Most existing directed trust statutes ignore this problem, making it a source of litigation.[170] Although many states have provisions that gov-

[168] UDTA § 2(5).

[169] UTC § 1009 is consistent with prevailing common law and similar in substance to Restatement (Third) of Trusts § 97 (Am. Law Inst. 2012).

[170] In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), for example, a trustee with authority to make distributions sued to force directors with authority over investments to

ern communications between a directed trustee and a beneficiary, few states make any provision for communications between a trustee and a trust director.[171] Delaware and South Dakota, for example, are silent on the issue, leaving courts and parties to guess at what a director's and a trustee's duties to share information might be—or else to assume that a director and a trustee have no duties to share information. Illinois provides that a director has a duty to communicate with a trustee, but not that a trustee has a duty to communicate with a director.[172]

Silence on the issue of trustee-trust director communication is not a workable solution, because background trust fiduciary law does not solve the problem. The generic declaration in many statutes that a trust director is a fiduciary is insufficient, because these statutes say nothing about what exactly a trust director's fiduciary duty entails. There is no precedent that would read a duty to share information into the broad declaration that a trust director is a "fiduciary." Additionally, even if these statutes imply something about the duty of a trust director, they say nothing about the duty of a trustee. The law of trusts has not traditionally imposed a duty on a trustee to share information with a fiduciary other than a cotrustee, so in the absence of a statute, it is not obvious whether a trustee even has such a duty. The UDTA's strategy in § 8 of applying the duties of a similarly situated trustee to a trust director does not solve the problem either, because as just noted the duties of a trustee did not historically include a duty to communicate with a fiduciary other than a cotrustee.

1. *The UDTA Solution*

The problem of trustee-trust director communication thus requires a special rule. UDTA § 10(b) provides that a trust director "shall provide information to a trustee or another trust director to the extent the information is reasonably related both to: (1) the powers or duties of the director; and (2) the powers or duties of the trustee or other director."[173] Section 10(a) imposes a similar duty on a directed trustee to share information with a trust director.

These mirror-image duties to share information mandate the sharing of just enough information, balancing each fiduciary's need for infor-

liquidate investments to raise cash for distribution. The dispute involved, among other things, questions over how much information the investment directors had to share with the trustee.

[171] The Colorado statute is an exception. It requires a trustee and trust director to share information with each other under certain circumstances. *See* COLO. REV. STAT. § 15-16-806(1)-(2) (2014).

[172] *See* 760 ILL. COMP. STAT. 5/16.3(h) (2015).

[173] UDTA § 10(b).

mation with the settlor's intent to divide responsibility for administering the trust. Sections 10(a) and 10(b) require a trustee or director to share information only if the information is reasonably related to the powers or duties of both the person communicating the information and the person receiving it. The information must be related to the powers or duties of the person communicating the information, because otherwise that person could not be expected to possess or understand the information. The information must also be related to the powers or duties of the person receiving the information, because otherwise the person would not need the information. For both the person communicating the information and the person receiving it, the relationship of the information to powers and duties must be "reasonable." A director cannot compel disclosure of information that is only tangentially related to the director's powers or duties or that the director desires to know merely for the sake of curiosity.

2. *Affirmative and Responsive Duties to Inform*

The duties of a trustee and trust director to share information include both an affirmative duty to provide information (even in the absence of a request for that information) and a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustee and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustee or other trust directors inquired about the amendment. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or another trust director whose powers or duties were reasonably related to the amendment.

3. *Safe Harbor for Reliance on Information*

UDTA § 10 also provides safe harbors for trust directors and trustees who act in reliance on information provided to them by another trust fiduciary under that section.[174] The safe harbors only apply, however, if the trustee or trust director who relies on the information is not engaged in willful misconduct. For example, § 10(c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in § 9, the rationale for the safe harbor and willful misconduct limit is to implement a settlor's division of labor between a trustee and director, subject to a mandatory fiduciary minimum.

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[174] *Id.* § 10(c)–(d).

4. *Duty to Inform Beneficiaries*

The duty in UDTA § 10 governs disclosure of information among trustees and trust directors. It does not govern disclosure to a beneficiary by a trustee or a trust director. The duty of a directed trustee to inform a beneficiary is governed principally by the background trust fiduciary law of an enacting state.[175] The duty of a trust director to inform a beneficiary is governed principally by UDTA § 8, which as we have seen prescribes the fiduciary duties of a trust director. However, the duties of both a trustee and a trust director to inform a beneficiary are limited by UDTA § 11, to which we turn next.

D. Cross-Monitoring (UDTA § 11)

The requirement under UDTA § 10 of information sharing among trustees and trust directors raises further questions. What if a trustee learns that a trust director is acting in breach of the director's duties? Or what if a trust director learns that a trustee is acting in breach of its duties? The UDTA's allocation of fiduciary responsibility in §§ 8 and 9 limit a trustee's and trust director's duty to prevent each other's misconduct. But what about a trustee's or trust director's duty to notify beneficiaries about each other's misconduct?

1. *No Duties to Monitor, Inform, or Advise*

As discussed above, in *Rollins v. Branch Banking & Trust Company of Virginia*,[176] the court considered the fiduciary liability of a trustee who was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments. But the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's failure. As *Rollins* illustrates, a directed trustee might discover a director's misconduct before a beneficiary does. If a trustee has a duty to share this information with the beneficiary—to inform a beneficiary that the trustee disagrees with a director's choices—that duty could become a backdoor for undoing the limitation on a directed trustee's fiduciary responsibility under UDTA § 9.

After *Rollins*, many states enacted fixes to their directed trust statutes to relieve a directed trustee from liability for a *Rollins*-like failure to warn a beneficiary. Following these statutes, the UDTA offers its own form of relief. UDTA § 11(a) provides that "a trustee does not have a duty to . . . monitor a trust director . . . or . . . inform or give advice to a

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[175] *See, e.g.*, UTC § 813(a) (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 82 (AM. LAW INST. 2007). Such law is expressly preserved by UDTA § 4.

[176] 56 Va. Cir. 147 (2002); *see supra* note 153 and text accompanying.

settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director."[177] Section 11(b) provides a mirror-image rule for a trust director, relieving a director of a duty to monitor, inform, or give advice to others about the conduct of a trustee or other trust director.

This provision offers significant practical improvements on similar provisions in the existing directed statutes. Unlike many existing statutes, UDTA § 11 covers both trustees and trust directors. Many statutes relieve a trustee of a duty to monitor a trust director, but say nothing about whether a director has a duty to monitor a trustee. Additionally, the language in UDTA § 11 is clearer and more concise than many state statutes, cutting through unnecessary and imprecise verbiage to state the point directly.[178]

2. *Survival of General Duty of Disclosure*

Although UDTA § 11 confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, § 11 does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law.[179] The same is true for a trust director, on whom UDTA § 8(a) imposes the fiduciary duties of a similarly situated trustee.

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[177] UDTA § 11(a).

[178] The Alaska statute, for example, provides that "the trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee." ALASKA STAT. § 13.36.375 (2017). Taken literally, this language fails to relieve a trustee from liability for actions of a trust director that do not require action by a trustee. If, for example, a trust director exercises a power to amend a trust, the statute would not relieve the trustee for failing to advise the beneficiaries about the amendment, because by its terms the statute only covers "the exercise of a power of the trustee" and not the exercise of an independent power of the director that requires no action by the trustee. The Alaska statute also fails to cover nonexercises (as distinct from exercises) of the powers of a director or trustee, with the result that it would not have covered even the *Rollins* case.

Similarly, the Nevada statute provides,

> A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.

NEV. REV. STAT. § 163.5549(2) (2015). This language covers only investments, with the result that it does not relieve a trustee from liability for failing to inform beneficiaries about the myriad other powers a director might hold, such as the power to direct distributions or to value trust property.

[179] *See, e.g.*, UTC § 813 (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 82 (AM. LAW INST. 2007).

For example, if a trust director has a power to direct investments and the director uses that power to concentrate the trust portfolio, UDTA § 11 would relieve a directed trustee of any duty to warn a beneficiary about the risks of such a concentration. The trustee would remain under any otherwise applicable duty, however, to keep records and to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust.

3. *No Assumption of Duty*

In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under UDTA § 11, many state directed trust statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions."[180] The purpose of these provisions is to ensure that if a directed trustee chooses to monitor, inform, or give advice, the trustee does not take on a continuing obligation to do so or concede a prior duty to have done so. UDTA § 11(a)(2) improves on these provisions by eschewing the opacity of the term "administrative actions" in favor of an express provision that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Section 11(b)(2) applies the same rule to a trust director.

III. Adapting the Subsidiary Rules of Trusteeship

In addition to addressing fiduciary duty, the UDTA also addresses a variety of subsidiary, non-fiduciary matters. In so doing, the UDTA sigificantly improves on existing statutes. Although almost all existing directed trusts pay some attention to fiduciary duties, none provides a comprehensive treatment of the many subsidiary matters that can arise in a directed trusteeship. The appointment, succession, and vacancy of a trust director, as well as the defenses available to the director and applicable limitations period for litigation against the director, are generally not addressed. Other important matters such as compensation of the director likewise receive no mention.

The UDTA, by contrast, foresees these problems and addresses them. It provides a comprehensive system of rules to address for a trust director all of the same matters that the subsidiary rules of trusteeship address for a trustee. The UDTA achieves this comprehensive treatment by employing the same concept it employs in providing fiduciary duties: it adopts the law of trusteeship. In a wide variety of subsidiary areas,

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[180] *See, e.g.*, Del. Code Ann. tit. 12, § 3313(e) (2018).

like acceptance, compensation, succession and defenses, the UDTA applies to a trust director the same rules that would apply to a trustee in a like position and similar circumstances. At the same time, the UDTA takes care to adopt the law of trusteeship in a manner sensitive to the distinctive needs of trust directors.

A. Rule of Decision for Jointly Held Powers of Direction

The first important subsidiary matter involves a rule of decision when a trust director holds its powers jointly with another trust director. Following the prevailing rule of majority action for cotrustees,[181] UDTA § 6(b)(2) provides a default rule of majority action for "trust directors with joint powers."[182] Thus, for example, a three-person committee with a power of direction over investment or distribution would act by majority decision unless the terms of the trust provided otherwise.[183]

B. Office of Trust Director

UDTA § 16 applies to the office of trust director, as it were, a wide variety of rules that apply to the office of trustee. The UDTA, in other words, systematically adopts for a trust director the many mechanical rules for a trustee that appear in Article VII of the Uniform Trust Code, including acceptance,[184] bond,[185] reasonable compensation,[186] resignation,[187] removal,[188] and vacancy.[189] Section 16 provides that regarding each of these matters, "[u]nless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director."[190]

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181 *See* UTC § 703(a) (2010); Restatement (Third) of Trusts § 39. The comment to UDTA § 6(b)(2) clarifies that the drafting committee assumed that in the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among cotrustees, a court could "direct exercise of the [joint] power or take other action to break the deadlock." Restatement (Third) of Trusts § 39 cmt. e.

182 UDTA § 6(b)(2).

183 The duty and liability of a trust director is governed by UDTA § 8, which applies the fiduciary duty of trusteeship to a trust director. Under UDTA § 8(a)(1)(B), a trust director that holds a power of direction jointly with a trustee or another trust director would be subject to the fiduciary duty of a cotrustee.

184 *See, e.g.*, UTC § 701(a)–(b); Restatement (Third) of Trusts § 35.

185 *See, e.g.*, UTC § 702(a)–(b); Restatement (Third) of Trusts § 34(3) (Am. Law Inst. 2003).

186 *See, e.g.*, UTC § 708; Restatement (Third) of Trusts § 38 cmt. i.

187 *See, e.g.*, UTC § 705 (amended 2001); Restatement (Third) of Trusts § 36.

188 *See, e.g.*, UTC § 706; Restatement (Third) of Trusts § 37 cmt. e.

189 *See*, e.g., UTC § 704 (amended 2004); Restatement (Third) of Trusts § 31 cmt. a.

190 UDTA § 16. The drafting committee intended that these rules would be "default or mandatory as applied to a trust director depend[ing] on whether [the rule] is default or mandatory as applied to a trustee." *Id.* cmt.

The UDTA drafting committee, however, took note that a trust director and a trustee can sometimes differ in important ways. As a practical matter, therefore, a court will have to be thoughtful about extending the rules of trusteeship to a trust director, because the circumstances of a trust director are often (though not always) different from the circumstances of a trustee.

For example, UDTA § 16(1) adopts for a trust director the same law that applies to a trustee regarding acceptance of appointment. Whether a trust director has accepted an appointment is thus determined by the same principles that determine whether a trustee has accepted appointment. A trustee, however, is expected to participate actively in the administration of the trust. At a minimum, a trustee must hold title to trust assets, which often forces the trustee to take some sort of action almost immediately. A trustee is therefore usually capable of signaling acceptance by conduct.[191] Even if the trustee has not expressly accepted appointment, the trustee may signal acceptance by actions alone.

The challenge in applying UDTA § 16(1), therefore, is that not every trust director may take action quickly like a trustee. Some trust directors may not take any action for long stretches of time, if ever. A director with a power to determine a settlor's competence may not act for years or even decades. When a trust director delays acting in this way, perceiving acceptance by conduct may become difficult.[192] A court must therefore apply the law of trustee acceptance sensitively, discerning what would be appropriate given the circumstances. Another example of the divide between a trustee and a trust director is a bond to secure performance under § 16(2). In the usual case, a trust director would not have custody of the trust property, making a bond typically inappropriate for a trust director.

Vacancy presents a similar question of adaptation in light of context. Under Uniform Trust Code § 704, "a vacancy in a trusteeship need not be filled" if "one or more cotrustees remain in office." Under UDTA § 16(6), the same rule applies to trust directors. If three of five trust directors with a joint power to determine the settlor's capacity remain in office, the court "need not" fill the vacancies, though the vacancies should be filled if doing so would be more consistent with the settlor's plan. Likewise, if the sole trust director with power over investment of the trust property ceases to serve, in most circumstances the vacancy should be filled, and this is true even if other directors with unrelated powers remain in office. An apt analogy is to a trust with sev-

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[191] *See, e.g.*, UTC § 701(a)(2); RESTATEMENT (THIRD) OF TRUSTS § 35(1) (AM. LAW INST. 2003).

[192] UDTA § 16(1) cmt.

eral cotrustees, each of whom has controlling authority over different aspects of the trust's administration. If any of those trustees ceases to serve, in many circumstances a court should appoint a successor even though other cotrustees remain in office.

The provision in UDTA § 16(3) for "reasonable compensation" for a trust director also merits some discussion. Reasonable compensation for a trust director will vary based on the nature of the director's powers, and in some circumstances may well be zero. Thus, in the comments and in the legislative note accompanying § 16(3), the drafting committee strongly urged that a state that provides statutory commissions for a trustee should refrain from using the same commission formula for a trust director and should instead use a rule of reasonable compensation. Statutory commissions will often overcompensate a trust director, especially a director that does not participate actively and continuously in the administration of the trust. At the same time, the state might take the occasion of enacting the UDTA to abandon statutory commissions for trustees too, as the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed.[193]

C. Litigation Issues

As we have seen, the UDTA imposes on a trust director the fiduciary duties of a trustee "in a like position and under similar circumstances."[194] The drafting committee thus contemplated that a breach of those duties by a trust director would be a breach of trust,[195] and that existing law governing standing to enforce a trust would resolve the

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193 An apt analogy is to a trustee that hires others to "render services expected or normally to be performed by the trustee." The compensation of such a trustee ordinarily declines in proportion to the trustee's diminished responsibilities. RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. c(1); *see also* UNIF. PRUDENT INV'R ACT § 9 cmt. (UNIF. LAW COMM'N 1994) ("If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.").

194 UDTA § 8, discussed *supra* Part II.A.

195 UDTA § 2(1) confirms expressly in blackletter that the term "'breach of trust' includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts." Furthermore, UDTA § 15 confirms that "by accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director." Several existing state directed trust statutes contain a similar provision, *see, e.g.,* COLO. REV. STAT. § 15-1-1105; GA. CODE. ANN. § 53-12-345 (2010); IDAHO CODE § 15-7-501(1) (2007); 760 ILL. COMP. STAT. 5/16.3(g) (2015); MICH. COMP. LAWS § 700.7809 (2010); MINN. STAT. § 501C.0808 (2016); MO. REV. STAT. § 456.8-808(11) (2018); NEV. REV. STAT. § 163.5555 (2009); N.H. REV. STAT. ANN. § 564-B:12-1203 (2017); WIS. STAT. § 701.0202 (2014), which is familiar from law of trusteeship, *see, e.g.*, UTC § 202(a).

question of who could bring an action for redress against the director.[196] But what of limitation periods and defenses? The UDTA's answers to these questions counts as another practical improvement on most existing directed trust statutes.

With respect to limitation periods, UDTA § 13 absorbs the rules that would apply to a trustee in a like position and under similar circumstances. Thus, subsection (a) applies to a trust director any statutory limitation rule enjoyed by a trustee, and subsection (b) applies to a trust director any rule of repose or limitation arising from a report or accounting to the beneficiaries.[197] However, subsection (b) is phrased so that it applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of the director's conduct.

With respect to defenses in an action for breach of trust, UDTA § 14 makes available to a trust director the same defenses that would be available to a trustee in a like position and under similar circumstances. The comment to § 14 confirms that such defenses could include laches or estoppel;[198] consent, release, or ratification by a beneficiary;[199] reasonable reliance on the terms of a trust;[200] and reasonable care in ascertaining the happening of an event affecting administration or distribution.[201]

Another question likely to arise in litigation involving a trust director is the ability of the director to seek indemnification for attorney's fees. The drafting committee contemplated that, in the event that the terms of a trust are silent on this question, it would be governed by UDTA § 6(b)(1). As we have seen, § 6(b)(1) establishes a default rule that allows a trust director to exercise "any further power appropriate to

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196 *See, e.g.*, Restatement (Third) of Trusts § 94 (Am. Law Inst. 2012).

197 The comment to UDTA § 13 confirms that "[l]aches, which strictly speaking is an equitable defense rather than a limitations period, would apply to an action against a trust director under Section 14."

198 *See, e.g.*, Restatement (Third) of Trusts § 98 (Am. Law Inst. 2012).

199 *See, e.g.*, UTC § 1009 (amended 2001); Restatement (Third) of Trusts § 97(b)–(c).

200 *See, e.g.*, UTC § 1006; Unif. Prudent Inv'r Act § 1(b) (Unif. Law Comm'n 1994).

201 *See, e.g.*, UTC § 1007; Restatement (Third) of Trusts § 76 cmt. f. As observed above, *see supra* note 125 and text accompanying, the UDTA also separately absorbs the law governing a trustee's exoneration and exculpation. Section 8(a) provides that "the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances." UDTA § 8(a).

the exercise or nonexercise of a power of direction granted to the director."[202] By default, therefore, a trust director would have a power to incur and be indemnified for attorney's fees and other expenses "appropriate" to the exercise of the director's expressly granted powers. Such a direction would normally be appropriate if a trustee in a like position and under similar circumstances would be entitled to indemnification of costs and expenses.

IV. Reconciling Cotrusteeship

The final stop on our tour through the UDTA is the reconciliation in § 12 of the law of cotrusteeship with the broad settlor autonomy recognized by the UDTA for a directed trust.

A. Traditional Law

The traditional understanding of cotrusteeship is that it is a safeguard imposed by the settlor. The beneficiaries are protected against trustee misconduct by the presence of multiple trustees. As one Scots judge put the point in 1897,

> It is, of course, disagreeable to take a cotrustee by the throat, but if a man undertakes to act as trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs, in letting things slide and losing money rather than create ill feeling.[203]

A complex web of default and mandatory rules, much of which persists in today's law, reflects this understanding of cotrusteeship as a beneficiary safeguard. On the powers side, under traditional law the default rule was that cotrustees were required to act unanimously.[204] Under modern law, the default rule is that multiple trustees may act by majority, unless there are only two, in which case they may act unanimously.[205] Under both rules of construction, a single trustee does not have the power alone to transfer or otherwise deal with the trust property.[206]

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[202] UDTA § 6(c)(1), discussed *supra* Part I.C.

[203] Sitkoff & Dukeminier, *supra* note 76, 611 n.37 (quoting Miller's Trustees v. Polson, (1897) SC 1038, 1043 (Scot.)).

[204] *See* Sitkoff & Dukeminier, *supra* note 76, at 610–11.

[205] *See, e.g.*, UTC § 703(a) (amended 2001); Restatement (Third) of Trusts § 39 (Am. Law Inst. 2012).

[206] *See* Sitkoff & Dukeminier, *supra* note 76, at 610–11.

On the duties side, the default rule is that each cotrustee is under a duty to participate actively in the administration of the trust.[207] Each cotrustee has the right to receive information about the administration of the trust.[208] And the modern authorities are uniform in recognizing a duty in each cotrustee "to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress."[209] This duty to prevent or seek redress for a cotrustee's breach of trust applies even if the settlor limits the role or function of one of the cotrustees. The Restatement (Third) of Trusts explains: "Even in matters for which a trustee is relieved of responsibility, . . . if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct."[210] Moreover, "even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate."[211]

B. Cotrusteeship Under the UDTA

The foregoing rules for a cotrustee stand in stark contrast with the less demanding fiduciary standards for a directed trustee under UDTA §§ 9, 10, and 11. The drafting committee therefore gave considerable attention to reconciling the law of cotrusteeship with the new law of directed trusts. The committee's aim was to avoid disrupting existing trust practice while bringing to cotrusteeship the broad settlor autonomy recognized by the UDTA for a directed trust.

1. *Law of Cotrusteeship by Default*

The UDTA preserves the distinction between a directed trust and a cotrusteeship. Under the UDTA, a "power of direction" cannot be held by a person while the person is serving as a trustee, nor can a person be

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[207] *See, e.g.*, UTC § 703(c); Restatement (Third) of Trusts § 81(1) cmt. c.

[208] Restatement (Third) of Trusts § 81 cmt. b.

[209] *Id*. § 81(2); *see also* UTC § 703(g).

[210] Restatement (Third) of Trusts § 81 cmt. b. The duty to take reasonable steps to prevent or redress a breach of trust by a cotrustee in UTC § 703(g) is not expressly made mandatory by UTC § 105(b). However, § 105(b) does make mandatory a cotrustee's duty "to act in good faith." And in most cases, good faith would require a cotrustee to take reasonable steps to prevent or redress another cotrustee's breach of trust even if the terms of the trust limit the cotrusee's sphere of responsibility. This construction of §§ 105 and 703 is supported by the framing of UDTA § 12 as enabling a weakening of a cotrustee's cross-monitoring duty, and by the subsequent 2018 amendment to § 703(g) to make it "[s]ubject to" UDTA § 12. UTC § 703(g) (amended 2018).

[211] Restatement (Third) of Trusts § 81 cmt. b (Am. Law Inst. 2007).

a "trust director" while the person is serving as a trustee.[212] In consequence, a cotrustee with a power to direct another cotrustee is not a trust director, and the other cotrustee is not a directed trustee. Instead, relations between multiple trustees remain subject by default to the law of cotrusteeship.

2. *Authorizing Opt Out from Traditional Cotrusteeship Law*

Under the UDTA, however, a settlor may opt out of the default law of cotrusteeship, and instead subject cotrustees to the more permissive fiduciary rules of a directed trusteeship as prescribed by §§ 9, 10, and 11. The drafting committee reasoned that, because a "settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee," there was little reason not to allow the settlor to apply "the fiduciary rules of [a directed trust] to a cotrusteeship."[213] To this end, UDTA § 12 provides,

> The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under Sections 9 through 11.[214]

Under the UDTA, therefore, if the terms of the trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in § 9 with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. Likewise, the terms of a trust can displace the duty under traditional law to take reasonable action to prevent a breach of trust by a cotrustee and the rule giving every trustee access to information regarding all aspects of the administration of the trust, replacing those rules with the less de-

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212 UDTA § 2(5), (9).

213 *Id.* cmt. The drafting committee also took note of similar provisions in Alaska, Florida, and North Carolina. ALASKA STAT. § 13.36.072(c) (2013); FLA. STAT. § 736.0703(9) (2014); N.C. GEN STAT. § 36C-7-703(g1) (2005). After Section 12 was in draft form, Delaware and New Hampshire adopted similar provisions. DEL. CODE ANN. tit. 12, § 3313A (2018); N.H. REV. STAT. ANN. § 564-B:7-711(c) (2017).

214 UDTA § 12. The legislative note gives instructions for revising UTC § 703 to conform with this provision, and the Uniform Law Commission has since revised UTC § 703 to make it subject to the UDTA. *See supra* note 210. The comment to UDTA § 12 also explains that it applies only "to a cotrustee that takes direction," akin to a directed trustee, and not the duties of a cotrustee that gives direction, akin to a trust director, because under UDTA § 8 the duties of a trust director are those of a similarly situated trustee.

manding rules for a directed trustee under § 10 for information sharing and § 11 for cross-monitoring.

3. *A Question of Construction*

Whether the traditional law of cotrusteeship or the more permissive rules of a directed trust apply to a particular cotrusteeship is a question of construction.[215] The default rule is that the traditional law of cotrusteeship applies. But if the terms of the trust manifest a contrary intent, under § 12 the reduced fiduciary duties of a directed trusteeship will apply instead.

For example, a familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Another familiar drafting strategy is to give one cotrustee power over investment of certain trust property. For example, a family cotrustee might have controlling power over decisions pertaining to a family business held in the trust. It is common in this kind of trust to relieve the cotrustee who does not direct investments from liability for matters under the control of the other cotrustee.

Under traditional law, in spite of such a provision, the cotrustee who does not exercise a controlling power would remain under a duty to take reasonable steps to prevent a breach by the controlling cotrustee. Under the UDTA, by contrast, the noncontrolling cotrustee would be liable only for its own willful misconduct, and would not be otherwise responsible for the actions of the controlling cotrustee.[216] In other words, the controlling cotrustee would be treated like a trust director, and the noncontrolling cotrustee would be treated like a directed trustee.

4. *Title Holding and Third Party Rights*

The change in the law of cotrusteeship effected by the UDTA pertains only to fiduciary governance within the trust. The UDTA "does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee."[217] The official comment elaborates thus:

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[215] Nothing in UDTA § 12 requires an express reference to that provision to invoke the rule prescribed by it. UDTA § 12 cmt.

[216] Recall, however, that under UDTA § 3(a) the act applies to a trust created before the effective date of the act, but only as to a decision or action occurring on or after that date.

[217] UDTA § 12 cmt.

> The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee's capacity as such.[218]

Instead, the UDTA changes only "the degree to which the terms of a trust may reduce a cotrustee's duty and liability."[219]

Conclusion

The UDTA addresses the key difficulties in a directed trust more comprehensively, more effectively, and more simply than existing directed trust statutes. The UDTA draws the scope of its application with care and precision and offers sensitive and thorough rules to govern the fiduciary duties of both a trust director and a directed trustee. The UDTA offers the first comprehensive treatment of the many matters of trust administration in a directed trust that go beyond fiduciary duties, such as acceptance, compensation and defenses. And the UDTA provides a simple update to the traditional law of cotrusteeship by permitting a settlor to apply to cotrustees the same flexible scheme of fiduciary duties that applies to a trust director and a directed trustee.

Although some state legislatures might disagree with some of the policy choices in the UDTA—especially with regard to the fiduciary duties of a directed trustee and trust director—the UDTA is nevertheless appropriate for enactment in every state. The UDTA offers many practical innovations that could benefit every state, and the small elements of policy disagreement between the UDTA and enacting states can easily be addressed by appropriate modifications to the UDTA. Practitioners drafting trusts not governed by the UDTA might benefit from the UDTA by consulting it as a source of model provisions and as a guide to the key issues posed by a directed trust.

Many centuries of legal development have placed the trustee at the center of a trust and its administration. Then came directed trusts. With the promulgation of the UDTA, the law of trusts is catching up to the rise of flexible, multi-party trust administration by trustees in concert with trust directors.

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218 *Id.*
219 *Id.*

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The Public Support Test: Practical Strategies for Protecting Public Charity Status

Sunday, October 20

<u>Speakers:</u>

Robert P. Goldman, Salem, MA

Barbara K. Wheaton, Portland, ME

How the Public Support Test Works and Strategies for Avoiding “Tipping” into Private Foundation Status

MassCPAs Nonprofit Conference
January 2023

Brad Bedingfield
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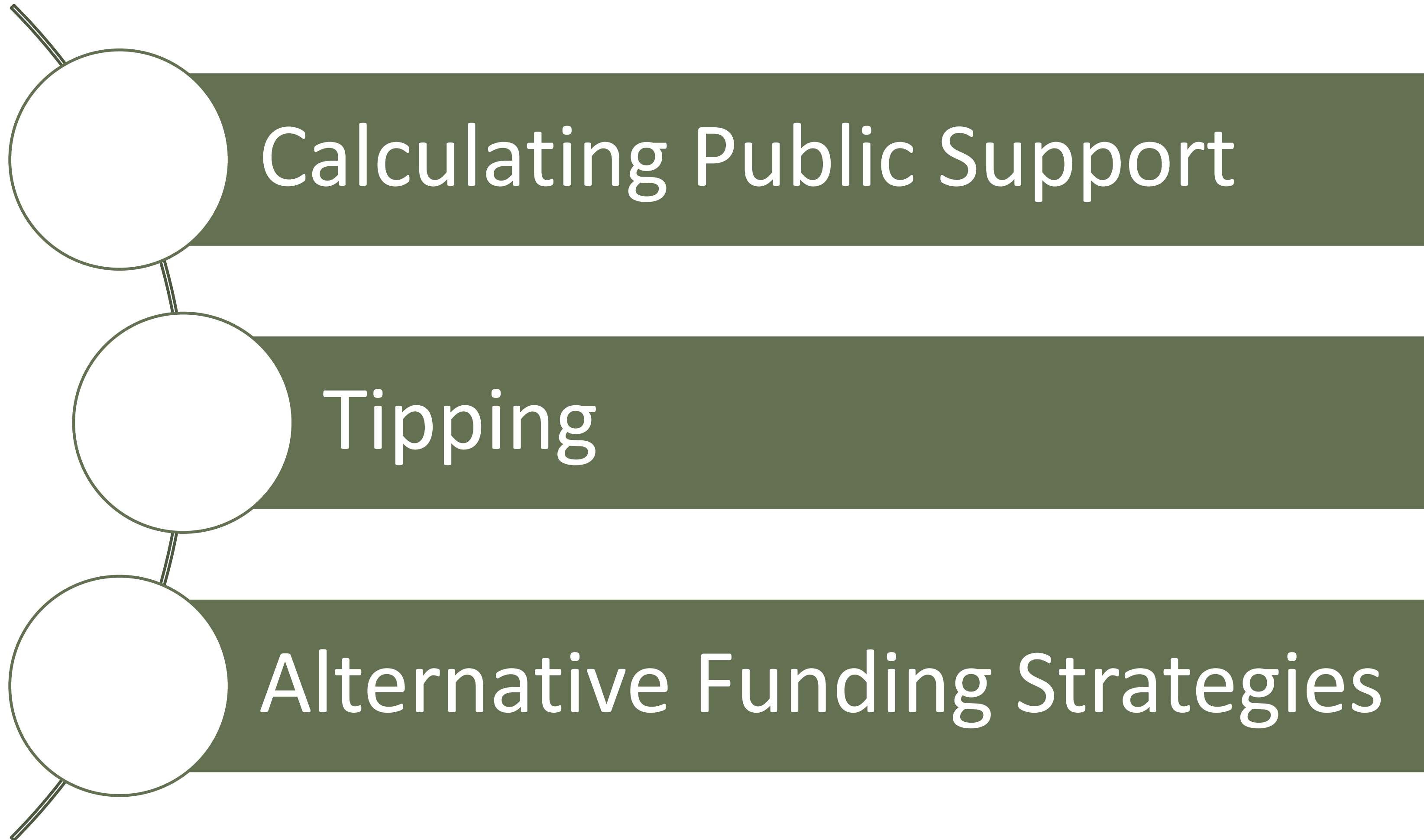
Overview of Topics



I.A Tax Exempt Organization Search - Categories

- **Public Charities**
  - 509(a)(1) (PC)
    - Churches - 170(b)(1)(A)(i)
    - Schools - 170(b)(1)(A)(ii)
    - Hospitals - 170(b)(1)(A)(iii)
    - Publicly supported organizations - 170(b)(1)(A)(vi)
  - 509(a)(2) (PC)
  - 509(a)(3) (Supporting Organizations)
    - Types I, II, and III Functionally Integrated (SO or SOUNK)
    - Type III Non-Functionally Integrated (SONFI or SOUNK)
- **Private Foundations (PF)**
- **Private Operating Foundations (POF)**
- **Non-501(c)(3) organizations**
  - Grants
  - Program-related investments
- **Individuals**

I.A Tax Exempt Organization Search - Categories

How can I tell what the grantee's foundation status is?

- Tax Exempt Organization Search - https://apps.irs.gov/app/eos/
- Form 990 Schedule A

SCHEDULE A (Form 990)

Department of the Treasury Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.
Attach to Form 990 or Form 990-EZ.
Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No. 1545-0047

2022

Open to Public Inspection

Name of the organization | Employer identification number

Part I **Reason for Public Charity Status.** (All organizations must complete this part.) See instructions.

The organization is not a private foundation because it is: (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i)**.
2 ☐ A school described in **section 170(b)(1)(A)(ii)**. (Attach Schedule E (Form 990).)
3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii)**.
4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii)**. Enter the hospital's name, city, and state:
5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv)**. (Complete Part II.)
6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v)**.
7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi)**. (Complete Part II.)
8 ☐ A community trust described in **section 170(b)(1)(A)(vi)**. (Complete Part II.)
9 ☐ An agricultural research organization described in **section 170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land-grant college of agriculture (see instructions). Enter the name, city, and state of the college or university:
10 ☐ An organization that normally receives (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions, subject to certain exceptions; and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2)**. (Complete Part III.)
11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4)**.
12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2)**. See **section 509(a)(3)**. Check the box on lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

I.B Public Support Test – 509(a)(1) – 33 1/3% Test

Public Support Ratio = Public Support ÷ Total Support

- Calculated over trailing 5 year period
- If qualify, 509(a)(1) for qualifying year and following year
- New organization: Years 1-5 **or** 2-6

Public Support	Total, Not Public Support	Excluded Entirely
Government grants	Grants above 2% limitation	Unusual grants
Grants from publicly supported organizations*	Unrelated business income	Capital gain income
Part of other grants (up to 2% limitation)	Investment income (other than capital gains)	Program service income**

* Includes 509(a)(1) public charities that satisfy the public support test under 170(b)(1)(A)(vi) and others (such as churches) that are able to satisfy that test (Treas. Reg. 1.170A-9(f)(6)(i))

** Program service income cannot be substantially all of organization's income for 509(a)(1) (ok for 509(a)(2))

I.B Public Support Test – 509(a)(1) – 33 1/3% Test

What is the 2% limitation?

- **Add up all contributions for past five years, take 2% of that**
- ***Example*:**
  - o $350,000 per year
    - $250,000 per year from single PF
    - $100,000 per year from diverse sources (all below 2% limit)
  - o $1.75 million over five years
  - o 2% of $1.75 million = $35,000
- **PF has given $1.25 million over five years**
- **Public Support portion = $35,000**
- **Non-Public Support Portion = $1,215,000 (counts in denominator, not numerator)**
- **<u>Public Support Ratio</u>:**
  - o $1,750,000 (grants) - $1,215,000 (excess over 2%) = $535,000
  - o $535,000 (public support) ÷ $1,750,000 (total support) = **30.57%**

If PF donation drops to $200,000 per year, public support = **35.33%**

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in)	(a) 2018	(b) 2019	(c) 2020	(d) 2021	(e) 2022	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	$350,000	$350,000	$350,000	$350,000	$350,000	$1,750,000
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf	$0	$0	$0	$0	$0	$0
3 The value of services or facilities furnished by a governmental unit to the organization without charge	$0	$0	$0	$0	$0	$0
4 **Total.** Add lines 1 through 3	$350,000	$350,000	$350,000	$350,000	$350,000	$1,750,000
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						$1,215,000
6 **Public support.** Subtract line 5 from line 4						$535,000

Section B. Total Support

Calendar year (or fiscal year beginning in)	(a) 2018	(b) 2019	(c) 2020	(d) 2021	(e) 2022	(f) Total
7 Amounts from line 4	$350,000	$350,000	$350,000	$350,000	$350,000	$1,750,000
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties, and income from similar sources	$0	$0	$0	$0	$0	$0
9 Net income from unrelated business activities, whether or not the business is regularly carried on	$0	$0	$0	$0	$0	$0
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)	$0	$0	$0	$0	$0	$0
11 **Total support.** Add lines 7 through 10						$1,750,000

12 Gross receipts from related activities, etc. (see instructions) — **12** $5,000,000

13 **First 5 years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ☐

Section C. Computation of Public Support Percentage

14 Public support percentage for 2022 (line 6, column (f), divided by line 11, column (f)) — **14** 30.57 %

15 Public support percentage from 2021 Schedule A, Part II, line 14 — **15** %

I.B Public Support Test – 509(a)(1) – Facts and Circumstances

Public Support Ratio between 10% and 33 1/3%

Factors

- Percentage of public support
- Fundraising efforts
- Public visibility
- Broadly representative board

I.B Public Support Test – 509(a)(1) – Unusual Grants

- **Grant attracted by reason of publicly supported nature of organization**

- **Unusual or unexpected in amount**

- ***Factors***
  - Relationship of donor to organization
  - Bequest or inter vivos transfer
  - Cash vs. in-kind gifts
  - New organization or robust fundraising attracting significant public support prior to unusual gift
  - Likelihood of getting significant public support after the unusual grant
  - Lack of reliance on unusual grant treatment in recent years
  - Representative board
  - Restrictions on gift

I.B Public Support Test – 509(a)(1)

Key things to watch out for when giving to small charities

- New organization
- Low public support percentages on Form 990 Schedule A, Part II
- Low annual revenue
- Facts and circumstances:
  - How community-facing are they?
  - Fundraising?
  - Broad, representative board?
    - Run by membership?

I.C Public Support Test – 509(a)(2)

509(a)(2) Organizations

- 33 1/3% Public Support (focus on service revenue, less on grants)
- No more than 33 1/3% from investment income and UBTI (can't rely on endowment)

I.C Public Support Test – 509(a)(2)

Key differences

- Program service revenue can help ratio (excluded from 509(a)(1) test)
- "Bright line" limit on investment income and UBTI
- No "facts and circumstances" safety net
- *Note*: "Unusual grants" excluded from *both* 509(a)(1) and 509(a)(2) calculations

Key limitations

- **"Disqualified Person" grants/receipts** excluded *entirely* from numerator
- **Per person limit** - receipts count only up to **greater of $5,000 or 1%** of total support for the year (excluding disqualified person receipts)
  - Grants are not subject to this $5k/1% limitation, and therefore count in full as public support
    - However, some large grants may be treated as non-public support as grants from disqualified persons

I.C Public Support Test – 509(a)(2)

Disqualified person

- Substantial contributors (at least $5k and exceeds 2% of contributions in current or past year)
- Directors and officers
- Close family members
- Related organizations

I.C Public Support Test – 509(a)(2)

Example: PASSED (assuming passed "no more than 33 1/3%" test as well)

- $350,000 per year
  - $100,000 per year from exempt service revenue (receipts)
    - Exclude $10k/year as disqualified
  - $50,000 per year from small diverse grants
  - $200,000 per year grant from private foundation (disqualified person)
- $1.75 million over five years
- Greater of $5k/1% limitation – 1% of $350k = $3,500, so $5,000 is per source limit
  - Or $25,000 over five years
- Substantial contributor = more than $5k and more than 2% per year ($7,000)
  - Check past years as well (track all disqualified persons)
- ***Public support*** = $1,750,000

  \- $50,000 ($10k/yr from disqualified persons)

  \- $1,000,000 (PF as disqualified person)

  = $700,000

  ÷ $1,750,000

  = 40%

I.C Public Support Test – 509(a)(2)

Example: FAILED

- $450,000 per year
  - $100,000 per year from exempt service revenue (receipts)
    - Exclude $10k/year as disqualified
  - $50,000 per year from small diverse grants
  - $300,000 per year grant from private foundation (disqualified person)
- $2.25 million over five years
- Greater of $5k/1% limitation – 1% of $400k = $4,500, so $5,000 is per source limit
  - Or $25,000 over five years
- Substantial contributor = more than $5k and more than 2% per year ($9,000)
  - Check past years as well
- ***Public support*** = $2,250,000

  \- $50,000 ($10k/yr from disqualified persons)

  \- $1,500,000 (PF as disqualified person)

  = $700,000

  ÷ $2,250,000

  = 31.11%

I.C Public Support Test – 509(a)(2)

Example: FAILED (but close!) – Service Revenue Instead of Grant

- $450,000 per year
  - $100,000 per year from exempt service revenue (receipts)
    - Exclude $10k/year as disqualified
  - $50,000 per year from small diverse grants
  - $300,000 per year contract from private foundation (not disqualified person)
- $2.25 million over five years
- Greater of $5k/1% limitation – 1% of $450k = $4,500, so $5,000 is per source limit
  - Or $25,000 over five years
- Substantial contributor = more than $5k and more than 2% per year ($9,000)
  - Check past years as well
- ***Public support*** = $2,250,000

  \- $50,000 ($10k/yr from disqualified persons)

  \- $1,475,000 (PF revenue subject to $5k/1% limitation)

  = $725,000

  ÷ $2,250,000

  = 32.22%

I.C Public Support Test – 509(a)(2)

Example: FAILED - Same Facts, but Trying for 509(a)(1) Test instead

- $450,000 per year
  - $100,000 per year from program service revenue (receipts)
  - $50,000 per year from small diverse grants
  - $300,000 per year grant from private foundation
- $1.75 million grants over five years (plus $500,000 receipts, excluded)
- <u>2% limitation</u> = 2% of $1.75 million = $35,000
- Non-Public Support Portion of PF Grants = $1,465,000

- ***Public support*** = $1,750,000
  - <u>- $1,465,000</u>
  - = $285,000
  - <u>÷ $1,750,000</u>
  - **= 16.28% - Facts and Circumstances Test?**

I.D Key Takeaways

- **You cannot know in advance whether your grant will result in tipping**
  - No data if in first five years
  - Other grants unknown until end of year
- **Look out for indications you may have a problem**
  - Low public support ratio
  - Low revenue
  - Not public-facing enough
  - No fundraising mechanisms
  - Small governing body
- **Review 990 Schedule A, but don't trust calculation if ratio is high**
  - Advise grantee to consult with someone if calculation seems off
- **Tipping in one year only is not fatal – must be two years in a row**
- **Treatment as grants vs. program service revenue can make a difference**
- **Grantee can qualify under either 509(a)(1) or 509(a)(2) in a given year**

I.E Consequences of Tipping

- Treated as private foundation in tipping year solely for purposes of IRC 6033, 507, and 4940
- Treated as private foundation thereafter for all purposes
- Must file Form 8940 to begin 60-month termination to convert back to public charity
- Three-year rule (Treas. Reg. 1.507-3(e)) for private foundation grants of 25% or more (IRC 507(b)(2)) – if a PF gives 25% or more of its assets in a 507(b)(2) transfer to a public charity which then loses its public charity status within 3 years of the grant, the grant is treated as a 507(b)(2) grant to a private foundation.

I.E How can we limit tipping / negative impact?

- **Unusual Grant Treatment**
- **If 509(a)(1), program service revenue instead of grants**
  - If 509(a)(2), service revenue limited by $5,000 / 1% limitation
- **Timing**
  - Allow tipping for one year only
  - Spread out impact
- **Advisory support for facts and circumstances test**
- **Parallel grants/payments**
- **Fundraising support / capacity building**

II. Working with Other Vehicles

- **Public Charities**
  - Donor-Advised Funds
  - Fiscal Sponsors
  - Community Foundations
  - Public Charity Partners
  - Collectives
  - Supporting Organizations

  Note: Beware earmarking

- **Non-Charitable Organizations**
  - Grants
  - Investments
    - Program-related investments
    - Mission-related investments

- **Land Trusts**

- **Community Development Financial Institutions**

- **Informal Community Groups**

III. Investments

Program-Related Investments

- Primary purpose to accomplish exempt purposes
- Production of income not significant purpose
  - Look to whether for-profit investors would invest on same terms
- Lobbying/political activity not a purpose
- *Examples*:
  - Low-interest loans to small businesses owned by economically disadvantaged groups, where reasonable commercial alternatives unavailable
  - High-risk investments in low-income housing or in deteriorating communities
- *Consequences*:
  - 4940 – Excluded in calculating excise tax
  - 4942 – Counts towards 5%; excluded from asset base for 5% calculation
  - 4943 – Not excess business holdings
  - 4944 – Not a jeopardizing investment
  - 4945 – Not a taxable expenditure

Mission-Related Investments

- Flexibility in satisfying IRC 4944 jeopardizing investment rules

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Current Developments in Digital Assets, Electronic Documents, Cryptocurrency and AI

Sunday, October 20

<u>Speaker:</u>

Suzanne Brown Walsh, Hartford, CT

Hot Topics in Fiduciary Litigation: Panel Discussion

Sunday, October 20

<u>Speakers:</u>

Benjamin Siracusa Hillman, Concord, NH

Charles W. Pieterse, Greenwich, CT

Elise Salek, Concord, NH

Marshall D. Senterfitt, Boston, MA

Mark E. Swirbalus, Boston, MA

From:	Salek, Elise H.
To:	Virna J. Tavarez
Subject:	RE: New England regional meeting
Date:	Wednesday, September 4, 2024 4:36:48 PM

Hi Virna. Is this sufficient for a bio? I just pulled it off my firm's website. Unless you need anything more descriptive, this is good enough for me!

Elise is a Director in the firm's Trusts and Estates Practice Group. Her practice centers on helping clients achieve their estate planning goals, while minimizing estate tax liability and probate litigation risk. Clients look to Elise to help navigate the complex landscape of will contests, breach of fiduciary duty claims, trusts, and estates.

Throughout her career, Elise has established herself as an authority on conflicts of interest and breach of fiduciary duty. She is a frequent presenter on topics including estate planning, probate, wealth transfer, business succession planning, and trust and estate law.

Elise helped draft the New Hampshire Power of Attorney Act and was an instrumental player in the successful effort to modify New Hampshire's Uniform Trust code and various other probate statutes. She is a past chair of the New Hampshire Bar Association Trusts and Estates Section, and a member of the American College of Trust and Estate Counsel.

Elise H. Salek
Attorney | Fellow, American College of Trust and Estate Counsel
PretiFlaherty

From: Virna J. Tavarez <vjtavarez@actec.org>
Sent: Wednesday, September 4, 2024 1:49 PM
To: bsiracusahillman@Shaheengordon.com; Salek, Elise H. <ESalek@preti.com>
Subject: FW: New England regional meeting

Note: *** **This email originated from outside of Preti. Please do not click on any links or open attachments unless you can verify the sender and content.*****

Hi Ben and Elise

Brodie forwarded your message. Apologies for dropping you from the speaker list! I had not received confirmation you were available to speak.

So, first thing first: Elise has a room. Ben, if you need one, please reserve it ASAP. Let me know if you have any issues.

Next, I need your bios & speaker releases. I am also missing a 1-2 sentence description from your panel. If you can get with your panel to discuss and submit, I appreciate it. We need this to apply for CLE Credit. I have also requested this from the rest of your panel

Materials are due September 25. Please let me know if you plan on using a power point presentation and I will order the appropriate equipment.

Lastly, we have improved our registration system! You are marked as speakers, and you can log in

AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
2024 NEW ENGLAND REGIONAL MEETING

Hot Topics in Fiduciary Litigation

Benjamin Siracusa Hillman, Concord, NH
Charles W. Pieterse, Greenwich, CT
Elise Salek, Concord, NH
Marshall D. Senterfitt, Boston, MA
Mark E. Swirbalus, Boston, MA

Materials:

1. *In the Matter of Estate of McLoughlin* (In Terrorem Clause – MA)
2. *Salce v. Cardello* (In Terrorem Clause – CT)
3. In Re The Omega Trust (Trust Amendment – NH)
4. N.H. RSA § 564-B:4-406 (Lifetime Validation of Trusts – NH)
5. N.H. RSA § 552:18 (Lifetime Validation of Wills – NH)
6. *Sacks v. Dissinger* (Interference with Expectancy – MA)

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

23-P-770 Appeals Court

IN THE MATTER OF THE ESTATE OF WILLIAM F. McLOUGHLIN.[1]

No. 23-P-770.

Worcester. March 11, 2024. – September 30, 2024.

Present: Green, C.J., Henry, & Ditkoff, JJ.[2]

Will, Construction, Testamentary capacity, Validity. Probate Court, Affidavit. Words, "Contest."

Complaint for instructions filed in the Worcester Division of the Probate and Family Court Department on August 19, 2022.

The case was heard by Kathryn M. Bailey, J., on motions for summary judgment.

Barry A. Bachrach for Sean McLoughlin.
Maureen E. Curran (Cara J. Daniels also present) for Margaret McLoughlin & others.

HENRY, J. As a fact witness, Sean McLoughlin provided an affidavit to his brother, William McLoughlin, Jr. (William Jr.),

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[1] The decedent was also known as William F. McLoughlin, Sr.

[2] Chief Justice Green participated in the deliberation on this case prior to his retirement.

who was attempting to challenge their father's will.[3] The question is whether Sean's actions triggered the "No Contest Provision" or in terrorem clause in the will, causing Sean to forfeit his inheritance.[4] The personal representative of the estate of William F. McLoughlin, Sr. commenced an action in the Probate and Family Court seeking instructions in these circumstances. We conclude that under the language of the specific in terrorem clause at issue, construed narrowly, Sean did not trigger the clause when he provided an affidavit in a matter brought by another person contesting or hoping to contest the will. Accordingly, we reverse the entry of summary judgment against Sean and remand this matter to the Probate and Family Court for entry of summary judgment in favor of Sean.

Background. The facts are undisputed.

1. The will. William F. McLoughlin, Sr. (decedent) died on October 30, 2020. He did not have a surviving spouse. He was survived by his six children: William Jr., Thomas, Sean, Margaret, Erin, and Susan. The decedent left a last will and

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[3] Because five of the decedent's children share a surname, we refer to the children by their first names to avoid confusion.

[4] "In terrorem" is Latin for "in fear." These clauses may be referred to as no contest clauses, in terrorem clauses, or forfeiture clauses. We use them interchangeably.

testament dated September 25, 2020 (will), thirty-five days before his death, that devised assets to all of his children except William Jr.

Section 3.2 of the will left a piece of real property to Sean. Section 3.1 of the will left two pieces of real property to Thomas. Pursuant to Section 5 of the will, the residue of the estate was to be split equally among all of the children except William Jr.

The will also contains a no contest clause, set forth in detail infra, which functions to disinherit a beneficiary who contests the will. Pursuant to this clause, the judge declared that benefits provided for Sean in the will are revoked. Because the will excluded William Jr. entirely, the in terrorem clause could cause William Jr. no fear because he risked nothing in contesting the will.[5]

On a petition filed by Thomas, a judge of the Probate and Family Court admitted the will to probate and appointed Thomas personal representative of the estate on April 9, 2021. Sean did not file an appearance or an objection to the will.

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[5] For an in terrorem provision to have power, the will must leave a beneficiary a sufficient inheritance such that the risk of forfeiture of that inheritance is a real disincentive for the beneficiary to challenge the will. See Rudd v. Searles, 262 Mass. 490, 500 (1928) (outlining privacy concerns, among others, that might motivate insertion of in terrorem provision).

2. William Jr.'s motion to allow late objection. William Jr. filed a motion to allow him to file an objection to the will late -- on July 21, 2021 -- asserting that he was unaware of the "new" 2020 will, he did not understand that it was the 2020 will that had been admitted to probate, and the 2020 will was invalid based on the decedent's mental state at the time of its writing.[6] Sean was not a party to this motion.

In response to William Jr.'s motion, Thomas submitted his own affidavit affirming that William Jr. had been made aware of the existence of the 2020 will and changes to the distributions to be made under it prior to the probate action. Thomas's affidavit recounted discussions after their father's death about the will with William Jr. at which Sean was present.

William Jr.'s attorney, Morgan Doiron, interviewed Sean about Thomas's affidavit and Sean "strongly disagreed with [Thomas's] statements" about conversations with William Jr. Sean expressed concern that if he signed a statement to correct Thomas's misstatements, he did not want it to "bite [him] in the . . . ," and the attorney assured him it would be fine. William

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[6] Both William Jr. and Sean aver that the decedent executed a prior will in 2004. As part of his motion to allow late filing of his objection, William Jr. alleged that he was unaware of the 2020 will until June of 2021, months after Thomas filed a petition to probate the will.

Jr.'s attorney prepared an affidavit that Sean reviewed for its truth and executed it.

Sean's affidavit stated it was "in support of" William Jr.'s motion to allow late filing of objection to the will "and in rebuttal to" Thomas's affidavit. Sean corroborated allegations made by William Jr. and contradicted some of Thomas's affidavit. Specifically, Sean disputed Thomas's account, calling certain statements "untrue and frankly absurd," and stating that conversations with William Jr. about the 2020 will had never occurred. Sean also stated that the decedent suffered from Alzheimer's and dementia, beginning in 2007, and that by 2020, the decedent's mental state had significantly deteriorated. Sean alleged that Margaret, Susan, and Thomas kept the decedent isolated and "controlled," and ultimately "manipulated [the decedent] into executing the 2020 will to alter his original wishes" that "the boys . . . get equal shares of [the decedent's] real estate and the rest of his estate . . . be divided as" provided in the will executed in 2004.

William Jr.'s attorney filed Sean's affidavit with the court and served it on the personal representative. After a hearing, a judge of the Probate Court denied William Jr.'s motion for late filing.

3. Complaint for instructions. On August 19, 2022, Thomas filed a complaint for instructions (complaint) to resolve the

question whether Sean's affidavit triggered the in terrorem clause of the will, thereby forfeiting his inheritance. Sean filed a notice of appearance and objection to the complaint for instructions. He then filed a motion for summary judgment arguing that the in terrorem clause did not apply because he did not contest the will and did not institute or join in (except as a party defendant) any proceeding to contest the validity of the will. As respondents to the complaint, Erin, Margaret, and Susan (collectively, sisters) filed a cross motion for summary judgment requesting that the judge declare that "by filing an Affidavit supporting his brother's attempt to challenge [the will] and stating that his father was incompetent and unduly influenced by his siblings, [Sean] forfeited his rights to an inheritance based on the in terrorem clause." A judge of the Probate and Family Court denied Sean's motion, allowed the sisters' motion, and "declar[ed] that benefits provided for Sean in the [w]ill are revoked, and such revoked benefits shall pass to the residuary beneficiaries of the [w]ill (other than Sean)." Sean now appeals.[7]

Discussion. Given the undisputed facts, the question whether Sean's affidavit triggered the will's in terrorem clause

[7] The estate, through the personal representative, Thomas, filed a notice that he would not be filing a brief in connection with this appeal.

"is a legal conclusion that we review de novo." Ritter v. Massachusetts Cas. Ins. Co., 439 Mass. 214, 215 (2003).

Massachusetts has long recognized in terrorem clauses as valid and enforceable. See Old Colony Trust Co. v. Wolfman, 311 Mass. 614, 616 (1942); Rudd v. Searles, 262 Mass. 490, 499 (1928).[8] The enforceability of such clauses was codified in G. L. c. 190B, § 2-517, which became effective July 1, 2011, and provides: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is enforceable." However, "because equity does not favor forfeitures, [in terrorem] clauses have been construed narrowly." Savage v. Oliszczak, 77

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[8] The Supreme Judicial Court summarized succinctly in Rudd why a testator should be empowered to include an in terrorem clause:

> "A will contest not infrequently engenders animosities and arouses hostilities among the kinsfolk of the testator, which may never be put to rest and which contribute to general unhappiness. Moreover, suspicions or beliefs in personal insanity, mental weakness, eccentricities, pernicious habits, or other odd characteristics centering in or radiating from the testator, may bring his family into evil repute and adversely affect the standing in the community of its members. Thus a will contest may bring sorrow and suffering to many concerned. A clause of this nature may contribute to the fair reputation of the dead and to the peace and harmony of the living."

Rudd, 262 Mass. at 500-501.

It may be optimistic to believe such clauses will bring peace and harmony between unequal beneficiaries or those who have been excluded, but such clauses may reduce litigation.

Mass. App. Ct. 145, 149 (2010), quoting Bogert, Trusts and Trustees § 181 (rev. 2d ed. 2007). Accord Lobb v. Brown, 208 Cal. 476, 484 (1929); Saier v. Saier, 366 Mich. 515, 520 (1962); Haley v. Pickelsimer, 261 N.C. 293, 299 (1964); Elder v. Elder, 84 R.I. 13, 24 (1956).

The clause at issue here was entitled "No Contest Provision" and provided as follows:

> "If any beneficiary hereunder shall contest the probate or validity of this will or of any of the beneficiary designations in place in connection with any of my qualified plans, IRAs, life insurance policies or any other asset of mine passing outside of this, my last will, or any provisions thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this will or any provisions I have made during my lifetime for the distribution of my assets, whether probate or non-probate in nature, or to prevent any provision thereof from being carried out in accordance with its terms, then all benefits provided for such beneficiary are revoked, and such revoked benefits shall pass to the residuary beneficiaries of this will (other than such beneficiary)" (emphasis added).

Sean, the sisters, and the judge all agreed that the in terrorem clause of the will has two triggers as separated by the emphasized "or." First, the clause can be triggered if a beneficiary "shall contest the probate or validity of [the] will." Second, the clause can be triggered if a beneficiary "shall institute or join in . . . any proceeding to contest the validity of [the] will." The sisters argue and the judge found that Sean violated both provisions. Because an in terrorem

clause must be interpreted narrowly, see Savage, 77 Mass. App. Ct. at 149, we disagree.

As to the first trigger, the sisters assert, and the judge agreed, that the phrase "contest the probate or validity of [the] will" could be through litigation or through conduct unrelated to litigation. The judge reasoned that "[t]he use of the word 'contest' as opposed to [the word] 'objection' in the No Contest Provision is designed to be read so as not [to limit] actions which trigger the first clause of the No Contest Provision to litigation." This is not a narrow reading of the clause. As the Supreme Judicial Court explained in O'Rourke v. Hunter, 446 Mass. 814, 816 (2006), "[a] person contesting the probate of a will must file an appearance" and an "affidavit of objections." The two terms, "contest" and "object," are used for the same purpose: to challenge the validity of a will after it has been submitted for court approval. The Supreme Judicial Court further elaborated in Sacks v. Dissinger, 488 Mass. 780, 784 (2021), that "[i]n the context of wills, [the court has] recognized the distinction between contests, which seek to determine the validity of a legal instrument, and other causes of action, which do not." The court applied that same rule to

trusts. Id. at 785.[9] Construing the term "contest" narrowly and applying traditional rules of interpretation, see Gustafson v. Svenson, 373 Mass. 273, 275 (1977) (where will unambiguous, language interpreted according to legal meaning, even where testator not likely to have understood legal meaning); Watson v. Goldthwaite, 345 Mass. 29, 33-34 (1962) (construing word "issue" according to its technical legal meaning where no evidence of testatrix's intentions to contrary), "contest" is a judicial proceeding to determine the validity of a will. Accordingly, Sean did not "contest the probate or validity of" his father's will.

As to the second trigger, Sean also did not "institute or join in (except as a party defendant) any proceeding to contest the validity of [the] will." Here, assuming William Jr.'s motion to allow late filing of objection to the will was a proceeding within the meaning of the in terrorem clause, Sean did not institute the motion or proceeding. Similarly, he did not join it. See Mass. R. Civ. P. 19, 365 Mass. 765 (1974)

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[9] The Massachusetts Uniform Probate Code does not define "contest." "When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose . . . . We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Williams v. Board of Appeals of Norwell, 490 Mass. 684, 693-694 (2022), quoting Commonwealth v. Morasse, 446 Mass. 113, 116 (2006).

(person is understood to have "joined" action when appearing as party in that action).

Sean's involvement was that of a witness. Construing this in terrorem clause narrowly, Sean's act of providing an affidavit that Attorney Doiron submitted in support of William Jr.'s motion did not amount to contesting or to instituting or joining in a proceeding to contest the validity of the will sufficient to trigger the clause. The sisters have cited no case to the contrary in similar circumstances and we have found none. Indeed, the only Massachusetts cases where we have concluded that there was a violation of a no contest clause are ones in which the individual was a party to the action challenging the will or trust. See Rudd, 262 Mass. at 491; Matter of the Estate of Urban, 102 Mass. App. Ct. 284, 289 & n.8 (2023); Caputo v. Moulton, 102 Mass. App. Ct. 251, 260-261 (2023) (beneficiaries' action to remove trustees could potentially trigger no contest clause of trust).

It is true that Sean voluntarily submitted the affidavit rather than insisting that he be subpoenaed. It also is true that his affidavit (making statements about the decedent's competency), went farther than it needed to go to respond to Thomas's statements about the siblings' conversations about the will after their father's death. Neither fact affects our analysis because we construe in terrorem clauses narrowly and

the affidavit did not trigger this clause. As Sean argues, had the judge decided to hold an evidentiary hearing and had Sean been subpoenaed to testify, he likely would not have been found in violation of the clause. We do not think the outcome should depend on whether a witness is sophisticated enough to insist on a subpoena.

Moreover, while in terrorem clauses are permissible, public policy also "demands that full and complete opportunity should be given to all interested parties to test the validity of . . . a testamentary document, not only to protect that which may be rightfully and legally theirs, but also to preserve the wishes and desires of the [testator] against designing persons seeking to take advantage of [the testator's] age and infirmities which are the usual result of advanced years." Lobb, 208 Cal. at 491-492. Once a legal process is initiated, as it was here by William Jr.'s motion, prospective witnesses should be permitted to testify and provide documents.

Our conclusion is in accord with decisions from other jurisdictions that have considered similar factual circumstances over the last century. While the clauses have varied in their language and some clauses prohibited direct or indirect efforts to contest a will, the clauses are construed narrowly and testifying as a witness in a contest brought by another person has not been deemed sufficient to trigger the in terrorem

clause. For example, in Haradon v. Clark, 190 Iowa 798, 799 (1921), the Supreme Court of Iowa held that a beneficiary who did not "join in the objections filed to the admission of the will to probate, did not employ counsel or contribute to the expense of the contest, but appeared as a witness without subpoena at the request of contestants and testified in their behalf" was not a contestant even though he admitted he was sympathetic to the challenge. Similarly, in Richards v. Piefer, 229 Mich. 609, 610 (1925), the Michigan Supreme Court held that a beneficiary who testified without being formally subpoenaed and who admitted in her testimony that her sympathies were with the contestant rather than a different beneficiary, did not trigger a no contest clause that covered a contest or an "attempt to set aside th[e] will." In Lobb, 208 Cal. at 483-491, the California Supreme Court held that two brothers did not trigger a no contest clause that prohibited "institut[ing]" proceedings contesting the will even though one brother testified and identified another witness, and the other brother paid the contestants' attorney some money. See Saier, 366 Mich. at 517, 525 (legatee who contacted witnesses for his brother's contest and who vociferously sympathized with his brother but did not file contest did not "contest or attempt to contest" admission of will to probate); Haley, 261 N.C. at 295-296, 301 (legatee who assisted her minor daughter in bringing breach of

contract action and gave evidence to establish that testator had promised to leave one-fifth of estate to legatee's daughter did not "object[] or dissent[] to" terms of will); Elder, 84 R.I. at 18, 25 (in terrorem clause triggered if legatee "should institute, conduct or share in any proceedings to oppose" will not triggered by legatee who was called as witness).

Nothing here indicates that Sean engaged in conduct beyond appearing as a witness; typically, more active participation in the contest is required to trigger an in terrorem clause. See Donegan v. Wade, 70 Ala. 501, 505-506 (1881) (where brother did not appear as named party, but funded and advised in sister's will contest, brother violated in terrorem clause); In re Estate of Barger, 303 Neb. 817, 833 (2019) (beneficiaries "supported" contest where they "aided and participated in the initiation and litigation of the will contest" brought by another prior to its filing, testified in opposition to will, and paid contesting party to bring action);[10] Kayhart v. Whitehead, 77 N.J. Eq. 12, 15-16 (Ch. 1910), aff'd 78 N.J. Eq. 580 (E. & A. 1911) (violation of in terrorem clause where beneficiary testified in

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[10] We note that the Nebraska Supreme Court interpreted the in terrorem clause broadly, its conclusion on this issue was dicta, Nebraska law differs in that in terrorem clauses are enforceable only if the contest is brought without probable cause, and the court ultimately concluded there was probable cause of undue influence. See In re Estate of Barger, 303 Neb. at 833-835, 837.

will contest, aided [contestant] in securing witnesses, entered into written agreement with caveator, and filed appearance, becoming party).

Conclusion. The judgment is reversed and the case is remanded for entry of a new judgment in favor of Sean.

So ordered.

348 Conn. 90
Supreme Court of Connecticut.

John SALCE
v.
Joan CARDELLO

(SC 20701)
|
Argued April 26, 2023
|
Officially Released September 26, 2023

Synopsis

Background: Son, as beneficiary of trust and will, filed action against daughter, as beneficiary of trust and will, alleging that daughter violated in terrorem clauses in will and trust agreement by filing request for hearing to challenge refusal of executor of estate to remove daughter's personal bank account from estate and gift tax return filed on behalf of estate and to deduct outstanding mortgages from value of estate on the return. The Probate Court, District of Branford-North Branford, concluded that daughter did not violate in terrorem clauses and that executor of estate incorrectly included bank account belonging to daughter in estate's assets. Son appeal, and daughter filed counterclaim alleging that son violated in terrorem clauses by instituting action to invalidate transfer of estate's interest in real property to daughter. On trial de novo, the Superior Court, Judicial District of New Haven, Robin L. Wilson, J., 2019 WL 6247662, rendered judgment dismissing son's probate appeal and for son on daughter's counterclaim. Son appealed. The Appellate Court, 210 Conn.App. 66, 269 A.3d 889, affirmed judgment. Son filed petition for certification to appeal, which was granted.

The Supreme Court, Robinson, C.J., held that daughter's actions, in challenging executor's refusal to remove her personal bank account from estate and gift tax return and to deduct outstanding mortgages from value of estate on the return, were based in good faith, and, thus, enforcement of in terrorem clauses against daughter would violate public policy.

Affirmed judgment of Appellate Court.

D'Auria, J., filed dissenting opinion.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Judgment.

Attorneys and Law Firms

****1033** Kenneth A. Votre, for the appellant (plaintiff).

William N. Wright, with whom was Michael P. Kaelin, for the appellee (defendant).

Robinson, C. J., and McDonald, D'Auria, Ecker and Alexander, Js.

Opinion

ROBINSON, C. J.

***93** In this certified appeal, we consider the extent to which in terrorem, or no-contest, clauses in will and trust documents are enforceable against a beneficiary who has challenged certain aspects of the performance of a fiduciary, namely, the executor of the will or the trustee of the trust. The plaintiff, John Salce, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court, which affirmed the trial court's judgment for the defendant, Joan Cardello, dismissing his probate appeal. See *Salce v. Cardello*, 210 Conn. App. 66, 68, 82, 269 A.3d 889 (2022). On appeal, the plaintiff principally contends that the Appellate Court incorrectly concluded that enforcement of the in terrorem clauses in the decedent's will and trust agreement against the defendant would violate public ****1034** policy when she challenged the executor's refusal (1) to remove her personal bank account from the estate's Connecticut estate and gift tax return, and (2) to deduct the outstanding mortgages from the value of the estate on the return. Consistent with this court's venerable decisions in *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 A. 961 (1917), and ***94** *Griffin v. Sturges*, 131 Conn. 471, 40 A.2d 758 (1944), because the defendant's actions were based in good faith, we conclude that enforcement of the in terrorem clauses in the present case would violate the public policy embodied by our statutes requiring probate courts to supervise fiduciaries. Accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court aptly sets forth the relevant facts, as found by the trial court, and procedural history. “The plaintiff and the defendant are the son and daughter, respectively, of Mae Salce (Mae). Mae was the

settlor of the Amended and Restated Mae Salce Revocable Trust Agreement (trust or trust agreement), which was established on June 29, 2005, and amended on April 3, 2008. The principal asset of the trust was Mae's interest in a piece of real property known as 113 Buffalo Bay in Madison (Buffalo Bay). The trust agreement provided that the defendant would serve as the trustee for the trust until Mae died, at which time Attorney Jay L. Goldstein would become the trustee. Pursuant to the terms of the trust agreement, on December 22, 2005, the defendant, acting as trustee of the trust, transferred a one-half interest in Buffalo Bay to herself. The trust agreement further provided that the defendant would receive the other one-half interest in Buffalo Bay at the time of Mae's death. On the same day that Mae amended the trust, she also executed her last will and testament. Consistent with the terms of the trust agreement, article third of the will provides that all of Mae's interest in Buffalo Bay was bequeathed to the defendant. It further provides that, if the defendant predeceased Mae, Mae's Interest in Buffalo Bay would be devised to '[the defendant's] issue, per stirpes or if there shall be no such issue to [the plaintiff] if [the plaintiff] shall survive me, [or] if [the plaintiff] shall not survive me to [the plaintiff's] issue, per stirpes.' In article fourth of her will, Mae ***95** forgave the plaintiff's obligation to pay any outstanding amounts due to her pursuant to a December 22, 2001 promissory note in the principal amount of $700,000.[2] In article seventh of her will, Mae designated the defendant as the executor of her estate.

"Both the trust agreement and the will contain an in terrorem clause providing that, if a beneficiary takes certain actions, he or she forfeits his or her rights as a beneficiary under the instruments. The in terrorem clause in the trust agreement provides in relevant part: 'If [a] beneficiary under this [t]rust [a]greement ... directly or indirectly ... (iv) objects in any manner to any action ****1035** taken or proposed to be taken in good faith by any [t]rustee ... [and/or] (vii) files any creditor's claim against [the] [t]rustee (without regard to its validity) ... then that person's right as a beneficiary of this [t]rust [a]greement and to take any interest given to him or her by terms of this [t]rust [a]greement ... shall be determined as it would have been determined if the person and the person's descendants had predeceased [the] [s]ettlor without surviving issue....' The in terrorem clause in the will likewise provides in relevant part: 'If [a] beneficiary hereunder ... directly or indirectly ... (iv) objects in any manner to any action taken or proposed to be taken in good faith by any [e]xecutor or trustee ... [and/or] (vii) files any creditor's claim against my [e]xecutor (without regard to its validity) or trustee ... then that person's right as a beneficiary of this [w]ill and any [c]odicil thereto or trust ... shall be determined as it would have been determined if the person and the person's descendants had predeceased me without surviving issue....'

"Mae died on April 12, 2012. Thereafter ... Goldstein became the trustee of the trust pursuant to ***96** the terms of the trust, as well as the executor of Mae's estate, after the defendant declined to serve as the executor. While administering the estate ... Goldstein sent letters to the beneficiaries, including the defendant, which detailed their required contributions for the payment of certain taxes and fees incurred by the estate. The beneficiaries were also permitted to inspect the Form CT-706/709 Connecticut Estate and Gift Tax Return (CT-706) that ... Goldstein had filed on behalf of the estate. When the defendant reviewed the CT-706, she noticed that a Citizens Bank account that belonged solely to her mistakenly had been listed as an asset of the estate. The defendant's attorney, Alphonse Ippolito, also reviewed the CT-706. In doing so, he realized that ... Goldstein also had inflated the value of the estate and increased the beneficiaries' tax burdens by failing to deduct two outstanding loans that were secured by mortgages on Buffalo Bay.[3] ...

"Ippolito raised these apparent errors with ... Goldstein, who then asked the defendant to 'produce evidence verifying that the income received pursuant to the mortgages was expended in connection with the administration of the trust.' The defendant did so, but ... Goldstein still refused to amend the CT-706 either to remove the Citizens Bank account or to deduct the outstanding mortgages.... Goldstein did, however, indicate to ... Ippolito that he would amend the return if instructed to do so by the Probate Court. The defendant, on July 30, 2014, filed a request with the Probate Court for a hearing on these issues but later withdrew the request for unknown reasons.

"Thereafter, the plaintiff filed a complaint in the Probate Court [for the district of Branford-North Branford], ***97** alleging that the defendant's filing of her request for a hearing, and the issues raised therein, violated the in terrorem clauses in both the will and the trust agreement. Specifically, the plaintiff argued that the defendant had violated the in terrorem clauses by (1) filing a creditor's claim against the estate, and (2) challenging ... Goldstein's refusal to amend the CT-706. Enforcement of the in terrorem clauses as requested by the plaintiff would cause Mae's [bequest] of her one-half interest in Buffalo Bay to the defendant to be nullified and, pursuant to the terms of her [trust], result in that interest being bequeathed to the plaintiff. The plaintiff, on

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December 17, 2015, also instituted a lawsuit in Superior Court seeking to invalidate ... Goldstein's December, 2012 transfer by quitclaim deed of the estate's interest in Buffalo Bay to the defendant pursuant to the will and trust. In response to the plaintiff's complaint in the Probate Court, the defendant claimed that the plaintiff had violated the in terrorem clauses by delaying the administration of the estate and by instituting the Superior Court action seeking to invalidate the transfer of the estate's remaining interest in Buffalo Bay to the defendant.

****1036** "Following a hearing, the Probate Court concluded that neither the plaintiff nor the defendant had violated the in terrorem clauses. Furthermore, the Probate Court concluded that ... Goldstein had erred in including the Citizens Bank account in the estate's assets and ordered that it be removed from the accounting." (Footnotes in original.) *Salce* v. *Cardello*, supra, 210 Conn. App. at 68–71, 269 A.3d 889.

"The plaintiff appealed from the Probate Court's refusal to enforce the in terrorem clauses against the defendant to the Superior Court, pursuant to General Statutes § 45a-186 (b). The defendant then filed a counterclaim in that appeal, alleging that the plaintiff had violated the in terrorem clauses by instituting the ***98** December 17, 2015 action to invalidate ... Goldstein's transfer of the estate's interest in Buffalo Bay to the defendant pursuant to the will and the trust.

"The [trial court] held a five day trial de novo on the plaintiff's appeal and the defendant's counterclaim. Thereafter, the court issued a memorandum of decision, in which it concluded that neither party had violated the in terrorem clauses. With regard to the defendant, specifically, the court concluded that she had not violated the clauses because she (1) never filed a creditor's claim against the estate, and (2) acted in good faith, upon probable cause, and with reasonable justification when challenging ... Goldstein's actions in administering the estate and the trust, thus excusing any violations of the in terrorem clauses." (Footnotes omitted.) Id., at 72, 269 A.3d 889. Accordingly, the trial court rendered judgment dismissing the plaintiff's probate appeal, and for the plaintiff on the defendant's counterclaim. See id., at 68, 72 and n.5, 269 A.3d 889.

The plaintiff appealed from the judgment of the trial court to the Appellate Court, claiming, inter alia, [4] that "the defendant violated the in terrorem clauses when she challenged ... Goldstein's refusal (1) to remove her Citizens Bank account from the estate's CT-706, and (2) to deduct the outstanding mortgages from the value of the estate." Id., at 77, 269 A.3d 889. The Appellate Court agreed with the plaintiff's argument that "the defendant technically violated both clauses when she challenged ... ***99** Goldstein's actions"; id., at 78, 269 A.3d 889; but relied on this court's decisions in *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176–77, 101 A. 961, *Griffin* v. *Sturges*, supra, 131 Conn. at 482–83, 40 A.2d 758, and *Peiter* v. *Degenring*, 136 Conn. 331, 335, 71 A.2d 87 (1949), along with sister state decisions in *Sinclair* v. *Sinclair*, 284 Ga. 500, 502–503, 670 S.E.2d 59 (2008), and *In re Estate of Wojtalewicz*, 93 Ill. App. 3d 1061, 1063, 49 Ill.Dec. 564, 418 N.E.2d 418 (1981), to conclude that "application of the clear and unambiguous language of the in terrorem clauses punishes the beneficiaries of the estate and the trust [insofar as it prevents them] from objecting to any actions of the trustee, including nondiscretionary, ministerial acts. Because such a clause undermines important private and public interests with no corresponding benefit, it violates public policy." ****1037** *Salce* v. *Cardello*, supra, 210 Conn. App. at 80–81, 269 A.3d 889; see id., at 80, 269 A.3d 889 (noting "significant" and "important" interests of beneficiaries and state in ensuring correct tax payments). Thus, the Appellate Court concluded that, "although the defendant technically violated both in terrorem clauses when she challenged ... Goldstein's actions in administering the estate and the trust, enforcing the clauses as written would violate public policy." Id., at 82, 269 A.3d 889. Given this conclusion, the Appellate Court declined to decide whether the good faith and probable cause exception articulated in *South Norwalk Trust Co.* v. *St. John*, supra, at 176–77, 101 A. 961, applied in this case "because the clauses are unenforceable even in the absence of such an exception." *Salce* v. *Cardello*, supra, at 78, 269 A.3d 889. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., at 82, 269 A.3d 889. This certified appeal followed. See footnote 1 of this opinion.

We begin with the first certified question, namely, whether the defendant's actions constituted a violation of the in terrorem clauses, which is easily resolved. It is undisputed that the Appellate Court correctly concluded that the defendant had "technically violated" ***100** the unambiguous language of both in terrorem clauses, which "makes [it] clear that all challenges to any actions taken by ... Goldstein constitute a violation of the in terrorem clauses," when she "filed an application and request for a hearing before the Probate Court, in which she challenged ... Goldstein's preparation of the CT-706 ...." *Salce* v. *Cardello*, supra, 210 Conn. App. at 78–79, 269 A.3d 889; see, e.g., *Schwerin* v. *Ratcliffe*, 335 Conn. 300, 309–10, 238 A.3d 1 (2020) (observing that "[t]he cardinal rule of testamentary construction" is

to ascertain and effectuate settlor's intent as expressed in language of instrument, particularly if language is clear and unambiguous). Thus, our analysis turns to the second certified question and whether the law provides the defendant some relief from those provisions.

The plaintiff argues with respect to the second certified question that, because the Uniform Probate Code does not govern; see *Schwerin* v. *Ratcliffe*, supra, 335 Conn. at 317 n.14, 238 A.3d 1; in terrorem clauses are enforceable in Connecticut, which, as the plaintiff points out, protects "the absolute right of a testator to dispose of his [or her] property as he or she sees fit ...." The plaintiff contends that the in terrorem clauses in this case did not preclude all court challenges but, instead, barred only those that would challenge the good faith actions of the fiduciary, which "mitigate[s]" the public policy concerns expressed by the Appellate Court as a reason for not enforcing the in terrorem clauses in this case. The plaintiff argues that "[n]o Connecticut case appears to have applied the so-called public policy exception to claims against the good faith actions of the fiduciary" and contends that this court's decision in *Peiter* v. *Degenring*, supra, 136 Conn. 331, 71 A.2d 87, on which the Appellate Court relied, does not relate to in terrorem clauses. Ultimately, the plaintiff argues that "[t]he Appellate Court's decision creates an exception to Connecticut's rule [of] enforc[ing] no-contest clauses that has not ***101** previously been adopted in Connecticut ... [and that does not] appear to be recognized in any other state," which "is inconsistent with Connecticut's public policy and law [of] enforc[ing] the clear terms of a testator's or settlor's documents."

In response, the defendant contends that the Appellate Court properly held that it would violate public policy for "a beneficiary [to] be disinherited through the enforcement of an in terrorem clause for raising before the Probate Court and seeking to correct the clear-cut and ministerial errors of the fiduciary in his administration ****1038** of an estate and a trust."[5] Relying on *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176–77, 101 A. 961, *Griffin* v. *Sturges*, supra, 131 Conn. at 482–83, 40 A.2d 758, and *Peiter* v. *Degenring*, supra, 136 Conn. at 335, 71 A.2d 87, the defendant argues that the in terrorem clauses are unenforceable under the circumstances of the present case because their enforcement "would have the effect of penalizing [her] for seeking to correct ... Goldstein's mistakes in the preparation of the CT-706," as well as for "objecting to, for example, the discretionary investment decisions by a fiduciary ...." As sources of "public policy in favor of the correct administration of an estate or a trust by a fiduciary," the defendant relies on (1) a beneficiary's right to seek an accounting in the Probate Court under General Statutes §§ 45a-98 and 45a-175,[6] ***102** (2) the fiduciary's obligations under General Statutes § 45a-233 (d)[7] to minimize the tax burden of the estate or trust, and (3) a fiduciary's obligation under General Statutes § 45a-242 (a)[8] "not to mismanage estate assets or ****1039** commit waste." Observing that Goldstein "effectively ***103** invited" her to seek intervention by the Probate Court after "refus[ing] to correct his errors [in the absence of] a court order," the defendant emphasizes that application of the in terrorem clauses in the way advocated by the plaintiff would "have the effect of barring the defendant from seeking redress in the courts to correct the fiduciary's mistakes on the [CT-706], namely, the erroneous inclusion of the Citizens [Bank] account and the failure to account for the two loans in the value of the estate."[9] We agree with the defendant and conclude that the Appellate Court correctly determined that enforcement of the in terrorem clauses in this case would violate public policy.

"An appeal from a Probate Court to the Superior Court is not an ordinary civil action.... When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate.... In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or [common-law] jurisdiction, but of a Probate Court.... [When], as in ***104** the present case, no record was made of the probate proceedings, the Superior Court was required to under-take a de novo review of the Probate Court's decision." (Citation omitted; internal quotation marks omitted.) *Hynes* v. *Jones*, 175 Conn. App. 80, 92–93, 167 A.3d 375 (2017), rev'd on other grounds, 331 Conn. 385, 204 A.3d 1128 (2019); see General Statutes § 45a-186 (b) through (d); *Andrews* v. *Gorby*, 237 Conn. 12, 15–16, 675 A.2d 449 (1996); see also *In re Probate Appeal of Harris*, 214 Conn. App. 596, 600–601, 282 A.3d 467 (discussing more limited standard of review set forth in General Statutes § 45a-186b for "appeals taken under ... § 45a-186 from a matter heard on the record in the Probate Court" (footnote omitted)), cert. denied, 345 Conn. 918, 284 A.3d 299 (2022). Because the trial court and the Appellate Court considered issues of law, our review on appeal is plenary. See, e.g., *Hynes* v. *Jones*, supra, at 93, 167 A.3d 375.

"A testator may impose such conditions as he pleases [on] the vesting or enjoyment of the estate he leaves, provided

they are certain, lawful and not opposed ****1040** to public policy." *Peiter* v. *Degenring*, supra, 136 Conn. at 335, 71 A.2d 87. This includes in terrorem, or no-contest, clauses, which are defined as "provision[s] designed to threaten one into action or inaction; [especially], a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will." Black's Law Dictionary (11th Ed. 2019) p. 1258; accord *McGrath* v. *Gallant*, 143 Conn. App. 129, 132 n.1, 69 A.3d 968 (2013). As the Appellate Court recognized, the leading Connecticut decision with respect to in terrorem clauses is this court's 1917 opinion in *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. 168, 101 A. 961, which was a will contest. See, e.g., *Salce* v. *Cardello*, supra, 210 Conn. App. at 74, 81, 269 A.3d 889. In *South Norwalk Trust Co.*, this court noted that "[s]ubstantially all authorities agree that a testator may in some cases impose [on] a [beneficiary] a condition ***105** forfeiting his legacy if he contest[s] the validity of the will." *South Norwalk Trust Co.* v. *St. John*, supra, at 174, 101 A. 961; see id., at 174–75, 101 A. 961 (recognizing distinction drawn by English courts of equity, but rejected by majority of American courts, which enforced conditions "as to legacies of personal property, but not as to devises of land"). This court further observed that, because "the testator may attach any condition to his gift [that does not violate] law or public policy, the [beneficiary] must either take the gift with its conditions or reject it. The disposition of these authorities has been to sustain forfeiture clauses as a method of preventing will contests, which so often breed family antagonisms and expose family secrets better left untold, and result in a waste of estates through expensive and long drawn-out litigation." [10] Id., at 175, 101 A. 961.

Nevertheless, it is black letter law that such in terrorem provisions "must be strictly construed against forfeiture, enforced as written, and interpreted reasonably in favor of the beneficiary. No wider scope can be given to the [verbiage] employed than is plainly required; nor may the court place a strained or overly technical construction [on] the language. Forfeiture provisions in a will are to be strictly construed, and forfeiture [is to be] avoided if possible. Testamentary dispositions are presumed to vest at the testator's death, and cannot be divested unless the precise contingency prescribed by the testator occurs. It is only [when] the acts of the parties fall strictly within the express terms of the punitive clause of the will that a breach may be declared." (Footnotes omitted.) ***106** *In re Estate of Westfahl*, 674 P.2d 21, 24 (Okla. 1983); see, e.g., 80 Am. Jur. 2d, Wills § 1323 (2023) ("[a]s a general rule, such clauses are valid but are construed strictly and without extension beyond their express terms" (footnote omitted)).

In *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. 168, 101 A. 961, this court considered various exceptions to this "general rule of forfeiture ...." [11] ****1041** Id., at 175–76, 101 A. 961. Of particular relevance to this appeal, this court considered the "exception that a contest for which there is a reasonable ground will not work a forfeiture ...." Id., at 176, 101 A. 961. The court observed that, although it was a minority view at the time, it was the "better reason[ed]" position because it "rests [on] a sound public policy. The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and [no] others." Id. The court posited that "only [those] who have an interest in the will ... will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth; and the devolution of property will be had in a manner against both statutory and common law. *Courts exist to ascertain the truth and to apply the law to it in any given situation*; *and a right of devolution* [*that*] *enables a testator to shut the door of truth and prevent the* ***107** *observance of the law, is a mistaken public policy*. If, on contest, the will would have been held invalid, the literal interpretation of the forfeiture provision has suppressed the truth and impeded the true course of justice. If the will should be held valid, no harm has been done through the contest, except the delay and the attendant expense." (Emphasis added.) Id., at 176–77, 101 A. 961. The court emphasized that "[t]he effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made [upon] probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs." Id., at 177, 101 A. 961. Thus, the court reiterated that, given the aid furnished to the court by the good faith challenger, "[t]he contest will not defeat the valid will, but it may, as it ought, the invalid will." Id. "[When] the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. [When] the contrary appears, the [beneficiary] ought not to forfeit his legacy." Id.; see id., at 178, 101 A. 961 (This court deemed the good faith exception inapplicable because

“[t]he facts of record [were] silent as to whether this contest was begun in good faith, and whether there was probable cause and reasonable justification. The stipulated facts [did] not bring the case within this exception.”).

With respect to the public policy issues presented by the second certified question, we find particularly instructive this court's decision in *Griffin* v. *Sturges*, supra, 131 Conn. 471, 40 A.2d 758. In *Griffin*, the court first upheld the validity of a will provision that both required the testator's son to “give up and refrain from the use of intoxicating liquor” in order “to receive the income from the entire estate” and left to the Probate Court the factual determination of whether the son complied with that provision. Id., at 480, 482, 40 A.2d 758; see id., at 482, 40 A.2d 758 (emphasizing ***108** duty of “the trustee under the will ... to account to the Probate Court, which [had] jurisdiction over the settlement of his account”). Significantly, though, this court invalidated that provision to the extent it ****1042** rendered “the order of the [Probate Court] ... conclusive and [provided that] *no appeal shall be allowed* ....” (Emphasis added.) Id., at 482, 40 A.2d 758. This court held that “this incidental provision” of the clause was void as a matter of public policy; id., at 483, 40 A.2d 758; because it was “contrary to the statutes giving a right of appeal from any decree of a Court of Probate to the Superior Court ....” (Citation omitted.) Id., at 482–83, 40 A.2d 758.

Several more recent sister state decisions are consistent with *Griffin*'s protection of statutory remedies as a matter of public policy, particularly insofar as in terrorem clauses directed at challenges to fiduciary conduct implicate public policy concerns different from those directed at document formation; this is particularly so in the trust context of the present case. See D. Gordon, “Forfeiting Trust,” 57 Wm. & Mary L. Rev. 455, 508–512 (2015). These cases are consistent with what has been described as “the statutory duty exception” to the enforcement of in terrorem clauses; M. Begleiter, “Anti-Contest Clauses: When You Care Enough To Send the Final Threat,” 26 Ariz. St. L.J. 629, 652 n.149 (1994); see id., 652–53; because an “executor has a statutory duty to account that the beneficiaries can and should enforce,” with “[o]bjections to the fiduciary's accounting on the ground of mismanagement, delay or other failure not violating a no-contest clause” being “one common example ....” Id., 670. The cases are also consistent with § 96 (2) of the Restatement (Third) of Trusts, which provides that “[a] no-contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.” 4 Restatement (Third), Trusts § 96 (2), p. 28 (2012); see id., comment (e), pp. 31–32 (describing ***109** relationship between provision, which permits attacks on exercise of trustee's discretion, and in terrorem clauses oriented toward more traditional will contests).

With respect to these statutory duty cases, we deem especially persuasive the Georgia Supreme Court's decision in *Sinclair* v. *Sinclair*, supra, 284 Ga. 500, 670 S.E.2d 59. In *Sinclair*, the court considered whether an in terrorem clause would cause a beneficiary to forfeit his interest under a will by bringing an action for an accounting and the removal of the executor. Id., at 501, 670 S.E.2d 59. In addition to strictly construing the clause not to “amount to a contest of the will by objecting to its probate,” the court further held that “it would violate public policy to construe the condition in terrorem so as to require the forfeiture of a beneficiary's interest for bringing an action for accounting and removal of the executor.” (Internal quotation marks omitted.) Id., at 502, 670 S.E.2d 59. The court emphasized that, “[a]fter a will has been admitted to probate, certain duties and obligations are thereupon imposed by law on the named executor. He has no arbitrary powers to avoid the provisions of a will [that] he is appointed to execute, and the provision ... being considered cannot be construed to confer any such unbridled authority. The executor, therefore, remains amenable to law in all his acts and doings as such, and a beneficiary under the will, in seeking to compel the performance ... of his duty, will not be penalized for so doing.” (Internal quotation marks omitted.) Id., at 502–503, 670 S.E.2d 59. The court concluded that “a condition in terrorem cannot make an executor unanswerable for any violations of the will or of the laws governing personal representatives in Georgia. A beneficiary assuredly is empowered to enforce the provisions of a [will], no matter the terms of any in terrorem clause.” (Internal quotation marks omitted.) Id., at 503, 670 S.E.2d 59.

Similarly, in *In re Estate of Wojtalewicz*, supra, 93 Ill. App. 3d 1061, 49 Ill.Dec. 564, 418 N.E.2d 418, the Illinois Appellate ****1043** Court concluded ***110** that the in terrorem clause of a will clearly and unambiguously expressed the testator's intent to “[forbid] any proceeding to challenge any of the provisions of the will,” including its provision naming the executor. (Emphasis omitted.) Id., at 1062, 49 Ill.Dec. 564, 418 N.E.2d 418. The court concluded, however, that enforcement of the in terrorem clause “would violate the law and public policy of [Illinois]. First, it would deprive [the putative beneficiary] of his statutory right ... to request the court to deny the appointment of the executor for the latter's failure to initiate a proceeding to have the will admitted

to probate within [thirty] days of acquiring knowledge of being named as executor in the will." (Citation omitted.) Id., at 1063, 49 Ill.Dec. 564, 418 N.E.2d 418. The court emphasized that "it would violate public policy to give effect to the in terrorem clause [because] its enforcement would endanger the assets of the estate. Courts closely scrutinize an executor's behavior to [ensure] that the standards of fair dealings and diligence of an executor toward the estate are adhered to.... It is the duty of the executor to properly manage the estate and protect it from [wilful] waste.... The [putative beneficiary] sought to deny the appointment of the executor on grounds that the executor's lengthy period of inaction and his failure to file proper tax returns caused the estate to incur substantial penalties." (Citations omitted.) Id. The court concluded that "a [beneficiary] under [the] will ... [could not] be terrorized into relinquishing his legacy by any threat of forfeiture. Otherwise, he would be forced to stand by silently while the executor jeopardizes the assets of the estate. [The court would] not allow this result, because it permits the estate to be subject to waste and thereby diminishes the desired share of each beneficiary chosen by the testator under her will." Id., at 1064, 49 Ill.Dec. 564, 418 N.E.2d 418; see *In re Estate of Ferber*, 66 Cal. App. 4th 244, 253, 77 Cal. Rptr. 2d 774 (1998) ("The power of the court is invoked in probate matters, at least in substantial measure, to protect the ***111** estate and [to] ensure its assets are properly protected for the beneficiaries. [No-contest] clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision."); *In re Estate of Prevratil*, 121 App. Div. 3d 137, 148, 990 N.Y.S.2d 697 (2014) (given narrow construction of no-contest clauses, declining to "conclude that [the] decedent intended to preclude [the] petitioners from seeking letters of administration in the face of the named fiduciaries' inaction," and observing that, "even if [the] decedent's intent were to prohibit a beneficiary from questioning the conduct of a nominated fiduciary, such a broad [no-contest] clause would be void" under statutes governing fiduciaries); *Barr v. Dawson*, 158 P.3d 1073, 1076 (Okla. Civ. App. 2006) (discussing case law holding that spousal election does not invoke no-contest clause for public policy reasons), cert. denied, Oklahoma Supreme Court, Docket No. SD-103371 (February 27, 2007); see also *Redman-Tafoya v. Armijo*, 138 N.M. 836, 848–51, 126 P.3d 1200 (App. 2005) (claims for disinheritance and removal of executor were statutorily authorized and did "not constitute contests" for purposes of broad in terrorem clause).

We conclude, therefore, that an in terrorem clause violates public policy when its application would interfere with the Probate Court's exercise of its statutorily mandated supervisory responsibilities over the administration of an estate and its superintendence of the fiduciary's statutory obligations. As the defendant argues, the in terrorem clauses in this case implicate the Probate Court's supervision over the fiduciary via the accounting process under § 45a-175, which may be invoked at ****1044** the request of a beneficiary. See footnote 6 of this opinion. In connection with that accounting, the Probate Court was called on to consider whether Goldstein had properly discharged his responsibilities to minimize the estate's tax burden under § 45a-233 (d) ***112** and his broader obligation under § 45a-242 (a) not to mismanage estate assets or to commit waste. See footnotes 7 and 8 of this opinion.

We acknowledge the plaintiff's argument that this public policy exception interferes with a different public policy, namely, "enforc[ing] the clear terms of a testator's or settlor's documents." See, e.g., *Derblom v. Archdiocese of Hartford*, 346 Conn. 333, 347, 289 A.3d 1187 (2023) ("[the] primary objective in construing ... [a] will is to ascertain and effectuate [the testator's] intent" (internal quotation marks omitted)). Although we acknowledge that clauses barring review of the fiduciary's actions are different in kind from contests that attack the underlying validity of the will or trust document, consistent with discussion at oral argument before this court, we nevertheless conclude that the testator's prerogative to dispose of his or her property as he or she sees fit must yield to the Probate Court's exercise of its power to protect the assets of the estate, which would be impinged if a beneficiary risks disinheritance by bringing, in good faith, potential tax return errors to the attention of the Probate Court. Indeed, as the plaintiff's counsel acknowledged before this court at oral argument, the defendant permissibly could have avoided these potential disinheritance issues by waiting for a hearing on the accounting, rather than raising the issue more proactively. This amounts to a matter of form that would scarcely justify disinheritance as a matter of public policy, especially because the good faith participation of the beneficiary is an important aspect of facilitating the responsibility of the court under § 45a-175. See *In re Estate of Ferber*, supra, 66 Cal. App. 4th at 253–54, 77 Cal.Rptr.2d 774 (The court acknowledged that it "may have the primary responsibility to monitor an executor's actions" but observed that, "as a practical matter, the courts lack the resources to scrutinize every matter for executor malfeasance. They must rely on ***113** beneficiaries to be aware of the facts and raise cogent points."). Put differently, the "power of the

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court is invoked in probate matters, at least in substantial measure, to protect the estate and [to] ensure its assets are properly protected for the beneficiaries. No contest clauses that purport to insulate executors *completely* from vigilant beneficiaries violate the public policy behind court supervision." (Emphasis added.) Id., at 253, 77 Cal. Rptr. 2d 774.

We emphasize, however, that this statutory duty and public policy exception protects only those challenges to the actions of a fiduciary that are brought in good faith. Consistent with this court's decision in *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176–77, 101 A. 961, allowing for enforcement of in terrorem clauses against beneficiaries whose challenges to the actions of the fiduciary are found to be brought in bad faith or frivolously balances effectuating the settlor's intent to minimize litigation with enabling beneficiaries to aid the Probate Court in the exercise of its statutory responsibilities to protect the estate. See *In re Estate of Ferber*, supra, 66 Cal. App. 4th at 254, 77 Cal.Rptr.2d 774 (adopting "a balancing process" to protect salutary features of no-contest clause, including discouraging litigation and protecting the testator's intent, by "enforcing [no-contest] clauses against beneficiaries who attempt to oust the executor with a frivolous challenge," while allowing "beneficiaries who believe an executor is engaged in misconduct to bring the potential malfeasance to the court's attention without fear of being disinherited, furthering the public policy of eliminating errant executors"); D. Gordon, ****1045** supra, 57 Wm. & Mary L. Rev. 463 (proposing burden-shifting scheme that merges probable cause, good faith standard with public policy concerns as "a more coherent and balanced approach to trust forfeiture clauses" that recognizes "the settlor's interest in facilitating a smooth relationship between [his or] her fiduciar[ies] and beneficiaries without forfeiting the precious oversight that ***114** allows trusts to function properly"). But see *In re Estate of Prevratil*, supra, 121 App. Div. 3d at 148, 990 N.Y.S.2d 697 (concluding that no-contest clauses precluding challenges of fiduciary's actions are per se void and that such challenges need not be based on probable cause because neither case law nor statutory provisions impose probable cause requirement). Put differently, a finding that a challenge to a fiduciary's action was brought in bad faith or is frivolous means that the statutory duty exception will not, as a matter of public policy, shield the challenging beneficiary from the operation of an applicable in terrorem clause.

Given the trial court's supported finding that the defendant's challenge to Goldstein's filings was brought in good faith, we agree with the Appellate Court's conclusion that "Goldstein unquestionably made a mistake when he listed the defendant's Citizens Bank account as an asset of the estate. In strictly complying with the in terrorem clauses, however, the defendant could not seek judicial review to correct that mistake, without risking forfeiture, despite its potential impact on her finances, the assets of the estate, and the accuracy of ... Goldstein's filings with the Probate Court and the state of Connecticut. Such a result would violate public policy." (Footnote omitted.) *Salce* v. *Cardello*, supra, 210 Conn. App. at 81, 269 A.3d 889. We conclude, therefore, that the Appellate Court properly affirmed the judgment of the trial court. [12]

***115** ****1046** The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, ECKER and ALEXANDER, Js., concurred.

D'AURIA, J., dissenting.

In this certified appeal, the court today holds that, in terrorem clauses, also known as no-contest causes, violate the state's public policy, unless a beneficiary's challenge to a trustee's or executor's actions is in bad faith or frivolous. Specifically, the majority holds that "an in terrorem clause violates public policy when its application would interfere with the Probate Court's exercise of its statutorily mandated ***116** supervisory responsibilities over the administration of an estate and its superintendence of the fiduciary's statutory obligations." In my view, absent any pertinent legislative action, for a supposed interest to qualify as a "state public policy" sufficient to overcome an interest such as the one implicated here—a testator's right to impose such conditions as she pleases upon the vesting or enjoyment of her estate, which this court has consistently upheld—the public interest must be strong, important, clearly articulated, and dominant. This is especially so because our statutes provide mechanisms for the Probate Court to comply with its duty to oversee fiduciaries. Accordingly, I respectfully dissent.

Initially, I observe that, when asked to exercise our judicial authority to declare the public policy of the state, and to declare further that this public policy trumps otherwise legal actions or relationships, we have, in other contexts, considered closely—and appropriately so—the strength of the public interest we are being asked to vindicate measured

against other public or private interests at stake. See, e.g., *Priore* v. *Haig*, 344 Conn. 636, 658, 280 A.3d 402 (2022) (weighing public interest in public participation in public hearing on special permit application before town's planning and zoning commission against private interest of protecting individuals from false statements in determining if public policy justified application of immunity to statements made during hearing). We also carefully examine the sources from which we draw our conclusions about the supposed public policy of the state. See id.

For example, notwithstanding that contracts of employment for an indefinite term, at common law, were, and remain, terminable "at will," without the need for "a showing of just cause for dismissal"; *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 474, 427 A.2d 385 (1980); we have "sanctioned a common-law cause of action for wrongful discharge in situations in which the ***117** reason for the discharge involved impropriety 'derived from some important violation of public policy.' " *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 798, 734 A.2d 112 (1999), quoting *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, at 475, 427 A.2d 385. "[W]e repeatedly have underscored our adherence to the principle that the public policy exception to the general rule allowing unfettered termination of an at-will employment relationship is a narrow one .... Consequently, we have rejected claims of wrongful discharge that have not been predicated [on] an employer's violation of *an important and clearly articulated public policy*." (Emphasis added; internal quotation marks omitted.) ****1047** *Dunn* v. *Northeast Helicopters Flight Services, LLC*, 346 Conn. 360, 371, 290 A.3d 780 (2023). As we recognized in *Morris* v. *Hartford Courant Co.*, 200 Conn. 676, 513 A.2d 66 (1986), however, because of "the inherent vagueness of the concept of public policy, it is often difficult to define precisely the contours of the exception." Id., at 680, 513 A.2d 66. Said another way, it is not clear in every case precisely what public interest is at stake and, once identified, whether that public interest is sufficiently important or clearly articulated to justify applying the public policy exception to the at-will employment doctrine.

A complication that can arise, when considering whether to invalidate a contractual provision in the name of public policy, is that there may be competing public and private interests. For example, this court has recognized as "well established that parties are free to contract for whatever terms on which they may agree ... [although] it is equally well established that contracts that violate public policy are unenforceable." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392, 142 A.3d 227 (2016). In light of these dueling principles of law, a contract provision violates public policy, and is unenforceable, if it "negate[s] laws enacted for the ***118** common good or is designed to evade statutory requirements ...." (Internal quotation marks omitted.) Id., at 397, 142 A.3d 227.

A "specific application" of this "general [common-law] doctrine ... that a court may refuse to enforce contracts that violate law or public policy" is found in our cases in which a party to a voluntary arbitration agreement asks a court to vacate the arbitration award on the ground that enforcing it would violate public policy. (Internal quotation marks omitted.) *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 197, 947 A.2d 916 (2008). "The public policy exception applies only when the award is *clearly* illegal or *clearly* violative of a *strong* public policy." (Emphasis added; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 135, 855 A.2d 964 (2004). We have said further in this context that "the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's ... [award] is limited to situations [in which] the contract as interpreted would violate some *explicit* public policy that is well defined and *dominant*, and is to be ascertained by reference to the laws and legal precedents *and not from general considerations of supposed public interests*." (Emphasis added; internal quotation marks omitted.) Id., at 135–36, 855 A.2d 964. "[G]eneral notions of the public good, public accountability or the public trust are insufficient grounds for invoking the extremely narrow public policy exception to judicial enforcement of arbitral awards." *New Haven* v. *AFSCME, Council 4, Local 3144*, 338 Conn. 154, 187–88, 257 A.3d 947 (2021).

I would scrutinize with the same rigor as in these other contexts the claimed public policy the defendant, Joan Cardello, advances to invalidate the in terrorem clauses at issue in the present case. In other words, I believe that, for a public interest to constitute a public ***119** policy of such importance as to negate the clear and explicit intent of a testator, as stated in an in terrorem clause, the public interest must be strong, important, clearly articulated, and dominant. This approach is justifiable and logical, in my view, because, in weighing the importance of a probate court's supervision of fiduciaries and in ultimately vindicating this supposed public interest, this court should also be mindful of

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any competing interests—private or public—that our law has historically protected. If we fail to consider the strength of the competing public and private interests **1048 at stake, this court in essence becomes the "roving commission" we so often say we are not, arrogating to ourselves the "general legal oversight ... of private entities" in the name of vindicating public policy. *TransUnion LLC* v. *Ramirez*, ––– U.S. ––––, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568 (2021); see also *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 28, 287 A.3d 557 (2023).

In particular, for more than one century, this court has recognized the "general rule [that] a testator has the right to impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate ...." (Internal quotation marks omitted.) *De Ladson* v. *Crawford*, 93 Conn. 402, 410, 106 A. 326 (1919); accord *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 218, 27 A.2d 166 (1942); see also *Peiter* v. *Degenring*, 136 Conn. 331, 335, 71 A.2d 87 (1949) ("[a] testator may impose such conditions as he pleases upon the vesting or enjoyment of the estate he leaves, provided they are certain, lawful and not opposed to public policy"). Our courts have "sustain[ed] forfeiture clauses as a method of preventing will contests, which so often breed family antagonisms, and expose family secrets better left untold, and result in a waste of estates through expensive and long drawn-out litigation." *South Norwalk Trust Co.* v. *St. John*, 92 Conn. 168, 175, 101 A. 961 (1917); see also ***120** *McGrath* v. *Gallant*, 143 Conn. App. 129, 132, 69 A.3d 968 (2013) (testator inserted in terrorem clause into will given "history of strife among his children ... anticipat[ing] that the animosity among the siblings would only escalate after his death"); cf. *Parker* v. *Benoist*, 160 So. 3d 198, 205 (Miss. 2015) ("forfeiture clauses may serve a valuable purpose in deterring 'unwarranted challenges to the donor's intent by a disappointed person seeking to gain unjustified enrichment,' or preventing 'costly litigation that would deplete the estate or besmirch the reputation of the donor,' or discouraging 'a contest directed toward coercing a settlement—the so-called strike suit' "); *Russell* v. *Wachovia Bank, N.A.*, 370 S.C. 5, 12, 633 S.E.2d 722 (2006) ("[No-contest] clauses may protect estates from costly and time-consuming litigation and minimize the bickering over the competence and capacity of testators, and the various amounts bequeathed. ... No-contest clauses may have the desirable effect of ensuring that the details of a testator's private life are not made public." (Citation omitted; internal quotation marks omitted.). There has been no suggestion in the present case that these principles and interests do not apply equally to trusts.

More recently, we have reiterated that "[t]he cardinal rule of testamentary construction is the ascertainment and effectuation of the intent of the testator, if that [is] possible. If this intent, when discovered, has been adequately expressed and is not contrary to some positive rule of law, it will be carried out." (Internal quotation marks omitted.) *Schwerin* v. *Ratcliffe*, 335 Conn. 300, 310, 238 A.3d 1 (2020); see also *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 700, 859 A.2d 533 (2004) ("[i]t is well settled that in the construction of a testamentary trust, the expressed intent of the testator must control" (internal quotation marks omitted)). Thus, it is clear that Connecticut law has historically protected a testator's right to control his property while ***121** he or she is living, and by will to direct its use after his or her death, unless to effectuate that intent would violate a positive rule of law. See *Peiter* v. *Degenring*, supra, 136 Conn. at 335, 71 A.2d 87.[1] ****1049** One such "positive rule of law" in Connecticut is statutory: namely, that, regardless of any provisions in the will, a surviving spouse may, subject to certain exceptions, elect "to take a statutory share of the real and personal property passing under the will of the deceased spouse" rather than take what the deceased spouse has by will devised or bequeathed to the surviving spouse. General Statutes § 45a-436 (a).[2]

To secure a judicial determination that this competing interest in favor of upholding a testator's stated intent has been overcome—that is, it violates a positive rule of law—I would require a showing of a strong, important, clearly articulated, and dominant public interest that outweighs the private interests in allowing testators to devise their property as they see fit. In the present case, the defendant contends, and the majority agrees, that, when a beneficiary brings a good faith challenge to the actions of a fiduciary, enforcement of the in terrorem clauses at issue contravenes the administrative ***122** interests embodied in General Statutes §§ 45a-175, 45a-233 (d) and 45a-242 (a). See footnotes 6–8 of the majority opinion. Specifically, the majority holds that these statutes reflect policies important enough and strong enough to justify the judicial action the court takes today, invalidating in terrorem clauses employed for decades because beneficiaries assist the Probate Court in monitoring the actions of fiduciaries. I lack the majority's confidence that I can divine that this is in fact a sufficiently dominant public policy of our state. Instead, just as the majority would defer to the legislature consideration of whether the application of a good faith, probable cause exception constitutes an independent basis for relieving the defendant from the application of the in

terrorem clauses, I am reluctant to declare that these clauses violate public policy.

The majority's survey of the few other jurisdictions that have addressed the issue reveals that some courts have in fact held that these clauses are unenforceable because insulating the fiduciary from challenge violates the policy underlying state statutes requiring court supervision of these fiduciaries. The majority's discussion of these cases is accurate, and I will not repeat it here.

There are cases that take a different approach than the court does in the present case, however. For example, Wyoming courts have held that in terrorem clauses are enforceable, recognizing both a long judicial history of upholding of a testator's clearly expressed intent and the fact that Wyoming's legislature has not adopted the rule the majority in the present case adopts judicially, despite having had a chance to do so. Specifically, in *EGW* v. *First Federal Savings Bank of Sheridan*, 413 P.3d 106 (Wyo. 2018), the plaintiffs claimed that an in terrorem provision was ****1050** void because, by allowing a minor child's parents to deprive him of property, the provision violated the public policy underlying constitutional ***123** provisions protecting minors, providing for due process, and providing access to the courts. Id., at 111–12. In rejecting the plaintiffs' claim, the court emphasized its well established precedent upholding "the absolute right of the testator to dispose of his property after death as he sees fit, provided he is legally qualified so to do and acts as the law directs." (Internal quotation marks omitted.) Id., at 110. The court explained that "[n]o right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality.... In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law." (Internal quotation marks omitted.) Id.

The court in *EGW* noted that, because of that policy, the court in *Dainton* v. *Watson*, 658 P.2d 79, 81 (Wyo. 1983), "previously [had] rejected the claim that no-contest clauses are unenforceable as violative of public policy, even [when] a challenge to the testamentary instrument is made in good faith and with probable cause." *EGW* v. *First Federal Savings Bank of Sheridan*, supra, 413 P.3d at 110. Specifically, in *Dainton*, the trial court declared a bequest to the defendant forfeited pursuant to the terms of an in terrorem clause in the will. *Dainton* v. *Watson*, supra, at 79. The defendant appealed, claiming that the in terrorem clause was invalid because "public policy demands that those who contest wills in good faith and with probable cause to believe that a will is invalid should be protected from strict enforcement of the terms of a no-contest clause"; id., at 82; ***124** based on § 3-905 of the Uniform Probate Code, which provides: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." (Internal quotation marks omitted.) Id., at 80. The court in *Dainton* rejected the defendant's argument, holding that (1) the claim "ignore[d] the overriding policy of [the] court and the [well accepted] principle elsewhere that a testator's intent as determined by the language in his will is controlling"; id., at 82; and, (2) unlike the legislatures of other states, Wyoming's legislature had chosen not to incorporate § 3-905 of the Uniform Probate Code into Wyoming's then recent enactment of its probate code. Id.; see also *In re Houston's Estate*, 371 Pa. 396, 399, 89 A.2d 525 (1952) ("[I]f a testator may disinherit his children, he may also condition their legacies so that the happening of a certain event will result in their disinheritance. Here ... the widow was faced with the unfortunate choice of receiving a small legacy or causing the children to lose their bequests, but that, once again, is a question of the wisdom of the testator and not public policy."); T. Challis & H. Zaritsky, State Laws: No-Contest Clauses, p. 2 ("The largest group of states (22) adopt the Uniform Probate Code rule and state that no-contest clauses are enforceable, unless the contest is based on probable cause. Sixteen of these states have adopted [§] 2-517 and/or [§] 3-905 of the Uniform Probate Code, to this effect. See Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, ****1051** North Dakota, South Carolina, South Dakota, and Utah. Five more states, Iowa, Kansas, Maryland, Pennsylvania and Wisconsin, have a similar rule, but without using the specific language of the [Uniform Probate Code]."), available at http://www.actec.org/%1Fassets/1/6/%1FState_Laws_No_Contest%1F_Clauses_-_Chart.pdf) ***125** (last visited September 21, 2023).[3]

The two concerns raised by the court in *Dainton* apply equally in the present case. In my view, our state's probate administration statutes, which have existed for decades, in tandem and in harmony with in terrorem clauses, manifest at best a generalized notion of the public good; see *New Haven* v. *AFSCME, Council 4, Local 3144*, supra, 338 Conn. at 187–88, 257 A.3d 947; and not the strong, important, clearly articulated, and dominant public policy that we should require before acting judicially to overcome the testator's explicit intent. The court's holding today means that the enforcement of in terrorem clauses has been violating public policy since the advent of our current Probate Court system and that the innumerable in terrorem clauses inserted by individuals into wills and trusts for decades—perhaps centuries—are suddenly illegal notwithstanding that this court has "sustain[ed]" them for more than one century "as a method of preventing will contests ...." *South Norwalk Trust Co*. v. *St. John*, supra, 92 Conn. at 175, 101 A. 961.

***126** Moreover, despite various amendments to the statutes governing probate procedures, wills, and trusts in the last decade; see, e.g., Public Acts 2019, No. 19-137 (adopting Connecticut Uniform Trust Code, General Statutes § 45a-499a et seq.); Connecticut's legislature, unlike other state legislatures; see R. Weisbord, "The Governmental Stake in Private Wealth Transfer," 98 B.U. L. Rev. 1229, 1273 n.240 (2018), citing T. Challis & H. Zaritsky, supra, p. 2; never has amended the statutes governing the Probate Court to render in terrorem clauses unenforceable in their entirety or under particular circumstances, even though it has had the opportunity to do so. Specifically, the legislature has not adopted the Uniform Probate Code as a whole or § 3-905 to create an exception for good faith and probable cause. This is telling because the legislature has explicitly adopted particular sections of the Uniform Probate Code, showing that it knows how to do so when it wants to, but has not done so in relation to in terrorem clauses. See *In re Joshua S.*, 260 Conn. 182, 206 n.18, 796 A.2d 1141 (2002) (discussing legislative history of amendment to General Statutes § 45a–596, which explained that amendment "follow[ed] the lead of [****1052** Uniform Probate Code § 5-202]" (internal quotation marks omitted); G. Borrelli, "The Appointment of a Neutral Third-Party Conservator in Connecticut: Where Do We Stand?," 26 Quinnipiac Prob. L.J. 156, 175 (2012) ("Connecticut has adopted the [Uniform Probate Code's last resort] option to appointing a conservator as well as the clear and convincing evidence standard"). Nor has this court, until today, relied on as persuasive authority § 96 (2) of the Restatement (Third) of Trusts,[4] which ***127** provides that "[a] no-contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust." See, e.g., *Ferguson* v. *Ferguson*, 167 Idaho 495, 506, 473 P.3d 363 (2020) (relying on § 96 (2) of Restatement (Third) of Trusts to hold that in terrorem clause was unenforceable).

The majority itself acknowledges that it is for the legislature to determine whether a good faith and probable cause exception applies to in terrorem clauses, allowing beneficiaries to object to a fiduciary's actions if they do so in good faith and with probable cause. Although the majority states that it is not deciding the applicability of the good faith, probable cause exception by holding that in terrorem clauses are viable only when ***128** a beneficiary's challenge to the fiduciary's actions is not brought in good faith, the majority, in essence, takes this decision out of the legislature's hands.

The majority takes this action by invoking the public interest in the Probate Court's supervision of fiduciaries but fails to explain how the enforcement of in terrorem provisions has hampered this interest in the decades that these kinds of clauses have been quietly coexisting with our statutes governing probate proceedings. The answer may lie in the fact that other statutes ****1053** provide means for the Probate Court to supervise fiduciaries and have for decades. Although it is true that beneficiaries may assist the Probate Court in monitoring the actions of fiduciaries; see General Statutes § 45a-175 (c) (1) ("[a]ny beneficiary of an inter vivos trust may petition a Probate Court specified in section 45a-499p for an accounting by the trustee or trustees"); the Probate Court's duty and power to supervise fiduciaries are not limited to issues that beneficiaries raise. Rather, it is undisputed in the present case that, eventually, there would have been a final accounting at which time the Probate Court would have been required to review the filings at issue and could have addressed any errors. See General Statutes § 45a-175 (a) (Probate Court "shall have jurisdiction of the interim and final accounts of testamentary trustees"); General Statutes § 45a-177 (a) ("[a]ll conservators, guardians and trustees of testamentary trusts, unless excused by the will creating the trust, shall render periodic accounts of their trusts signed under penalty of false statement to the Probate Court having jurisdiction for allowance, at least once during each three-year period and more frequently if required by the court or by the will or trust instrument creating the trust"); General Statutes § 45a-286 ("[a]ny court of probate shall, before proving or disapproving any last will and testament, or codicil thereto, hold a hearing thereon, of which notice, either public or

personal ***129** or both, as the court may deem best, has been given to all parties known to be interested in the estate, unless all parties so interested sign and file in court a written waiver of such notice, or unless the court, for cause shown, dispenses with such notice"). Additionally, although our statutes allow beneficiaries to raise challenges to the actions of a trustee or executor, they also allow probate courts to challenge and penalize trustee or executor misconduct on their own motion. See General Statutes § 45a-242 (a) ("[t]he Probate Court having jurisdiction may, upon its own motion ... after notice and hearing, remove any fiduciary"); General Statutes § 45a-98 (a) (6) (Probate Court, "to the extent provided for in section 45a-175, [may] call executors, administrators, trustees ... to account concerning the estates entrusted to their charge"). Thus, contrary to the majority's contention, in terrorem clauses do not allow testators to "shut the door of truth and prevent the observance of the law ...." (Internal quotation marks omitted.)

The in terrorem clauses at issue in the present case in particular provide another means for the Probate Court to supervise fiduciaries. These clauses explicitly contemplate actions by the beneficiary that would not implicate these clauses. Specifically, both clauses prohibit a beneficiary from objecting to the fiduciary's actions but only so long as the fiduciary has taken those actions in good faith.[5] Thus, if the ****1054** fiduciary in ***130** the present case did not take a defensible position on the inclusion of the allegedly improper information in the tax documents, the in terrorem clauses would not protect the fiduciary against action by the beneficiary.

But the clauses also contemplate that the executor or trustee might make mistakes or that there might be good faith disagreements over actions the executor or trustee might undertake. Nonetheless, it is clear from the language of the clauses that the testator intended for the determinations of the executor or trustee, absent bad faith, to be the end of the matter. This result would not be so unusual. Under our various standards of review, our courts are required under certain circumstances to tolerate the mistakes of other denominated decision makers, even when the court itself would have made different findings or reached different conclusions. See, e.g., *McCann* v. *Dept. of Environmental Protection*, 288 Conn. 203, 217, 952 A.2d 43 (2008) ("[F]actual errors do not constitute grounds for vacating the arbitrator's decision.... [T]he arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the [ground] that ... the interpretation of the agreement by the arbitrators was erroneous." (Citation omitted; internal quotation marks omitted.)).

In my view, enforcing the in terrorem clauses in this case implicates no issues of public importance. Rather, the facts of the present case illustrate how broadly applying a generalized —and in this case, at best, administrative—interest in the name of "public policy" constitutes ***131** an unwarranted intrusion on private interests. This is not a case involving a beneficiary who acted as a whistle-blower, shedding light on scandalous or improper behavior by a fiduciary. Rather, the defendant, as the single beneficiary of nearly the entire estate of the decedent, challenged the executor's filing of an allegedly inaccurate tax return. Describing the supposed public policy at stake as "the state's interest in receiving accurate tax filings and payments"; *Salce* v. *Cardello*, 210 Conn. App. 66, 80, 269 A.3d 889 (2022); or the fiduciary's actions as "endanger[ing] the interests of the beneficiaries or the estate," dresses up what is essentially a dispute about how much the defendant would receive from the estate. Id., at 81, 269 A.3d 889. Perhaps the fiduciary's actions resulted in the estate's overpayment of taxes and therefore, perhaps, in turn, reduced the defendant's inheritance. As far as I can see, no state interest justifies voiding previously valid in terrorem clauses on the ground of public policy. The testator expressly stated her intent that beneficiaries should not contest the actions of the executor or trustee and thereby waste time and money on such a dispute.

That this is fundamentally a private matter not implicating a strong, important, clearly articulated, and dominant public policy is made even more clear by the fact that the testator originally appointed the defendant the executor of her estate. As the executor, the defendant would have been the one to file the tax documents at issue and, presumably, would have insisted on including what, in her view, was the accurate information. Instead of being personally involved in filing the tax documents, however, the defendant declined to take on the executor role her mother had asked her to, instead deciding to second-guess determinations the executor made in his role that might be against her interest. By the terms of the trust and will, that is ****1055** exactly what her mother did not want. I fail to see a public interest strong enough, ***132** clear enough, and important enough to overcome the testator's own interest in placing a condition on the distribution of the trust's proceeds to any and all beneficiaries, either to prevent family strife or to prevent dissipation of the estate.

Accordingly, I respectfully dissent.

All Citations

348 Conn. 90, 301 A.3d 1031

Footnotes

1 We granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the defendant had violated the in terrorem clauses in the decedent's will and trust agreement when the defendant challenged the trustee's refusal (1) to remove her bank account from the estate's Connecticut estate and gift tax return, and (2) to deduct the outstanding mortgages from the value of the estate?" *Salce* v. *Cardello*, 343 Conn. 902, 272 A.3d 657 (2022).

(2) "If the answer to the first question is 'yes,' did the Appellate Court correctly conclude that enforcement of the in terrorem clauses in the decedent's will and trust agreement would violate public policy and that the clauses, therefore, were unenforceable as to the defendant's conduct?" Id.

And (3) "[i]f the answer to the second question is 'no,' does the good faith exception to the enforcement of in terrorem clauses apply in this case?" Id.

2 "The will describes the payee of the promissory note as Mae's deceased husband, John J. Salce." *Salce* v. *Cardello*, supra, 210 Conn. App. at 69 n.1, 269 A.3d 889.

3 "In her role as trustee, the defendant took out two loans that were secured by mortgages on Buffalo Bay so that she could pay for expenses related to the property." *Salce* v. *Cardello*, supra, 210 Conn. App. at 70 n.2, 269 A.3d 889.

4 The plaintiff also claimed on appeal that the defendant had violated the in terrorem clauses of the will and the trust by filing a creditor's claim against the estate. See *Salce* v. *Cardello*, supra, 210 Conn. App. at 74, 269 A.3d 889. The Appellate Court held that the trial court's finding that there was no creditor's claim was not clearly erroneous because there was no evidence that the defendant had ever made a written demand for payment or reimbursement to Goldstein as contemplated by General Statutes §§ 45a-353 (d) and (e) and 45a-358 (a). See id., at 75–76, 269 A.3d 889. The plaintiff does not challenge the Appellate Court's conclusion in this respect in this certified appeal, and we need not consider it further.

5 Implicating the third certified question; see footnote 1 of this opinion; the defendant also argues that, "even if the subject in terrorem clause is not unenforceable as against public policy, the defendant's actions here would be subject to the long recognized good faith exception to the enforcement of in terrorem clauses because her efforts to correct the fiduciary's mistakes were taken in good faith and upon probable cause." See *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176–77, 101 A. 961. Given our conclusion as to the second certified question, we, like the Appellate Court, need not reach the defendant's arguments as to the third certified question. See also footnote 12 of this opinion.

6 General Statutes § 45a-175 provides in relevant part: "(a) Probate Courts shall have jurisdiction of the interim and final accounts of testamentary trustees, trustees appointed by the Probate Courts, conservators, guardians, executors and administrators, and, to the extent provided for in this section, shall have jurisdiction of accounts of the actions of trustees of inter vivos trusts and agents acting under powers of attorney.

"(b) A trustee or settlor of an inter vivos trust or the successor of the trustee, settlor or his or her legal representative may petition a Probate Court specified in section 45a-499p for submission to the jurisdiction of the court of an account for allowance of the trustee's actions under such trust.

> "(c) (1) Any beneficiary of an inter vivos trust may petition a Probate Court specified in section 45a-499p for an accounting by the trustee or trustees. ..."

General Statutes § 45a-98 (a) (6) provides in relevant part that probate courts, "to the extent provided for in section 45a-175, [may] call executors, administrators, [and] trustees ... to account concerning the estates entrusted to their charge ...."

7 General Statutes § 45a-233 (d) provides in relevant part: "No discretionary power or authority conferred upon a fiduciary as provided in sections 45a-233 to 45a-236, inclusive, may be exercised by such fiduciary in such a manner as, in the aggregate, to deprive the trust or the estate involved of an otherwise available tax exemption, deduction or credit ... except as otherwise prescribed by the testator or settlor, or operate to attract or impose a tax upon a settlor or estate of a testator or upon any other person as owner of any portion of the trust or estate involved.... The exercise of a power in violation of the restriction contained in this subsection shall render the action by the fiduciary or any other person with regard to that violation void. 'Tax' means a federal, state, whether that of Connecticut, another state or territory of the United States, the District of Columbia or the Commonwealth of Puerto Rico, local, municipal or foreign, whether national, provincial, state, local or municipal, income, gift, estate, generation-skipping, inheritance, succession, accessions or other death tax, duty or excise imposed on the transfer of property at death or by gift...."

8 General Statutes § 45a-242 (a) provides in relevant part: "The Probate Court having jurisdiction may, upon its own motion or upon the petition of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substantially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available...."

9 The defendant argues that the plaintiff's reliance on the clause language seeking only to insulate the "good faith" actions of the fiduciary from challenge is ineffectual in this respect because it "would still prohibit a beneficiary from seeking to correct mistakes made by the fiduciary, such as those made by ... Goldstein on the CT-706 ... simply by arguing [that] he was acting in good faith, even though he was objectively mistaken." Noting that the trial court found as a factual matter that "the inclusion of the Citizens [Bank] account and the failure to account for the mortgage[s] in the value of the estate were erroneous actions," she emphasizes that, "[b]y their very nature, mistakes are often actions that are taken in good faith but are nonetheless wrong. There is still a strong public interest in favor of correcting those mistakes to, for example, ensure that an estate tax return is accurate. This interest remains the same *even if the trustee or executor was acting in good faith at all relevant times*." (Emphasis in original.)

10 Contemporary authorities continue to echo these considerations supporting the use of in terrorem clauses. See, e.g., *Russell* v. *Wachovia Bank, N.A.*, 370 S.C. 5, 12, 633 S.E.2d 722 (2006) (The court observed

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that no-contest "clauses may protect estates from costly and time-consuming litigation and minimize the bickering over the competence and capacity of testators, and the various amounts bequeathed.... No-contest clauses may have the desirable effect of ensuring that the details of a testator's private life are not made public." (Citation omitted; internal quotation marks omitted.)).

11 The court described the first exception as "not an exception," observing that, "[i]f the action of a [beneficiary] is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning." *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176, 101 A. 961. The court deemed this doctrine inapplicable because the probate appeal "did not ... raise the question of the construction of [the] will." Id.

12 Like the Appellate Court, our conclusion as to the public policy exception means that we do not need to consider the third certified question, which asks us to consider the application of the good faith, probable cause exception discussed in *South Norwalk Trust Co.* v. *St. John*, supra, 92 Conn. at 176–77, 101 A. 961, as an independent basis for relieving the defendant from the application of the in terrorem clauses. The plaintiff's argument that *South Norwalk Trust Co.* is nonbinding dictum leads us to the work of commentators who have suggested that the time is apt for refinement of the law governing such in terrorem clauses, particularly given their relative lack of effectiveness and the increasing transmission of wealth from members of the baby boomer generation to their descendants in coming years, including via the use of nonprobate assets and instruments. See, e.g., M. Begleiter, supra, 26 Ariz. St. L.J. 678–79; G. Beyer et al., "The Fine Art of Intimidating Disgruntled Beneficiaries with *In Terrorem* Clauses," 51 SMU L. Rev. 225, 268–69, 274 (1998); R. Domsky, "*In Terrorem* Clauses: More Bark Than Bite?," 25 Loy. U. Chi. L.J. 493, 505 (1994); E. Shaheen, Note, "In Terrorem Clauses: Broad, Narrow, or Both?," 95 Notre Dame L. Rev. 1763, 1782–83 (2020).

Thus, the continuing vitality of that exception, which is now a nationwide majority position modeled on *South Norwalk Trust Co.*; see, e.g., *Parker* v. *Benoist*, 160 So. 3d 198, 204–206 and n.7 (Miss. 2015); *Russell* v. *Wachovia Bank, N.A.*, 370 S.C. 5, 12, 633 S.E.2d 722 (2006); presents an issue "of public policy, and, [i]n areas [in which] the legislature has spoken ... the primary responsibility for formulating public policy must remain with the legislature." (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 659, 224 A.3d 147 (2020); see also *Butler* v. *Stegmaier*, 77 Va. App. 115, 134–35, 884 S.E.2d 806 (2023) (declining to adopt good faith and probable cause exception to enforcement of no-contest clauses as matter of public policy because "it is the role of the [Virginia] General Assembly to evaluate and adopt or discard particular public policy changes as the elected representatives of Virginians directly accountable to the citizenry"); *EGW* v. *First Federal Savings Bank of Sheridan*, 413 P.3d 106, 111–12 (Wyo. 2018) (noting that Wyoming legislature had "chosen not to incorporate § 3-905 of the Uniform Probate Code," which provides for good faith and probable cause exception, into recently enacted probate code, in declining to apply such exception as matter of common law); K. Blanco & R. Whitacre, "The Carrot and Stick Approach: In Terrorem Clauses in Texas Jurisprudence," 43 Tex. Tech L. Rev. 1127, 1137–38 (2011) (discussing "[the] delicate balance of competing interests and values" that attends formulation and enforcement of rule concerning validity of no contest clauses). We therefore leave to another day—and more aptly to the legislature—the continuing vitality of the good faith and probable cause exception.

1 It has been said that the law "abhors a forfeiture" and that, as the Appellate Court recognized, in terrorem clauses "are disfavored by the courts and thus must be construed strictly to prevent forfeiture." *Salce* v. *Cardello*, 210 Conn. App. 66, 74, 269 A.3d 889 (2022). These are, at best, maxims as opposed to positive rules of law. See *Micek-Holt* v. *Papageorge*, Superior Court, judicial district of Windham at Putnam, Docket Nos. CV-14-6008881-S and CV-15-5006173-S, 2016 WL 6393593 (September 26, 2016) ("court is mindful of the [maxim] 'equity abhors a forfeiture' "), aff'd, 180 Conn. App. 540, 183 A.3d 1213, cert. denied, 328 Conn. 934, 183 A.3d 634 (2018). Like the Appellate Court, the majority does not attempt to arrive at a narrow

construction of the clauses at issue to prevent a forfeiture, nor could it given their broad language. Rather, both the Appellate Court and the majority have invalidated the clauses entirely, an altogether different undertaking for which there is no equivalent maxim.

2 A "statutory share" means "a life estate of one-third in value of all the property passing under the will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate." General Statutes § 45a-436 (a).

3 Additionally, some state courts have upheld in terrorem clauses as a matter of public policy because they recognize a distinction between challenges to the provisions of the will or trust and challenges to the trustee's or executor's action. See *McLendon* v. *McLendon*, 862 S.W.2d 662, 679 (Tex. App. 1993, writ denied) ("We construe the language of the in terrorem clause to prohibit a beneficiary from contesting the validity of the will or seeking to attach, modify, or impair the validity of the provisions. It does not prohibit a beneficiary from instituting legal action against a [coexecutor] for breach of fiduciary duties. We disagree with [the coexecutor's] contention that the clause applies to any challenge of the [coexecutor's] right to engage in business in partnership form. The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship."); *In re Estate of Rimland*, 2003 WL 21302910, *2 (N.Y. Sur. June 3, 2003) ("In terrorem clauses are designed to prevent attacks on the validity of a will and it has been held that they do not come into play where the issue is whether a fiduciary nominated in the will is qualified to serve in that capacity (*In re Estate of Stralem*, 181 Misc. 2d 715, 695 N.Y.S.2d 274 [1999]) or where the issue is whether a legacy to a charity under the will is barred under the law (*In re Estate of Alexander*, 90 Misc. 2d 482, 395 N.Y.S.2d 598 [1977]).").

4 Comment (e) to § 96 (2) of the Restatement (Third) of Trusts provides in relevant part: "The rule of Subsection (2) provides only that an otherwise enforceable no-contest clause is unenforceable insofar as doing so would inhibit beneficiaries' enforcement of their rights under a trust (whether created by the will or other instrument) or would otherwise undermine the effective, proper administration of the trust. Suits to enforce the duties of trustees, or to determine the proper meaning or effect of the terms of a trust or to enforce those terms, normally have the effect of seeking to ascertain and implement settlor intentions and trust provisions under the instrument—rather than constituting a 'contest' or challenge to the instrument or its provisions.

"Accordingly, a no-contest clause ordinarily (see Reporter's Note, final paragraph) is unenforceable to prevent or punish: a beneficiary's petition for instructions (§ 71, even though, for example, it seeks an interpretation contrary to the trustee's interpretation—and see further Reporter's Note to this Comment); a demand for or challenge to a trustee's accounting (§ 83); a suit to enjoin or redress a breach of trust (§ 95); a petition for removal of a trustee for unfitness or for repeated or serious breach of trust (§ 37); a suit alleging that a trustee's particular exercise of discretion or even 'absolute' discretion constituted an abuse of discretion (§ 87); or the like. Similarly, a beneficiary's allegation that a trustee's misconduct exceeded the standard of misconduct permissibly protected by an exculpatory clause (Comments b and c) is not a contest of that provision of the instrument. See generally § 27 (2) and § 27, Comment b, and Reporter's Note thereto. See also Restatement Third, Property (Wills and Other Donative Transfers) § 8.5, Comment d, on suits to construe, reform, or modify.

"The rule of this Subsection (2) does not prevent enforcement of a no-contest clause insofar as it would, absent probable cause, exact forfeiture: (a) for a beneficiary's challenge to the validity of a trust or trust provision on grounds of incapacity (§ 11), lack of due execution (§§ 17–23), or forgery, fraud, undue influence, or other wrongful procurement (§ 12); or (b) for a beneficiary's claim either (i) as a creditor or (ii) as the owner of property that the settlor intended to include in the trust, provided, in either case, that the no-contest clause is clearly intended to apply to such a claim." 4 Restatement (Third), Trusts, § 96 (2), comment (e), pp. 31–32 (2012).

5 The in terrorem clause in the trust agreement provides in relevant part: “If [a] beneficiary under this [t]rust [a]greement ... directly or indirectly ... (iv) objects in any manner to any action taken or proposed to be *taken in good faith by any* [*t*]*rustee* ... [and/or] (vii) files any creditor's claim against [the] [t]rustee (without regard to its validity) ... then that person's right as a beneficiary of this [t]rust [a]greement and to take any interest given to him or her by terms of this [t]rust [a]greement ... shall be determined as it would have been determined if the person and the person's descendants had predeceased [the] [s]ettlor without surviving issues ....” (Emphasis added.)

The in terrorem clause in the will likewise provides in relevant part: “If [a] beneficiary hereunder ... directly or indirectly ... (iv) objects in any manner to any action taken or proposed to be *taken in good faith by any* [*e*]*xecutor or trustee* ... [and/or] (vii) files any creditor's claim against my [e]xecutor (without regard to its validity) or trustee ... then that person's right as a beneficiary of this [w]ill and any [c]odicil thereto or trust ... shall be determined as it would have been determined if the person and the person's descendants had predeceased me without surviving issue. ...” (Emphasis added.)

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THE SUPREME COURT OF NEW HAMPSHIRE

10th Circuit Court-Brentwood Probate Division
No. 2021-0138

IN RE THE OMEGA TRUST

Argued: November 18, 2021
Opinion Issued: May 12, 2022

Casassa Law Office, of Hampton (Lisa J. Bellanti on the brief and orally), for the petitioner.

Barradale, O'Connell, Newkirk & Dwyer, P.A., of Bedford (Pamela J. Newkirk on the brief and orally), for the respondent-trustee.

Shaheen & Gordon, P.A., of Concord (Benjamin T. Siracusa Hillman and Stephanie K. Annunziata on the brief, and Benjamin T. Siracusa Hillman orally), for the respondent-special trustee.

HANTZ MARCONI, J. The petitioner, David J. Apostoloff, appeals an order of the Circuit Court (Weaver, J.) dismissing his petition to validate a purported amendment to the Omega Trust. He contends that the court erred when it dismissed his petition by finding that the grantor did not substantially

comply with the terms of the trust regarding amendments, and that there was not clear and convincing evidence that the grantor intended to amend his trust. For the reasons set forth below, we reverse and remand.

The petitioner alleges the following facts, which we accept as true for purposes of this appeal. See Elter-Nodvin v. Nodvin, 163 N.H. 678, 679 (2012). The Omega Trust was established by executed trust agreement on December 30, 2005, by the grantor, Mark Frank Douglas. The Omega Trust was twice amended, once in June 2015 and once in September 2015.

The relevant portions of the Omega Trust, regarding amendments and their execution, provide:

> [Paragraph] 19. AMENDMENT AND REVOCATION. The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.
>
> . . . .
>
> [Paragraph] 22. EXECUTION. This trust agreement, and any amendments hereto, shall be effective when executed by the Grantor, notwithstanding that the signature of the Trustee is provided for, the Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only.
>
> This trust agreement may be executed in any number of counterparts with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together and shall constitute one agreement.

In July 2016, the grantor informed his Trust Protector[1] that he was in poor health and asked her for assistance "in preparing the Third Amendment" to the Omega Trust. He informed her "of the changes that he planned to make and she assisted him in drafting an email to his attorney . . . to make the

[1] "A trust protector . . . is any person, other than a trustee, who under the terms of the trust, an agreement of the qualified beneficiaries, or a court order has a power or duty with respect to a trust, including, without limitation, one or more" of the 13 enumerated powers in RSA 564-B:12-1201 (2019).

changes to the trust." The grantor also informed the trustee "that he was making changes to [the Omega] Trust and he was contacting his attorney to amend" the same.

In August, the grantor emailed his attorney about updating his estate plan documents, including "his desire to amend the [Omega] Trust, with specific instructions on what he wished to do," and informed the attorney of his "significant health issues." The grantor's instructions provided for a number of changes, including that "he wished to add successor trustees and successor trust protectors," and to include four additional beneficiaries. On August 12, his attorney responded "with some questions about the changes requested." On August 16, the attorney sent an email to the grantor that "summarized and confirmed the current actions to be taken regarding [the grantor's] estate plan," and indicated that his law firm was "working on the revised documents now." In this email, the attorney explained that the firm "will prepare an Amendment to the Omega Trust," and noted the changes that the trust would reflect including, among other things, the distribution of tangible property and trust shares. The email summary also provided for changes to some of the grantor's other trusts. The grantor replied: "Very nice job, there are just a few suggested changes as noted below." That night, the attorney responded that the firm "will prepare the revised documents accordingly." On August 18, the grantor died without having signed the Third Amendment.

In August 2019, the petitioner sought a declaration by the court that the series of emails between the grantor and his attorney constituted a valid third amendment to the Omega Trust. The special trustee of the Omega Trust[2] filed a motion to dismiss the petition; the petitioner objected. The court found that the "exchange of the e-mails did not substantially comply with the terms of the [Omega] Trust." The court based its finding, in part, on "the history of how the Trust was amended in the past and the language of the Trust." The history and language of the trust, the court found, showed that the grantor "understood that documents amending the [Omega] Trust must be signed" and that "notice to the trustee included having the trustee acknowledge the receipt of the amendment."

The court also considered the "overall nature" of the emails, which it explained involved instructions to revise "an entire estate plan," not simply the Omega Trust. Noting that the attorney's response indicated that documents "will" be drafted, the court found it was "clear that [the grantor] expected that documents were to be prepared and forwarded to him for final review and signature." The court, therefore, found that because the Omega Trust

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[2] At the time of the petition, the trustee of the Omega Trust believed he had a conflict of interest given the changes to the beneficial interests of the Omega Trust, under the purported amendment. The court appointed a special trustee to represent the interests of the beneficiaries.

“required all amendments to be executed, the failure to execute any amendment require[d] a finding that the petition must be dismissed.”

The court further found that the petitioner had not shown “by clear and convincing evidence that [the grantor] intended the e-mails to be the amendment to his trust.” “Indeed,” the court observed, the grantor “was still making corrections and waiting to see the final version from his attorney when he died.” Specifically, the court noted that the grantor’s “last e-mail does not indicate any intention that the amendment was completed at that point.” The court dismissed the petition; the petitioner appealed.

In reviewing the trial court’s grant of a motion to dismiss, our standard of review is whether the allegations in the petitioner’s pleadings are reasonably susceptible of a construction that would permit recovery. Automated Transactions, LLC v. Am. Bankers Ass’n, 172 N.H. 528, 532 (2019). We assume that the facts set forth in the petitioner’s pleadings are true and construe all reasonable inferences in the light most favorable to the petitioner. See id. We need not assume, however, the truth of statements in the pleadings that are merely conclusions of law. Elter-Nodvin, 163 N.H. at 680. We then engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations do not constitute a basis for legal relief, we must uphold the granting of the motion. Id. In conducting this inquiry, we may also consider documents attached to the pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the petition. See Automated Transactions, LLC, 172 N.H. at 532.

On appeal, the petitioner contends that the trial court erred when it dismissed his petition to validate the Third Amendment because the grantor “clearly and unequivocally sought to amend the [Omega] Trust.” He maintains that the email exchange between the grantor and his attorney, “instruct[ing] his attorney . . . to prepare a Third Amendment and Restatement reflect[s] [the grantor’s] intent.” Resolving this appeal requires that we interpret provisions of the New Hampshire version of the Uniform Trust Code (UTC), see RSA ch. 564-B (2019 & Supp. 2021). To do so, we rely upon our ordinary, well-established rules of statutory construction. Hodges v. Johnson, 173 N.H. 595, 604 (2020). Under those rules, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. See id. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Id. We also rely upon the official comments to the UTC. Id.

RSA 564-B:6-602 governs the revocation or amendment of a revocable trust. Paragraph (c) provides that a settlor may revoke or amend a revocable trust by two methods: first, under (c)(1), “substantial compliance with a method provided in the terms of the trust,” or, second, under (c)(2), by “any other

method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the terms of the trust." RSA 564-B:6-602(c). We need not decide, here, whether the facts, as pled, constitute "substantial compliance" with the trust terms because we conclude that the petitioner adequately pled an alternative method of amendment under subparagraph (c)(2).

Here, the terms of the Omega Trust provide, in pertinent part, that the grantor may amend the trust "at any time or from time to time without the consent of any person and without notice to any person other than the Trustee . . . by filing notice of such revocation, modification, change, or withdrawal with the Trustee," and that such an amendment "shall be effective when executed by the Grantor." Because the terms of the Omega Trust provide a method for amendment, we first consider whether the trust "expressly prohibit[s] methods other than" that provided by the trust terms. RSA 564-B:6-602(c)(2).

Both the trustee and the special trustee maintain that the method of amendment provided in the terms of the Omega Trust is exclusive. The trustee contends that the no-contest clause "precludes other methods of amendment," and thereby "precludes any claim of an amendment pursuant to RSA 564-B:6-602(c)(2)." Similarly, the special trustee argues that the use of the word "shall" in paragraph 22, the execution paragraph, "identifies the execution of a document as the exclusive method of amendment." According to the special trustee, because the word "shall" is used to "express a command," the grantor's use of the word "must be interpreted in the context of the Trust as a whole" and in "light of all the circumstances and other competent evidence of the settlor's intent." (Quotations omitted.) We are not persuaded by either argument.

The commentary to the UTC explains that the code "tries to effectuate the settlor's intent to the maximum extent possible . . . ." Unif. Trust Code § 602 cmt. at 220 (2018). "[T]o honor the settlor's intent," paragraph (c) "generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust." Id. Even absent substantial compliance with the trust's terms, a settlor may still revoke or amend a revocable trust by "any other method manifesting clear and convincing evidence of the settlor's intent." Id. (explaining that, although amendment or revocation of a trust "will ordinarily . . . be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent"). "Only if the method specified in the terms of the trust is made exclusive is the use of other methods prohibited." Id.

Similarly, the Restatement (Third) of Trusts provides that if the terms of the trust provide a method for the exercise of a power of revocation or

amendment, but they do not make that method exclusive, "the settlor's power can be exercised either in the specified manner," or "in any way that provides clear and convincing evidence of the settlor's intention to do so." Restatement (Third) of Trusts § 63 cmts. h, i, at 447-48 (2003). As an example of an exclusive amendment provision, the Restatement (Third) of Trusts provides, "if a settlor reserves the power to revoke the trust 'only by a notice in writing delivered to the trustee,' revocation requires the delivery of such a notice to the trustee." Id. cmt. i at 447 (emphasis added). From this guidance, we conclude that only if the method specified in the terms of the trust is made exclusive does the trust "expressly prohibit methods other than methods provided." RSA 564-B:6-602(c)(2).

Here, nothing in the terms of the Omega Trust purports to make the method of amendment provided exclusive. The method provided in the trust terms, set forth in paragraphs 19 and 22, provides that the grantor may revoke or amend the trust "in whole or in part . . . by filing notice of such revocation, modification, change, or withdrawal with the Trustee," which "shall be effective when executed by the Grantor." Nothing in this language prohibits the use of other methods to amend the trust. Accordingly, the power to amend the Omega Trust could be exercised by any method, manifesting clear and convincing evidence "of the settlor's intention to do so." Restatement (Third) of Trusts, supra § 63 cmt. h at 447; see RSA 564-B:6-602(c)(2). We conclude that the method at issue here — an expression of intent to amend by email — is capable of manifesting, by clear and convincing evidence, the settlor's intent. See RSA 564-B:6-602(c)(2). Because the settlor's intent "is a question of fact to be determined by competent evidence and not by rules of law," King v. Onthank, 152 N.H. 16, 18 (2005), we leave the question of the settlor's intent to the trial court to determine in the first instance.

In sum, taking all of the facts alleged in the petition as true, and applying them against the applicable law, we conclude that the allegations constitute a basis for legal relief. See Elter-Nodvin, 163 N.H. at 680. Thus, the petitioner has sufficiently pled his case to survive a motion to dismiss. Accordingly, we reverse the order of the circuit court granting the special trustee's motion to dismiss. See id.

Reversed and remanded.

MACDONALD, C.J., and HICKS, BASSETT, and DONOVAN, JJ., concurred.

N.H. Rev. Stat. § 564-B:4-406

Section 564-B:4-406 - Validity of Trusts

(a) A trust is void to the extent that it was not validly created in accordance with this chapter or its creation was induced by fraud, duress, or undue influence.

(b) A person may commence a judicial proceeding to contest the validity of a trust within the earlier of:

(1) in the case of a trust that was revocable at the settlor's death, 3 years after the settlor's death;

(2) in the case of an irrevocable trust, including a formerly revocable trust that has become irrevocable, 3 years after the trustee sent to the beneficiary a notice described in RSA 564-B:8-813(c)(3); or

(3) in the case of an irrevocable trust, including a trust that was revocable at the settlor's death or a formerly revocable trust that has become irrevocable, 180 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name, address, and telephone number, and the time allowed for commencing a proceeding to contest the validity of a trust.

(c) A trustee may send the notice described in subsection (b)(3) for purposes of commencing the 180-day limitation period, but the trustee does not have a duty to do so. A trustee shall not be liable to any person for not sending the notice described in subsection (b)(3).

(d) During his or her life, a settlor may commence a judicial proceeding to determine the validity of a trust that he or she created, subject only to the trust's subsequent amendment or revocation if the trust is revocable.

(1) The trust instrument must expressly provide that this state's laws govern the trust's validity, interpretation, and administration, and the trust must have its principal place of administration within this state.

(2) The venue for the judicial proceeding is in the county where the trust has its principal place of administration.

(3) In addition to the settlor, each of the following persons is an interested person in the judicial proceeding:

(A) the settlor's spouse;

(B) the persons who, if the settlor had died on the date of filing the petition, would be the settlor's heirs;

(C) the qualified beneficiaries;

(D) the trustees, trust advisors, and trust protectors;

(E) if the trust is wholly or partially a charitable trust, the director of charitable trusts;

(F) if the trust is a trust for the care of an animal under RSA 564-B:4-408, the persons who, under the terms of the trust, have the power to enforce the trust;

(G) if the trust is a trust authorized under RSA 564-B:4-409, the persons who, under the terms of the trust, have the power to enforce the trust; and

(H) any other persons who would be an interested person in a judicial proceeding to determine the validity of the trust.

(4) In the case of a revocable trust, the qualified beneficiaries and other interested persons shall be determined as if the trust was irrevocable on the date of filing the petition, and each of the qualified beneficiaries and other interested persons shall be deemed possessed of inchoate property rights.

(5) Notice shall be given to each of the interested persons. The court may order notice be given to other persons.

(6) After a hearing, the court shall declare whether the trust is valid or invalid, and it may make other findings of fact and conclusions of law that are appropriate under the circumstances.

(7) A trust for which there is a declaration of validity under this subsection may be modified or revoked in the same manner as a trust for which there is no declaration of validity under this subsection.

(8) A settlor's failure to commence a judicial proceeding under this subsection shall not be construed as evidence or as an admission that the trust is invalid for any reason.

(e) A trustee may proceed to distribute the trust property in accordance with the terms of the trust even though the period for contesting the validity of the trust has not expired. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(f) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

(g) If the laws of this state govern a trust's validity and the trust has its principal place of administration in this state, then the trust and any transfer of property by a settlor to the trust shall not be void or voidable for either of the following reasons:

(1) The laws of a foreign jurisdiction prohibit or do not recognize the concept of a trust; or

(2) The trust or the transfer defeats any forced heirship, legitime, forced share, or any similar heirship right under the laws of a foreign jurisdiction.

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TITLE LVI
PROBATE COURTS AND DECEDENTS' ESTATES

CHAPTER 552
PROBATE OF WILLS

Section 552:18

552:18 Proof of Will During Life. –
I. During his or her life, an individual may commence a judicial proceeding to determine the validity of his or her will, subject only to the will's subsequent modification or revocation. For purposes of commencing the proceeding under this section, the individual must be domiciled in this state or own real property located in this state. A person acting as an individual's guardian, conservator, or attorney-in-fact shall not commence the proceeding on behalf of the individual.
II. If the petitioner is domiciled in this state, then the venue for the judicial proceeding shall be in the county where the petitioner has his or her domicile. If the petitioner is not domiciled in this state but owns real property located in this state, then the venue for the judicial proceeding shall be in the county where any of that real property is located.
III. In addition to the petitioner, each of the following persons is an interested person in the judicial proceeding:
(a) The petitioner's spouse;
(b) The persons who, if the petitioner had died on the date of filing the petition, would be the petitioner's heirs;
(c) The legatees and devisees under the terms of the will;
(d) The executors nominated in the will;
(e) If a charitable organization is a legatee or devisee or the will contains any charitable interest, the director of charitable trusts; and
(f) Any other persons who, if the petitioner had died on the date of filing the petition, would be interested parties in a judicial proceeding to prove the petitioner's will.
IV. For the purposes of this section, each of the interested parties shall be deemed possessed of inchoate property rights.
V. Notice shall be given to each of the interested parties. The court may order notice be given to other persons. In connection with the judicial proceeding, a person may represent and bind another person in accordance with Article 3 of RSA 564-B.
VI. In the judicial proceeding, the petitioner is the proponent of the will, the will shall be proved in solemn form, and the burden of proof and presumptions shall be the same as in a proceeding to prove the will in solemn form. After a hearing, the court shall declare whether the will is valid or invalid, and it may make other findings of fact and conclusions of law that are appropriate under the circumstances.
VII. After the individual's death, the will for which there is a declaration of validity under this section shall have full legal effect as the individual's will and, upon request, shall be admitted to probate and conclusively deemed proved, except to the extent that the will is modified or revoked after the court's declaration.
VIII. A will for which there is a declaration of validity under this section may be modified or revoked in the same manner as a will for which there is no declaration of validity under this section.
IX. An individual's failure to commence a judicial proceeding under this section shall not be construed as evidence or an admission that the individual's will is invalid for any reason.

Source. 2014, 195:4, eff. July 1, 2014.

488 Mass. 780
Supreme Judicial Court of Massachusetts,
Middlesex.

Matthew SACKS & another [1]
v.
Nancy DISSINGER & others. [2]

SJC-13105
|
Argued September 8, 2021
|
Decided December 29, 2021

Synopsis
Background: After learning that they had been removed as beneficiaries of their grandfather's trust, grandchildren brought action against their aunts and their grandmother's estate, more than two years after grandfather's death, alleging that their exclusion from the trust arose from undue influence exerted by one of their aunts and their grandmother upon their grandfather. Defendants moved to dismiss plaintiffs' claims as time-barred. The Superior Court Department, Suffolk County, Michael D. Ricciuti, J., granted motion. Plaintiffs appealed, and case was transferred to the Supreme Judicial Court on its own motion.

Holdings: The Supreme Judicial Court, Lowy, J., held that:

[1] plaintiffs' claim for intentional interference with expectancy of inheritance did not challenge validity of trust, and so was not governed by statute requiring actions contesting validity of revocable trust to be brought within one year of trust settlor's death, but, instead, was subject to three-year statute of limitations for tort actions, and

[2] plaintiffs' claim for unjust enrichment did not challenge validity of trust and so did not fall within the subject statute.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (22)

[1] **Appeal and Error** De novo review
Appeal and Error Dismissal and nonsuit in general

Supreme Judicial Court reviews grant of motion to dismiss de novo, accepting as true facts alleged in plaintiffs' complaint as well as any favorable inferences that reasonably can be drawn from them.

3 Cases that cite this headnote

[2] **Trusts** Time to Sue, Limitations, and Laches

Statute requiring actions that "contest" validity of revocable trust to be brought within one year of trust settlor's death applies to proceedings to litigate, call into question, or challenge the validity of a trust instrument. Mass. Gen. Laws Ann. ch. 203E, § 604.

[3] **Trusts** Time to Sue, Limitations, and Laches

Statute requiring actions that contest validity of revocable trust to be brought within one year of trust settlor's death encompasses claims, however titled, that seek relief against the trust, such as rescission or reformation; because relief sought would change or revoke the trust, implicit in any such claim is that the trust, as is, is not legally enforceable or valid. Mass. Gen. Laws Ann. ch. 203E, § 604.

[4] **Trusts** Time to Sue, Limitations, and Laches

While it is necessary to consider relief sought when determining whether claim constitutes trust "contest" within meaning of statute requiring actions that contest validity of revocable trust to be brought within one year of trust settlor's death, it is not sufficient; that is, claim that does not seek rescission or reformation

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can still be trust contest, and to focus exclusively on relief sought would be to elevate labels placed on claim or prayer for relief over substance of claim. Mass. Gen. Laws Ann. ch. 203E, § 604.

[5] **Trusts** Nature and Form of Remedy

Wills Nature and form of remedies in general

Although the processes by which wills and trusts become objects of contests are quite different, courts' analyses of these two instruments, once they have become objects of contests, are quite similar. Mass. Gen. Laws Ann. ch. 203E, §§ 112, 406.

[6] **Wills** Conclusiveness of Probate or Record

Determination of will's validity establishes will against all world; it does not ultimately speak to specific relationship among persons.

[7] **Trusts** Time to Sue, Limitations, and Laches

For purposes of statute requiring actions that contest validity of revocable trust to be brought within one year of trust settlor's death, trust "contest" is action where underlying facts are assessed for their effect on all or part of trust, such as invalidity, while "noncontest" is action where underlying facts are assessed for their effect on person, such as harm. Mass. Gen. Laws Ann. ch. 203E, § 604.

[8] **Trusts** Time to Sue, Limitations, and Laches

For purposes of assessing applicability of statute requiring actions that contest validity of revocable trust to be brought within one year of trust settlor's death, ultimate object of trust "contest" is determination of trust's validity, not personal liability or even culpability of settlors, beneficiaries, or trustees. Mass. Gen. Laws Ann. ch. 203E, § 604.

1 Case that cites this headnote

[9] **Limitation of Actions** Injuries to property in general

Trusts Time to Sue, Limitations, and Laches

In action by grandchildren, who had been removed as beneficiaries of their grandfather's trust, against their aunts and grandmother's estate, claim for intentional interference with expectancy of inheritance did not challenge validity of trust, and so was not governed by statute requiring actions contesting validity of revocable trust to be brought within one year of trust settlor's death, but by statute of limitations for tort actions; plaintiffs sought recourse against grandmother via her estate and against their aunt in her capacity not as trustee, but as individual, claim did not challenge nature or validity of trust but, rather, sought determination of harm caused by grandmother and aunt, claim was predicated upon effectiveness of amendment that removed plaintiffs' father's heirs as trust beneficiaries, as absent amendment, plaintiffs would have suffered no harm from trust's enforcement, and undue influence could have supported tort claim distinct from a contest. Mass. Gen. Laws Ann. ch. 203E, § 604; Mass. Gen. Laws Ann. ch. 260, § 2A.

[10] **Torts** Wills, Inheritances, Trusts and Gifts

To prevail on claim for tortious interference with expectancy of receiving gift, plaintiff must show that defendant intentionally interfered through unlawful means with plaintiff's legally protected interest by acting on would-be donor continuously until time expectancy would have been realized. Restatement (Third) of Torts: Liab. for Econ. Harm § 19.

1 Case that cites this headnote

[11] **Action** Nature of remedy by action

Cause of action for tortious interference with expectancy of receiving a gift or an inheritance

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is an in personam action, not an in rem or quasi in rem action.

[12] **Torts** Wills, Inheritances, Trusts and Gifts

Charge of undue influence may underlie tort claim, in addition to trust or will contest, and thus may equally be basis for claim of tortious interference with expectancy of a gift. Mass. Gen. Laws Ann. ch. 203E, § 406.

[13] **Limitation of Actions** Injuries to property in general

Trusts Time to Sue, Limitations, and Laches

For purposes of determining applicability of statute requiring actions that contest validity of revocable trust to be brought within one year of trust settlor's death, the difference between a trust contest and a tort claim for interference with expectancy of receiving a gift or inheritance derives not from the predicate conduct, which may be identical across the claims, but, rather, from where the effect of the conduct is being assessed, that is, on the trust or on a person. Mass. Gen. Laws Ann. ch. 203E, § 604.

[14] **Torts** Availability, adequacy, exclusivity, and exhaustion of other remedies

In prohibiting separate claim for intentional interference with expectancy where final and conclusive probate decree necessarily addresses such claim, plaintiffs are not permitted "second bite at the apple" where probate proceedings invariably provide forum; implication is that where there is no such decree, it may be permissible for plaintiffs to bring suit.

[15] **Wills** Determination in probate proceedings as to validity or construction of provisions of will

Unlike trusts, the property of which is often distributed without a formal declaration of the trust's validity by a court, virtually every will subject to the jurisdiction of the Commonwealth must be declared valid before any transfers of property may occur pursuant to the will. Mass. Gen. Laws Ann. ch. 190B, § 3-102.

[16] **Trusts** Representation of cestui que trust by trustee

Wills Notice of application for probate or for revocation

While a decedent's heirs-at-law and devisees are required to receive notice of the probate of a will, only qualified beneficiaries, who represent a subset of beneficiaries and do not include family members who have been excluded, may be entitled to information about a trust. Mass. Gen. Laws Ann. ch. 190B, §§ 3-306, 3-403; Mass. Gen. Laws Ann. ch. 203E, § 103.

2 Cases that cite this headnote

[17] **Trusts** Time to Sue, Limitations, and Laches

In action by grandchildren, who had been removed as beneficiaries of their grandfather's trust, against their aunts and grandmother's estate, claim for unjust enrichment did not challenge validity of trust, and so was not governed by statute requiring actions contesting validity of revocable trust to be brought within one year of trust settlor's death; claim was predicated on allegedly tortious conduct perpetrated by one person against another, such that the inquiry went not to the validity of the legal instrument, but to the effects of the tortious conduct on people. Mass. Gen. Laws Ann. ch. 203E, § 604.

3 Cases that cite this headnote

[18] **Unjust Enrichment and Constructive Contracts** Nature and Grounds of Liability

"Unjust enrichment" is defined as retention of money or property of another against the fundamental principles of justice or equity and good conscience.

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10 Cases that cite this headnote

[19] **Unjust Enrichment and Constructive Contracts** Knowledge and intent; expectations of parties

Unjust enrichment claim sounds in equity, but may bear considerable resemblance to a claim for intentional interference with an expectancy.

4 Cases that cite this headnote

[20] **Unjust Enrichment and Constructive Contracts** Restitution and disgorgement

"Restitution" is not damages; rather, restitution serves as flexible remedy, arising from equitable unjust enrichment claims, and may be distinguishable in form but not in substance from remedies that seek reformation or rescission.

[21] **Unjust Enrichment and Constructive Contracts** Nature and Grounds of Liability

Liability for unjust enrichment, unlike liability for intentional interference with an expectancy, may extend to recipients who were not responsible for wrongful conduct.

2 Cases that cite this headnote

[22] **Unjust Enrichment and Constructive Contracts** Elements of unjust enrichment in general

Unjust Enrichment and Constructive Contracts Restitution and disgorgement

A plaintiff bringing a claim for unjust enrichment must give fair notice to any innocent recipients that restitution is sought under an innocent recipient theory and provide a foundation for entry of judgment against the innocent recipients on such a theory.

****391** Trust, Beneficiary. Undue Influence. Unlawful Interference. Unjust Enrichment. Limitations, Statute of. Uniform Trust Code.

CIVIL ACTION commenced in the Superior Court Department on November 22, 2019.

A motion to dismiss was heard by Michael D. Ricciuti, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Attorneys and Law Firms

Robert L. Hamer, Boston, for the plaintiffs.

Mardic A. Marashian, Boston, for the defendants.

Present: Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

LOWY, J.

***780** This case involves three generations of the Sacks family. After learning that they had been removed as beneficiaries of their grandfather's trust, the plaintiffs, Matthew and Rebecca ***781** Sacks,[3] brought suit against their aunts and their grandmother's estate. The plaintiffs alleged that their exclusion from the trust -- and their aunts' correspondingly larger shares of distributions -- arose from undue influence exerted by one of their aunts and their grandmother upon their grandfather.

The defendants moved to dismiss the plaintiffs' claims, arguing that the claims were time barred under G. L. c. 203E, § 604 (§ 604), which requires that actions "contest[ing] the validity of a trust" be brought within one year of the trust settlor's death. A Superior Court judge agreed and granted the defendants' motion. The plaintiffs appealed, maintaining that their claims for intentional interference and unjust enrichment did not challenge the validity of the trust and, therefore, were not time barred by § 604. We transferred this case from the Appeals Court on our own motion.

We conclude that the plaintiffs' claims for intentional interference and unjust enrichment are substantively different from the trust contests governed by § 604 and therefore are not time barred. We reverse and remand to the Superior Court for further proceedings consistent with this opinion.

Background. We take the following facts from the complaint as supplemented by undisputed facts from the plaintiffs' grandparents' probate records. See ****392** Galiastro v.

Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164, 4 N.E.3d 270 (2014).

The grandparents, Aaron and Sheila Sacks, are deceased; Aaron was the settlor of the trust at issue, and Sheila's estate is represented as one of the defendants. Aaron and Sheila had five children: Jeffrey Sacks, who is deceased, and four of the defendants, Nancy Dissinger, Joan Rosenthal, Donna Sacks, and Cheryl Sacks O'Toole. The plaintiffs, Matthew and Rebecca, are Jeffrey's children.

Aaron established the Aaron H. Sacks Revocable Trust (trust) in August 2011. The original terms of the trust provided that, after Aaron's and Sheila's deaths, each of their five children would receive one-fifth of the trust's assets. If any of their children predeceased Aaron and Sheila, that child's share would go to that child's heirs. By contemporaneous wills and subsequent codicils, both Aaron and Sheila devised the residues of their estates ***782** to the trust, including their interests in their family home.

In June 2012, Jeffrey died after battling a brain tumor for almost two years. Based on the recommendation of his doctors and with the support of his son, Matthew, and his sisters Donna and Joan, Jeffrey made the difficult decision to decline any further treatment. Sheila by then was suffering from the effects of a stroke and the onset of dementia. Distraught over her son's end-of-life decision, she blamed grandson Matthew and daughters Donna and Joan for supporting it. Sheila considered them complicit in Jeffrey's "murder." Nancy, another of Aaron and Sheila's children, encouraged this belief in their mother.

Within months of Jeffrey's death, Aaron was persuaded by Sheila and Nancy to remove Jeffrey's heirs as beneficiaries of the trust. Aaron executed an amendment to the trust in July 2012, providing that after Aaron's and Sheila's deaths, the trust property would be divided equally among only their four daughters.

When Aaron died in August 2017, the trust, as amended, became irrevocable. Sheila survived her husband, and during her lifetime, the trust property was to be available only for her health, education, support, and maintenance. Sheila died in July 2019, precipitating the events that brought this matter before us.

The plaintiffs claim that they learned of their exclusion from the trust only upon Sheila's death in July. In November 2019, the plaintiffs commenced this action in the Superior Court, filing a three-count complaint. The plaintiffs first sought rescission of the 2012 amendment; second, they brought a claim against Sheila's estate and against Nancy for intentional interference with advantageous relations;[4] and finally, they brought a claim against all four of their aunts for unjust enrichment. In each of these claims, the plaintiffs alleged that Nancy and Sheila had exerted undue influence upon Aaron.

The defendants filed a motion to dismiss on the basis that all three counts were time barred under § 604. In response, the plaintiffs voluntarily dismissed count I (rescission) but maintained that counts II and III (intentional interference and unjust enrichment, respectively) were not governed by § 604 and thus ***783** timely.[5] A Superior ****393** Court judge ruled in favor of the defendants and dismissed the plaintiffs' claims. The plaintiffs appealed, and we transferred the case to this court on our own motion.

[1] Discussion. 1. Standard of review. We review the grant of a motion to dismiss de novo, "accept[ing] as true the facts alleged in the plaintiffs' complaint as well as any favorable inferences that reasonably can be drawn from them." Galiastro, 467 Mass. at 164, 4 N.E.3d 270.

2. Section 604. Adopted as part of the Massachusetts Uniform Trust Code (MUTC), § 604 states in relevant part: "A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within ... [one] year after the settlor's death." G. L. c. 203E, § 604 (a) (1).[6] Aaron undoubtedly is the settlor of the trust, and the plaintiffs filed their complaint over two years after Aaron's death; thus, to the extent the plaintiffs are seeking to "contest the validity" of the trust, their claims are time barred. The plaintiffs argue, however, that their claims of intentional interference and unjust enrichment are not trust contests but rather distinct causes of action. The Superior Court judge rejected this argument, holding that, although the plaintiffs' claims were not pleaded as challenges to the validity of the trust, they remained, in substance, trust contests. We disagree.[7]

[2] The plain language of § 604 suggests that the statute applies to proceedings to litigate, call into question, or challenge the validity of a trust instrument (or any part thereof). Black's Law Dictionary 398 (11th ed. 2019). See Uniform Trust Code § 604 comment (2003) ("A 'contest' is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee").

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[3] **[4]** The question that follows is this: what does it mean to litigate, call into question, or challenge the validity of a trust? As the ***784** plaintiffs seemed to acknowledge by voluntarily dismissing count I (rescission), this definition clearly captures claims -- whatever those claims may be titled -- that seek relief against the trust (e.g., rescission or reformation). Because the relief sought would change or revoke the trust, implicit in any such claim is that the trust, as is, is not legally enforceable or valid. However, while it is necessary to consider the relief sought when determining whether a claim constitutes a trust contest, it is not sufficient. That is, a claim that does not seek rescission or reformation can still be a trust contest. To focus exclusively on the relief sought would be to elevate the labels placed on a claim or prayer for relief over the substance of a claim. Cf. Hendrickson v. Sears, 365 Mass. 83, 85, 310 N.E.2d 131 (1974) ("we have looked to the 'gist of the action' or the essential nature of the plaintiff's claim" to determine whether it sounds in contract or tort).

[5] Our treatment of will contests is informative here. Although the processes ****394** by which wills and trusts become objects of contests are quite different, see infra, our analyses of these two instruments -- once they have become objects of contests -- are quite similar. Compare G. L. c. 203E, § 406 ("A trust shall be void to the extent its creation was induced by fraud, duress or undue influence"), with Neill v. Brackett, 234 Mass. 367, 370, 126 N.E. 93 (1920) ("Fraud or undue influence ... invalidates a will ..."). See G. L. c. 203E, § 112 ("The rules of construction that apply in the [C]ommonwealth to the interpretation of and disposition of property by will shall also apply, as appropriate, to the interpretation of the terms of a revocable trust and the disposition of the trust property"). See also Report of the Ad Hoc Massachusetts Uniform Trust Committee § 112 comment, at 11 (rev. July 18, 2012) ("[T]his section made applicable to all trusts the rules of construction applicable to wills. The Committee revised this section to provide that such rules of construction should apply only to 'revocable trusts,' defined as trusts intended to be will substitutes").

[6] In the context of wills, we have recognized the distinction between contests, which seek to determine the validity of a legal instrument, and other causes of action, which do not. We have reasoned that "a will contest is in the nature of a property right" and is not a "vindication of personal rights." Sheldone v. Marino, 398 Mass. 817, 819, 501 N.E.2d 504 (1986). The determination of a will's validity "establishes the will against all the world"; it does not ultimately speak to a specific relationship among persons. Finer v. Steuer, 255 Mass. 611, 616, 152 N.E. 220 (1926).

***785** **[7]** **[8]** We understand a trust contest, then, as an action where the underlying facts are assessed for their effect on all or part of a trust (e.g., invalidity), while a noncontest is an action where the underlying facts are assessed for their effect on a person (e.g., harm). The ultimate object of a contest is a determination of a trust's validity, not the personal liability or even culpability of the settlors, beneficiaries, or trustees. Cf. Harvey v. Fiduciary Trust Co., 299 Mass. 457, 464, 13 N.E.2d 299 (1938) (treating matter about trustee's proper distribution of trust property as matter in rem or quasi in rem). We now apply this reasoning to the plaintiffs' claims. [8]

[9] 3. Intentional interference. The Uniform Trust Code (UTC), in an explanatory comment to its own nearly identical § 604, explicitly carves out intentional interference ****395** with an expectancy claims from the statute's purview: "An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section" (emphasis added). Uniform Trust Code § 604 comment. The MUTC was modeled on the UTC, and the UTC comment sheds valuable light on the statute at issue here. Report of the Ad Hoc Massachusetts Uniform Trust Code Committee, supra at 3 (although not officially adopted, "the official comments to the [UTC] are helpful to understand [the MUTC's] provisions"). We agree with the UTC commentary's explicit carveout -- which was not disavowed in the MUTC's own commentary -- and hold that the plaintiffs' intentional interference claim is not a trust contest.

***786** **[10]** **[11]** "[W]e have long recognized a cause of action for tortious interference with the expectancy of receiving a gift[, including an inheritance,] in certain limited conditions." Labonte v. Giordano, 426 Mass. 319, 320, 687 N.E.2d 1253 (1997). The claim derives from the harm one person causes another: to prevail, a plaintiff must show that a defendant intentionally interfered through unlawful means with the plaintiff's legally protected interest by acting on the would-be donor continuously "until the time the expectancy would have been realized." Id. at 321, 687 N.E.2d 1253. See Restatement (Third) of Torts: Liability for Economic Harm § 19 (2020) ("A defendant is subject to liability for interference with an inheritance or gift if: [a] the plaintiff had a reasonable expectation of receiving an inheritance or gift; [b] the defendant committed an intentional and independent

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legal wrong; [c] the defendant's purpose was to interfere with the plaintiff's expectancy; [d] the defendant's conduct caused the expectancy to fail; and [e] the plaintiff suffered economic loss as a result”). This is an in personam action, not an in rem or quasi in rem action.

Here, the plaintiffs seek recourse against their grandmother, Sheila, via her estate, and against their aunt Nancy, in her capacity not as a trustee but as an individual. The plaintiffs’ claim for intentional interference does not challenge the nature or validity of the trust but, rather, seeks a determination of the harm caused by Sheila and Nancy. Moreover, the plaintiffs’ intentional interference claim is predicated upon the amendment's effectiveness: without such amendment being given effect, the plaintiffs would suffer no harm flowing from its enforcement.

[12] **[13]** In ruling for the defendants, the Superior Court judge adopted the defendants’ view that the plaintiffs’ reliance on undue influence rendered this claim substantively indistinguishable from a contest. However, a charge of undue influence may underlie a tort claim, in addition to a trust or will contest, and thus may equally be a basis for a claim of tortious interference with an expectancy.[9] See Brignati v. Medenwald, 315 Mass. 636, 637-638, 53 N.E.2d 673 (1944) ***787** (undue influence claim not brought as part of will contest sounded in tort). Compare G. L. c. 203E, § 406 (“A trust shall be void to the extent its creation ****396** was induced by fraud, duress or undue influence”), with Labonte, 426 Mass. at 321 n.4, 687 N.E.2d 1253 (“unlawful means” required as element of interference with expectancy tort “include duress, fraud, or undue influence”). Cf. Metropolitan Life Ins. Co. v. DeNicola, 317 Mass. 416, 419-420, 58 N.E.2d 841 (1944) (distinguishing between action to “recover damages for fraud” and “the right to have a contract annulled for fraud or mistake”). The difference between a trust contest and a tort claim derives not from the predicate conduct -- which may be identical across the claims -- but rather from where the effect of the conduct is being assessed (i.e., on the trust or on a person).

[14] Even so, in the wills context, this court has held that there could be no separate cause of action in tort based on a defendant's undue influence if there had been an adequate remedy during probate (i.e., through a contest). See Brignati, 315 Mass. at 638-639, 53 N.E.2d 673. See also Restatement (Third) of Torts: Liability for Economic Harm § 19 comment c (“Some common forms of interference with inheritance can be adequately redressed in a probate court, and thus cannot form the basis of a claim under this Section”). In Brignati, supra at 637-638, 53 N.E.2d 673, we affirmed a directed verdict against the plaintiff for her claim of intentional interference with an expectancy -- where the expectancy was a testamentary bequest -- reasoning that the plaintiff had tried to make a claim inconsistent with the “final and conclusive” probate decree. See Tobin v. Larkin, 187 Mass. 279, 282, 72 N.E. 985 (1905) (“A decree of the Probate Court within its jurisdiction is good unless it is set aside, and it cannot be attacked collaterally”). Cf. Alba v. Raytheon Co., 441 Mass. 836, 841, 809 N.E.2d 516 (2004) (“The judicial doctrine of collateral estoppel provides that ‘[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim’ ” [citation omitted]). In prohibiting a separate claim for intentional interference with an expectancy where a final and conclusive probate decree necessarily addresses such a claim, we do not permit plaintiffs “a second bite at the apple” where probate proceedings invariably provide a forum. The implication is, of course, that where there is no such decree, it may be permissible for plaintiffs to bring suit.

[15] If the plaintiffs’ claim for intentional interference with an expectancy fell within the ambit of Brignati, then it would be ***788** unable to stand as a distinct cause of action sounding in tort: even if it were substantively distinguishable from a contest, that distinction would be inconsequential, and this inquiry irrelevant. However, our holding in Brignati was based on the universal nature of the probate process to which wills are uniquely subject. While wills and trusts are treated similarly when objects of contests, they arrive at being such objects in different ways. Unlike trusts, the property of which is often distributed without a formal declaration of the trust's validity by a court, virtually every will subject to the jurisdiction of the Commonwealth must be declared valid before any transfers of property may occur pursuant to the will. G. L. c. 190B, § 3-102. Indeed, revocable trusts have become such popular will substitutes precisely because they typically remain out of probate, providing greater administrative ease and privacy.[10] Unless a trust contest expressly is ****397** brought, there is no affirmative ruling on the validity of a revocable trust; in fact, usually no court ever sees a trust instrument. Therefore, our holding in Brignati -- which was premised on the understanding that virtually every will in the Commonwealth is reviewed by a judge of the Probate and Family Court and subject to a probate decree regarding its validity -- does not apply.

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[16] Moreover, although trusts are common will substitutes, we decline to extend Brignati's line of reasoning to the instant case. Not only are trusts not probated, but also would-be beneficiaries are far less likely to learn of their exclusion from a trust. While a decedent's heirs-at-law and devisees are required to receive notice of the probate of a will, G. L. c. 190B, §§ 3-306, 3-403, only qualified beneficiaries -- who represent a subset of beneficiaries and certainly do not include family members who have been excluded -- may be entitled to information about a trust, G. L. c. 203E, § 103. See, e.g., Matter of the Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 521, ––– N.E.3d ––– (2021) ("Upon ***789** Lillian's death, Michael became a distributee under the trust and, thus, met the definition of 'qualified beneficiary.' Until then, he was not a 'qualified beneficiary' .... Accordingly, the MUTC provides no basis for Michael to quarrel with the trustees' failure to inform him of the existence of the trust prior to Lillian's death ..."). While the law of wills and trusts may overlap considerably, with an understanding that both often serve a single testamentary objective, the lack of preemptive judicial review of trusts and of robust notice requirements for trust beneficiaries, where such review and notice are provided for wills, marks a significant difference between the two instruments and necessitates that we do not apply the reasoning in Brignati to a tort claim involving a trust. See Restatement (Third) of Torts: Liability for Economic Harm § 19 comment c ("A probate court, for example, is the appropriate forum for determining whether a will is valid.... A probate court[, however,] is unable to provide a remedy for wrongful conduct in relation to a nonprobate transfer, such as a transfer by inter vivos trust.... Again, a restitution or tort claim may be used to address those circumstances").

Because an intentional interference with an expectancy claim inquires into one person's (harmful) effect on another -- not one person's effect on the trust's validity -- and because undue influence can support such a tort claim distinct from a contest in these circumstances, we conclude that the intentional interference claim here is not subject to § 604's one-year deadline. Instead, it is subject to the three-year statute of limitations prescribed by G. L. c. 260, § 2A.

[17] **[18]** **[19]** **[20]** 4. Unjust enrichment. "Unjust enrichment is defined as retention of money or property of another against the fundamental principles of justice or equity and good conscience" (quotation and citation omitted). ****398** Santagate v. Tower, 64 Mass. App. Ct. 324, 329, 833 N.E.2d 171 (2005). An unjust enrichment claim sounds in equity, see, e.g., Keller v. O'Brien, 425 Mass. 774, 778, 683 N.E.2d 1026 (1997) ("Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party"), but may bear considerable resemblance to a claim for intentional interference with an expectancy. In fact, the two claims often go hand in hand: "[M]ost cases of liability under [intentional interference with inheritance or gift] can also be redressed by a claim in restitution rather than tort.... In cases that arise under this Section, as in ... most others that involve intentional wrongdoing, a plaintiff may choose which theory of ***790** recovery to pursue." [11] Restatement (Third) of Torts: Liability for Economic Harm § 19 comment f. Indeed, "[a] remedy in equity where the plaintiff may lay hold of the property in the hands of the wrongdoer [is] preferable in many cases to an action of tort [for intentional interference]. Damages at best are only an approximation of the loss, while relief in equity, by requiring the wrongdoer to transfer to the intended devisee or legatee that which would have gone to him but for the [wrongful conduct] of the former, gives the intended beneficiary exactly what he would have received in the absence of such [wrongful conduct]." [12] (Citations omitted.) Monach v. Koslowski, 322 Mass. 466, 470-471, 78 N.E.2d 4 (1948). Given the reasoning supra, where, as here, a claim for unjust enrichment is predicated on allegedly tortious conduct, we hold that it is not a trust contest under § 604.

[21] **[22]** It is true that liability for unjust enrichment, unlike liability for intentional interference, may extend to recipients who were not responsible for wrongful conduct. [13] See, e.g., Demoulas v. Demoulas, 428 Mass. 555, 572, 703 N.E.2d 1149 (1998) (constructive trust to remedy unjust enrichment may be imposed against property transferred by wrongdoer to his children, who committed no wrong but were not bona fide purchasers). See also Stevens v. Nagel, 64 Mass. App. Ct. 136, 139-140, 831 N.E.2d 935 (2005); Jensen v. Daniels, 57 Mass. App. Ct. 811, 818, 786 N.E.2d 1225 (2003) ("There are, to be sure, circumstances under which the innocent recipient of money, or goods the money bought, may be required to make restitution to the person from whom the money was wrongfully obtained"); Restatement (Third) of Restitution and Unjust Enrichment § 46 ("The misconduct that invalidates the transfer to the recipient may be the act of ***791** the recipient or of a third person"). Cf. Cavadi v. DeYeso, 458 Mass. 615, 627, 941 N.E.2d 23 (2011) ****399** ("[A] constructive trust, implied by law as a result of mistake, violation of a fiduciary duty, or unjust enrichment, may be imposed, generally as between transferor

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and transferee, without proof of fraudulent intent" [emphasis added]). But in claims for unjust enrichment such as the one before us, these so-called innocent parties have benefited directly due to the harm one person has tortiously perpetrated against another. Where intentional interference claims seek a determination of the harm effected by wrongful conduct, unjust enrichment claims seek a determination of the benefit resulting from that conduct. Thus, the inquiry still goes to the effects of tortious conduct on people and not to the validity of a legal instrument.

Therefore, because this claim for unjust enrichment -- like the intentional interference with an expectancy claim -- derives from tortious conduct perpetrated by one person against another, for the reasons stated supra, the plaintiffs' claim for unjust enrichment is not a contest under § 604. [14]

Conclusion. Because the plaintiffs' claims of intentional interference with an expectancy and unjust enrichment do not constitute trust contests, they are not governed by G. L. c. 203E, § 604. The order granting the defendants' motion to dismiss is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

All Citations

488 Mass. 780, 178 N.E.3d 388

Footnotes

1 Rebecca Sacks.

2 Donna Sacks, individually and as personal representative of the estate of Sheila Sacks; Joan Rosenthal; and Cheryl Sacks O'Toole.

3 Because many parties share a surname, we refer to them all by their first names.

4 In their complaint, the plaintiffs pleaded their claim as "interference with advantageous relationship." We interpret this to be for interference with an expectancy. See Labonte v. Giordano, 426 Mass. 319, 320-321, 687 N.E.2d 1253 (1997). See also Restatement (Third) of Torts: Liability for Economic Harm § 19 (2020).

5 The plaintiffs argue that count II is governed by the three-year statute of limitations set forth in G. L. c. 260, § 2A, and that count III is governed by the six-year statute of limitations set forth in G. L. c. 260, § 2.

6 General Laws c. 203E, § 604 (a), states in full: "A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of: (1) [one] year after the settlor's death; or (2) [sixty] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding." Neither party suggests that G. L. c. 203E, § 604 (a) (2), applies here.

7 Because we hold that the plaintiffs' claims are timely and not governed by § 604, we do not reach the question whether § 604 serves as a statute of repose or a statute of limitations.

8 The defendants cite a number of cases from other States, interpreting those States' equivalents of § 604, which likewise were modeled on or adopted from the Uniform Trust Code. In each of those cases, the court held that the plaintiff's claims, although not pleaded as such, actually were contests and thereby time barred under the equivalent of § 604. However, we do not find those cases persuasive as to the matter before us, as all of those cases addressed claims that centered on the validity of all or part of a trust, not, as here, on the personal consequences of the defendants' conduct. See, e.g., Derringer v. Emerson, 729 F. Supp. 2d 286, 290-291 (D.D.C. 2010), aff'd, 435 Fed. Appx. 4, 2011 WL 2621881 (2011) (claim seeking declaratory

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judgment on invalidity of trust amendments was time-barred contest); In re Gerald L. Pollack Trust, 309 Mich. App. 125, 147, 867 N.W.2d 884 (2015) (claim seeking to set aside trust was time-barred contest); Morris v. Trust Co. of the Ozarks, 423 S.W.3d 918, 919 (Mo. Ct. App. 2014) (claim seeking to terminate trust was time-barred contest); In re the Admin. of the Lee R. Wintersteen Revocable Trust Agreement, 2018 S.D. 12, ¶ 16, 907 N.W.2d 785 (claim challenging validity of trust amendment was time-barred contest); Matter of Elizabeth A. Briggs Revocable Living Trust, 2017 S.D. 40, ¶¶ 9-10, 898 N.W.2d 465 (claim to invalidate trust amendments was time-barred contest).

9 It is hardly unusual for a factual predicate to give rise to more than one cause of action. Section 604 establishes an unforgiving one-year deadline by which to bring a trust contest. While the Legislature may have good reason to preclude a challenge to a revocable trust beyond one year from its settlor's death, the Legislature could not have intended that this one-year statutory deadline preclude intended beneficiaries from seeking recovery simply because they suffered from tortious conduct that also gives rise to grounds for a trust contest. Rather, the legislative history, common sense, and basic fairness suggest the opposite.

10 See, e.g., E.P. Hayes, S.T. Donovan, & L. Macauley, Understanding and Using Trusts § 2.1 (Mass. Cont. Legal Educ. 4th ed. 2020) ("[A] revocable pour-over trust is not filed with the court. Thus, its dispositive provisions also remain unavailable to the public"); P.L. Halter, D.L.S. Freytag, & J.W. Murphy, Seminar, How to Structure Revocable Living Trusts (Mass. Cont. Legal Educ. June 9, 2020) (touting cost, time, and privacy saved by using revocable trusts to avoid probate); J.E. Steffensen, T.E. Bator, T.A. Craig, W.N. Friedler, J.W. Moore, E.V. Moreno, L.M. Neeley, J.W. Roberts, & M.J. Simolo, A Practical Guide to Estate Planning in Massachusetts § 3.3, at 3-41 (Mass. Cont. Legal Educ. 4th ed. 2017 & Supp. 2019) (listing "avoidance of probate" and "privacy" as first two advantages of revocable trusts).

11 It is worth emphasizing that while we hold that plaintiffs may timely bring either or both of their remaining claims, we do not hold that plaintiffs may ultimately recover under both claims.

12 Vitally, "[r]estitution is not damages" (citation omitted). Santagate, 64 Mass. App. Ct. at 336, 833 N.E.2d 171. Rather, restitution serves as a flexible remedy, arising from equitable unjust enrichment claims, and may be distinguishable in form but not in substance from remedies that seek reformation or rescission.

13 While an unjust enrichment claim may be brought against innocent recipients, those innocent recipients "are entitled to the standard affirmative defenses, the most significant in this context being change of position." Restatement (Third) of Restitution and Unjust Enrichment § 46 comment h (2011). Additionally, a plaintiff bringing a claim for unjust enrichment must give "fair notice" to any innocent recipients that restitution is sought "under an 'innocent recipient' theory" and "provide [a] foundation for entry of judgment against [the innocent recipients] on such a theory." Jensen v. Daniels, 57 Mass. App. Ct. 811, 818, 786 N.E.2d 1225 (2003).

14 The plaintiffs argue that the six-year statute of limitations set forth in G. L. c. 260, § 2, applies to their unjust enrichment claim. While we need not reach the issue, we presume that the statute of limitations for an unjust enrichment claim predicated on tortious conduct is instead the three-year statute of limitations set forth in G. L. c. 260, § 2A. See, e.g., SiOnyx, LLC v. Hamamatsu Photonics K.K., 332 F. Supp. 3d 446, 466 (D. Mass. 2018) ("Where an unjust-enrichment claim is contractual in nature, the limitations period for that claim is ... six years" under Massachusetts law); Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg., 448 F. Supp. 2d 244, 262-263 (D. Mass. 2006), aff'd, 510 F.3d 77 (1st Cir. 2007), cert. denied, 555 U.S. 815, 129 S.Ct. 58, 172 L.Ed.2d 25 (2008) (unjust enrichment claim governed by three-year tort statute of limitations). Nonetheless, since the plaintiffs commenced their action within the shorter three-year limitations period, it is unnecessary for us to determine which period applies to this, or other, unjust enrichment claims.

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