The Past Year's Most Significant, Curious, or Downright Fascinating Fiduciary Cases*

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

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TABLE OF CONTENTS

I. **INVESTMENTS.** 14

A. ***Kastner v. Intrust Bank,* 2014 U.S. App. LEXIS 11864 (10th Cir. Court of Appeals, 2014).** Claims against trustee dismissed where beneficiary is not a "qualified beneficiary" under the Kansas Uniform Trust Code, for failure to provide expert testimony on the standard of care, and for lack of factual support. 14

B. ***Greenberg v. JP Morgan Chase Bank,* 2014 N.Y. Misc. LEXIS 2011 (2014).** Court refuses to dismiss claims for investment losses during economic downturn, where bank rejected individual co-trustee's and beneficiary's requests to reallocate portfolio or liquidate equities**.** 15

C. ***Matter of Littleton,* 2014 N.Y. Misc. LEXIS 2586 (2014).** Court refuses to dismiss suit against trustee for failure to diversify concentration of Corning Glass stock, despite trust terms exonerating trustee for retention of stock. 16

D. ***Matter of Knox, 2010 NY Slip Op 52234U* (February 24, 2010); *2010 NY Slip Op 52251U* (November 24, 2010); 2012 N.Y. App. Div. LEXIS 4880 (June 19, 2012)**; ***Campbell v. Bank of America,* 2014 N.Y. Misc. LEXIS 4353 (2014).** Surrogate's court surcharges trustee for over $21 million for not diversifying investments and taking investment directions from a non-fiduciary family member. The appellate division largely reverses the surcharge on appeal. Supreme Court refuses attempt by beneficiaries to relitigate lost claims, or raise new related claims in Suffolk County court and disqualify Erie judge that had rendered adverse rulings. 17

E. ***Cavagnaro v. Sapone,* 2014 Cal. App. Unpub. LEXIS 7011 (2014).** Trustee did not breach duties by selling residential property to save expenses and better support widow, regardless of fact that remainder beneficiary resided there. 22

II. **DISTRIBUTIONS.** 22

A. ***Kritchman v. Wolk,* No. 3D12-2977 & 3D12-2457 (Fla. 3rd District Court of Appeals, October 1, 2014).** Trustees breached duties by failing to carry out settlor's direction to pay grandchild's college tuition out of revocable trust assets after the death of the settlor. 22

B. ***Walker v. Brooks,* 2014 Mich. App. LEXIS 2046 (Unpub. 2014).** Settlor, serving as trustee of trust for his wife with remainder to her son, breached his duties and went beyond "health" standard by making distributions for charity and to educate wife's orphaned grandchildren. 23

C. ***Berlinger v. Wells Fargo, N.A.,* 2014 U.S. Dist. LEXIS 114571, 125872 & 134643 (M.D. Florida, 2014).** In a claim that trust distributions to satisfy divorce obligations of primary trust beneficiary were improper, court refuses to dismiss trustee's third party complaint against ex-spouse, dismissed $18 million claim of civil theft for 45 day delay in transfer of assets to successor trustee, and sustains objection to testimony seeking communications between trust officer and in-house counsel. 24

D. ***Educational Trust for Ferren Chambers,* 2014 Phila. Ct. Comm. Pl. LEXIS 237 (2014).** Trustees surcharged for using trust assets set aside for educational needs to pursue civil rights litigation the school district 25

E. ***Favour v. Favour,* No 1 CA-CV 13-0196 (Az. Court of Appeals 2014).** Trial court surcharge reversed in part for limiting net income to DNI and construing trust terms prohibiting invasion of corpus as barring trustee from paying administrative expenses, diversifying trust investments, and allocating expenses to corpus under state law. 27

F. ***Estate of Greenblatt,* 2014 ME 32 (2014).** Executor did not breach duty of loyalty by allowing eldest generation members, including executor, to select item of tangible personal property with significant family value but nominal monetary value, before making item available to younger generations 28

III. **THIRD PARTY LIABILITY.** 30

A. ***Goldberg v. HSBC Securities,* 2014 N.Y. Misc. LEXIS 858 (2014).** Bank did not breach its contract or aid and abet undue influence by performing its banking function at arm's length. 30

IV. **LIMITATIONS & OTHER DEFENSES.** 30

A. ***Smith v. SunTrust Bank,* A13A2256 (Georgia Court of Appeals, January 15, 2014).** Line item on account statement reporting sale to straw man does not start statute of limitations on sale by trustee, but trustee's detailed letter received by beneficiaries starts limitations period on income distributions. 30

B. ***Beck, et. al. v. Mueller*, 2014 Wisc. App. LEXIS 377 (Court of Appeals of Wisconsin, May 8, 2014).** Wisconsin Court of Appeals rules that trust beneficiaries' claims against trustee were time-barred by the statute of limitations as the beneficiaries had notice of the trustee's actions and their claims thus accrued before the trustee filed his formal accounting. 32

C. ***Deborah K. Morris v. Trust Company of the Ozarks*, 2014 Mo. App. LEXIS 284 (Ct App Missouri, Southern Dist. Div. 1, March 11, 2014).** In Missouri, a trust validity contest by any other name is still a trust validity contest and subject to the two year statute of limitations 33

D. ***Ward v. Stanford, et. al.*, 2014 Tex. App. LEXIS 9061 (Court of Appeals of Texas, August 14, 2014).** Texas Court of Appeals rejects trustees' and grantor's arguments that beneficiary's claims were precluded by res judicata under a judgment entered in a separate divorce proceeding and that the claims were time-barred. 34

E. ***Gibbs. V. Altenhofen*, 2014 MT 200 (Supreme Court of Montana, July 29, 2014).** Supreme Court of Montana finds that trial court properly ruled that beneficiaries' claims against initial trustee were time-barred and that the claims brought in a second action against the successor trustee were barred by the doctrines of claim preclusion, judicial estoppel, and issue preclusion, with the exception of two claims that were not brought in the initial action. 37

V. **ATTORNEYS' FEES & COSTS.** 39

A. ***Regions Bank v. Lowrey,* 2014 Ala. LEXIS 53 (Alabama Supreme Court 2014).** Trial court improperly reduced trustee's reasonable reimbursement of attorneys' fees and costs of successful defense against surcharge claims. 39

B. ***Larkin v. Wells Fargo Bank,* 2014 Minn. App. Unpub. LEXIS 1077 (2014).** Lone beneficiary that continues litigation following completed settlement, arbitration, and judicial resolution of claims is responsible for attorneys' fees incurred by trustee and other beneficiaries incurred in responding to his actions. 41

C. ***Sheen v. Sheen*, 2014 WL 2940596 (California, Court of Appeal, Second District, Division 8, July 1, 2014).** California Court of Appeal rules that beneficiaries who bring an action and benefit the trust are entitled to have their legal fees paid from the trust under the "common fund doctrine." 42

D. ***Arthur v. Davies*, 2014 Cal. App. Unpub. LEXIS 5892 (Court of Appeal of California, Second Appellate District, Division Six, August 21, 2014).** California Court of Appeal affirms trial court's denial of counsel fees and trustee fees to trustee, who failed to produce invoices to support her fee applications. 43

VI. **BUSINESS INTERESTS.** 45

A. ***Rollins v. Rollins*, 2013 Ga. App. LEXIS 332 (March 29, 2013); 20 Ga. LEXIS 179 (March 3, 2014).** Appellate court holds that trustees must account for corporate level activities of entities held in trust where they have the individual control over the entities, and are subject to trustee duties for their entity level actions; Georgia Supreme Court reverses. 45

B. ***Harris v. Bonander, 2014 Cal. App. Unpub. LEXIS 3804 (2014).*** Trustee cannot be sued for actions taken as general partner of partnership held in trust, where such claims were released in family settlement agreement. 47

C. ***Osborn v. Griffin,* Civil Action No. 2011-89 & 2013-32 (E.D. Kentucky 2014).** Summary dismissal denied on claims that brothers abused multiple fiduciary offices to prevent sisters from acquiring interest in family company and related properties where parents' estate plan would leave company equally to 11 children. 48

D. ***Federal National Mortgage Association v. Grossman,* 2014 U.S. Dist. LEXIS 113308 (2014).** Debtor could seek invalidation of transfers to LLCs as fraudulent transfers and name LLCs as parties, and remedies against LLCs are not limited to charging orders. 52

E. ***Jimenez v. Corr,* 2014 Va. LEXIS 153 (2014).** Use of "pour over" will violates shareholder's agreement and forces sale of stock to company, despite the fact that the revocable trust provided for distribution or sale of shares to qualifying shareholders. 52

VII. **ESTATE & TRUST ACCOUNT CLOSING.** 54

A. ***In re Jenzabar, Inc. Derivative Litigation,* 2014 Del. Ch. LEXIS 138 (2014).** Short-term GRAT that retained stock after its termination date contrary to trust terms cannot maintain derivative action in the absence of specific authority in the trust instrument. 54

VIII. **DISCLOSURE TO BENEFICIARIES.** 54

A. ***Abbott v. Brennemann,* 288 Neb. 389 (2014).** Trustees breached duties by failing to maintain trust records, and Form K-1s are not adequate disclosure under pre-UTC law or the UTC, but breach was harmless where trust was otherwise properly administered. 54

IX. **FIDUCIARY PRIVILEGES & EXCEPTIONS.** 56

A. ***Heisenger v. Cleary,* 2014 Conn. Super. LEXIS 1835 (2014).** Connecticut refuses to recognize the fiduciary exception to the attorney-client privilege.. 56

B. ***Hammerman v. Northern Trust Company,* No. 1 CA-CV 13-0260 (Arizona Court of Appeals, 2014).** In a case of first impression, Arizona Court of Appeals holds that UTC and state law support adoption of the fiduciary exception to the attorney-client privilege, but reverses trial court for ordering disclosure of all communications to both beneficiary and successor trustee without determining whether advice was for trust administration and should be disclosed, or for self-defense that is not required to be disclosed, and for requiring disclosure merely because advice was paid for with trust funds and obtained from trust counsel. 57

C. ***Zook v. Pesce*, (Maryland Court of Appeals, May 16, 2014).** Maryland Court of Appeals upholds the testamentary exception to the attorney-client privilege, but rules that petitioner failed to establish that the trial court's error in denying her evidence under the exception was prejudicial to her.. 58

X. **FIDUCIARY SUCCESSION.** 59

A. ***Testamentary Trust of Conti,* 2014 Phila. Ct. Comm. Pl. LEXIS 289 (September 17, 2014).** Court refuses to approve UTC nonjudicial settlement agreement that provided terms for the change of corporate trustees in conflict with the UTC judicial change of trustee provisions. 59

B. ***Taylor Intervivos Trust,* 2014 Phila. Ct. Comm. Pl. LEXIS 239 (August 18, 2014).** Beneficiaries cannot use the UTC codification of the *Clafflin* trust modification doctrine to grant beneficiaries power to remove and replace trustee without cause and contrary to the UTC judicial removal of trustee provision. 60

C. ***Hudson v. UMB Bank, N.A.,* 2014 Mo. App. LEXIS 936 (August 26, 2014).** The identification of the trustee by reference to its Kansas location and granting Kansas fiduciary powers amount to the settlor's designation of Kansas law to control the trusts, and under the Kansas UTC charitable remainder trusts are not "noncharitable trusts" subject to modification under the UTC codification of the *Clafflin* doctrine... 62

D. ***Vincent J. Fumo Irrevocable Children's Trust FBO Allison Fumo,* 2014 PA Super 235 (2014).** Court, over one dissenting opinion, voids the settlor's appointment of a trustee under a power reserved in the trust where the trustee was found to be the "alter ego" of the settlor and would facilitate settlor's plan to reclaim the benefit of the assets in the trust following his federal incarceration for mail fraud and tax evasion.. 63

E. ***In the Matter of Modell*, 2014 N.Y. Misc. LEXIS 3170 (New York County Surrogate's Court, July 17, 2014).** New York County Surrogate's Court rules that a petition to remove trustees that is detailed with specific accounts of self-dealing and other transgressions cannot be dismissed for failure to state a claim and further that the statute of limitations cannot bar a petition to remove a trustee. 65

XI. **DIRECTED TRUSTS, PROTECTORS & SPECIAL FIDUCIARIES.** 66

A. ***SEC v. Wyly*, Case 1:10-cv-05760-SAS (S.D.N.Y. September 25, 2014).** In securities law case, court rejects "independent trustee" exception in §674(c) and finds trusts are grantor trusts despite professional offshore trustees, where trust protectors consistently followed family's directions. 66

B. ***Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 143644 (October 9, 2014); *Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 1528 (Charleston South Carolina Division, January 7, 2014).** South Dakota trust code provision giving court power to enter preliminary orders in trust cases does not eliminate general requirements for issuance of preliminary injunction. Trustee appointed by trust protector substituted as plaintiff because beneficiaries' removal of trust protector without appointing a successor protector for 3 months violated the trust terms and did not bar protector from appointing trustee 68

C. ***Robert T. McLean Irrevocable Trust v. Ponder*, No. SD31767 (Missouri Ct. of Appeals 2013).** Trust "protector" not liable where there was no proof of harm caused by protector not exercising power to remove trustees. 70

XII. **ARBITRATION.** 71

A. ***Brown v. Brown-Thill,* 2014 U.S. App. LEXIS 15349 (8th Cir. 2014).** Under co-trustees' arbitration agreement, arbitrator could order co-trustees to consent to distribution plan from trust owned entities, but could not exercise judicial power to remove trustee under UTC. 71

B. ***Archer v. Archer,* 2014 Tex. App. LEXIS 6551 (2014).** Trust term "requesting" arbitration of disputes is precatory and cannot establish an enforceable agreement to arbitrate under trust agreement. 73

C. ***Gupta v. Merrill Lynch,* 2014 U.S. Dist. LEXIS 113670 (E.D. Louisiana August 15, 2014).** Court enforces broad arbitration provision in separate unrelated custody agreement as barring claims against trustee for breach of trust, but refuses to apply direct benefits estoppels to bind trust beneficiaries with no contractual connection to arbitration provisions in trust agreement. 73

D. ***Warren v. Geller,* 2014 U.S. Dist. LEXIS 117332 (E.D. Louisiana August 22, 2014).** Beneficiaries bound by arbitration in "client agreement" creating a trust by court's finding they were third party beneficiaries of the contract and through equitable estoppel by accepting distributions 74

XIII. **MEDIATION, SETTLEMENT, RELEASES & INDEMNIFICATION.** 75

A. ***In the Matter of the Estate of J. Thomas Bernard*, 2014 Wash. App. LEXIS 1902 (Court of Appeals of Washington, February 27, 2014).** Washington Court of Appeals rules that trust grantor "substantially complied" with the modification provisions of his trust, that the modification was in compliance with Washington's Trust and Estate Dispute Resolution Act, and that the trustees of the trust and the personal representative of the grantor's estate had standing to appeal the trial court's order declaring the trust amendment and a codicil "null and void." 75

B. ***Estate of Snow*, 2014 ME 105 (Supreme Judicial Court of Maine, August 14, 2014).** Supreme Judicial Court of Maine affirms Probate Court's judgment granting a motion to enforce a settlement agreement placed on the record before a professional reporter during a scheduled deposition despite that the Probate Court entered its judgment without holding an evidentiary hearing relating to the settlement agreement. 78

C. ***Hill v. Schilling*, 2014 U.S. App. LEXIS 16109 (5th Circuit, August 21, 2014).** Fifth Circuit affirms District Court's denial of trust beneficiary's motion to enforce a settlement where the relief sought by the beneficiary was not a part of the settlement agreement. 79

XIV. **CONSTRUCTION & CONDITIONS.** 81

A. ***Estate of George McFadden,* 2014 PA Super 203 (2014).** Ambiguous perpetuities termination provision construed to allow trust to exist for longest possible period allowed under the rule against perpetuities. 81

B. ***Matter of Kirschner v. Fischer*, 2014 NY Slip Op 03626 (New York Appellate Division, First Department, May 20, 2014).** New York Appellate Division determines that no trust assets pass under a trust provision for the distribution of property in the amount of assets "includable in the grantor's gross estate for Federal estate tax purposes" where the decedent died in the year 2010 and elected to pay no Federal estate tax. 82

C. ***James Michael Aldrich v. Laurie Basile*, 136 So.3d 530 (Florida, March 27, 2014).** Florida Supreme Court holds intestacy law applies to after acquired property when decedent's Will does not contain a general devise or residuary clause. 83

XV. **ISSUE.** 84

A. ***Knudson v. Scherer,* 2014 WY 129 (2014).** In a case of first impression, the Wyoming Supreme Court rejects the doctrine of equitable adoption for purposes of intestate succession. 84

XVI. **DISCLAIMERS & POWERS.** 85

A. ***Cessac v. Stevens*, 127 So3d 675 (Dist. Ct. App Florida, 1st Dist. Nov 20, 2013).** Florida first district, court of appeals affirms lower court decision that will did not exercise special power of appointment because it lacked specific reference to the power. 85

B. ***Midwest Trust Company et al. v. Reed Brinton*, 2014 Kan. App. Unpub. LEXIS 680 (Kan. Ct. App., August 15, 2014).** Trust beneficiary's exercise of testamentary general power of

appointment was not valid because it did not strictly comply with the condition precedent of approval by the trust protector. 85

XVIII. **AMENDMENT, REVOCATION, REFORMATION & TERMINATION OF NON-CHARITABLE TRUSTS.** 89

A. ***O'Connell v. Houser,*** **2014 Mass. LEXIS 841 (October 28, 2014).** Reformation of trust affirmed by state supreme court under *Commissioner v. Bosch* principles on adequate proof that reformation was proper to avoid loss of grandfathered GST-exempt status. 89

B. ***Bank of America v. Babcock,*** **2014 Mass LEXIS 840 (October 28, 2014).** State supreme court rejects suit to construe trust terms to protect marital deduction under *Commissioner v. Bosch* principles where there is no alleged drafting error or misconstruction of trust terms. 90

C. ***Turner v. Kent*****, No. 64A05-1310-TR-510 (Indiana Court of Appeals, July 31, 2014).** Incorporation of specific gift of real property by reference is invalid and will not be construed as a trust amendment. 90

D. ***Richard C. Head v. George A. Head, Successor Trustee*****, 2014 Ore. App. LEXIS 267 (Crt App Oregon, March 5, 2014).** Although courts generally have expansive powers under the theories of equity, such powers do not expand to trust modifications when neither party requested such modifications. 91

E. ***Daniel D. Peck, Trustee v. Constance L. Peck*****, 2014 Fla. App. LEXIS 2571 (Ct App Florida, 2d Dist. Feb. 26, 2014).** Both Florida's Uniform Trust Code and Common Law provide that a trust can be terminated upon the consent of the settlor and all beneficiaries even if such termination would frustrate the purposes of the trust. 91

F. ***Barlow v. Olguin,*** **2014 N.M. App. LEXIS 37 (2014).** Will can effectively revoke or amend a revocable trust under the New Mexico Uniform Trust Code. 92

G. ***Purcella v. Olive Kathryn Purcella Trust*****, 325 P.3d 987 (Supreme Court of Alaska, April 18, 2014).** Alaska Supreme Court rules that grantor of self-settled irrevocable trust did not produce evidence sufficient to establish that trust was the product of undue influence or sufficient to reform, modify or terminate the trust due to a purported mistake of fact or law or due to unanticipated circumstances. 93

H. ***In the Matter of the Estate of John Wagner*****, 2014 N.Y. App. Div. LEXIS 5649 (NY Sup. Ct., August 8, 2014).** Divided court rejects trust terms that provided for distribution of all assets to current beneficiary on termination of uneconomical trust. 95

I. ***Gerald McCarthy v. Rozlyn Taylor, et al.*****, 2014 Ill. App. LEXIS 610 (Ill. App. Ct., August 22, 2014)**. Handwritten notations on a copy of the trust are a valid amendment. 95

XIX. **NO-CONTEST CLASUES.** 96

A. ***Winston v. Winston, et. al.,*** **2014 Mo. App. LEXIS 972 (Court of Appeals of Missouri, September 2, 2014).** Missouri Court of Appeals holds that (1) the beneficiaries did not violate no-contest clauses where they did not seek to void the trusts; (2) the "Investment Trustee's" power to consent to, or veto, distributions was not subject to his fiduciary duties and that he

did not have to act in the beneficiaries' best interests in exercising this power; (3) trust agreements contemplated the hostility that arose between the trustee and the beneficiaries; and (4) that no changed circumstances existed justifying reformation of the trust agreements. 96

XX. **CHARITABLE MATTERS (GENERALLY).** 98

A. ***Lechowicz v. Costco Wholesale Corporation,* 2014 Conn. Super. LEXIS 2277 (2014).** Terms of deed granting standing to local citizens not effective to grant citizens, rather than attorney general, standing to enforce terms of a charitable gift, where citizen cannot show unique interest in gift or harm. 98

B. ***Littson v. Schaub,* 2014 U.S. Dist. LEXIS 150808 (E.D. California 2014).** Probate exception bars federal court from hearing challenge to validity of amendment to trust creating private foundation. 99

XXI. **CY PRES & TERMINATION OF CHAIRTABLE TRUSTS.** 99

A. ***Old National Bancorp v. Hanover College,* 2014 Ind. LEXIS 683 (2014).** Trustee that failed to seek stay of court order and transferred assets to charity lacks standing to appeal termination of charitable trust. 99

XXII. **TAX ELECTIONS.** 100

A. ***Walton v. Estate of Swisher,* 2014 Ind. App. Unpub. LEXIS 114 (2014).** Agreement to release claims to later tax benefits from DSUE election precludes later demand for payment for benefits of portability. 100

XXIII. **SPENDTHRIFT & ASSET PROTECTION TRUSTS.** 100

A. ***Estate of Creamer,* 2014 Phila. Ct. Com. Pl. LEXIS 322 (2014).** Spendthrift provision in will protecting outright gifts to son is subject to UTC exception for court orders of child support, and son's children have standing to object to elective share claims of widow to the extent support claims are not satisfied from estate. 100

B. ***Mennen v. Wilmington Trust Company,* 2013 Del Ch. LEXIS 204 (2013); C.A. No. 8432-ML (January 17, 2014).** Fiduciary exception to the attorney-client privilege does not apply to trustee's legal advice in connection with trustee's petition arising out of failed investments directed by co-trustee. Master recommends dismissal of claims to recover against trust for co-trustee's benefit under spendthrift clause, and rejects creation of public policy exception to clause for family member claims beyond support claims. 101

C. ***Safanda v. Castellano*, 2014 WL 3881338 (Bankruptcy, ND Illinois, 2014).** Spendthrift provision in South Carolina trust does not protect assets from bankruptcy trustee where debtor instructed family member trustee to apply provision and convert outright gift to a trust, thereby causing the trust to be a device similar to a self-settled trust and subject to creditors. 103

D. ***Scott v. Dondero,* 2014 Del. Ch. LEXIS 166 (2014).** Court stays wife's claims concerning Delaware trust until Texas court resolves Texas divorce action and interpretation of premarital agreement. 104

E. ***In re BankcorpSouth Bank, Relator*, 2014 Tex. App. LEXIS 4052, (Ct App Texas, 5th Dist. April 14, 2014)**. The Texas spendthrift statute does not have an exception for spousal support. 105

F. ***In re Marriage of Milias, Case No: 2012CA1969 Not Published Pursuant to C.A.R. 35(f) (Colo. Ct. App., March 20, 2014).*** Appreciated trust assets considered martial property subject to division upon divorce. 105

XXIV. **MEDICAID.** 106

A. ***In the Matter of the Estate of Arnold Melby*, 841 N.W.2d 867 (Iowa, Jan. 10, 2014)**. Under Iowa law the power to invade the trusts to pay for expenses due to last illness provides for Medicaid recovery. 106

B. ***Zahner v. Mackereth*, 2014 WL 198526 (W.D. Pa. Jan. 16, 2014).** Timing and purpose of annuity purchases make a difference in determining whether the annuity is a countable resource or exempt resource for Medicaid eligibility. 107

XXV. **WILLS & PROBATE.** 108

A. ***In re Matter of Buchting*, 111 A.D.3d 1114 (2013)**. Presumption of duly executed will arises where the execution of the will is supervised by the drafting attorney. 108

B. ***Estate of Truong Tran*, 2014 N.Y. Misc. LEXIS 3501 (NY Surr. Ct., August 5, 2014)**. Decedent's DNA sample is an estate asset. 108

C. ***In the Matter of the Estate of Peter Heiman*, 2014 N.C. App. LEXIS 746 (NC Ct. App., July 15, 2014).** Nondisclosure by personal representative of pending litigation was not material and, therefore, surviving spouse was provided fair and reasonable disclosure of the property and made a valid waiver of her spousal election. 109

D. ***In re Estate of Reynolds*, 2014 WL 1633034 (Ariz. Ct. App., April 24, 2014).** Under Arizona law the right of publicity exists and can be enforced by the estate after death. 109

E. ***James Michael Aldrich v. Laurie Basile*, 136 So.3d 530 (Fla., March 27, 2014).** Intestacy law applies to after-acquired property where decedent's "E-Z Legal Form" online will does not contain a general devise or residuary clause. 110

F. ***In re Estate of Thompson*, 434 S.W.3d 877 (Ark., May 22, 2014, rehearing denied June 19, 2014).** Fraud on marital rights causes revocable trust assets to be included in estate for elective share purposes. 111

XXVI. **DAMAGES & REMEDIES.** 112

A. ***Miller v. Bank of America, N.A.,* 2014 NMCA 053 (New Mexico Court of Appeals 2014).** Trustee breached duties by investing in nonproductive commercial real estate and borrowing from an affiliate to generate phantom income to distribute to the beneficiaries, and measure of damages should include both inflation adjustments and prejudgment interest without reduction for the phantom interest distributed to the beneficiaries. 112

B. ***Fetter v. Brown,* Tex. App. LEXIS 11209 (2014).** Where trust has not terminated, surcharge award is properly payable to successor trustee and not beneficiaries, and award is not excessive or subject to offset because of trustee-beneficiary's interest in the trust. 113

XXVII. **JURISDICTION & VENUE.** 114

A. ***Matter of Aboud Inter Vivos Trust,* 129 Nev. Advance Opinion 97 (Nevada Supreme Court, December 19, 2013).** Court's *in rem* jurisdiction in a trust accounting action does not give court jurisdiction over assets in partnership held in trust or *in personam* jurisdiction over former trustee and alleged improper purchaser of partnership assets. 114

B. ***Ashford v. Ann K. Fauvor Kan. Trust*, 2013 WL 6389519 (Kansas Ct. of Appeals 2013).** Kansas court lacks personal jurisdiction over Arkansas trust with respect to claims that do not concern Kansas property held in trust. 115

C. ***Littson v. Schaub,* 2014 U.S. Dist. LEXIS 150808 (E.D. California 2014).** Probate exception bars federal court from hearing challenge to validity of amendment to trust creating private foundation. ***Discussed infra.*** 116

XXVIII. **STANDING & PARTIES.** 116

A. ***Old National Bancorp v. Hanover College,* 2013 Ind. App. LEXIS 601 (2013).** Trustee that does not seek a stay of order terminating trusts, and does not intervene in its individual capacity, lacks standing to appeal immediate order of termination. 116

B. ***Ronald Louis Smith, Jr., Personal Representative of the Estate of Ronald Louis Smith v Harry Wayne Casey, individually, K.C. & The Sunshine Band, Inc. et al*, 741 F.3d 1236, (US Ct App 11th Cir. Jan. 22, 2014).** Estate of song author does have standing for copyright infringement action through the copyright registration by the producer when such registration listed the author and stated that the work was "not for hire". 117

C. ***In the Estate of James T. Spencer, Incapacitated/Disabled Person*, 417 S.W.3d 364 (Ct App Missouri, East. Dist, Div 2, December 24, 2013).** Under the Missouri Uniform Trust Code, a contingent future beneficiary does have standing to bring a declaratory action regarding Trustee's actions. 118

D. ***See Kastner v. Intrust Bank, infra*.** Claims against trustee dismissed where beneficiary is not a "qualified beneficiary" under the Kansas Uniform Trust Code, for failure to provide expert testimony on the standard of care, and for lack of factual support. 119

E. ***Bookman v. Davidson*, 2014 Fla. App. LEXIS 6472 (Court of Appeal of Florida, First District, May 5, 2014).** Florida Court of Appeal rules that a successor personal representative possesses the power and authority of his predecessor, including the power to prosecute a malpractice claim that could have been brought by his predecessor against the predecessor's estate administration attorney, and that any Florida Circuit Court has jurisdiction to hear claims that pertain to settlement of estates. 119

F. ***Doris Guyear, Heir of Leroy Guyear, Deceased v. Joey Blalock, et al.*, 2014 Tenn. App. LEXIS 425 (Tenn. Ct. App. July 23, 2014)**. Surviving spouse failed to meet the standing requirement necessary to enforce a promissory note. 120

XXIX. **ABUSIVE LITIGATION.** 120

A. ***Ringgold-Lockhart, et. al. v. County of Los Angeles, et. al.*, 2014 U.S. App. LEXIS 14979 (9th Cir., August 4, 2014).** 9th Circuit vacates district court's order that declared plaintiffs "vexatious litigants" and imposed a pre-filing condition on the plaintiffs as a result of their various filings relating to their challenge of the Los Angeles County Probate Court's removal of one of the plaintiffs as trustee. 9th Circuit rules finds that the district court did not make proper substantive findings of frivolousness or harassment and that the order was too expansive. 120

XXX. **STATE TAXATION & CHOICE OF LAW.** 122

A. ***Gray v. Division of Taxation*, 28 NJ Tax 28 (Tax Court of New Jersey, May 5, 2014).** New Jersey Tax Court rules that irrevocable trusts with retained interests are not subject to New Jersey Inheritance Tax where transfers were completed and became irrevocable more than three years prior to grantor's death and where no interest is retained by grantor upon her death. 122

B. ***Linn v. Department of Revenue,* 2013 Il. App. (4th) 121055 (December 18, 2013).** After Illinois trust decanted to Texas trust that lacked contacts with Illinois, imposition of Illinois state income tax on trust income violated the Due Process Clause. 123

C. ***Hussemann v. Husseman* (Iowa Supreme Court May 23, 2014).** Iowa Supreme Court, applying the "balancing approach" under the Restatement (Second) of Conflict of Laws, honors the choice of law provision subjecting a post-nuptial agreement to Florida law despite the fact that the spouses, who had resided in Florida, thereafter became domiciled in Iowa after the agreement's execution. 124

D. ***De Rosa v. Director, Division of Taxation*, 2014 N.J. Tax LEXIS 17 (Tax Court of New Jersey, July 17, 2014).** New Jersey Tax Court rules that the New Jersey Inheritance Tax is based on the distribution of assets as directed under the terms of a decedent's will and is not based on a post-death agreement among beneficiaries to alter the disposition of estate assets. 125

XXXI. **LIFE INSURANCE.** 126

A. ***Torti v. Hoag,* 2014 U.S. Dist. LEXIS 148471 (2014).** Court refuses to dismiss claims against trustee and trustee's insurance broker business for loan to settlor from cash value in life insurance subject to split-dollar arrangement. 126

B. ***Noveletsky v. Metropolitan Life Insurance Company,* 2014 U.S. Dist. LEXIS 134760 (2014).** Claims against trustee of ILIT dismissed where settlor selected the policy, the trust terms exculpated the trustee for receiving a commission on the policy sale and waived any responsibility over the policy as an investment, and the high premium burden on the policy, while a burden on the settlor, was not proven to be harmful to the trust or its beneficiary. 127

XXXII. **DELAWARE.** 129

A. ***IMO Daniel Kloiber Dynasty Trust,* C.A. No. 9685-VCL (Del. Chancery Court, August 6, 2014).** Delaware chancellor refuses to temporarily enjoin Kentucky divorce court from enforcing orders restricting the assets of a Delaware trust for the primary benefit of one spouse while the divorce proceedings are adjudicated. 129

XXXIII. **TORTS, SLAYERS & BAD ACTORS.** 132

A. ***Axiotis v. Michalovits*, 2014 WL 486658 (Superior Ct. of Conn. 2014).** Connecticut recognizes tort of interference with inheritance rights. 132

B. ***Beim v. Hulfish*, 2012 WL 1912261 (N.J. Super 2012)**. Appellate court includes increased estate taxes as potential damages in wrongful death action; New Jersey Supreme Court reverses. 132

C. ***Morris v. Morris*, 2014 Ga. App. LEXIS 191 (Ct App Georgia 3d Div. March 20, 2014)**. Georgia Court of Appeals affirms North Carolina slayer statute does not apply to slayer's irrevocable trust governed by Georgia law. 133

REVIEW OF THE PAST YEAR'S SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES*

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

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I. **INVESTMENTS.**

A. ***Kastner v. Intrust Bank,* 2014 U.S. App. LEXIS 11864 (10th Cir. Court of Appeals, 2014).** Claims against trustee dismissed where beneficiary is not a "qualified beneficiary" under the Kansas Uniform Trust Code, for failure to provide expert testimony on the standard of care, and for lack of factual support.

1. In 1996, Jessie Brooks created a revocable trust with a bank as trustee. The trust was for her benefit during her lifetime, and then after her death continued in trust for her daughter Nola Mae. Upon Nola Mae's death, the trust assets would continue in trust for Nola Mae's son, Kristopher. Jessie died in 2000.

2. In 2010, Kristopher, who was legally trained but not admitted to the bar, sued the trustee alleging nine causes of action, several which related to the creation of the trust and its terms waiving the negligence and prudent investor standards, and others which related to the administration of the trust.

3. The trial court dismissed all of the claims (self-dealing, negligent misrepresentation, and fraud) related to the creation of the trust. The court of appeals affirmed on the grounds that the claims were brought 14 years after the trust creation, and were barred by the Kansas 10-year statute of repose.

4. The trial court dismissed the claims for reformation of the trust (to eliminate the waivers of the negligence and prudent investor standards), and the court of appeals affirmed, on the grounds that: (1) under the Kansas UTC (which differs in this respect from the NCCUSL version of the UTC), the "qualified beneficiaries" of a trust only include current distributees and remaindermen, and not successor distributees where the trust does not terminate; (2) under the Kansas UTC, only a qualified beneficiary has standing to seek removal of a trustee or modification of a trust; (3) as a successor distributee, and neither a current beneficiary or a remainderman upon termination, Kristopher is not a qualified beneficiary under the KUTC and therefore lacks standing for these claims. The court of appeals also refused to certify the issue of who is a qualified beneficiary to the state supreme court because the question is not novel.

5. The trial court dismissed the deceptive trade practice claims, and the court of appeals affirmed, on the grounds that Kristopher was not a "consumer" and did not allege a "consumer transaction" under the Kansas Consumer

Protection Act. Other claims were dismissed for being redundant with the breach of trust claims.

6. The trial court granted the trustee summary judgment on the breach of trust claims, which the court of appeals affirmed on the grounds that: (1) breach of trust claims generally require expert testimony on the standard of care; (2) Kristopher was not qualified to act as his own expert by merely having legal training; (3) the factual record does not support the claims, where the trust assets outperformed the S&P 500 while disbursing $500,000 to the beneficiaries during the period in question. The court also rejected Kristopher's claims of judicial bias as being based on mere speculation.

B. ***Greenberg v. JP Morgan Chase Bank,*** **2014 N.Y. Misc. LEXIS 2011 (2014).** Court refuses to dismiss claims for investment losses during economic downturn, where bank rejected individual co-trustee's and beneficiary's requests to reallocate portfolio or liquidate equities**.**

1. Rubin Greenberg created a trust in 2000 with his son Alex as trustee. After Rubin's death in 2005, pursuant to the trust terms the assets were divided into separate trusts for Rubin's three sons and a bank was appointed as co-trustee of the trusts. The separate trusts permitted discretionary principal distributions, along with mandatory partial distributions at ages 45, 50, 55, and final distribution at age 60.

2. In 2006, Alex and the bank entered into an agreement by which Alex delegated sole investment responsibility to the bank. The agreement required the bank to take certain actions with respect to investments, including to meet annually with Alex to review circumstances and recommend changes to the investment objectives for the trusts, with any changes to be made in writing and signed by both Alex and the bank.

3. The separate trusts were funded in 2007, and initially invested with a weighting in securities between 55 and 70%. After the collapse of Bear Sterns in 2008, Alex contacted the bank with his concerns about the investments and asked about a more conservative weighting in cash and bonds. In multiple conversations and communications, both Alex and his brother Jess expressed their desire to reallocate or liquidate the securities, their preference for preservation of capital, and their desire to be on the investment "sidelines" during the volatile investment climate. The bank at various times refused to reallocate the accounts, increased the equity positions even after concerns were raised, asserted fiduciary law as an obstacle to liquidation, maintained that reallocation could not be made unless at least 50% of the funds remained in equities, and generally ignored Alex's requests for a short term strategy. Alex was reassured that market conditions were temporary.

4. Alex sued the bank for breach of contract and breach of the Prudent Investor Act, along with fraudulent misrepresentation, negligence, negligent supervision, and various other claims. On the bank's motion, the court

dismissed all of the claims other than breach of contract and breach of the Prudent Investor Act as a matter of law, as redundant claims.

5. The court refused to dismiss the claims for breach of contract and breach of the Prudent Investor Act on the grounds that: (a) the complaint adequately plead claims for (i) breach of the agreement to confer with the co-trustee and (ii) exposure of the trusts to excessive market risk; (b) a trustee is not immune from losses as a matter of law merely because the losses correlate with a widespread market decline, and the conduct of the trustee is a factual determination that depends on the facts and circumstances of each case; (c) the complaint meets the heightened pleading requirements for fiduciary claims; (d) the impact of any duties owed to remainder beneficiaries is an additional factual inquiry, and not grounds for dismissal as a matter of law; (e) Alex's selection of a "growth" objective in 2008 does not amount to waiver of claims, where "growth" is not well defined, and because such a guideline would not require strict adherence where other circumstances indicated a change was necessary; (f) Alex's ability to revoke the delegation of investment authority does not bar his claims because the bank as co-trustee could still resist his demanded change in allocation; (g) the trust terms authorizing the bank to invest in its own products is not a bar to Alex's claims, where the claims allege that the bank's profits from its own products are motivation for the bank's disregard of its duties; and (h) the delegation agreement impose duties on the bank and afford Alex breach of contract rights that are distinct from the Prudent Investor Act.

C. ***Matter of Littleton,* 2014 N.Y. Misc. LEXIS 2586 (2014).** Court refuses to dismiss suit against trustee for failure to diversify concentration of Corning Glass stock, despite trust terms exonerating trustee for retention of stock.

1. In 1960, John Littleton, the inventor of Pyrex and a Corning Glass executive, created a trust for the benefit of his wife, his son Harvey, and Harvey's family, with a bank as trustee. The trust received the residue of his probate estate upon his death. The trust terms provided that "to the extent that the trustee retain any stock, it shall not be held responsible for any loss or appreciation that may occur". The trust was funded in 1968 with a concentration of Corning stock from John's estate.

2. In 2008, the trustee filed an accounting for the period from 1966 through 1994. The beneficiaries filed objections to the accounting, and alleged that: (1) for 8 years after the initial funding, the trustee did not develop an investment plan for the trust, diversify the portfolio, or meet with the beneficiaries; (2) the trustee failed to keep the beneficiaries informed and thereby concealed its breaches of duty; and (3) the trustee should have divested 90% of the Corning stock by 5 months after the initial funding of the trust. The trustee moved for summary judgment.

3. The court refused to dismiss the claims on summary judgment on the grounds that: (1) the trustee was not able to produce any policy or procedural manuals for its trust practices from 1968-1972; (2) Harvey's actions as co-executor for his father, including funding the trust with the Corning stock from the estate,

do not justify summary judgment because a trustee cannot escape liability by relying on the acts of others; (3) the record does not include evidence that the trustee personally met with the beneficiaries, and no communication at all with the remainder beneficiaries, and this is a question of fact; (4) Harvey's actions as requesting distributions are not a basis for summary judgment; (5) the timing of the sales of stock and the impact of the timing on the trust are questions of fact; (6) despite the exculpatory clause in the trust, some accountability by the trustee is required, and the material fact issues raised by the beneficiaries preclude summary judgment under the exculpatory clause.

D. ***Matter of Knox, 2010 NY Slip Op 52234U* (February 24, 2010); *2010 NY Slip Op 52251U* (November 24, 2010); 2012 N.Y. App. Div. LEXIS 4880 (June 19, 2012)**; ***Campbell v. Bank of America,* 2014 N.Y. Misc. LEXIS 4353 (2014).** Surrogate's court surcharges trustee for over $21 million for not diversifying investments and taking investment directions from a non-fiduciary family member. The appellate division largely reverses the surcharge on appeal. Supreme Court refuses attempt by beneficiaries to relitigate lost claims, or raise new related claims in Suffolk County court and disqualify Erie judge that had rendered adverse rulings.

1. Seymour Knox II (Mr. Knox) created a trust under a trust agreement in 1957 for the benefit of his son Seymour Knox III (Seymour), with a predecessor to HSBC Bank as sole trustee. The Knox family had long been involved with the bank, and both Mr. Knox and his son Northrup headed the bank for many years. The Knox family was one of the bank's most important clients and among the founders of the modern version of the bank. Seymour and Northrup also founded the Buffalo Sabres NHL hockey franchise.

2. The trust provided for discretionary income and principal distributions among Seymour's children and more remote descendants on a *per stirpes* basis, with the goal of treating Seymour's children equally. The trust was funded with 5,000 shares of Woolworth stock and 5,200 shares of Marine Midland (now HSBC) stock.

3. At the time Mr. Knox created the trust, he was on the board of directors of both Woolworth and Marine Midland and owned 13% of all Woolworth stock. Within a year following the creation of the trust, the trustee sold 2,100 shares of Woolworth stock and purchased other equities. The trustee retained the balance of the stock at Mr. Knox's request. In 1985 the Woolworth stock made up 38.1% of the trust portfolio, which increased to 40.2% by 1996. The concentration was approved by the trustee's regional manager due to the low cost basis of the stock and "the sensitive nature of these issues on this account." In 1991, the trustee wrote to Seymour and recommended the sale of the stock, but said they would continue to hold the stock because "co-trustee" Seymour did not want the stock sold. By 1995, Woolworth was showing signs of trouble and stopped paying dividends. That year, at Seymour's request, the trust invaded principal to make up for the income lost when Woolworth stopped paying dividends, but continued holding a 33.6% concentration of the stock. There was no documentation in the file as to why the stock was retained.

4. Seymour died in 1996. In 1997, Northrup wrote to the trustee and warned against holding Woolworth stock, and informed the trustee that all Woolworth stock in the Knox Foundation had been sold. That year, the trustee sold 5,000 shares of Woolworth stock, leaving 23,000 shares in the trust, making up a 21.1% concentration. That same year, Woolworth was removed from the trustee's "hold list." In 1998, the trustee sold another 3,000 shares. Later that year, the trustee received 20,000 shares of Venator (the successor to Woolworth) stock in an exchange. The trustee did not fully divest the trust of Woolworth stock until 1999, four years after it stopped paying dividends.

5. When the trust was created, it was also funded with 5,200 shares of Marine Midland stock. The trust agreement expressly authorized the retention of the Marine Midland stock, even if the asset was not otherwise authorized by law as a suitable trust investment and even if the bank was acting as trustee. Internal bank documents stated that Mr. Knox understood that the trustee had complete authority to sell the bank stock for purposes of diversification, and that Mr. Knox was not adverse to the sale but hoped other assets would be acquired rather than the bank stock sold. In 1981, Seymour informed the trustee of his preference to retain the bank stock, and the trustee retained the stock. The only documentation of the annual decision to retain the stock was a literal rubber-stamped entry in the investment diary, with no analysis in the trust files. The bank stock was finally sold in 1987.

6. In 1969, Mr. Knox and Seymour requested that the trustee purchase stock in Dome Petroleum and Leesona Corporation for the trust. The trustee determined these stocks were not good trust investments, but purchased them anyway on the approval of Mr. Knox and Seymour. Despite the trustee's negative conclusions about the Dome stock, it was held in an overweight position (well above 10% of the trust portfolio, and by 1981 as high as 43.4%) at Seymour's direction, whom the bank internally referred to as a "co-trustee" even though he was not actually a co-trustee. Even though Leesona was an off-list security not proper for the trust, the trustee held a concentration in Leesona as high as 30.4% of the trust portfolio on Seymour's authorization. There was no documentation in the file explaining the retention of the overweight position. The trust also retained an overweight position of Digital Equipment stock (as high as 20%) without documentation.

7. In September of 2006, the trustee brought an action in the Surrogate's Court to settle its accounting from 1957 to 2005 and to resign and be discharged as trustee. Seymour's children objected to the accounting and alleged that the trustee negligently retained the Venator Group (the successor to Woolworth) stock. The guardian *ad litem* appointed for Seymour's minor descendants also filed objections alleging that the trustee breached its duty by failing to diversify investments, violating its own internal procedures in making investments, improperly abdicating its fiduciary role to Mr. Knox and Seymour, and being engaged in an overall pattern of imprudence and negligence.

8. The court held that the trustee breached its fiduciary duty and was negligent in purchasing the Dome and Leesona stock at the direction of a non-trustee (at different times Mr. Knox and Seymour) when the trustee's own analysis

concluded those stocks were not proper trust investments. On critical management issues, the court concluded that the trustee simply deferred to Mr. Knox and Seymour, even to the extent of allowing one or both of them to effectively override the best consideration of the sole trustee.

9. With respect to the Woolworth stock, the court held that the trustee should have sold the stock when it became an off-list holding in 1997 at the latest, and that the trustee offered no plausible explanation for its gross dereliction of its fiduciary duty. The court rejected the trustee's defense that the stock produced one-third of the trust's income because there was no documentation of that rationale during the administration, other stocks could have generated more income, and the stock was retained by the trustee after it stopped paying dividends. The court was also sharply critical of the trustee's distribution of principal to make up for the lost Woolworth dividends, without any analysis and simply at Seymour's request.

10. With respect to the bank's stock, the court held that: (1) the trust instrument exonerated the trustee for holding its own stock, but only where it exercised its discretion with respect to the stock; and (2) since there was no proof that the trustee performed any actual analysis about the prudence of holding the stock and ignored its fiduciary duties, the trustee could not be absolved of its negligence by the trust terms.

11. The court held that the trustee negligently managed the trust by: (1) failing to maintain documentation; (2) failing to develop an investment plan; (3) being indifferent to bank policies; (4) acquiescing to directions by a non-trustee and treating Seymour as a co-trustee; (5) failing to sell the bank stock at the inception of the trust; and (6) failing to sell 90% of the Woolworth stock at the inception of the trust and the balance of the shares by 1991.

12. In a supplemental decision concerning damages against the trustee, the court: (1) used a straightforward application of the *Matter of Janes* method of calculating damages; (2) awarded 9% interest compounded annually, finding that a 9% return would have been earned by the trust assets if invested properly; (3) awarded actual damages in the amount of $21,437,084; (4) declined to order the trustee to return commissions due to a lack of evidence of malevolence or dishonesty; and (5) reserved decision about the trustee's attorneys' fees.

13. On appeal, the Appellate Division largely reversed the surrogate on the following grounds:

    a. The trust terms gave the trustee the power to invest without regard to diversification.

    b. The trust terms allowed the trustee to consult with "counsel" and provided that the trustee would be protected for acting in good faith in accordance with the opinion of counsel. This provision is not an absolute exoneration provision that is contrary to law.

c. The term “counsel” is not limited in the trust terms to only legal counsel.

d. The trustee acted prudently on consulting with Seymour in making investment decision because Seymour (a) was co-trustee of other family trusts, (b) had a vested interest in the success of the trust for his children, and (c) was a knowledgeable and savvy investor.

e. The retention of the bank stock was specifically authorized by the trust terms.

f. Dome and Leesona were purchased and held in reliance on advice from Seymour, and to the extent they were sold for losses the losses were nominal. There was no evidence that the trustee acted imprudently in relying on Seymour’s advice, and no evidence that Seymour was acting against the interest of his children or that he was uneducated in financial matters.

g. Even though assets were held in overweight positions, the objectant failed to establish that it was imprudent to do so, those positions were held in consultation with Seymour, and the objectant failed to show a financial loss from the holdings.

h. The Woolworth and bank stocks were inception assets, and inception assets may be prudently retained even where it might be imprudent to purchase those assets during the administration. Those stocks also generated significant income for the beneficiaries. It would be unreasonable to find that a trustee acted imprudently in retaining assets that had both appreciated in value and provided significant income to the trust.

14. The appellate division sustained the surcharge award only as to the retention of the Woolworth stock after the date it stopped paying dividends.

15. *New Chapter.* Following their losses in the Erie County Surrogate’s and Supreme courts, certain beneficiaries then filed a new lawsuit in the Suffolk County Supreme Court with 15 causes of actions seeking accountings and claiming abuse of process, bad faith, breach of fiduciary duty, fraud, conversion, aiding and abetting, judicial bias, and other claims. The beneficiaries also sought to move the matters currently pending in Erie to Suffolk County, and to disqualify counsel for the trustees. The only contact with Suffolk County was that one of the beneficiaries resided there. All other contacts related to the claims were in Erie County. The Suffolk County generally granted motions to dismiss all of the claims and required any claims not subject to dismissal to be heard in Erie County on the grounds that:

a. The Erie judge refused to recuse herself, and the grandchildren failed to appeal her decision which is the proper course of action. The Erie surrogate can afford complete relief in the case, the surrogate and supreme courts have concurrent jurisdiction in these matters, and the proceedings in Erie were filed before the Suffolk County action. Any allegations that the Erie judge is biased must be raised before that judge.

b. The trustees and family office, which are at the center of the case, are located in Erie.

c. The court may not vacate, overrule, modify, reconsider, or disturb the decision of a fellow judge with coordinate jurisdiction.

d. Unless the Erie judge's decree is vacated by reversal on appeal, the causes of action that are an attempt to relitigate prior decisions in another court are dismissed.

e. Causes of action dependent on factual issues presently before the Erie court are dismissed without prejudice so they can be filed in Erie, due to the possibility of inconsistent rulings and judicial economy.

f. Claims that within the scope of releases signed by the beneficiary of trusts that are terminated are dismissed.

g. Claims that seek an accounting beyond the 6-year limitations period on accountings after trust termination are dismissed as untimely.

h. Claims that are related to the accountings for trusts, where the trustee has already petitioned for settlement of the accountings in Erie, are dismissed.

i. Claims related to a fictional trust that does not exist are dismissed.

j. The guardian *ad litem* appointed by the Erie court may not intervene in the Suffolk action, as his claims are better heard in Erie.

k. The Erie accounting proceedings filed by the trustees cannot be joined with the Suffolk actions because the Suffolk actions are dismissed or properly filed in Erie.

l. The beneficiaries' multiple claims and motions do not rise to the level of sanctions as they are based upon legal theories.

m. The beneficiaries' claim to disqualify the trustees' attorney are rejected.

E. ***Cavagnaro v. Sapone,* 2014 Cal. App. Unpub. LEXIS 7011 (2014).** Trustee did not breach duties by selling residential property to save expenses and better support widow, regardless of fact that remainder beneficiary resided there.

1. Ebe and John Sapone created a joint revocable trust. Upon John's death in 1991, the trust assets divided into 4 separate trusts all of which were for Ebe's lifetime benefit, and thereafter for their daughter and her children. The principal assets of the trusts were several parcels of real property. By 2013, the daughter lived in one of the residential properties.

2. In 1998, Ebe married Alfred Cavagnaro. By 2013, Alfred was serving as Ebe's conservator and trustee of the trusts. The court order appointing him as trustee required court permission to sell real property. Alfred petitioned for permission to sell several properties, including the residential property where the daughter resided. The non-exempt marital trust holding this property ran a $1,350 monthly deficit from the commercial real estate in the trust, and the trustee sought to make the trust financially productive and self-sustaining and eliminate the monthly deficit. The court approved the sale and the daughter appealed.

3. On appeal, the court affirmed on the grounds that: (1) while the trust terms required to look to the other survivor's trust first when making principal distributions, the sale of the property and reinvestment of the proceeds is not a distribution and this provision does not apply; (2) the allegation that the sale is needed to deal with future emergency expenses is not an intent to invade principal, although principal invasion is permitted for Ebe's benefit; (3) the trust terms do not identify maintaining the daughter in the house is a trust purpose; (4) Ebe's statements of her desire to support her daughter and her happiness with her living arrangements, submitted in order to justify gifts to her from the conservatorship estate, do not evidence an intent that binds the trustee and do not rise to the level of amending the trust terms; and (5) the trustee is not required to leverage other trust assets to subsidize the daughter's perpetual rent-free use of the trust property.

II. **DISTRIBUTIONS.**

A. ***Kritchman v. Wolk,* No. 3D12-2977 & 3D12-2457 (Fla. 3rd District Court of Appeals, October 1, 2014).** Trustees breached duties by failing to carry out settlor's direction to pay grandchild's college tuition out of revocable trust assets after the death of the settlor.

1. Lola Kritchman created a revocable trust with herself and a bank as co-trustees. Lola directed the bank to pay her grandson's private school tuition out of the trust for several years. She then directed the bank to pay her grandson's tuition, room, and board for his freshman and sophomore years at Yale.

2. During his sophomore year, Lola directed in writing that the bank make arrangements to pay the costs of her grandson's junior and senior years at Yale. The bank paid the costs for fall semester of his junior year.

3. Lola died in November of her grandson's junior year. Her son, the father of the grandson receiving the payments, became co-trustee. A bank trust officer emailed the grandson's mother assuring her that the next tuition payment would be made by the trust. Thereafter, the son and the grandson's mother disagreed about Lola's will and a disputed fourth codicil which would be to the detriment of the son, and the son as co-trustee opposed Lola's instructions to the bank to pay his the grandson's tuition. The costs for the balance of junior year, and all of senior year, were not paid by the trust.

4. The grandson sued the co-trustees for both undergraduate, and also future graduate, expenses. The trial court granted summary judgment for the grandson on the undergraduate costs in the amount of $101,000 plus prejudgment interest, reserved judgment on the graduate expenses (which were not part of the direction and were based on the broad definition of education elsewhere in the trust instrument), and ordered disgorgement of the attorneys' fees paid by the co-trustees out of the trust.

5. On appeal, the court of appeals affirmed on the grounds that: (1) the co-trustees were required by the trust terms to carry out Lola's directions; (2) the bank represented it would pay the costs, and the dispute about the fourth codicil was not justification for disregarding her instructions; (3) the bank has not offered any supportable explanation for disregarding Lola's direction; (4) the failure to carry out the direction violated the provision of the Florida UTC on the duty to administer the trust in good faith and under its terms, the duty to act impartially, and the duty of prudent administration; (5) the trial court did err by considering claims for graduate expenses that were not part of Lola's direction; (6) the damage award should be reduced to $86,000 to cover just tuition, room, and board, and not the broader definition of expenses elsewhere in the trust agreement and not in Lola's direction; (7) the co-trustees are jointly and severally liable for the damages; and (8) the co-trustees must disgorge, and cannot pay, any attorneys' fees from the trust as a result of its breach.

B. ***Walker v. Brooks,* 2014 Mich. App. LEXIS 2046 (Unpub. 2014).** Settlor, serving as trustee of trust for his wife with remainder to her son, breached his duties and went beyond "health" standard by making distributions for charity and to educate wife's orphaned grandchildren.

1. Joseph Brooks created a trust for his wife Edwina, with himself as trustee, and funded it with $500,000 to save taxes and so that his wife would have some of her own money to spend. The trust provided for distributions to Edwina for her health, support, and maintenance. At her death, the residue passed one-half to her son Walker and one-half to her daughter's children, who were orphaned.

2. During Edwina's lifetime, Joseph made distributions at Edwina's request for the graduate school education of her orphaned grandchildren, and to create a church scholarship fund. Edwina died in 2009, and her son sued Joseph to remove him as trustee, compel an accounting, and challenge the distributions. At Edwina's death, her son's share of the trust was only $4,000. The trial

court approved the distributions as being proper for "health". The son appealed.

3. On appeal and in an unpublished opinion, the Michigan Court of Appeals reversed the trial court and held that Joseph breached his duties as trustee on the grounds that: (1) the trial court erred by including the well-being of Edwina's "soul" in the definition of health; (2) the health of the soul should not be augmented by giving gifts, and the trial court's definition of health was improperly subjective and more akin to "happiness"; (3) while Edwina might have benefited mentally and spiritually by making gifts to charity and her orphaned grandchildren, these do not fall under "health" under the trust instrument; and (4) the trust was for Edwina's lifetime benefit and not the benefit of the charity or the grandchildren. A concurring opinion focused on the tax reasons for including an ascertainable standard under IRC Section 2041, and would reach the same result by reading that standard in view of its tax purposes.

C. ***Berlinger v. Wells Fargo, N.A.,*** **2014 U.S. Dist. LEXIS 114571, 125872 & 134643 (M.D. Florida, 2014).** In a claim that trust distributions to satisfy divorce obligations of primary trust beneficiary were improper, court refuses to dismiss trustee's third party complaint against ex-spouse, dismissed $18 million claim of civil theft for 45 day delay in transfer of assets to successor trustee, and sustains objection to testimony seeking communications between trust officer and in-house counsel.

1. The children of Bruce Berlinger and Sue Casselberry were the beneficiaries of three family trusts, with Bruce as primary beneficiary, and Bruce and the bank as co-trustees. The beneficiaries sued the co-trustees for allegedly improper distribution out of the trusts to satisfy millions of dollars in equitable distribution, alimony, and support obligations imposed on Bruce in the settlement of his divorce from Sue.

2. The bank filed third party complaints for contribution and unjust enrichment against Bruce, and unjust enrichment against Sue. Sue moved to dismiss the third party claim against her, which the court refused on the grounds that: (1) impleader of Sue as a party is proper; (2) the bank properly plead a claim for unjust enrichment; (3) the bank has standing because if it is held individually liable for the distributions, it would be inequitable to allow Sue to retain the funds; and (4) it is not clear from the face of the pleadings that the limitations period on the claims has expired.

3. The beneficiaries exercised their right to remove the bank and appoint a successor corporate trustee, and demanded he transfer of assets to the successor within 30 days. The beneficiaries sued the bank 45 days later for civil theft and sought treble damages exceeding $19 million. A month later, the trustee had transferred the funds to a successor corporate trustee. The beneficiaries then sought $6 million in damages for the delay. The bank moved to dismiss the claim of civil theft for failure to state a claim, and the entire Second Amended Complaint as a shotgun pleading. The court dismissed the civil theft claim because the trust terms did not provide for distribution of the assets to the beneficiaries, and therefore they did not have

a sufficient property interest to support the claim. The court dismissed claims that the bank had a felonious intent on the grounds that the beneficiaries knew the funds were with the bank and therefore the location of the funds was not concealed. The court dismissed the claims for over $6 million in damages for the delay in transferring the funds for lack of proof of harm since they were not entitled to distributions under the trust instrument and there was no proof of a distribution approved by the successor trustee that was frustrated by the delay in the transfer. The court allowed corrections to the pleadings to cure the concerns about a shotgun pleading.

4. In a dispute over the deposition of a trust officer assigned to the account, the court: (1) sustained an objection to questions that sought communications between the trust officer assigned to the account and in-house counsel concerning the distributions; (2) held that disagreeing with the deponent's answer is not grounds for reopening a deposition where the witness was not noticed under Rule 30(b)(6) and was not required to be knowledgeable about the subject of inquiry; (3) refused sanctions; and (4) admonished counsel to conduct themselves in a more civil manner in future depositions.

D. ***Educational Trust for Ferren Chambers,* 2014 Phila. Ct. Comm. Pl. LEXIS 237 (2014).** Trustees surcharged for using trust assets set aside for educational needs to pursue civil rights litigation the school district.

1. Ronald and Leslie Chambers successfully sued the Philadelphia school district for denying their disabled son a free and appropriate public education. As a remedy, the school district funded a trust created by the parents for the son's benefit with the parents and a bank as co-trustees. The parents were also the court appointed guardians for their son.

2. The trust terms authorized distributions for the son's "supplemental educational needs" which was a defined term in the trust, and also distributions that have a "reasonable relationship" to the educational needs, were recommended by certain educational institutions, or certain other expenses for services the school district is not providing after notice to the school district. The trust terms provides that the school district would pay the fees of the bank co-trustee.

3. The parents pursued federal civil rights litigation against the school district under a contingency fee agreement with counsel, which was approved by the court. When the claims were unsuccessful, the parents engaged appellate counsel. At the parents' request, the bank distributed funds from the trust to pay for the appellate counsel in the civil rights litigation.

4. The trust terminated by its terms on December 31, 2010, and the terms provided for the distribution of the remaining balance to the school district (subject to claims by the state public welfare department). Two weeks prior to the termination date, the parents requested an additional $130,000, which the bank rejected on the grounds that the distributions were not authorized by the trust terms. The trust balance at that time was $117,000. The bank rejected a series of additional requests for appellate counsel fees as not

authorized by the trust terms. The bank also rejected a claim for $60,000 for special education services provided by Potential, Inc. The parents sued the bank to compel the distributions, the bank filed its first and final accounting, and the school district filed counterclaims against the trustee asserting that certain trust distributions were not authorized.

5. The trial court ruled against the parents and also imposed a surcharge on all three co-trustees. The bank did not appeal. The parents appealed.

6. On appeal, the Court of Common Pleas affirmed the trial court on the following grounds:

    a. The trust terms are clear in defining educational needs for which proper distributions may be made, none of the categories of permissible distributions include litigation costs, and there is no indication that the trust was intended to be used as a vehicle to fund civil rights litigation. The litigation was not to provide educational services, but rather to seek monetary damages for the past failure to provide those services. The fact that the bank changed its mind mid-stream about those distributions is not evidence of intent that they be included. The trust could only properly pay litigation expenses that were incurred to secured educational services.

    b. The distribution of $35,000 from the trust for appellate litigation costs was improper, and the trial court properly surcharged the three co-trustees for the distributions. The bank's decision to reject later distributions was proper.

    c. The co-trustees breached their fiduciary duties by failing to enforce trust terms that required the school district to reimburse the trust for any fees paid to the bank, and thereby waived the trust's right to reimbursement. The trial court properly surcharged the three co-trustees $21,000 for this failure.

    d. The co-trustees additionally breached their fiduciary duties by failing to seek reimbursement from the school district for the attorneys' fees properly incurred to seek educational services, where the court awarded the fees.

    e. The bank properly rejected payment of the $60,000 for special education services provided by Potential, Inc. because those services were provided after the termination date of the trust.

    f. All three co-trustees are properly subject to surcharge. The parents cannot claim a lack of control over the trust and shift all of the liability to the bank where: (1) they had previously called the trust assets "their own pocket"; (2) they were the settlors and co-trustees of the trust; and (3) the courts were available to them at any time if they disagreed with the actions of the bank.

g. The co-trustees breached their duties and are not entitled to have their attorneys' fees for this litigation paid out of the trust.

E. ***Favour v. Favour,* No 1 CA-CV 13-0196 (Az. Court of Appeals 2014).** Trial court surcharge reversed in part for limiting net income to DNI and construing trust terms prohibiting invasion of corpus as barring trustee from paying administrative expenses, diversifying trust investments, and allocating expenses to corpus under state law.

1. Alpheus Favour died in 2002, survived by his wife Susan and three children from a prior marriage. Under his will, he created a QTIP marital trust for Susan's benefit, with Susan as trustee, that distributed only net income to Susan and provided that neither the trustee nor Susan have the right to invade principal for any purpose. The trust was funded with cash, stocks, commercial and ranch property interests, and a 20% interest in an entity holding an apartment complex also owned by Susan individually and Alpheus' children.

2. Over Susan's objection, two of the children borrowed against the apartment complex for their personal benefit, and had trouble repaying the loan. They proposed to sell the ranch jointly owned with the trust, Susan rejected the sale term and the ranch was not sold, the loan went into default, and the apartment building was sold at a trustee's sale.

3. Susan sued the children for the harm to the trust and her from the loan, default, and forced sale of the apartment building. The children sued Susan for breach of fiduciary duties, removal as trustee, an accounting, and other relief. Susan had not maintained a checking account for the trust and deposited income into her personal account, reported trust income on her personal, rather than on the trust, tax returns, took depreciation deductions on her personal returns, and used trust assets to pay part of her legal fees in the dispute. She did not generate statements for the trust, did not provide the children with requested accountings, and set up an automatic $3,000 monthly distribution to her from the trust despite the "net income only" limitation in the trust terms.

4. The trial court removed Susan as trustee, surcharged her, ordered her counsel to disgorge $70,000 in fees, and awarded the children attorneys' fees based on its findings that Susan: (1) failed to account and keep the children informed as beneficiaries; (2) used trust assets for personal benefit and invaded principal; (3) breached duties by selling stock in the trust; and (4) filed inaccurate tax returns. Susan appealed.

5. On appeal, the Arizona Court of Appeals reversed the trial court in part and remanded on the grounds that: (1) the trial court erred by holding that Susan was only entitled to "distributable net income", because net income for distribution purposes is determined under the trust instrument and the state principal and income act (and then increased as necessary to comply with the QTIP requirements as provided under the trust terms) and is not dependent on the tax concept of DNI; (2) while the trust terms do not allow invasion of principal, the trust terms also incorporate and grant the trustee broad

fiduciary powers under state law, and therefore the trial court erred by holding that Susan as trustee could not use principal if necessary to administer and protect the trust; (3) because the will is silent on the allocation of trust expenses, the trustee could also charge a part of expenses to principal under the state principal and income act; (4) the trial court erred by holding that Susan's sale of the original stock in the trust, and reinvesting the proceeds, was an invasion of principal, because under both the pre-UTC prudent investor act and the UTC she had the power to invest, trade, diversify, and manage the trust assets; (5) a mere decline in the value of the trust assets does not establish a breach, without a determination of the reasonableness of her actions at the time they were taken; and (6) the court erred by holding that Susan must avoid potential conflicts of interests, rather than actual conflicts of interest, and on remand the court must determine whether Susan actually advanced her own interests to the detriment of the children.

6. The Court of Appeals affirmed the findings that Susan failed to keep records and inform the beneficiaries, wrongly deposited trust income into her personal account, filed incorrect tax returns, and improperly took corpus with the $3,000 monthly withdrawals, but vacated the removal, surcharge, and attorneys fees award and remanded for the trial court to determine whether that conduct justified sanctions or removal of Susan as trustee, in view of the reversal of the court's other findings of fault. The court also vacated and remanded the fee decisions.

F. ***Estate of Greenblatt,* 2014 ME 32 (2014).** Executor did not breach duty of loyalty by allowing eldest generation members, including executor, to select item of tangible personal property with significant family value but nominal monetary value, before making item available to younger generations.

1. Ada Greenblatt died testate and without issue. The residue of her estate passed to her siblings and the children of her deceased siblings. The residue included items of family importance but nominal monetary value, including a mizrah (ornamental religious print) worth $100. The executors (her brother Owen and one of her nephews) decided to allow Ada's surviving siblings to select from these items before making them available to nieces and nephews, since most of these items came from Ada's parents and her siblings grew up with these items. Owen, as a sibling (and also the executor), selected the mizrah.

2. All items selected by the siblings were charged to their respective shares of the residue for their appraised value, and were to be marked "unavailable" on the list of items sent to all of the beneficiaries including the nieces and nephews. However, the mizrah was inadvertently not marked this way, and Ada's nephew Mark also selected the mizrah. He was then informed it was not available because Owen had already selected it.

3. Mark challenged the distribution of the mizrah, complained in writing to the estate's counsel, and refused to cooperate with the rest of the estate administration, causing the executors to have to petition the court for permission to sell other estate property and obtain a default judgment against

him. Mark objected to the petition to settle the estate at the executor's legal fees, but the court found that even though the distribution of the property was not "perfect" it was still "proper", ordered the estate closed, and approved the executors' legal costs. Mark appealed.

4. On appeal the Maine Supreme Court affirmed the trial court on the grounds that: (1) applying trust law principles and the Uniform Trust Code because executors are subject to trustee standards by Maine statute, the duty of impartiality does not require that all beneficiaries be treated equally, rather they must be treated equitable in light of the purposes and terms of the instrument; (2) an executor does not automatically breach a duty by distributing to himself as a beneficiary; (3) the will did not provide instructions on distributing the property and the probate code has minimal guidance other than to act in the interests of the beneficiaries; (4) it was reasonable and consist with the interest of the beneficiaries to give preference for these items to the family members in the nearest degree of kinship to Ada, who had grown up in the home with those family items; (5) Owen was unaware at the time that anyone else would be interested in the mizrah; and (6) Owen offset his residuary interest by the $100 value of the mizrah and his share was not enhanced by receiving the item.

G. ***In Re: Cletus P. McCauley and Mary A. McCauley Irrevocable Trust*, 2014 Ohio App. LEXIS 3624 (Ohio Ct. App., August 25, 2014).** Payment of funeral and burial expenses for the primary trust beneficiary is a proper distribution for support and maintenance.

1. Cletus and Mary McCauley established an irrevocable special needs trust for their son Kevin, which was his sole means of support after their deaths. The trust terms provided that the trustee could distribute principal and income for Kevin's maintenance and support. After their deaths, Kevin's guardian filed an action contesting his Paula's administration of their estates. While the litigation was pending, Kevin died.

2. The trustee of the special needs trust moved the court for approval to pay for Kevin's burial and funeral expenses. Paula's children objected. The trial court approved the expenses as valid maintenance and support because the settlors' intent was to provide for all of Kevin's needs.

3. On appeal, the Court of Appeals affirmed on the grounds that, although the trust document did not expressly provide for the expenses, Cletus's and Mary's intent was clear in providing for Kevin to the fullest extent possible and the paying for his funeral and burial expenses aligned with their intent.

III. **THIRD PARTY LIABILITY.**

A. ***Goldberg v. HSBC Securities,* 2014 N.Y. Misc. LEXIS 858 (2014).** Bank did not breach its contract or aid and abet undue influence by performing its banking function at arm's length.

1. Herbert Lerner died in 2011. At that time, he had several bank and investment accounts. Herbert's executor sued the bank and Arnold Orlinsky. Orlinsky was also allegedly a client of the same bank. The executor alleged that while Herbert was hospitalized and medicated, Orlinsky exerted undue influence over Herbert that caused Herbert to designate Orlinsky, rather than the estate, as the beneficiary of a $250,000 annuity owned by Herbert, and also to transfer $120,000 into an ITF ("in trust for") account in Orlinksy's name. The executor sued the bank for allegedly aiding and abetting the undue influence and for breach of contract by allegedly assisting in Orlinsky's claimed bad acts.

2. The court dismissed the claims against the bank on the grounds that: (1) there is no direct New York case law that concludes there is a New York cause of action for aiding and abetting undue influence, and the standard appears to be essentially a claim for aiding and abetting fraud that must be pleaded with specificity; (2) allegations that the bank violated its own "KYC" (know your client) rules are not sufficient to prove substantial assistance in a fraud; (3) mere presence at meetings and observance of allegedly abusive behavior, and performing banking functions in an arm's length manner (and not intervening to stop the alleged abusive conduct), do not support a claim for aiding and abetting; and (4) vague allegations that the bank violated its KYC rules by not explaining the allegedly abusive transactions to Herbert are not sufficient to establish a breach of contract action because they do not identify any specific contract provision that was breached.

IV. **LIMITATIONS & OTHER DEFENSES.**

A. ***Smith v. SunTrust Bank,* A13A2256 (Georgia Court of Appeals, January 15, 2014).** Line item on account statement reporting sale to straw man does not start statute of limitations on sale by trustee, but trustee's detailed letter received by beneficiaries starts limitations period on income distributions.

1. Orr Fisher created a trust in 1969 for the benefit of his daughter Emily along with 17 other relatives and their descendants, with Emily, Spencer Linder, and a bank as co-trustees. The trust was funded with a 15% interest in Georgia commercial real estate under a 90-year ground lease, which now contains a large office park. In the trust terms, Orr expressed his precatory wish that the property not be sold, and prohibited the sale without his or his wife's consent during their lifetimes.

2. The trust was divided into 3 subtrusts: one with 10% of the property paying income to Emily for life; another with a 60% interest that distributed income to the other beneficiaries; and a third trust (called "Trust C" which is at issue in the case) with a 30% interest that permitted income distributions to all of

the beneficiaries combined as needed for maintenance, health, support, and education, after considering other resources. The trust terms required annual accountings. Upon termination of the trust at the end of the perpetuities term, the trust assets passed to the Fisher Foundation.

3. Orr died in 1969 just after creating the trust. In 1979, the trustees sold the property to Orr's widow for the appraised value of $300,000 in a straw man transaction. She then immediately conveyed the property to Emily and her husband (the deeds were recorded within minutes of each other). The trust account statements for 1979 noted the sale to the widow, but did not mention the transfer to Emily. One beneficiary, Rob Smith, testified he did not receive the statements and was unaware of the transaction. Other beneficiaries testified that their parents may have received the statements, but they were not aware of the sale transaction.

4. From 1969 until 1989, all of the income of Trust C was distributed to Emily (to the exclusion of the other beneficiaries), and without any application of the standards in the trust instrument. In 1989, a new trust officer for the corporate trustee attempted to require Emily to provide documentation of her need and other resources as a condition of receiving income, but capitulated when Emily refused and continued distributions. In 1990, the trust officer sent the Trust C beneficiaries a letter that recited how income distributions had been handled and would be handled unless another beneficiary expressed a need for income. All of the beneficiaries except Ron admitted they received the letter. In 1998, a new trust officer reviewed the income situation, called it a debacle, and noted it was best to leave the issue as it is.

5. The Trust C beneficiaries also testified that they did not receive statements for the trust and had not provided a copy of the trust instrument before the litigation.

6. In 2011, the trustees petitioned to terminate the trusts and distribute the trust assets to the current beneficiaries. In 2012, the beneficiaries sued the trustees for improper sale of the property and for improper distributions of income from Trust C. The trial court granted summary judgment for the trustees on the basis of the running of the statute of limitations on the claims.

7. On appeal, the court of appeals:

    a. Reversed summary judgment on the claims related to the sale on the grounds that: (i) the account statement was not a "written report" that starts the limitations on the sale, where the incomplete information and lack of disclosure of the straw man transaction could allow a jury to find the disclosure was deceptive; (ii) there was evidence (viewed most favorably to the beneficiaries for summary judgment purposes), including the use of a straw man, that could allow a jury to find that the trustees fraudulently concealed the transaction, creating an issue of material fact on whether the limitations period had been tolled; and (iii) the evidence could allow a jury to find the trustees had breached their duties through the straw man transaction;

b. Reversed summary judgment on Rob Smith's claims on the income distributions and accountings because he testified that he did not receive the trust instrument, accountings, or the trustee's letter about income distributions; and

c. Affirmed the summary judgment dismissing the claims of those beneficiaries that admitted to receiving the trustee's 1990 letter about income distributions, other than claims brought within the 6 year limitations period.

B. ***Beck, et. al. v. Mueller*, 2014 Wisc. App. LEXIS 377 (Court of Appeals of Wisconsin, May 8, 2014).** Wisconsin Court of Appeals rules that trust beneficiaries' claims against trustee were time-barred by the statute of limitations as the beneficiaries had notice of the trustee's actions and their claims thus accrued before the trustee filed his formal accounting.

1. Norma Beck died testate in 1984 leaving six separate, equally funded trusts for each of her six grandchildren. She named Gordon Mueller ("Mueller") as trustee of the trusts and provided him with discretion to make income and principal distributions for the support, maintenance, and education of the beneficiaries. The will further provided for partial distributions of the trusts' assets at the ages of 23, 28 and 35.

2. On December 12, 2011, the six beneficiaries brought a lawsuit against Mueller for intentional breach of his fiduciary duties and for intentional fraud. The beneficiaries alleged that Mueller had breached his duties by failing to file annual and final accountings; failing to make required distributions, including the final distributions when the beneficiaries attained age 35 (the youngest beneficiary had attained age 35 in 2007); failing to wind up the administration in a timely manner; failing to prudently invest the assets; and converting the assets for his own benefit. The beneficiaries also claimed that these actions constituted an intentional fraud on the beneficiaries.

3. Mueller asserted the affirmative defense that the claims were barred by the applicable statute of limitations (it was undisputed that a two year statute of limitations applied) and then moved for summary judgment. Thus the beneficiaries' claims would have had to have accrued after December 11, 2009 to survive.

4. The beneficiaries, relying on the discovery rule, argued that their claims did not accrue until June 20, 2010 when each received a final accounting of his or her respective trust. They claimed that prior to this they had "neither knowledge of the extent or value of trust property, nor knowledge of whether they received the proper amounts when funds were distributed from trust." Alternatively, they argued that their claims were tolled from the time of first injury until Mueller was removed as trustee, which was less than two years before they filed their December 12, 2011 complaint.

5. The trial court denied Mueller's summary judgment motion, and Mueller was granted leave to appeal. The Court of Appeals reversed the trial court's decision and remanded the matter with directions.

6. On appeal, Mueller argued that the claims were time-barred and also that their claim of intentional fraud was not pled with particularity. Analyzing Wisconsin's discovery rule, the Court concluded that a "reasonable person, exercising reasonable diligence, would have discovered his or her injuries with respect to his or her trust, which should have terminated between 1998 and April 2007, sometime prior to December 2009."

7. The Court noted that Peter, the oldest grandchild, had personally received a copy of the Will upon Norma's death in 1984 and that Peter acted as the remaining beneficiaries' collective representative. Thus the remaining beneficiaries constructively received the Will, which provided the relevant terms regarding terminating distributions and the like.

8. The Court determined that it would not take a verified accounting for the beneficiaries to know that the trusts retained property years after they should have been fully distributed and terminated and noted that an injured party "does not need to have full and complete knowledge of everything necessary to carry out a lawsuit." Thus the Court ruled that Mueller was entitled to summary judgment dismissing the beneficiaries' complaint.

C. ***Deborah K. Morris v. Trust Company of the Ozarks*, 2014 Mo. App. LEXIS 284 (Ct App Missouri, Southern Dist. Div. 1, March 11, 2014).** In Missouri, a trust validity contest by any other name is still a trust validity contest and subject to the two year statute of limitations.

    1. In 1991, husband and wife, William and Kathryn, created joint revocable grantor trust with each other as Co-Trustee and upon the death of both, son Steven as successor Trustee. Upon Kathryn's death, William became sole Trustee. In 2005, William died and sixteen months later Steven died. In 2008, Deborah Morris as personal representative of Steven's estate files a petition to discover assets and asserts that the trust actually terminated at William's death and the assets should have been paid to Steven.

    2. Missouri statute 56.6-604-1 provides that revocable trust validity actions must be filed within two years of the settlor's death. However, Morris argues that she is not contesting the validity of the trust only that it terminated as a matter of law, and therefore, her action should not be barred by the two year statute of limitations.

    3. The court disagrees and finds that "to charge failure, by operation of law, of an existing and otherwise valid trust is to charge that the trust is no longer valid [and] to do so by lawsuit is to contest the validity of the trust."

D. ***Ward v. Stanford, et. al.*, 2014 Tex. App. LEXIS 9061 (Court of Appeals of Texas, August 14, 2014).** Texas Court of Appeals rejects trustees' and grantor's arguments that beneficiary's claims were precluded by res judicata under a judgment entered in a separate divorce proceeding and that the claims were time-barred.

1. Travis Ward (the "Grantor") and his wife, Martha, created an irrevocable trust for the benefit of his four children (the "Trust"). One of his children was Michael Ward (the "Beneficiary"), who brought a series of claims against the trustees of the Trust (the "Trustees") and against the Grantor.

2. Two disputes were before the Court of Appeals. The first dispute pertained to whether limitations barred the Beneficiary's claims relating to the Trustees' failure to collect a renewed loan, evidenced by a promissory note (the "Renewal Note"), that the Grantor had obtained from the Trust. The Renewal Note was issued in 1996 and, by its terms, renewed a prior 1985 note (the "1985 Note"). The Beneficiary claimed that the Trustees, in failing to collect on the Renewal Note from the Grantor, breached their fiduciary duties to him. The Beneficiary also claimed that the Grantor was liable for his failure to satisfy the Renewal Note.

3. The second dispute pertained to two judgments entered in divorce proceedings between the Grantor and Martha. In 1980 a divorce judgment was entered (the "1980 Judgment"), which declared that the Trust owned certain specific assets, including two mineral leases. The Trustees and Grantor argued that the Beneficiary's claims in the Trust action were barred by res judicata based on an October 2011 judgment (the "2011 Judgment") entered in the same divorce proceedings. The Grantor also took the position that the 1980 Judgment was void and that he, rather than the Trust, therefore owned the two mineral leases.

4. Summary judgment motions were filed by both the Beneficiary and the Trustees and Grantor. The trial court entered an order denying the Beneficiary's motions for partial summary judgment in which the Beneficiary asserted that the Note had not been accelerated by the Trustees and that the Trust owned the property listed in the 1980 Judgment. The trial court further granted the Trustees' and Grantor's motions for partial summary judgment that asserted that the 1980 Judgment was void, that the Beneficiary's claim based on the 1980 Judgment barred by res judicata, and that the claims against the Trustees and Grantor were barred by limitations as the Beneficiary's alleged injuries were "not inherently discoverable."

5. The trial court then entered a final judgment in favor of the Trustees and Grantor. The Beneficiary appealed. The Court of Appeals reversed the trial court's judgment and remanded the matter for further proceedings.

6. With respect to the Note, the Court of Appeals considered the limitations period that was imposed first on the Trustees to pursue repayment of the Note from the Grantor and second, the period imposed on the Beneficiary to pursue breach of fiduciary duty claims against the Trustees.

7. The limitation period applicable to the Trustees' claims against the Grantor depended on whether the Note was negotiable. The Note would be negotiable, and a six year period would apply, if it was a "written unconditional promise to pay a sum certain in money, upon demand or at a definite time, and was payable to order or to bearer. However, the Note would be non-negotiable and subject to a four year period, if another instrument must be examined to determine obligations and rights under the Note. The Trustees and Grantor argued that the note was not negotiable because it "amends and restates" rather than supersedes the prior 1985 Note that it renewed, and thus the 1985 Note must be examined to determine the parties' rights and obligations with respect to the Renewal Note. The Court disagreed, finding that as the Renewal Note "amends and wholly restates" the 1985 Note, reference to the 1985 Note is not necessary to determine the due, the amount due, whether the obligation to pay is conditional, or the liability for legal fees on the Renewal Note. Thus the Court concluded that the Renewal Note was negotiable and the Trustees' action to enforce the Renewal Note was six years.

8. Next, the Court considered the date when the six year limitations period would begin to run. The Trustees and Grantor contended that the time period began to run on May 21, 1998, the date that they claim the Renewal Note was accelerated. If the Trustees did indeed accelerate the Note, it would begin to run on the accelerated due date rather than the due date stated on the Note. The Court concluded that the Trustees did not accelerate the Note. The Trustees and Grantor argued that a May 11, 1998 demand letter from an attorney for the Trustees to the Grantor, which recited that the first payment on the Renewal Note was due and unpaid, was evidence of this acceleration. The Beneficiary argued that the letter did not actually accelerate the Renewal Note, but only threatened to do so if the amount due was not paid in ten days. The Court agreed, finding that while the Trustees held an option to accelerate the Renewal Note, such option required action on their part to effectuate the acceleration, which was not taken. Thus the Court of Appeals concluded that issues of material fact existed regarding whether the Renewal Note's maturity was accelerated and also, if it was, whether acceleration was withdrawn, revoked, or abandoned.

9. The Court next specifically considered when the Beneficiary's breach of fiduciary claims against the Trustees pertaining to the Renewal Note accrued. The Beneficiary argued that he was not injured by the Trustees' inaction until the Trustees were time-barred from bringing claims against the Grantor. The Beneficiary claimed that after that date (the date when the Trustees' claims were time-barred), he had four years to pursue his claims against the Trustees. The Trustees claimed that the Beneficiary impermissibly sought to "stack" the two limitation periods. The Court ruled that the date on which the Trustees' inaction can be said to cross the line into a breach of their fiduciary obligations to the Beneficiary remained a fact situation and that the trial court erred in granting the Trustees partial summary judgment on the Beneficiary's claims against them regarding their failure to pursue collection on the Renewal Note.

10. The Court also addressed the Trustees' claim that the "discovery rule" delayed the accrual of the claims against the Trustees. The Trustees contended that the Beneficiary had actual knowledge of the facts giving rise to his claim in 1999, when the Beneficiary received a letter of resignation from a former trustee, who indicated that he was resigning because trust issues were being "intentionally ignored and mishandled" by his co-Trustees, among other reasons. Plaintiff, however, claimed that he was not aware of the Grantor's self dealing and the Trustees' failure to protect the Beneficiary until 2008, when he learned of the Grantor's denial of the Renewal Note's existence. The Court agreed, finding that the Trustees failed to negate the discovery rule.

11. Next, the Court addressed when the Beneficiary's claims against the Grantor accrued. The trial court had ruled that Beneficiary's claims against the Grantor were barred by limitations "as the alleged injuries were "not inherently undiscoverable." On appeal, the Beneficiary argued, however, that accrual was deferred because the Grantor's wrongdoing was "fraudulently concealed." The Court noted that fraudulent concealment only tolls a limitations period until the fraud is discovered or could have been discovered. The Court concluded that the Beneficiary; who noted that he was unaware of the Grantor's claims that the Grantor, not the Trust, owned the mineral leases, and that other Trust property was transferred to the Grantor; raised genuine issues of material fact on fraudulent concealment.

12. The Trustees and Grantor also used the Beneficiary's appeal as a forum to argue that the Beneficiary's various other claims against the Trustees for breaches of their fiduciary duties and against the Grantor for participating in their breaches were time-barred. The Court of Appeals, however, ruled that the trial court erred in disposing of these additional claims as time-barred as the Trustees' and Grantor's motions for summary judgment did not address the accrual dates of these claims.

13. The Court next considered various summary judgment motions pertaining to the 1980 Judgment and the 2011 Judgment. In the 1980 Judgment, the trial court in the Grantor's separate divorce proceeding ruled that the Trust owned certain property, including two mineral leases.

14. The Trustees and Grantor first argued that the 1980 Judgment was void, pursuant to section 34.001 of the Texas Civil Practice and Remedies Code as a writ of execution was not issued within 10 years of the rendition of the 1980 Judgment. However, the Court ruled that the 1980 Judgment, which was a final judgment was not appealed, was not rendered void because execution was not required for the 1980 Judgment to pass title to the property addressed by the judgment.

15. The Trustees and Grantor next argued that the 2011 Judgment, entered in the same divorce proceeding, was res judicata of the Beneficiary's claims in this separate trust action. The Beneficiary had filed an application for supplemental relief in the divorce action, seeking an order protecting and enforcing the declaratory relief granted in the 1980 Judgment. The trial court in the divorce proceeding entered the 2011 Judgment, denying the

Beneficiary's application on the grounds that a separate 1992 Order indicated that Willis D. Moore owned the mineral leases. The 2011 Judgment was affirmed on appeal. Nevertheless, the Court of Appeals in this matter, reversed the trial court's ruling that the Beneficiary's claims here were barred by res judicata. The Court of Appeals found that while the Beneficiary could seek supplemental relief to enforce the 1980 Judgment, neither he nor the Trustees and Grantor could relitigate the issue of the Trust's ownership of the property listed in the 1980 Judgment.

16. Accordingly, the Court of Appeals remanded the matter for further proceedings.

E. ***Gibbs. V. Altenhofen*, 2014 MT 200 (Supreme Court of Montana, July 29, 2014).** Supreme Court of Montana finds that trial court properly ruled that beneficiaries' claims against initial trustee were time-barred and that the claims brought in a second action against the successor trustee were barred by the doctrines of claim preclusion, judicial estoppel, and issue preclusion, with the exception of two claims that were not brought in the initial action.

1. L.H. Gibbs ("Lee") and his wife, R. Delle Gibbs ("R. Delle"), placed one-half of their family ranch in the R. Delle Gibbs Family Trust (the "Trust") for their own lifetime benefit. Upon the death of the survivor of Lee and R. Delle, the interest in the ranch was to pass equally to two of their children -- Timothy Gibbs ("Tim") and Roderick Gibbs ("Rod") if the ranch operations were profitable within six months of the last remaining parent's death.

2. Upon R. Delle's death in August 2000, Lee disclaimed his interest in the trust property. However, Lee individually owned the other one-half interest in the ranch. In November 2001, Lee and another son of Lee, Reginald Gibbs ("Reginald"), served as trustees of the Trust. Tim, Rod, Lee, and Reginald (collectively, the "Gibbs") asked James Altenhofen ("Altenhofen") to serve as trustee of the Trust. The Gibbs later removed Altenhofen on June 29, 2005 and Delwin Nortvedt ("Nortvedt") was appointed Altenhofen's successor. On October 6, 2006, Nordvedt sent a letter to the Gibbs advising them of potential claims against Altenhofen for misappropriation of trust funds.

3. When the Trust became delinquent in its obligations, Altenhofen, and later Nordtvedt, tried to sell the Trust's one-half interest in the ranch. On August 5, 2005, Nordtvedt filed an action in the District Court of Seventh Judicial District of Montana, requesting that the court determine whether any restrictions existed in the Trust agreement limiting the trustee's power to sell Trust's real and personal property. Thereafter, Nordtvedt moved for summary judgment, arguing that he was in fact obligated to sell the property as a prudent investor. Lee had decided to sell his own half of the property and signed a buy/sell agreement (the "Buy/Sell Agreement") to effectuate his sale.

4. Tim and Rod filed cross-claims against Nordtvedt, alleging breach of duties of loyalty, to administer the trust, to deal impartially with the beneficiaries, and to avoid conflicts o interest. The Court granted Nordtvedt summary judgment on March 30, 2006, agreeing that the prudent investor rule called for the sale

of the property. Tim and Rod did not seek to alter or amend the judgment and did not appeal the court's decision.

5. The Gibbs filed a complaint against Alternhofen, Nordtvedt, and Nordtvedt's accounting firm, CHMS. They alleged that Nordtvedt had a conflict of interest and breached his fiduciary duty in approving the sale of the ranch, obtaining court approval for the sale, giving up an arrangement with the Farm Service Administration of the Department of Agriculture, failing to take any action against Altenhofen, and charging excessive fees. On August 30, 2013, the court granted Nordtvedt summary judgment, concluding that the Gibbs were seeking to relitigate claims and issues that were either raised or could have been raised in the 2005 litigation and that the claims against Nordtvedt were barred by the doctrines of issue preclusion, judicial estoppel, and claim preclusion.

6. The Gibbs also asserted that Alterhofen breached his fiduciary duty by using trust property for his own benefit and by charging excessive fees. On February 2, 2012, the court also granted Alternhofen summary judgment, finding that the Gibbs' claims against Altenhofen were time-barred under a three year statute of limitations for tort claims and actions brought under the trust code.

7. On appeal, the Supreme Court ruled that, with the exception of two of the claims brought in the second action, the District Court did not err in finding that the claims against Nordtvedt were barred by the doctrine of claim preclusion. The Court noted that most of the parties in the original 2005 litigation and their privies were the same as the parties in the current litigation. The parties in the 2005 litigation included Tim, Rod, the Trust, and Nordtvedt. Nordtvedt and CHMS were in privity as Nordtvedt was a shareholder in CHMS when he acted as trustee. Moreover, the Court noted that it was irrelevant that the Gibbs originally sued Nordtvedt in his capacity as trustee and now sue him individually. Only Lee was not a party in the first action, but a party to the second action. Nevertheless, the doctrine of judicial estoppel barred Lee's claims in the second action against Nordtvedt.

8. The Court also concluded that the subject matter and issues in the second action were the same as the subject matter and the issues in the first action, with the exception of two claims – the claim that Nordtvedt breached his fiduciary duty by failing to take action against Altenhofen and the claim that Nordtvedt charged excessive fees during the ensuing ten months that he acted as trustee following the 2005 litigation. Accordingly, the Court reversed the order granting summary judgment as to these two specific claims, but ruled that the Circuit Court did not err with respect to the remaining claims.

9. The Court further ruled that the District Court did not err in finding that the elements of judicial estoppel were met with respect to Lee's claims. The Court noted that the current trustees are bound by the arguments that were previously made by the Trust under judicial estoppel. Because the parties did not raise and the District Court did not consider the argument that Lee was no longer a beneficiary when he disclaimed his interest in the Trust, the Supreme Court treated Lee as a beneficiary. Thus, the Court ruled that Nordtvedt was

not liable to Lee for breach of Trust as Lee, by signing the Buy/Sell Agreement, consented to the conduct allegedly constituting the breach.

10. Next, the Supreme Court ruled that the issue before the Court – the propriety of the sale of the ranch -- was barred by issue preclusion as it was raised, briefed, and argued in the original 2005 litigation. The Gibbs did not meet their burden of establishing the absence of a full and fair opportunity to litigate that issue in the original 2005 litigation. Thus the District Court did not err in ruling that this issue was subject to issue preclusion.

11. Finally, the Supreme Court ruled that the District Court properly dismissed Altenhofen as a party defendant because the claim against him was time-barred under the applicable three year statute of limitations. The Gibbs claimed that they did not discover the possible existence of the Trust's claim against Altenhofen until receive an October 6, 2006 letter from Nordtvedt regarding Altenhofen's misappropriation of Trust funds and that the complaint was therefore timely filed on July 11, 2008. The Supreme Court, however, ruled that the District Court did not err in concluding that the Gibbs should have known of the existence of the claims when they terminated Altenhofen as trustee on June 29, 2005. Thus the District Court did not err in concluding that the claims against Altenhofen were barred by the statute of limitations.

V. ATTORNEYS' FEES & COSTS.

A. ***Regions Bank v. Lowrey,* 2014 Ala. LEXIS 53 (Alabama Supreme Court 2014).** Trial court improperly reduced trustee's reasonable reimbursement of attorneys' fees and costs of successful defense against surcharge claims.

1. Trust beneficiaries brought a $13 million surcharge action against the trustee related to losses to timberland held in the trust. The trustee prevailed and the court rejected all of the beneficiaries' claims, but denied the trustee its attorneys' fees in defense of the claims. On appeal, the Alabama Supreme Court affirmed the judgment for the trustee, but reversed the trial court's denial of fees and remanded the case to determine the reasonable fees of the trustee that should be charged to the trust. The trustee requested $642,500 in legal fees and $150,000 for expenses, along with interest (at a 6% rate) in the amount of $140,000.

2. The successor corporate trustee argued for a 27% line-by-line reduction in the fees and denial of interest. The trustee presented evidence of the accuracy of the billings and their reasonableness, and an appropriate interest rate. The successor trustee submitted an affidavit with its opinion that the fees were unreasonable and the amount of its suggested reduction, amended its position and called for a 34.2% line-by-line reduction, and submitted an affidavit of a local attorney that called for a $220,000 reduction in the fees.

3. The trial court: (1) categorically denied attorneys' fees of $220,000 for contact by counsel with experts and fact witnesses that did not testify at trial; (2) categorically denied $68,000 in fees related to the trustee's counterclaim for instructions that was part of the litigation; (3) categorically denied

$69,000 in fees incurred in seeking reimbursement of the fees; (4) denied interest; and (5) applied an additional across the board discount of 27% to the fees. The trustee appealed.

4. On appeal, the Alabama Supreme Court reversed and remanded the case back to the trial court on the grounds that:

   a. the court's order is not supported by the evidence as the trustee presented testimony and affidavits, and the only evidence by the successor trustee was an affidavit by the local attorney and the trial court's reduction even far exceeds the reduction called for in that affidavit;

   b. the categorical denial of certain types of fees is problematic and not in keeping with the norms of litigation preparation and practice;

   c. the court must be mindful of the $13 million exposure the trustee faced;

   d. the categorical denial of certain types of fees does not address whether a reasonable and zealous advocate would have conducted those activities;

   e. when functioning as defense counsel, an attorney must be prepared to respond to any piece of evidence a plaintiff might present, and the reasonableness of the attorney's preparation cannot be determined solely by what evidence is ultimately presented at trial; (f) activity is reasonable if a reasonable attorney might have done the same thing in representing the client, and a court must order reimbursement for those fees and expenses that are reasonable under this standard;

   f. denying a trustee reimbursement for expenses incurred while pursuing reimbursement for the successful defense of its claims would unfairly reduce its compensation, and the trustee is entitled to be reimbursed for the costs of litigating its right to reimbursement;

   g. by statute and under the trust terms that give the trustee the right to advance money for trust purposes and to be reimbursed for those advancements with interest, the trustee is entitled to reasonable interest on the fees and costs. By advancing money for its successful defense against the beneficiaries' claims, the trustee was realizing the settlor's purpose and was therefore advancing money for the trust's benefit, and is entitled to reasonable interest on that advancement.

B. ***Larkin v. Wells Fargo Bank,*** **2014 Minn. App. Unpub. LEXIS 1077 (2014).** Lone beneficiary that continues litigation following completed settlement, arbitration, and judicial resolution of claims is responsible for attorneys' fees incurred by trustee and other beneficiaries incurred in responding to his actions.

1. Robert Larkin died in 2000, and thereafter his revocable trust created family and marital trusts for the benefit of his wife, with his children and grandchildren as remainder beneficiaries. His wife, his son Patrick, and Wells Fargo were named as trustees. The bank advocated diversifying the Ecolab stock in the trusts to diversify the portfolio, which many beneficiaries objected to. The stock was sold over the objections, and then Ecolab posted large gains.

2. Patrick died in 2008, Robert's wife refused to act as co-trustee, and another son Michael declared he would exercise his mother's powers as co-trustee as her agent under a power of attorney. The bank sued to remove the wife as co-trustee. Michael sued the bank alleging breach of duty, negligence, and other claims.

3. Following partial summary judgment for the bank, the court ordered the parties into mediation. The mediation resulted in a handwritten settlement initialed by all of the parties that included a plan for change of corporate trustee, dismissal of all claims, and arbitration of future matters. Michael refused to sign the formal settlement agreement and circulated his own draft settlement with different claims than those agreed in the mediation. The court ordered arbitration, and the arbitrator affirmed the bank's draft formal settlement and ordered Michael to pay two-thirds of the bank's fees personally or out of his share of the trust.

4. Michael's attempt to vacate the arbitration award failed, but he still refused to sign the formal settlement agreement. The court removed him as his mother's agent, which was affirmed on Michael's appeal. The bank and the other beneficiaries moved to enforcement the settlement and for fees. The court confirmed the settlement and awarded the bank and the other beneficiaries their fees to be paid out of Michael's share of the trust.

5. On appeal, the Court of Appeals affirmed on the grounds that: (1) the court has the power to award fees where a trust beneficiary engages in burdensome litigation; (2)a trust beneficiary who engages in litigation that benefits the trust may be entitled to fees, and here the beneficiaries benefitted the trust by joining with the trustee to enforce the settlement and end litigation; (3) the trustee is entitled to fees because is acted to enforce the settlement and end costly litigation; (4) Michael's ongoing attempts to undermine the settlement, which was confirmed by arbitration and court orders, were nonsensical and included ad hominem attacks on other trust beneficiaries, and was therefore vexatious and burdensome; (5) the other beneficiaries agreed to abide by the settlement, and only Michael continued the litigation.

C. ***Sheen v. Sheen*, 2014 WL 2940596 (California, Court of Appeal, Second District, Division 8, July 1, 2014).** California Court of Appeal rules that beneficiaries who bring an action and benefit the trust are entitled to have their legal fees paid from the trust under the "common fund doctrine."

1. The beneficiaries of the Quinlock Sheen Living Trust ("Quinlock's Trust") filed a motion for attorney's fees, asserting the equity-based "common fund doctrine."

2. Quinlock Sheen ("Ms. Sheen") established her Trust in 1997 to provide for distributions of assets in equal shares to each of her six adult children upon Ms. Sheen's death. In 2001, Ms. Sheen, as trustee, deeded certain Trust assets, including real estate, to one of her six children, Dolores Sheen ("Dolores"). Ms. Sheen thereafter died in 2002.

3. In July 2005, Ms. Sheen's daughter, Eugenia Ringgold ("Eugenia"), who was a beneficiary of Quinlock's Trust and also successor trustee, joined four other beneficiaries of Quinlock's Trust in filing a petition in the probate court under Probate Code 850 to restore the Trust assets that Ms. Sheen transferred to Dolores. The petitioners argued that Ms. Sheen was not of sound mind and that the transfers were the product of undue influence.

4. While the action was pending, Eugenia died in April 2006. Eugenia had established her own living trust ("Eugenia's Trust"), which was in line to receive Eugenia's distributions from Quinlock's Trust.

5. Nevertheless, the remaining three petitioner beneficiaries (the "Three Petitioners") continued the section 850 proceedings without Eugenia and on May 2006, secured a judgment setting aside the deeds issued to Dolores, restoring property to Quinlock's Trust, and awarding $100,000 in damages against Dolores. Thereafter, on August 2006, the Three Petitioners filed a motion for an award of counsel fees and costs measured as a percentage of "the amount recovered for the common fund." They argued that the counsel fee award was justified as their action "resulted in the creation or preservation of a common fund to the benefit of persons beside the [Three Petitioners], consisting of numerous [other] beneficiaries" of the Quinlock Trust. Their motion sought 40% of the value of the trust assets recovered based on a contingency fee retainer agreement between the Petitioners and their lawyers.

6. Anthony Sheen ("Anthony"), the trustee of Eugenia's Trust opposed the motion for common fund attorney fees. He conceded that the Three Petitioners were entitled to counsel fees, but argued that their fees should only be paid out of their own share of Quinlock's Trust.

7. Nevertheless, in October 2006, the trial court granted the Three Petitioners' attorney fee motion and awarded their attorneys 40% of the proceeds of the entire judgment. However, in January 2007, another Judge vacated the fee award, finding that there had been a "failure of complete and proper service" of the attorney fee motion. In March 2007, the Petitioners re-filed their motion.

8. Thereafter and without the Court having had the opportunity to hear the Petitioners' re-filed motion, the Three Petitioners and Anthony pursued numerous adverse proceedings against one another over the course of several years, including multiple applications to disqualify attorneys, legal malpractice claims, applications to turnover files, collection actions, and multiple appeals.

9. In April 2012, the Three Petitioners again re-filed a motion for counsel fees based on either or both of (1) the common fund doctrine and (2) contractual attorney fees owed under contingency fee retainer agreements. The re-filed motion sough reinstatement of the trial court's October 2006 fee award of 40% of the value of the property recovered for the Quinlock Trust. Alternatively, the motion sought a $720,000 sum based on contingency fee retainer agreements between the Petitioners and their attorneys.

10. On May 16, 2012, the trial court denied the counsel fees on the ground that a common fund award was inappropriate because the attorneys "relied on trust property values that were six years old" and that this would be "inequitable." Moreover, the trial court judge considered the motion to be a new motion rather than a renewed motion and therefore found the new motion untimely under California Rules of Court, rule 3.1702.1(b)(1) (which provides that an attorney fee motion must be filed in the time for filing a notice of appeal).

11. The California Court of Appeal reversed the trial court's decision. It found that the attorneys should have been awarded *some* measure of legal fees. First, the Court of Appeal found the motion to be timely. It noted that Rule 3.1702.1(b)(1) provides for the time limitation "in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract." The Court noted that "attorney's fees in probate court litigation are not subject to concerns sufficiently unique . . . to distinguish them from fees generated in ordinary civil litigation." Moreover, the probate court enjoys "broad equitable powers over the trusts within its jurisdiction." Thus the Court ruled that the trial court erred in applying Rule 3.1702.1(b)(1)'s time limitation.

12. In addition, the Court ruled that while it was unclear what valuation should have been used in determining the fee award (i.e. whether the trial court could apply 40% to the value of the assets as of 2006 or as of another date), this is not a basis to deny counsel fees. Thus the Court reversed the trial judge's ruling and remanded the matter to the trial court for further proceedings.

D. ***Arthur v. Davies*, 2014 Cal. App. Unpub. LEXIS 5892 (Court of Appeal of California, Second Appellate District, Division Six, August 21, 2014).** California Court of Appeal affirms trial court's denial of counsel fees and trustee fees to trustee, who failed to produce invoices to support her fee applications.

1. Elmer W. Synder and his wife, Lois P. Snyder created the Elmer W. Snyder Family Trust, naming their children – Janet Arthur ("Janet"), Richard Snyder ("Richard"),Ronald Snyder, Douglas Snyder, and Jeffrey Snyder ("Jeffrey") as remainder beneficiaries. The trust provided that on the first spouse's death,

the trust assets would be divided into an exemption trust and a survivor trust. Janet was named trustee of the exemption trust and Janet and Richard were named trustees of the survivor trust. Janet was also named trustee of two special needs sub-trusts for Jeffrey.

2. Janet filed multiple petitions pertaining to the trusts' administration, including a petition to compel Richard to provide an accounting. Richard and his brothers, Ronald and Douglas, filed a cross-petition to remove Janet as co-trustee, alleging that she breached her fiduciary duties. Following a three week trial, the trial court removed Richard as co-trustee of the survivor's trust, leaving Janet as sole trustee. Diane E. Davies ("Diane" was appointed as the successor trustee of Jeffrey's special needs subtrusts.

3. Thereafter, Richard and Janet filed separate trust accountings from June 2009 through July 1, 2012. The court found that some of Richard's fees and costs did not benefit the trust and surcharged him, however, the court approved the trust's payment of $178,850.15 for Richard's attorney fees.

4. Janet's accounting listed attorney fees and her withdrawal for trustee's fees, but did not describe what services were provided. With respect to the attorney fees, the Court requested invoices to support Janet's application on multiple occasions, however, Janet failed to produce invoices. She also failed to list what services she provided to support her request for trustee's fees. Ultimately, the trial court awarded Janet just $43,406.56 of her requested $73,279.94 in attorney fees. The $29,873.38 difference was for undocumented paralegal fees. The trial court also disapproved $30,260 for trustee's fees because Janet produced no invoices or time sheets describing the services provided.

5. Janet appealed the trial court's rulings with respect to both Richard's fees and her fees. With respect to Richard's fees she argued that the trail court erred as Richard's attorney fees were four times the amount approved for Janet and she argued that the trial court failed to analyze how Richard's fees benefitted the trust. However, the appellate court noted that Richard's attorney fees were "well documented by itemized invoices that explain[ed] how the services benefitted the trust." The trial court had scrutinized the accountings and surcharged both Richard and Janet for fees that did not benefit the trust. As Janet made no showing that the fees awarded to Richard were excessive or unreasonable, the appellate court affirmed the trial court's fee award to Richard.

6. Janet also argued that the trial court abused its discretion in denying Janet's request to be reimbursed for her paralegal's fees. After the trial court denied Janet's request for paralegal fees, Janet filed a motion for reconsideration. The appellate court agreed that as Janet produced no invoices or time sheets for paralegal fees, she failed to meet her burden of proof to establish why it was appropriate to use the paralegal's services and that the fees charged were reasonable. The Court also ruled that while Janet finally produced paralegal invoices with her motion for reconsideration, she failed to produce a satisfactory explanation for her failure to produce that evidence at an earlier

time when requested by the Court. Thus the appellate court found that the trial court had not abused its discretion.

7. The appellate court found that the trial court likewise did not abuse its discretion in denying Janet's request for trustee's fees as Janet also provided no invoices or time sheets to support that request. Janet did not establish that those fees were reasonable. Thus the Judgment awarding Richard's attorney fees and denying Janet's request for trustee's fees and paralegal fees was affirmed.

VI. BUSINESS INTERESTS.

A. ***Rollins v. Rollins*, 2013 Ga. App. LEXIS 332 (March 29, 2013); 20 Ga. LEXIS 179 (March 3, 2014).** Appellate court holds that trustees must account for corporate level activities of entities held in trust where they have the individual control over the entities, and are subject to trustee duties for their entity level actions; Georgia Supreme Court reverses.

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

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

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

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

5. The trial court granted summary judgment for the trustees. The trial court held that the trustees were not required to account for the entities held in the trust because the interests were minority interests, and that trustee fiduciary

duties did not attach to actions taken at the entity level. The beneficiaries appealed.

6. On appeal, the Georgia Court of Appeals reversed the trial court and held that the trustees were required to account for entity level actions on the grounds that: (1) the minority interests in this case did not mean the trustees lacked control over the entity making it impossible to produce information about entity level transactions, because the trustees are controlling members of the various family entities; (2) the trustee is obligated as fiduciary to provide beneficiaries information that is within his control; (3) a trustee with a controlling interest in an asset held in a trust is required to account for the entity.

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

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

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

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

    c. Imposing, at the entity level, a "code of conduct" establishing conditions on distributions to the trust beneficiaries, which considered (1) attendance and meaningful participation at family business meetings, (2) engaging in "serious pursuits that are meaningful, respectable, and worthwhile in the opinion of the trustees", (3) investment performance, and (4) contributions to the family, and (5)

the beneficiaries personal conduct, none of which were part of the trust terms.

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

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

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

B. ***Harris v. Bonander, 2014 Cal. App. Unpub. LEXIS 3804 (2014).*** Trustee cannot be sued for actions taken as general partner of partnership held in trust, where such claims were released in family settlement agreement.

1. Emory and Dorothy owned 75% of a car dealership with their son Donald owning the other 25%. In 1991, Emory and Dorothy funded a family trust with their dealership interests and land, with themselves as initial trustees and their three children, Donald, Sharon, and Gwen as successors. They also created a children's trust with all three children as initial trustees. The trustees of the two trusts then formed a partnership that eventually converted to a limited partnership, with Emory & Dorothy as general partners in their capacities as trustees of the family trust.

2. The partnership then purchased land that was orally leased to the dealership for $9,000 per month. After Emory died in 1998, Donald became president and CEO of the dealership. Dorothy as sole general partner of the partnership lowered the rent in increments and eventually down to $5,000 per month in 2001. In 2001, Dorothy named Donald as general partner, and then died 2 weeks later.

3. Under Dorothy's estate plan, Donald was to receive the remaining interest in the dealership, with the daughters receiving equalizing gifts of cash. The children could not agree on how to value the dealership, and the daughters complained that Donald owed cash to the estate for the lowered rent charged for the use of the partnership's land. The daughters sued for instructions, daughter Sharon died in the interim and was succeeded by her own children, and a third party was appointed as interim trustee.

4. The day before trial, the parties agreed to mediation, which was unsuccessful. Gwen filed a surcharge action against Donald. The parties then entered into a settlement that released all claims, other than claims against Donald as co-trustee for the rent charged to the dealership. In the settlement, Donald reserved the right to assert all available defenses to the claims.

5. The trial court surcharged Donald and Donald appealed. On appeal, the California Court of Appeals reversed the surcharge on the grounds that: (1) the only claim not released in the settlement was a claim against Donald as co-trustee with respect to the rent charged to the dealership; (2) the partnership owned the land and the general partners had the power to enter into the lease; (3) a partnership is an entity distinct from its partners; (4) the claims against Donald were claims related to only his duties as general partner because the rent could only be set by the general partner; (5) the evidence, including the testimony of the drafting attorney, did not support Gwen's claim that only the trustee could serve as general partner, which was the basis for her position that her claims could be filed against Donald as trustee; (6) the obligations of the different capacities in which a party acts must be kept separate and distinct (citing a case involving a bank acting as both executor and trustee); (7) the obligations of a trustee and a general partner are not identical, and Donald cannot be held to a different standard than that of a general partner simply because, at the time he acted, he also held the position of trustee of a related trust; and (8) as trustee, Donald had no authority to set the rent charged by the partnership and was not acting as trustee when he reduced or failed to increase rents.

C. ***Osborn v. Griffin,*** **Civil Action No. 2011-89 & 2013-32 (E.D. Kentucky 2014).** Summary dismissal denied on claims that brothers abused multiple fiduciary offices to prevent sisters from acquiring interest in family company and related properties where parents' estate plan would leave company equally to 11 children.

1. John Griffin founded Griffin Industries, a rendering company. He and his wife had twelve children, with his sons active in the business and his five daughters not involved. His sons John and Dennis were board members, and his son Robert was CEO.

2. Between 1964 and 1978, the Griffins purchased land in their own names, and the land was used by the company. The company paid the expenses for the property, and there were leases between Mr. Griffin and the company for several parcels. In 1974, he purchased property in Cold Springs, Kentucky in his own name as "trustee" but he was not serving as a trustee of any trusts, and that property was used as the Company headquarters. Testimony

connected the purchase of the property to the Company, the Company paid the expenses of the property, and the asset was listed as a Company asset. In 1981, the Company bought another rendering company, Craig Protein, with Mr. Griffin holding 23.86% of the stock and the Company holding the balance.

3. In 1983, Mr. Griffin suffered a stroke, and at the time his wife suffered from Parkinson's. Shortly thereafter, at the brothers' request, the Company's counsel reviewed the parents' estate plans and opined that if Mr. Griffin predeceased his wife the children not involved in the Company would own a majority of the stock. Two brothers then obtained power of attorney for their mother. The brothers talked with Company counsel about how to retain control of the Company.

4. Mother died in 1985. Her estate plan provided for her Company stock to pass to Mr. Griffin, whose plan gave the stock equally to his surviving children. However, just after mother's death brothers Dennis and Griffy: (1) obtained removal of Mr. Griffin as mother's executor and their own appointment as successors; (2) obtained power of attorney for Mr. Griffin; (3) had themselves appointed as co-trustees of the Griffin Family Trust; (4) Mr. Griffin appointed them as co-trustees of his 1967 trust; and (5) arranged for the transfer of Mr. Griffin's stock in the Company to the 1967 trust.

5. Dennis and Griffy then developed a plan to give four brothers control over 87.6% of the Company stock by: (1) having father disclaim the stock gift from his wife's estate; (2) rather than distributing the stock under the terms of her plan, selling the stock to the six brothers; (3) having father sell 4% of his stock to trusts for his grandchildren bringing his ownership below 50%; (4) having the grandchildren's trusts grant the six brothers a 5-year option to purchase the shares at 60% of their book value; and (5) buying the balance of the father's stock at a minority discount. After two family meetings where the brothers allegedly gave the sisters misleading information about the mother's estate and the condition of the Company, the brothers implemented their plan. Dennis also arranged for the trustee of mother's trust to sell certain property to the Company for only $5,000, even though the Company had been paying mother annual rent of $6,600 for the property. Four of the brothers disclaimed their interest in the cash in mother's estate, with the cash passing to the other children.

6. Sister Betsy sued to reopen mother's estate and contest the stock sales, but the probate court dismissed for lack of standing. She then sued Dennis and Griffy, their counsel, Star Bank (trustee of mother's trust), and the Company in federal district court, and brought her claims individually and derivatively. In response, the four brothers and their counsel met with Mr. Griffin and explained Betsy's lawsuit to him. The lawyer's notes state that the lawsuit angered Mr. Griffin, and he executed a codicil and trust amendment prepared by the brother's counsel that ratified the sons' actions and have the balance of his estate to his daughters. He also signed an affidavit stating he wanted his sons to have the Company and his daughters to have cash, and that he wanted his daughter to drop her lawsuit.

7. Betsy settled her case under terms that included payment of $10,000 to each of the 7 siblings not involved in the Company. A fairness hearing was scheduled and notice was given to the family members due to the derivative nature of Betsy's claims. Cyndi had a conflict with the date, Dennis said she didn't need to attend, and she testified she was not aware of the settlement. Judy testified she never received notice. Testimony was offered that Griffy was misleading about documents he insisted family members sign related to the settlement, and other derivative plaintiffs were told or believed they received the same terms as Betsy. None of the derivative plaintiffs attended the hearing. The court approved the settlement. Under the settlement terms, Mr. Griffin then amended his estate plan to leave all of his remaining estate to his daughters, and agreed not to make further changes to his estate plan. Pursuant to the settlement, Dennis and Griffy transferred shares of Company stock to Betsy or trusts for his family, the law firm paid a settlement to Betsy, and the settlement included a confidentiality clause.

8. A month later, the brothers' counsel opined that two brothers, as executors of Mr. Griffin's estate, could not sell Mr. Griffin's Craig Protein stock because of self-dealing. Mr. Griffin then granted an option to purchase the stock to two other sons. Mr. Griffin died a month later in 1995.

9. Counsel opined that the two brothers as executors could not sell father's real property to themselves, so they sold the properties to an LLC owned by the minor children of three brothers. The Company administered the LLC and paid its bills, and the LLC leased the properties to the Company for $4.6 million over 16 years. The executors sold the Craig Protein stock to two other brothers. The sisters testified they didn't receive information about the father's estate and trust.

10. In 2010, the Company sold its stock to another company, Darling International, in a merger. Darling's counsel concluded the Cold Springs property (used as Company headquarters) was titled in the name of the five daughters. Around that time, Cyndi mistakenly received a list of Company shareholders and the sisters were shocked to learn that Betsy received Company stock while they had not. They learned about the Cold Springs property issue at a shareholders meeting. Some brothers were evasive about whether they owned the property, and others threatened that the sisters would have to reimburse the Company for expenses and improvements. Robert told them they had no right to the property, demanded they sign a special warranty deed, and threatened that the merger would be lost and the Company would owe a $30 million penalty if they refused. Company counsel told the sisters it was "50/50" whether they owned the property. Some sisters signed the deed under pressure, the Company counsel told Betsy that everyone else had signed (which was not true), Betsy talked with her sisters, and several signatures were then revoked from the deed.

11. A meeting of all siblings other than Betsy got heated, Robert offered each sister $200,000 to sign the deed, and Betsy refused the deal. Darling counsel insisted in the deed or an exception in the owner's policy. Dennis, as co-trustee, delegated all authority for the property to co-trustee Griffy. Griffy,

through counsel, moved to reopen Mr. Griffin's estate, met with the probate judge off record, counsel told the judge there was a title defect, the judge reopened the estate that day, and Griffy as trustee quitclaimed the property to the Company for $1. Robert, as Company president, accepted the deeds prepared by counsel. The merger was completed the next day, Robert disclosed the merger not what happened with the property, and the sisters testified that since the sale was completed they must not have owned the property.

12. Betsy sued in federal court challenging the sale of the properties and the Craig Protein stock, and the defendants moved to dismiss. The other sisters filed a separate lawsuit against the brothers, the LLC, and the brothers' counsel.

13. After several evidentiary rulings, the District Court for the Eastern District of Kentucky:

    a. refused to dismiss claims based on the statute of limitations because of material factual disputes about whether defendants made adequate and truthful disclosures to the sisters;

    b. with respect to the sale of Company stock out of the mother's estate: (1) refused to dismiss claims of the other sisters (excluding Betsy who settled her claims); (2) rejected the defense *res judicata* that Betsy represented and bound her other sisters to her settlement because Betsy and the brothers did not inform the other sisters, Betsy's terms were adverse to her sisters; (3) rejected the defense of acquiescence due to material disputes about truthful disclosure; and (4) rejected the defense of *laches* for the same reason;

    c. with respect to the Cold Spring property, granted the defendants summary judgment on the grounds that because the Company provided all of the purchase money and funds for the property, Mr. Griffin held only bare legal title, but equitable title was always vested in the Company;

    d. with respect to the sale of other properties to the LLC and the sale of the Craig Protein stock to two other brothers, held as a matter of law that Dennis and Griffy breached their fiduciary duties by selling the property where the father's estate plan gave them outright to the sisters, without informing them of their right to demand distribution in kind, rejected the "option" granted by father as a defense as invalidly created, rejected summary judgment on the various other defenses of acquiescence, laches, and acceptance of benefits;

    e. dismissed the malpractice claims against counsel as barred by the statute of limitations;

    f. dismissed the RICO claims as barred by the statute of limitations; and

g. dismissed the counterclaim against Betsy for breach of the settlement agreement.

D. ***Federal National Mortgage Association v. Grossman,* 2014 U.S. Dist. LEXIS 113308 (2014).** Debtor could seek invalidation of transfers to LLCs as fraudulent transfers and name LLCs as parties, and remedies against LLCs are not limited to charging orders.

1. Fannie Mae obtained judgments for $16 million against Andrew Grossman and recorded them. At the time, Grossman had substantial assets including interests in four LLCs. Following the judgments, Grossman established a Cook Islands trust, transferred all of his assets including the LLC interests to the trust, and the LLCs then distributed millions of dollars to the trust.

2. Fannie Mae sued Grossman and the LLCs to set aside the transfers as fraudulent, and Grossman and the LLCs moved for summary judgment claiming the only permitted relief against the LLCs under state law is a charging order and the LLC should not be parties to the suit.

3. The court refused to grant Grossman and the LLCs summary judgment on the grounds that: (1)the limited liability company act provisions limiting remedies to charging orders is designed to prevent creditors of the LLC from obtaining member rights; (2) Fannie Mae's claims do not seek to become a member, but rather seek to void the transfers as fraudulent, and therefore these restrictions do not apply and the relief sought would not interfere with the LLC management or activities; (3) under reverse veil piercing, an entity loses separate statute if the individual manipulates the entity for personal purposes; (4) the record supports at least a *prima facie* case that Grossman operates the LLCs as mere extensions of himself, rather than as separate business entities, where he had roles as managers, Grossman's testimony was evasive, he could not recall the identity or actions of other directors or officers, the LLCs had an informal and exceedingly casual relation with Grossman, he loaned funds to the LLCs, the LLCs gave him money on occasion, transactions did not appear on any financial statements, could not characterize money received as pay, and Grossman's roles blurred into each other; and (5) therefore the LLCs, by virtue of being extension of Grossman personally, are proper parties to the action.

E. ***Jimenez v. Corr,* 2014 Va. LEXIS 153 (2014).** Use of "pour over" will violates shareholder's agreement and forces sale of stock to company, despite the fact that the revocable trust provided for distribution or sale of shares to qualifying shareholders.

1. Lewis Corr established Capitol Foundry in 1976 and was its sole shareholder. His son Lewis purchased 5 shares in 1981, after joining the family business. His daughter Nancy joined the business that same year. Mr. Corr died in 1999 and his shares passed to his wife Norma. In 2002, Norma transferred 5 shares to Nancy.

2. Nancy, Lewis, and Norma entered into a shareholder's agreement that: (1) provided for the mandatory sale of a deceased shareholder's stock to "the Company or the Remaining Shareholders"; (2) allowed an exception to the mandatory sale for a conveyance or bequest to a member of the deceased shareholder's immediate family (defined as children, spouses, parents, and siblings); and (3) required Nancy, Lewis, and Norma (and their successors) to vote the stock to cause the Company to perform its obligations under the agreement.

3. Norma died in 2012. Her will poured-over the residue to her revocable trust, and also allowed the executors to distribute directly to the trust beneficiaries, rather than passing through the trust, if the trust beneficiary would receive assets "immediately" under the trust terms. Lewis, and Nancy's husband Thomas, qualified as co-executors. Under her revocable trust, Norma gave the trust assets (including the shares) outright and equally to her three children, but granted Lewis the right to purchase the shares for a cash down payment and a 10-year note. Lewis and Thomas were co-trustees under the trust agreement after Norma's death.

4. Nancy sued to compel the sale of Norma's shares to the Company under the shareholder's agreement, and to prevent Lewis from exercising the purchase option under the trust agreement. While the suit was pending, the parties agreed to an IRC Section 303 redemption of 64.4 shares for tax reasons, leaving at issue the remaining 30.6 of Norma's shares. The trial court held that the shareholder's agreement did not control, the shares passed to the trust, and Lewis was permitted to purchase the shares. Nancy appealed.

5. On appeal, the Virginia Supreme Court, over one dissent, reversed the trial court on the grounds that: (1) both the trustees and beneficiaries have substantial interests in the trust agreement; (2) the trustees do not qualify as members of Norma's immediate family because Thomas was Nancy's spouse and was disqualified; (3) the will provision allowing direct distribution of the shares to the trust beneficiaries, rather than through the trust, does not apply because the trust distribution is not "immediate" as a consequence of Lewis's purchase option; (4) therefore, the exception to the forced sale under the shareholder's agreement did not apply and the shareholder's agreement must be enforced and controls over the will and trust agreement; (5) if the parties cannot agree on how to implement the shareholder's agreement, the court will compel the parties to vote the Company stock in favor of the purchase of the shares by the Company.

6. The dissenting justice would enforce the trust terms on the grounds that: (1) a "pour over" will is a common estate planning document used to transfer assets to beneficiaries; (2) the shareholder's agreement placed no restrictions on the method used to transfer the stock to immediate family; and (3) the trustee held only bare legal title to the shares, and in their capacity as trustees held no beneficial interest in the shares that would offend the shareholder's agreement.

VII. ESTATE & TRUST ACCOUNT CLOSING.

A. ***In re Jenzabar, Inc. Derivative Litigation,*** **2014 Del. Ch. LEXIS 138 (2014).** Short-term GRAT that retained stock after its termination date contrary to trust terms cannot maintain derivative action in the absence of specific authority in the trust instrument.

1. In 2000, Gregory Raiff established a 2-year GRAT funded with Jenzabar stock. Despite the GRAT terms providing for termination of the trust in 2002, the trust never distributed the annuity payments to the settlor and did not make the terminating distribution to the remainder beneficiaries. Even after its termination date, the GRAT entered into transactions as a company shareholder, such as a stock buyback and a books and records request.

2. Another shareholder brought individual and derivative claims against the company that were settled. Notice of the stipulated dismissal of the claims was sent to the other shareholders, including the GRAT. The trustee of the GRAT attempted to intervene to continue the litigation of the derivative claims.

3. The court dismissed the GRAT's claims on the grounds that: (1) the post-termination transactions with the GRAT did not equitably estop the company from seeking dismissal of the GRAT's claims for lack of standing to sue, since the trustee was aware of the GRAT terms; (2) under trust law, upon termination, and in the absence of a specific power in the instrument, the trustee only has those powers necessary to preserve the trust assets pending distribution; (3) the derivative action does not meet this standard; and (4) the trust terms authorizing the trustee to "contest any claim", when read in context, only authorizes the trustee to take defense action to protect trust assets, and does not authorize offensive action such as the derivative claim against the company and its directors for a large bonus paid to the company CEO.

VIII. DISCLOSURE TO BENEFICIARIES.

A. ***Abbott v. Brennemann,*** **288 Neb. 389 (2014).** Trustees breached duties by failing to maintain trust records, and Form K-1s are not adequate disclosure under pre-UTC law or the UTC, but breach was harmless where trust was otherwise properly administered.

1. Upon his death in 1976, Rolf Brennemann created a trust under his will to hold a 42% interest in a company holding ranch property, with his three children Edward, Mamie, and Bill as trustees (and each of their oldest sons as their named successors). The trust provided income to Rolf's wife, Bessie, for her life, followed by income to his children for life, and then after the deaths of all three children the distribution of the remainder to Rolf's grandchildren outright.

2. In 1982, Edward died and his son John became a co-trustee. In 1986, because the company was not providing income to support Bessie, the

trustees petitioned the court for approval to vote the stock in favor of selling the ranch to John. The court approved the sale, the sales price, and the terms, which included purchase of the ranch by installment payments with a 10% interest rate. In 1996, the parties to the sale agreed to extend the original purchase agreement for 10 years at a slightly lower 8% interest rate.

3. Bessie died in 1998 and income passed to the children or their issue. In 2002, Bill died and his children, including daughter Kim, became beneficiaries and Bill's son became co-trustee. In 2006, with all installment payments made, the bank conveyed the ranch to John.

4. In 2009, the trust accountant proposed terminating the trust which had only $75,000, and Kim sued the trustees for an accounting because she believed the trust should have more assets. The trustees accounted for 2002-2010. Kim then sued the trustees for breach of duty to maintain trust records, inform the beneficiaries, and lack of good faith. Kim had received Form K-1s after becoming a beneficiary. The trustees testified that the trust was properly administered, but records before 2002 were lost or had been destroyed by the various banks and accounting firms involved, or could not be located. Kim's expert testified that the trust should have more money, but the trust's accountant pointed out flaws in Kim's expert's analysis and testified that the beneficiaries had not been harmed by the trust administration.

5. The trial court rejected Kim's claims and the Court of Appeals affirmed on the grounds that: (1) there is a presumption that a trustee has acted in good faith, and the burden of proof is on the one questioning the trustee; (2) Kim did not meet her burden of proof; (3) any alleged breach was harmless; (4) before the enactment of the UTC, the providing of a Form K-1 was adequate to meet the trustee's disclosure obligations (but not after UTC enactment); (5) while after the enactment of the UTC the Form K-1 was not adequate disclosure, any breach was cured by the subsequent accounting and was therefore harmless; (6) the trial court did not abuse its discretion by refusing Kim's request for attorneys fees.

6. On further appeal, the Nebraska Supreme Court largely affirmed the Court of Appeals decision, and held that: (1) any presumption of correctness of the trustees' actions disappeared once the trustee failed to maintain trust records, and all doubts about the trustees' actions are to be resolved against the trustees in those circumstances; (2) however, there is no error in the Court of Appeals' general observation that a trustee's actions are presumed correct and that the beneficiary has the burden of proving breach of trust; (3) under pre-UTC law (and under the UTC), the providing of a Form K-1 is not adequate trustee disclosure, and the Court of Appeals erred by holding otherwise; (4) while the trustees' conduct was below standards regarding record keeping, the breach was harmless as the evidence shows that the trust was properly managed; (5) while certain investments lost money during the 2008 economic downturn, there was no allegation that the investment in the funds was irresponsible, and Kim's own expert testified it was reasonable at the time; (6) the Nebraska UTC provides for attorneys fees awards as justice and equity require, and the trial court erred in failing to apply this standard in rejecting

Kim's fee claim where the trustees breached their duty to maintain records and Kim was forced to litigate the issue and prevailed, and this issues should be remanded to the trial court for application of the UTC standard on fees.

IX. FIDUCIARY PRIVILEGES & EXCEPTIONS.

A. ***Heisenger v. Cleary,* 2014 Conn. Super. LEXIS 1835 (2014).** Connecticut refuses to recognize the fiduciary exception to the attorney-client privilege.

1. The decedent's son sued the co-executors for breach of fiduciary duty for allegedly overvaluing company stock by $3 million and incurring $2.8 million in additional estate taxes. The son sought to depose the co-executors' attorney and subpoena documents to conduct the deposition. Objections were filed, and the co-executors then produced 3,800 pages of documents related to the valuation and estate taxes. The son moved to overrule the objections and the co-executors sought a protective order, claiming that the materials were discoverable based on the fiduciary exception to the attorney-client privilege and other grounds.

2. The court granted the co-executors a protective order on the grounds that:

   a. The dicta by the U.S. Supreme Court in *United States v. Jicarilla Apache Nation* (in which the court assumed, and did not rule upon, the existence of the exception at common law) did not alter the status of the common law on the fiduciary exception and also did not render the prior 2010 decision of Connecticut Judge Shapiro rejecting the fiduciary exception;

   b. As recognized by the Supreme Court, other jurisdictions have a mixed patter of recognition and rejection of the fiduciary exception;

   c. It does not appear that the Supreme Court of Connecticut, if faced with the question, would adopt and recognize the fiduciary exception because of the state's long-standing and strong public policy of protecting attorney-client communications to facilitate effective legal representation;

   d. Any possible waiver by one co-executor did not waive the privilege for the other co-executor;

   e. Asserting the special defense of good faith reliance on the company valuation by Management Planning, Inc. did not implicitly waive the privilege; and

   f. The party asserting the privilege should submit a privilege log, and challenges will be handled by the court through *in camera* review.

B. ***Hammerman v. Northern Trust Company,* No. 1 CA-CV 13-0260 (Arizona Court of Appeals, 2014).** In a case of first impression, Arizona Court of Appeals holds that UTC and state law support adoption of the fiduciary exception to the attorney-client privilege, but reverses trial court for ordering disclosure of all communications to both beneficiary and successor trustee without determining whether advice was for trust administration and should be disclosed, or for self-defense that is not required to be disclosed, and for requiring disclosure merely because advice was paid for with trust funds and obtained from trust counsel.

1. The sole income beneficiary of trust disagreed with the decision of the corporate trustee to sell of a Phoenix warehouse held in a single member LLC held as trust asset. The beneficiary exercised her power to remove and replace the trustee before the sale closed.

2. The beneficiary and the successor corporate trustee requested all trust files. The trustee turned over all of the files, other than 4% of the 1100 emails related to the trust. The trustee asserted that those emails were privileged in that they were obtained in its corporate, rather than fiduciary capacity, and related to the threat of litigation by the beneficiary.

3. The trial court ordered the trustee to turn over all of the emails on the grounds that the trustee (1) used the trust counsel for the advice and (2) paid for the advice out of the trust, and the trust has an absolute right to the advice it pays for. The trustee appealed.

4. On appeal, the Court of Appeals recognized the fiduciary exception to the attorney-client privilege, but reversed the trial court and remanded the case on the following ground:

    a. The beneficiary of a trust is not the "real client" of the legal advice obtained by the trustee. However, the trustee's duty to disclose under the Arizona UTC is consistent with the rationale for the fiduciary exception that the trustee's disclosure obligation extends to legal advice related to the trust administration. Therefore, a component of the trustee's disclosure duty under the Arizona UTC is a duty to disclose "legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering a trust". A trustee cannot withhold material facts from a beneficiary simply because the trustee has communicated those facts to an attorney.

    b. Courts that have rejected the fiduciary exception were not constitutionally empowered to apply exception to the attorney-client privilege in the absence of legislative action, but Arizona courts have this power.

    c. The question of whether a trustee acted in a fiduciary capacity cannot be resolved simply by asking who paid for the advice. The trial court erred by holding that disclosure is required solely because the trust

paid for the advice – the trust does not have an absolute right to information that it paid for.

d. When a trustee seeks legal advice in its personal capacity for purposes of self-protection, there is no exception and the attorney-client privilege extends to the advice. The trial court erred by ordering the trustee to turn over legal advice without considering whether the advice was sought for self-protection. Privileged communications made in this personal capacity do not cease to be privileged merely because the trustee used trust funds to pay the attorney or because the same attorney also provided trust administration advice. If trust funds are wrongly used, the correct remedy is a claim against the trustee, but the cost allocation issue does not affect ownership of the privilege.

e. Similarly, a successor trustee has a right to legal advice obtained by the prior trustee related to trust administration, but not personal advice such as advice related to self-protection. The trial court erred by holding that the successor trustee was entitled to all privileged communications by the prior trustee.

f. The trial court must conduct an *in camera* review of the emails the trustee seeks to withhold to determine whether they are related to trust administration or its own interests such as self-protection.

C. ***Zook v. Pesce*, (Maryland Court of Appeals, May 16, 2014).** Maryland Court of Appeals upholds the testamentary exception to the attorney-client privilege, but rules that petitioner failed to establish that the trial court's error in denying her evidence under the exception was prejudicial to her.

1. Eugene D. Zook died in December 2008, survived by three adult living children: Dennis Eugene Zook ("Dennis"), Susan M. Pesce ("Respondent") and Mary Caroline Zook ("Petitioner"). On November 20, 2007, Eugene established the Eugene D. Zook Living Trust (the "2007 Living Trust"). Thereafter, on December 2, 2008, Eugene amended his 2007 Living Trust (hereinafter, the "2008 Living Trust"), 22 days before his death. Decedent executed both instruments, with the help of his attorney Thomas P. Downs ("Mr. Downs") and each instrument named Respondent as trustee.

2. Article Seven of the 2008 Living Trust specified that each of Eugene's three children was to receive an equal one-third share of the trust's remainder. However, while Respondent and Dennis were to receive their shares outright, Petitioner's share was to be held in further trust for her.

3. Petitioner, as a self-represented litigant, filed an action in the Circuit Court for Prince George's County, questioning the validity of the 2008 Living Trust. That action was liberally construed by the Court as an action to invalidate the trust due to Decedent's purported lack of capacity and also as the purported product of undue influence.

4. During the proceeding, Petitioner requested access to a copy of the 2007 Living Trust. Mr. Downs, responding to Petitioner's subpoena for records, asserted that the 2007 Living Trust was a privileged communication with his deceased client and asserted the attorney-client privilege on Eugene's behalf as well as on the behalf of the trustee of that trust, Respondent. The Circuit Court honored the privilege and refused to allow Petitioner access to the 2007 Living Trust agreement or to allow any questions about its content. The Court also determined that there was insufficient evidence of Eugene's lack of capacity or of undue influence and dismissed Petitioner's complaint.

5. The Court of Special Appeals affirmed the Circuit Court's decision and the Maryland Court of Appeals granted *certiorari* to consider whether the testamentary exception to the attorney-client privilege exists in Maryland and also whether the trial court erred by recognizing the applicability of the attorney-client privilege to the original living trust.

6. The Court of Appeals ruled that the testamentary exception to the attorney-client privilege does indeed exist in Maryland. The Court further ruled that the trial court erred by failing to require Mr. Downs to produce the 2007 Living Trust agreement. However, it noted that it is Petitioner's burden to establish that this error was prejudicial and determined that Petitioner failed to establish this. The Court found that had the trial judge considered the terms of the 2007 Living Trust or evidence relating to its execution, the court would not have been persuaded to rule any differently. Petitioner could not establish lack of capacity as Petitioner had merely produced evidence that Eugene was seriously ill with cancer when he executed the 2008 Living Trust. Moreover, Petitioner had produced no evidence, other than Eugene's change in the terms of his Living Trust, to support a claim that Decedent was subject to undue influence. The Court noted that if it were to rule that a mere change in a will or trust is sufficient to create a prima facie case of undue influence or unsound mind, its decision would only induce more litigation and discourage people from making desired and appropriate revisions to their wills or trusts. Thus the Court ruled that Petitioner was not entitled to a new trial.

X. FIDUCIARY SUCCESSION.

A. ***Testamentary Trust of Conti,* 2014 Phila. Ct. Comm. Pl. LEXIS 289 (September 17, 2014)**. Court refuses to approve UTC nonjudicial settlement agreement that provided terms for the change of corporate trustees in conflict with the UTC judicial change of trustee provisions*.*

1. Under his will, John Conti established a trust for the benefit of his issue to last until the perpetuities termination date, with a single corporate trustee and no provisions for the change of trustees. Through mergers, Wells Fargo Bank became the trustee of the trustee.

2. The trustee petitioned to settle its accountings. Certain beneficiaries petitioned the court to approve a UTC nonjudicial settlement agreement that modified the trust to grant the income beneficiaries the right to remove and replace the corporate trustee without cause, and for the corporate trustee to

resign without court permission. The trustee filed a petition to approve its resignation and the appointment of the successor corporate trustee selected by all of the qualified beneficiaries. The beneficiaries objected to the trustee's attorneys' fees and termination fee.

3. The parties settled, the beneficiaries waived objections, and the trustee waived its termination fee and capped its attorneys' fees. Both the beneficiaries' petition for approval of the nonjudicial settlement agreement and the trustee's petition for resignation were presented to the court for adjudication without opposition.

4. The court approved the trustee's petition for resignation and approval of the successor selected by all of the qualified beneficiaries as being completely consistent with the judicial change of trustee provisions of the UTC.

5. The court refused to approve the UTC nonjudicial settlement agreement modifying the trust on the grounds that: (1) the Pennsylvania UTC permits nonjudicial settlement agreements including for appointment of a trustee and the modification and termination of trusts; (2) the purpose of this section of the UTC is to resolve matters by nonjudicial means, and therefore court approval of the agreement would be superfluous; (3) approving the agreement would force the court to diverge from the other UTC provisions that set forth its role in connection with trustee succession; (4) seeking court approval of the agreement would thwart the intent of nonjudicial settlement agreements and created a conflict for the court because in approving an agreement it is still bound by the other provisions of the UTC; (5) where the settlor does not provide for the change of trustees, the court is bound by the default provisions of the UTC including the provisions that only allow trustee resignation without court approval where the trust instrument provides for the succession of trustees (which was not the case here); (6) approving the agreement would eviscerate this limitation of the UTC, which appears to preserve the settlor's intent that a corporate trustee be involved with trust decisions rather than abdicating that supervisory role to the beneficiaries alone; (7) the agreement terms allowing the beneficiaries to remove a trustee without cause conflicts with the court's role under the UTC in determining whether the conditions are met for removal of a trustee under the UTC (as recently addressed in *McKinney*); (8) there is no precedent explaining the interplay between the nonjudicial settlement agreement section of the UTC and the judicial removal of trustee section; (9) *McKinney* reaffirms the role of the court in reviewing petitions to remove trustees; and (10) by its terms, court approval is unnecessary for a nonjudicial settlement agreement, and in light of the clear requirements of the UTC for when a court may remove a trustee the court will not bestow a superfluous imprimatur on the nonjudicial settlement agreement.

B. ***Taylor Intervivos Trust,* 2014 Phila. Ct. Comm. Pl. LEXIS 239 (August 18, 2014).** Beneficiaries cannot use the UTC codification of the *Clafflin* trust modification doctrine to grant beneficiaries power to remove and replace trustee without cause and contrary to the UTC judicial removal of trustee provision.

1. Edward Taylor died in 1939. Under his revocable trust agreement, he created a trust for the benefit of his daughter. She exercised her power of appointment over the trust to provide for the distribution of income after her death to her issue, and continuing until the perpetuities termination date. The trust named a corporate trustee and provided for the appointment of a successor upon its ceasing to serve, but did not provide for the removal of the trustee by the beneficiaries. Upon petition by the trustee, the trust was severed into four separate $1.8 million trusts, one each for the four current income beneficiaries.

2. In 2013, three of the four income beneficiaries petitioned to modify the trust under the Pennsylvania UTC provision permitting judicial modification of the trust on the consent of some, but not all of the beneficiaries, where the court finds it could have approved the modification had all beneficiaries approved and the interests of the non-consenting beneficiaries are adequately protected (part of the UTC provision codifying the *Clafflin* doctrine). The beneficiaries sought to modify the trusts to grant the beneficiaries the power to remove the trustee without cause and without court approval. The trustee opposed the petition.

3. The court denied in the petition on the grounds that: (1) the case involves novel and complex issue of statutory interpretation of the UTC, and the relationship between the consent modification section and the trustee removal section; (2) the beneficiaries do not explain how the interests of the non-consenting beneficiaries are protected; (3) the UTC provisions on removal of a trustee contemplate court review; (4) these provisions are applied to the trusts as default provisions because the settlor did not address removal of the trustee in the instrument; (5) the Pennsylvania version of the UTC does not include the provision allowing removal of a trustee where all beneficiaries agree (in contrast to the UTC as adopted in Vermont, Maine, and Arkansas); (6) the "no-fault" removal statute requires that the beneficiaries prove by clear and convincing evidence that the removal serves the beneficiaries' best interests, does not violate a material trust purpose, there is a suitable successor, and there has been a substantial change in circumstances (as recently addressed in *McKinney*); (7) the petition does not address or satisfy these requirements; (8) the removal statute contemplates an active inquiry and findings by the court; (9) applying rules of statutory construction, these provisions must be construed together, and the general trust modification provision must yield to the specific statute addressing removal of trustees; and (10) where the settlor does not address removal, the clear intent of the legislature was not to allow beneficiaries to remove a trustee without satisfying the trustee removal section requirements.

C. ***Hudson v. UMB Bank, N.A.,* 2014 Mo. App. LEXIS 936 (August 26, 2014).** The identification of the trustee by reference to its Kansas location and granting Kansas fiduciary powers amount to the settlor's designation of Kansas law to control the trusts, and under the Kansas UTC charitable remainder trusts are not "noncharitable trusts" subject to modification under the UTC codification of the *Clafflin* doctrine.

1. A. B. Hudson died in Kansas in 2008 shortly after executing his will. Under his will, he established separate charitable remainder trusts for each of his grandchildren and funded each with $1.5 million. He named UMB Bank, N.A. "with an office and place of business in Topeka, Kansas" as trustee and granted the trustee the powers under the Kansas Uniform Trustees' Powers Act (which had been repealed and replaced by the UTC at the time). His will was probated in Kansas and the trusts were initially managed in Kansas. Eventually for the convenience of the beneficiaries, the trustee assigned managers in Colorado to handle the trusts. The trust account statements sent to the beneficiaries listed the trustee's address in Missouri.

2. The grandchildren asked the trustee to resign because the trustee refused to adopt their investment requests, and the trustee refused. The grandchildren then petitioned the court in Missouri, naming the charitable remainder beneficiary as an additional plaintiff, seeking to modify the trusts under the UTC provision allowing modification of noncharitable trusts on consent of the beneficiaries if not inconsistent with trust material purposes (the codification of the common law *Clafflin* doctrine). The modification would grant the beneficiaries the power to remove and replace trustees without cause. The beneficiaries also sought removal and replacement of the trustee and denial of the trustee's attorneys' fees.

3. The trial court granted summary judgment for the trustee under Kansas law on all counts and the grandchildren appealed.

4. On appeal, the Missouri Court of Appeals affirmed on the grounds that:

    a. The trial court erred by applying the UTC's "most significant relationship to the matter" test in determining that Kansas law applied to administrative matters for the trust. While the NCCUSL version of the UTC does not define "principal place of administration", Missouri's version of the UTC does, making it unnecessary and inappropriate to resort to the "significant relationship test". The Missouri definition only applies where the settlor has not designated a pace of administration. By naming the trustee with reference to its location in Kansas, and by referencing the Kansas trust powers act (even though repealed at the time), the settlor unambiguously expressed his intent that the trusts be administered under Kansas law. The settlor's designation of controlling law must be respected where, as is the case here, all or any part of the administration occurs in Kansas. Here the trusts were formed and funded in Kansas, were initially managed in Kansas, and continue to be managed in part in

Kansas. Therefore, the trial court correctly applied Kansas law albeit for the wrong reasons.

b. But for the settlor's controlling designation of Kansas law, the trusts would be "principally administered" in Missouri. Kansas law therefore controls administrative matters including the removal of trustees.

c. The Kansas UTC does not allow removal of a trustee based on the unanimous consent of all beneficiaries. The Kansas UTC requires a "substantial change of circumstances" to remove a trustee, which the beneficiaries admit they have not alleged and cannot establish. The trial court therefore correctly granted judgment for the trustee albeit for the wrong reasons (the trial court held that the beneficiaries were attempting to indirectly modify the trust and had failed to meet the standards for modification).

d. The beneficiaries cannot modify the trusts under the UTC provision allowing modification of noncharitable trusts on consent of the beneficiaries, because that provision of the Kansas UTC is limited to noncharitable trusts. Under the Kansas UTC, a charitable trust includes a trust, or a portion of a trust, created for charitable purposes. Here, the charitable remainder trusts are not "noncharitable trusts" under the UTC and Kansas case law because of the charitable remainder interests.

D. ***Vincent J. Fumo Irrevocable Children's Trust FBO Allison Fumo,* 2014 PA Super 235 (2014).** Court, over one dissenting opinion, voids the settlor's appointment of a trustee under a power reserved in the trust where the trustee was found to be the "alter ego" of the settlor and would facilitate settlor's plan to reclaim the benefit of the assets in the trust following his federal incarceration for mail fraud and tax evasion.

1. In 2006, Vincent Fumo created an irrevocable trust for his daughter and funded the trust with a 49.5% interest in a family limited partnership. A similar trust was created for his son. Vincent retained ownership of the 1% corporate general partner and served as president until his friend later took over. The daughter's trust provided for outright distribution upon her reaching age 40. The son's trust terminated in 2009 when the son turned 40.

2. In 2009, Vincent was convicted of 137 counts of mail fraud, tax evasion, and obstruction of justice, and was sentenced to 55 months' imprisonment, a $400,000 fine, and $2.3 million restitution. He then named his son and friend as agents under his power of attorney. In 2009, the FLP distributed $333,000 to Vincent, but there was not distribution to daughter's trust.

3. Father, through his agents, then borrowed $1.4 million from the FLP without the consent of the trustee of daughter's trust. The next year the loan was modified to be more favorable to Vincent, again without the trustee's consent. Vincent wrote to his daughter's mother saying he intended to become judgment proof and "own nothing but control everything".

4. In 2011, the initial trustee announced her resignation, failed to appoint a successor as permitted in the trust for 60 days following resignation, and abandoned her duties as trustee. The named successor trustee renounced his appointment without appointing a successor as permitted in the trust for 60 days. The trustee position remained vacant for a year. During the vacancy, Vincent changed title to the loan collateral, thereby making the loan payable on its terms. Vincent failed to pay the loan and it went into default. In 2012, the son asked the loan be repaid and for an accounting of the FLP, and Vincent removed the son from the power of attorney.

5. In 2012, the initial trustee appointed, far after the 60 day period in the trust, Vincent's close friend and family member as successor trustee. Daughter then sued to terminate the trust or nullify the trustee appointment. Son and daughter demanded that the then president of the FLP seek repayment of the loan, but he refused. Daughter filed an emergency petition and the court imposed a stay order, but the FLP president proceeded to amend the loan again to be more favorable to Vincent, curing any default and extending the term to 2040 when Vincent would be 97 (despite his bad health and history of heart attacks).

6. In 2013, son visited Vincent in federal prison, where Vincent declared his children had a moral obligation to give him all the money in the FLP, there would never be an independent trustee of the daughter's trust, he would win at all costs, and he would hire lawyers to burn up the FLP resources rather than allow the children to have the funds over him.

7. Two weeks before trial, father purported to appoint his long-time friend and personal physician as trustee of daughter's trust. The then serving trustee resigned and joined in appointing father's long-time friend and physician as trustee, which the court found was orchestrated by Vincent for the purpose of having a trustee that would protect Vincent's interests to the detriment of the trust. The daughter nominated her CPA, who was experienced in trust matters, to serve as trustee.

8. The trial court invalidated the prior trustee appointments under both the trust terms and under the doctrine of unclean hands, and filled the vacancy by appointing the daughter's nominee as trustee. The father appealed.

9. On appeal, the Pennsylvania Superior Court affirmed on the grounds that: (1) the court under its equitable powers may decline to enforce trust terms when the party seeking enforcement has unclean hands; (2) the trust terms prohibit Vincent from serving as trustee, implicitly the trust terms prohibit his "alter ego" from serving as trustee, and the father's purported trustee was clearly his "alter ego", and to carry out the settlor's intent that he not serve as trustee the court correctly voided the appointment of his alter ego as trustee; (3) Vincent had unclean hands and appointed the trustee to protect his own interests and not the trust's interests; (4) having voided the trustee appointments, under the UTC the court could fill the office with the person selected by the sole qualified beneficiary; and (5) the court could also remove and replace the trustee under the UTC due to a substantial change of

circumstances because of Vincent's desire to obtain and control all of the trust assets and his actions with respect to distributions and the loans, and because the trial court correctly found the requirements under *McKinney* were clearly met.

10. A single dissenting judge would have reversed the trial court for removing the trustee appointing by Vincent, under the power granted him in the trust, without a showing that the trustee had breached his duties under the trust terms.

E. ***In the Matter of Modell*, 2014 N.Y. Misc. LEXIS 3170 (New York County Surrogate's Court, July 17, 2014).** New York County Surrogate's Court rules that a petition to remove trustees that is detailed with specific accounts of self-dealing and other transgressions cannot be dismissed for failure to state a claim and further that the statute of limitations cannot bar a petition to remove a trustee.

1. Michael Modell ("Decedent") established trusts under his will for the benefit of his wife, Abby Modell ("Abby") and his three children. Upon his death on April 20, 2001, Decedent owned a one-half ownership interest in Modell's Sporting Goods ("Modells"). His interest became the primary assets of a martial trust established under his will (the "Marital Trust").

2. Abby; Decedent's brother, Mitchell Modell ("Mitchell"); and Joel Goldberg ("Joel"), who was described in Decedent's will as a "friend;" served as trustees of each of the three trusts. Mitchell owned the other one-half of Modell's and managed its operations as the company's Chief Executive Officer.

3. In early 2010, Abby commenced a proceeding to remove her co-trustees and sought to compel them to account. The court directed all three trustees to account, however, Abby, who was not at all involved in the trust administration, filed an accounting that listed no assets under her administration. Abby indicated that Mitchell and Joel excluded her from the trust administration.

4. With respect to her removal petition, Mitchell and Joel (collectively, "Respondents") filed a motion to dismiss Abby's petition on two grounds. First, they argued that the petition failed to state a claim. Second, they argued that her petition was time-barred.

5. The Surrogate's Court rejected the Respondents' assertion that the petition failed to state a claim. The Court noted that the petition "detail[ed] a disturbing course of conduct by the fiduciaries and the total exclusion of Abby as co-trustee." Abby alleged that by virtue of his ownership of 50% of Modell's stock and his position as both trustee and an officer and director of Modell's, Mitchell had engaged in self dealing, including increasing his compensation by millions of dollars and causing Modell's to make improper payments to Mitchell to fund his lavish lifestyle. Contrary to the Respondents' assertions, the Court held that the corporate operations of Modell's were not "irrelevant" to the issue of removal as under such a theory, Mitchell would be

insulated as a matter of law from any wrongdoing as trustee for conduct he engaged in as CEO of the company.

6. The Surrogate's Court also noted that Abby claimed that Joel acted solely at behest of Mitchell and was completely "beholden to Mitchell." Accordingly, the Court ruled that Abby's pleading gave the Respondents notice of the specific acts which she alleged were breaches of the trustees' fiduciary obligations.

7. The Court also ruled that the fact that Respondents were Decedent's chosen fiduciaries was not fatal to the petition and that Decedent's awareness of Mitchell's dual roles did not warrant dismissal as such a conflict would not give Mitchell a license to overreach as alleged in the petition. Finally, the Court ruled that the fact that Modell's value increased under Mitchell's stewardship was irrelevant if Mitchell was reaping benefits of the company's success to the exclusion of the Marital Trust.

8. The Court also ruled that the petition was not time-barred. Contrary to Respondents' claims, a petition to remove a trustee is not subject to a six year statute of limitations. The Court noted that a petition to remove a fiduciary pursuant to SCPA 711 based on allegations of breach of fiduciary duty are not subject to any statute of limitations as a time-bar cannot prevent removal of a fiduciary whose conduct could be proved to be a present danger to a trust and as the court has an ongoing responsibility to ensure the trust's protection.

XI. DIRECTED TRUSTS, PROTECTORS & SPECIAL FIDUCIARIES.

A. ***SEC v. Wyly*, Case 1:10-cv-05760-SAS (S.D.N.Y. September 25, 2014).** In securities law case, court rejects "independent trustee" exception in §674(c) and finds trusts are grantor trusts despite professional offshore trustees, where trust protectors consistently followed family's directions.[1]

1. *SEC v. Wyly* is the determination of the "disgorgement" remedy in a securities law violation case by the Wyly brothers. The court based the amount of disgorgement largely on the amount of federal income taxes that the defendants avoided from the use of offshore trusts, after finding that the trusts were grantor trusts and that the defendants should have paid federal income taxes on all of the income from those trusts. The court determined in particular that the "independent trustee" exception in §674(c) did not apply even though the trustees were various Isle of Man professional management companies. Three close associates of the Wylys (the family attorney, the family office CFO, and the CFO of one of the Wyly entities) were trust protectors who had the power to replace the trustees. Throughout the trust administration, the Wylys expressed their requests to the trust protectors, who relayed them to the trustees, who always complied.

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[1] Thanks to Steve Akers of Bessemer Trust, Dallas, Texas, for providing his summary of *SEC v. Wyly.*

2. The SEC argued that independent trustees *always* followed the wishes of the grantors regarding investment decisions (including some very questionable investments with close relatives, unsecured loans to relatives, and investments in real estate, artwork, jewelry, collectibles, furnishings used by family members). The court noted that the Tax Court had previously rejected this theory in *Estate of Goodwyn v. Commissioner*, T.C. Memo. 1976-238, which held that whether the independent trustee exception under §674(c) applies turns on "a power reserved by instrument or contract creating an ascertainable and legally enforceable right, not merely the persuasive control which he might exercise over an independent trustee who is receptive to his wishes." (The Tax Court's rejection of the theory was grounded in the U.S. Supreme Court's decision in *U.S. v. Byrum,* an analogous determination that retained powers to cause gross estate inclusion under §2036(a)(2) must be "ascertainable and legally enforceable powers." The court disagreed with that long-standing analysis, pointing to the substance over form doctrine, reasoning that the trustee always followed the grantors' directions, and observing that "tax law deals in economic realities, not legal abstractions."

3. Brothers Charles Wyly and Sam Wyly transferred stock options in four publicly traded corporations to companies owned by offshore trusts (with various financial management firms from the Isle of Man as trustees) in exchange for deferred private annuities "in a tax-free kind of transaction." This raised securities law disclosure issues as to whether the Wylys had to disclose the ownership of and trading in those companies. The tax advisors advised that public SEC filings might lead the IRS to discover and investigate the tax effects of the transfers. If the Wylys controlled the stock in the offshore trusts, that could negate the desired tax-deferred nature of the transfers to the offshore trusts and result in the U.S. income taxation of those trusts. The SEC filings might be used by the IRS as evidence that the Wylys had some degree of control over the stock. As a result, the holdings and trades in the companies owned by the offshore trusts were not reported in SEC filings. Over the next ten years, the trusts and their subsidiary companies exercised the options, separately acquired options and stock in the four companies, and sold the shares, without filing any disclosures.

4. After a six-week trial in the spring of 2014, a "jury found that the Wylys *always* had beneficial ownership over the options, warrants, and securities held by the [offshore] trusts" and found the Wylys liable on all counts alleged by the SEC. The court in August held a one-week bench trial to determine appropriate remedies. The SEC sought disgorgement of about $620 million. The court discussed that it had very broad discretion to determine the measure of and amount of appropriate disgorgement and decided to base the disgorgement amount primarily on the amount of income taxes that the Wylys avoided improperly by the offshore trust structure. This turned on whether the trusts were grantor trusts; if so, the Wylys should have reported the income from the trusts on their U.S. income tax returns.

5. There were two sets of trusts:

a. One set, referred to as the “Bulldog Trusts,” were created by the Wylys as settlors for the benefit of their wives and children and several charitable organizations, but no U.S. beneficiary could receive a distribution until two years after the settlor’s death. Named trust protectors could add to or substitute the charitable organizations. (The delay in distributions until after the settlors' deaths was apparently in an attempt to avoid the treatment of the foreign trusts as grantor trusts under §679, which treats any foreign trust created by a U.S. person as a grantor trust to the extent that distributions could be made to U.S. beneficiaries; the delay argument to avoid §679 was removed in a 2010 amendment to §679.)

b. The other set, referred to as the “Bessie Trusts,” did not have the distribution delay provision. They were nominally funded by foreign individuals; for example the foreign settlor of some of these trusts contributed $1 and a note for $24,999 but the note was immediately forgiven. If a foreign person created the trust and the Wylys merely transferred assets to the trust for full consideration, §679 would not apply.

6. The trustees of all of the trusts were professional management companies located in the Isle of Man. In addition, there were three trust protectors of each trust, the Wylys’ family attorney, the family office CFO, and the CFO of a Wyly-related entity. The trust protectors had the power to add or substitute charitable beneficiaries of the Bulldog Trusts and had the power to remove and replace trustees of all of the trusts.

7. After the trusts were created, the Wylys told the trust protectors what transactions they wanted the trusts to enter, the trust protectors discussed those recommendations with the trustees, and the trustees always followed those directions. There was no evidence of a single investment that ever originated with the independent trustees or that the trustees ever rejected *any* Wyly recommendation. There were several situations in which the Wylys directed the sales of certain assets, bypassing the trustees entirely.

B. ***Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 143644 (October 9, 2014); *Schwartz v. Wellin,* 2014 U.S. Dist. LEXIS 1528 (Charleston South Carolina Division, January 7, 2014).** South Dakota trust code provision giving court power to enter preliminary orders in trust cases does not eliminate general requirements for issuance of preliminary injunction. Trustee appointed by trust protector substituted as plaintiff because beneficiaries’ removal of trust protector without appointing a successor protector for 3 months violated the trust terms and did not bar protector from appointing trustee.

1. A 2009 irrevocable trust was funded with a 98.9% limited partnership interest in a family limited partnership (with a LLC as 1.1% general partner), which was in turn funded with 896 Class A Berkshire Hathaway shares. In 2013, the LLC manager directed the liquidation of the partnership. The settlor’s three adult children, as co-trustees, directed that the trust retain

enough assets to satisfy the promissory note, and then distribute the balance of the assets outright to themselves as beneficiaries. Four days later, the corporate co-trustee resigned.

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

3. 11 days later, the attorney named as trust protector sued the trustees for breach of trust in the Charleston, South Carolina probate court for allegedly frustrating the settlor's intent to also benefit his grandchildren with the trust, and sought removal of the co-trustees, fees, and a temporary injunction. The probate court enjoined the children from taking any action with the assets (both those distributed and those retained in the trust) without the trust protector's consent.

4. The children removed the case to the federal court, and the trust protector filed an emergency motion to extent the probate court's TRO.

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

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

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

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

9. The court held that the appointment of the trustee was valid and the trustee was a proper party on the grounds that: (1) the trust terms required that there always be a protector serving and a successor should have been appointed contemporaneously with the removal; (2) by not appointing a successor protector for 3 months following removing the original protector, the children

violated the trust terms and the removal of the protector was invalid; (3) the protector therefore had the power to appoint a trustee for the trust; (4) a trustee is the proper party to bring claims on behalf of the trust and is properly substituted as a plaintiff.

C. ***Robert T. McLean Irrevocable Trust v. Ponder*, No. SD31767 (Missouri Ct. of Appeals 2013).** Trust "protector" not liable where there was no proof of harm caused by protector not exercising power to remove trustees.

1. Robert McLean (McLean) was involved in a car accident that left him severely disabled. He deposited the proceeds of his award from his personal injury action into a special needs trust (the Trust). J. Michael Ponder (Ponder), McLean's attorney who successfully prosecuted the personal injury action, was named the Trust protector. Under the Trust terms, Ponder had the authority to remove a Trustee, to appoint a successor, and to resign as trust protector. The Trust did not provide Ponder with powers or duties to supervise the Trustees.

2. In May 1999, during the trust administration when the original trustees resigned, Ponder appointed two attorneys who had in the past referred legal work to Ponder as successor trustees. In July 2001, one of those successor trustees resigned. Ponder appointed a successor trustee and immediately resigned as trust protector while appointing a successor trust protector. In July 2002, this successor trustee also resigned.

3. In August 2004, the Trust brought an action against all persons who had served as trustees or trust protectors. The petition asserted that Ponder had breached his fiduciary duties to McLean and that he had acted in bad faith by failing to monitor and report expenditures, by failing to stop trustees when they acted against McLean's interests, and by placing his loyalty to the trustees and their interests above McLean's.

4. The trial court granted Ponder's motion to dismiss and entered a Judgment of Dismissal. On appeal, the Court of Appeals remanded the matter finding that a genuine issue of material fact existed as to whether Ponder breached his fiduciary duty. On leave, the Trust thereafter amended the petition to allege that Ponder ignored information he received regarding the trustees and did not investigate the depletion of the trust assets, did not question the trustees' actions or take any action, and as a result the Trust was damaged.

5. After a trial, the trial court found that the trust protector's authority was limited to the power to remove trustees. At the close of the Plaintiff's evidence, Ponder filed a motion for a directed verdict, claiming that the Trust had failed to set forth evidence of a duty, breach of the duty, liability, causation, damages suffered as a result of Ponder's alleged failure to remove the trustees, bad faith, or conduct supporting punitive damages. The trial court granted Ponder's motion. The Trust appealed.

6. On appeal, the Court of Appeals upheld the trial court's decision on the grounds that: (1) the Trust failed to present evidence that the alleged breach

of fiduciary duty caused harm or damage to the Trust; (2) while the Trust's value decreased, there was no evidence that any damages were caused by Ponder; (3) no testimony applying any dollar figure to any of Ponder's alleged bad faith was presented; (4) the Trust's experts were not experts on damages; (5) while 22% of the trust's corpus had been spent in a short period of time, this was done before Ponder was approached by anyone on behalf of the Trust or McLean to remove the Trustees; (6) as a result, the 22% depletion could not be a damage the Trust incurred due to Ponder's alleged breach; (7) the Trust failed to identify what unnecessary spending or purchases would not have been made if Ponder had replaced the Trustees; and (8) no explanation was provided as to how the expenditures were inappropriate.

XII. **ARBITRATION.**

A. ***Brown v. Brown-Thill,*** **2014 U.S. App. LEXIS 15349 (8th Cir. 2014).** Under co-trustees' arbitration agreement, arbitrator could order co-trustees to consent to distribution plan from trust owned entities, but could not exercise judicial power to remove trustee under UTC.

1. Siblings Richard and Susan were co-trustees of a trust created by their parents. An attorney was trustee of another trust. Each trust owned 50% of an LLC that was the corporate general partner for two family limited partnerships. Therefore, in order to cause the FLPs to take an action, Richard, Susan, and the attorney needed to agree. As a result of an inability to reach agreement, the partnerships had not made any distributions since 2008 and there were numerous disputes, including over the payment of estate taxes on the father's estate.

2. In 2010, Richard and Susan entered into an agreement to arbitrate all disputes concerning the trusts and the business entities. With an estate tax payment approaching, the attorney circulated a proposal for partnership distributions to pay estate taxes. Richard objected, and the issue was submitted to the arbitrator. The arbitrator approved a plan for distributions from the partnerships, and Richard sued to vacate the award.

3. While this was pending, and because of ongoing disagreements, Susan submitted to the arbitrator the issue of whether Richard should be removed as co-trustee. In response, Richard signed a resignation as co-trustee conditioned on appointment of his designee as his successor. After the hearing with the arbitrator was scheduled, Richard also signed an unconditional resignation as co-trustee to be effective in 30 days (falling after the date of the hearing). The arbitrator removed Richard as co-trustee applying the statutory removal standards under the Uniform Trust Code and Richard sued to vacate the award.

4. The district court denied Richard's attempt to vacate both awards and denied Susan's request for attorneys' fees. Richard and Susan cross-appealed.

5. On appeal to the Eight Circuit Court of Appeals:

a. The court affirmed the arbitrator's approval of distributions from the partnerships on the grounds that: (i) the issue was within the broad scope of the arbitration agreement therefore the standard of review under the Federal Arbitration Act is extremely deferential; (ii) it was for the arbitrator to address any procedural concerns raised by Richard, and the arbitrator is entitled to even greater deference on procedure than afforded on substantive matters; (iii) concerns about alleged *ex parte* contacts with the arbitrator were not raised with the arbitrator, and therefore were waived; (iv) the arbitrator was picked by the parties, was very experienced, *ex parte* contacts were inevitable, and there was no proof of bias or misconduct; (v) the lack of a formal "hearing" is not evidence of misconduct where the arbitrator was required to act at a meeting of the partnerships, there was a prior telephonic hearing, the parties all exchanged numerous emails, Richard had notice of the partnership meeting and the arbitrator's possible actions, and Richard refused to attend the meeting but submitted written objections to the arbitrator through counsel; and (vi) the arbitrator did not exceed his authority by resolving the conflicting judgment of the co-trustees and approving the plan of partnership distributions, there was no suggestion that the position of either co-trustee violated fiduciary duties or conflicted with the trust terms, and the parties agreed that any decision by the arbitrator would have the effect of a joint action of the co-trustees.

b. The court reversed the arbitrator's removal of Richard as co-trustee on the grounds that: (i) the trust terms did not give either co-trustee the power to remove the other; (ii) the Missouri and Florida Uniform Trust Codes give the court the power to remove a co-trustee due to lack of cooperation that impairs the trust, or for other grounds; (iii) the trust terms giving beneficiaries the power to remove and replace trustees did not evidence the settlor's intent to override the UTC provisions, did not expressly attempt to do so, and it is doubtful that state courts would construe this trust provisions as permitting preclusion of judicial review of whether a trustee was fulfilling his fiduciary duties; (iv) the arbitration agreement was not a nonjudicial settlement agreement under the UTC because the beneficiaries were not parties; and (v) the arbitrator exceeded his authority because his removal decision was not based on interpreting the trust agreement, but rather on UTC statutory trustee removal powers reserved to the courts

c. However, because Richard had unconditionally resigned as co-trustee while the dispute was pending, he was no longer the co-trustee of the trust. The court affirmed the trial court's denial of Susan's petition for fees based on the terms of the arbitration agreement.

B. ***Archer v. Archer,* 2014 Tex. App. LEXIS 6551 (2014).** Trust term "requesting" arbitration of disputes is precatory and cannot establish an enforceable agreement to arbitrate under trust agreement.

1. Philip Archer served as trustee of separate trusts for the benefit of the children of Clarence and Mildred Archer, created after their deaths. The beneficiaries sued Philip for breach of trust and for an accounting.

2. The trustee moved to compel arbitration under the section of the trust titled "No Court Proceedings", which provided in part that "[the settlors] request that any…disputes that may arise…be resolved by mediation and if necessary, arbitration in accordance with the Uniform Arbitration Act".

3. The court distinguished *Rachal v. Reitz* and affirmed the trial court's denial of the motion to compel arbitration, on the grounds that: (1) arbitration cannot be ordered in the absence of an agreement to arbitrate; (2) the trust terms defined "shall" as a mandatory requirement, and used that term 450 times in the trust, but did not define the term "request" (which was used 10 times in the trust); (3) in the absence of a definition in the trust, the word "request" is given its natural meaning as precatory; (4) the title "No Court Proceedings" is to be disregarded in the construction of the trust terms that direct disregarding captions; (5) the repeated use of "shall" in the trust shows that the settlors understood how to provide mandatory directions, and reading the trust as whole, there is no support for construing the term "request" as mandatory; and (6) the provision in *Rachal* was clearly mandatory and not precatory.

C. ***Gupta v. Merrill Lynch,* 2014 U.S. Dist. LEXIS 113670 (E.D. Louisiana August 15, 2014).** Court enforces broad arbitration provision in separate unrelated custody agreement as barring claims against trustee for breach of trust, but refuses to apply direct benefits estoppels to bind trust beneficiaries with no contractual connection to arbitration provisions in trust agreement.

1. In 1990, Narinder Gupta met with a Merrill Lynch ("ML") broker to discuss wealth management strategies. The broker recommended creating a revocable trust that could be terminated and liquidated at any time. Narinder's aunt created the trust in 2001 for the benefit of Narinder's wife and sons, with Narinder as a secondary beneficiary, and ML as trustee (acting through the broker).

2. Around May 23, 2002, Narinder informed the broker his aunt had died. The broker then obtained a copy of her death certificate, changed the date of death, forged the aunt's signature on documents directing the transfer of funds out of the trust to another ML account. The broker ignored Narinder's direction to liquidate the trust and, contrary to his prior comments, said it could not be liquidated. Narinder, his wife, and his children sued ML and the broker for securities violations and racketeering.

3. ML and the broker moved to compel arbitration of the claims and dismiss for improper venue.

4. The trust, through ML as trustee, entered into a cash management account agreement with its affiliate that included an arbitration provision. The court refused to enforce this arbitration provision against the trust beneficiaries on the following grounds: (1) federal determines whether the trust beneficiaries are bound by the CMA; (2) the strong federal policy favoring arbitration does not apply to the initial determination whether arbitration applies; (3) the beneficiaries did not sign the CMA and nonsignatories are only bound to an arbitration agreement in rare circumstances; (4) the beneficiaries did not incorporate the CMA into any agreements they signed; (5) the beneficiaries did not manifest through any conduct a willingness to arbitrate and did not assume the obligation; (6) the trustee is not an agent for the beneficiaries; (7) the trust is not a corporation that can be bound a parent company or subsidiary under an alter ego theory; (8) direct benefits estoppel does not apply because the beneficiaries did not seek direct benefits from the CMA, did not seek to enforce the CMA, their claims do not arise under the CMA and are dependent in any way on the CMA, and they have not received any funds from the trust; and (9) the trust beneficiaries are not mentioned in the CMA and were clearly not intended to be third-party beneficiaries of the CMA.

5. Narinder and his wife signed an option agreement with ML for a joint account that was not a trust account, which included a broad agreement to arbitrate "any controversies" with ML. The court enforced the agreement and barred the claims by Narinder and his wife against ML, and the broker (because he was acting at all times on behalf of ML), related to the trust.

6. The court held that none of Narinder's sons' claims against ML were subject to arbitration because they were not signatories to any agreements. The court stayed their claims while arbitration proceeds on the grounds that: (1) the claims are identical; (2) resolving common questions of law and fact in arbitration eliminates the possibility of conflicting decisions and is efficient; (3) a stay is convenient for the parties and avoids parallel proceedings in New York and Louisiana; (4) there is no showing of prejudice from a stay; and (5) forcing adjudication in Louisiana while New York arbitration proceeds would thwart the federal policy in favor of arbitration.

D. ***Warren v. Geller,*** **2014 U.S. Dist. LEXIS 117332 (E.D. Louisiana August 22, 2014).** Beneficiaries bound by arbitration in "client agreement" creating a trust by court's finding they were third party beneficiaries of the contract and through equitable estoppel by accepting distributions.

1. Benjamin Geller was a sports agent and financial adviser to Frank Warren of the New Orleans Saints. Geller suggested to Warren that he purchase life insurance from an agent (who was not licensed in Louisiana). Geller arranged for signature of the documents, and Warren paid the premiums until his death in 2002. The death benefits were to be paid to a life insurance trust with Geller as trustee, created under a "Client Agreement" that included an arbitration provision. Warren's widow claimed Geller was not appointed as trustee, and the trust instrument left the name of the trustee blank.

2. The widow claimed that Morgan Keegan received the insurance proceeds in a trust account opened by Geller and, through the actions of its employees (one of whom was Geller's neighbor) acting in concert with Geller, allowed all of the proceeds to be diverted to Geller (i.e. for personal plane tickets, hotels, furniture, trips to Las Vegas and New York, and concert tickets) with nothing going to the family as trust beneficiaries. Warren's widow and four minor children sued Geller, Morgan Keegan, and its employees for breach of fiduciary duty, negligence, fraud, and conversion.

3. The court stayed the matter during Geller's criminal prosecution. Following his conviction and incarceration, the court reopened the matter. The bank employees were not prosecuted. The bank and its employees moved to compel arbitration of the claims or for dismissal.

4. The court held that the arbitration provision in the trust agreement was enforceable and required the widow and children to arbitrate their claims on the grounds that: (1) the widow's challenge to the validity of the trust itself (which must be heard before an arbitrator) is not a challenge to the arbitration provision itself; (2) the arbitration clause covers all controversies arising from the trust account; (3) no federal policy requires avoiding arbitration; (4) the account belonged to a trust, which "by definition means that there was a third-party beneficiary" to the agreement, and the trust terms provided a specific and certain benefit to the beneficiaries of $4,000 per month showing the intent of third party beneficiaries; (5) while the beneficiaries are not bound by the signature of the trustee through agency principles, the beneficiaries are bound by equitable estoppel by accepting the $4,000 per month distributions.

XIII. MEDIATION, SETTLEMENT, RELEASES & INDEMNIFICATION.

A. ***In the Matter of the Estate of J. Thomas Bernard*, 2014 Wash. App. LEXIS 1902 (Court of Appeals of Washington, February 27, 2014).** Washington Court of Appeals rules that trust grantor "substantially complied" with the modification provisions of his trust, that the modification was in compliance with Washington's Trust and Estate Dispute Resolution Act, and that the trustees of the trust and the personal representative of the grantor's estate had standing to appeal the trial court's order declaring the trust amendment and a codicil "null and void."

1. J. Thomas Bernard ("Tom") executed a last will and testament (the "Will") and a revocable trust (the "Trust") on March 25, 2009. The Trust agreement provided that upon Tom's death, the Trust residue would pass to Tom's son, James Bernard ("James") or James' issue. If James predeceased Tom, the residue would pass to Tom's nieces and nephews (collectively, the "Linger Beneficiaries") and to various organizations.

2. In his Trust, Tom reserved the power to revoke, withdraw property from, or modify the Trust. However, the Trust provided that power was "subject to" a separate agreement executed pursuant to the Trust and Estate Dispute Resolution Act ("TEDRA") by Tom and James on the same date (the "First TEDRA Agreement"). The Trust further provided that Tom's power to revoke,

withdraw property from, or modify the Trust was "not exercisable by Trustor unless and until Trustor obtains the court order required by such agreement and otherwise satisfies all of the requirements imposed by the TEDRA." Moreover, the Trust stated that "(i)f and to the extent such TEDRA is determined to be unenforceable for any reason, the restrictions on Trust's right to revoke, modify, and/or withdraw property from the Trust as stated herein shall be incorporated in this Agreement by reference and shall remain fully enforceable against the Trustor."

3. The First TEDRA Agreement, which was actually executed by Tom and James on March 27, 2009, was apparently an alternative to a guardianship of Tom's estate, that had been proposed by James. The First TEDRA Agreement imposed those prerequisites before Tom could exercise his power to modify the Trust: (1) Tom would have to file a petition for a hearing in which he clearly set forth a proposal for an exercise of his modification power, (2) Tom would have to timely provide James with a summons, and (3) an order would have to be entered approving of the proposed modification (collectively, the "Three Requirements"). Tom and James expressly agreed that unless such a court Order was entered, any modification would be null and void.

4. After Tom's relationship with one of the Linger Beneficiaries deteriorated, Tom and James executed a second agreement in August 2009 (the "Second TEDRA Agreement). Tom simultaneously executed an Amendment to the Trust (the "Trust Amendment") and a codicil to the Will (the "Codicil"). In the Trust Amendment, Tom reduced the shares of the Linger Beneficiaries from 20 percent of the very substantial trust assets to just $20,000 each. Moreover, the Trust Amendment added additional contingent beneficiaries (the "Karp Beneficiaries"), two of whom would receive 15 percent shares and one of whom would receive a 25 percent share.

5. James predeceased Tom in September 2010, leaving no issue. Tom died in January 2011. After Tom's testamentary documents were filed with the court, the Linger Beneficiaries contested the various estate planning documents and TEDRA Agreements. The Linger Beneficiaries moved for partial summary judgment, requesting that the court invalidate the First and Second TEDRA Agreements. Alternatively, they argued that the Trust Amendment was void. The Karp Beneficiaries opposed the motion. The trial court initially denied the Linger Beneficiaries' motion, but, on reconsideration, concluding that the Codicil and Trust Amendment were "null and void." The court thereafter denied the Karp Beneficiaries' own motion for reconsideration.

6. The personal representative of Tom's estate and the trustees of the Trust petitioned for a determination regarding whether they had a right to appeal and the Karp Beneficiaries supported this petition. After a court commissioner initially decided that they did have a right to appeal, the revision judge, upon the Linger Beneficiaries' motion for revision, concluded that they did not have the right to appeal. The Karp Beneficiaries, the personal representative, and the trustees thereafter appealed.

7. The Karp Beneficiaries argued that the trial court erred when it concluded that the Trust Amendment and Codicil were null and void. The appellate court agreed.

    a. First, the court noted that the Three Requirements described in the First TEDRA Agreement were not incorporated by reference in the Trust agreement despite the trust agreement's language. The Trust agreement provided that Tom's modification right was "subject to" the First TEDRA Agreement, meaning that the modification right was contingent or dependent on what was stated in the First TEDRA Agreement.

    b. Second, the court found that Tom "substantially complied" with the modification provisions of the Trust and the First TEDRA Agreement when Tom agreed to the terms of the Second TEDRA Agreement. The court found that the trial court erred when it concluded that the First TEDRA Agreement could not be modified by the Second TEDRA Agreement. Moreover, the Second TEDRA Agreement explicitly provided that it satisfied the First TEDRA Agreement's requirement that Tom obtain a court order prior to any requirement.

    c. The Second TEDRA Agreement's provisions demonstrated that Tom and James were not trying to change the First TEDRA Agreement's requirements, but instead were trying to comply with them. Moreover, Tom filed a memorandum of the Second TEDRA Agreement, making this second agreement "deemed approved by the court and equivalent to a court order." Thus Tom and James "substantially complied" with the three requirements by executing the Second TEDRA Agreement.

    d. The Court further noted that the second agreement complied with the relevant provisions of TEDRA. Contrary to the Linger Beneficiaries' contentions, as contingent beneficiaries whose rights to the revocable Trust were not vested at the time that the First and Second TEDRA Agreements were executed, they did not have to be "parties" to either agreement.

    e. Contrary to the Linger Beneficiaries' requests, the court also declined to consider address the capacity of Tom to enter the two TEDRA Agreements or to make the testamentary instruments as the issue of Tom's capacity was not before the court on appeal.

    f. Finally, the court ruled that the personal representative and the trustees did indeed have the right to appeal the trial court's ruling. The personal representative and the trustees had the duty to take all steps necessary to uphold their respective testamentary instruments. Thus, as the trial court's order declared the Trust Amendment and the Codicil null and void, the personal representative and the Trustees had standing to appeal the trial court's ruling.

B. ***Estate of Snow*, 2014 ME 105 (Supreme Judicial Court of Maine, August 14, 2014).** Supreme Judicial Court of Maine affirms Probate Court's judgment granting a motion to enforce a settlement agreement placed on the record before a professional reporter during a scheduled deposition despite that the Probate Court entered its judgment without holding an evidentiary hearing relating to the settlement agreement.

1. On March 20, 2012, Linda C. Moulton ("Linda"), the personal representative of the estate of her father, Harold Forest Snow ("Decedent") brought an action contesting a gift allegedly made by Decedent to Linda's sister, Susan R. Snow ("Susan"), as an improvident transfer and as the product of undue influence. Linda was named executor of Decedent's estate in his last will and testament (the "Will") and the Will nominated Susan in the event that Linda did not serve.

2. On July 30, 2013, Susan appeared for her deposition at the office of Linda's attorney. Before Susan was deposed, she authorized her attorney to negotiate a settlement with Linda's attorneys. Ultimately, Susan's and Linda's attorneys went on the record before the professional reporter, indicating that they settled the case and that they were "going to put down the outlines of the settlement" and that they would then "work on finalizing it." The attorneys then discussed the details of the settlement on the record, and Susan left without being deposed.

3. Over the next two weeks, the attorneys sent proposed language to one another. However, neither side agreed to sign the other's proposed settlement documents. Linda therefore filed a motion to enforce the settlement agreement and to amend her complaint to add a claim for breach of the agreement. Susan allowed Linda to amend her complaint, but opposed the motion to enforce.

4. On October 28, 2013, the Probate Court granted Linda's motion to enforce, finding that the record "contains an unequivocal stipulation by the parties' attorneys that the matter was settled" and that the material terms of the agreement were clearly defined in the transcript that was attached to Linda's motion papers. Susan subsequently filed a motion for findings of fact and conclusions of law, however, the court denied the motion, concluding that "the Order and the portions of the record incorporated therein by reference provide adequate findings of fact and conclusions of law regarding the issues identified within [Susan's] motion."

5. On appeal, Susan argued that there was language in the transcript and subsequent email correspondence indicating that that the conference on the record was merely an "outline" and that certain details remained to be negotiated. However, the appellate court ruled that the mere existence of some evidence that would support a finding contrary to the court's decision would not render the decision clearly erroneous.

6. Susan also suggested that the Probate Court inappropriately looked to parol evidence in determining the contract's terms despite finding it unambiguous. However, the appellate court noted that the trial court looked to subsequently

written materials only to determine whether the parties accurately memorialized the terms orally agreed to on the record before the court reporter.

7. Susan next argued that the statements in the transcript cannot constitute a binding agreement because a Maine statute requires that the agreement be in writing, signed by all of the successors pursuant to the Will. However, the appellate court found that the statue, by its plain language, did not apply to this matter where the personal representative herself (Linda) was a party to the agreement and is in fact seeking to enforce the agreement.

8. Finally, Susan argued that the Probate Court erred or abused its discretion in granting the motion to enforce the settlement agreement without holding a trial or an evidentiary hearing, or converting the motion to one for summary judgment. However, the appellate court ruled that as the parties did not dispute the authenticity or accuracy of the transcript that they submitted to the court and as the court found that the transcript unequivocally reflected a binding settlement agreement, no evidentiary hearing was required. It found that the parties stood in essentially the same position as if the conference had occurred before the court.

9. Moreover, the court noted that even if the Probate Court had erred in deciding the motion to enforce without holding an evidentiary hearing, Susan had not articulated how she would be prejudiced by the lack of a hearing. According, the Probate Court's judgment was affirmed.

C. ***Hill v. Schilling*, 2014 U.S. App. LEXIS 16109 (5th Circuit, August 21, 2014).** Fifth Circuit affirms District Court's denial of trust beneficiary's motion to enforce a settlement where the relief sought by the beneficiary was not a part of the settlement agreement.

1. H.L. Hunt formed irrevocable trusts for six of his children, including the Margaret Hunt Trust Estate ("MHTE") and the Haroldson L. Hunt, Jr. Trust Estate ("HHTE"). The Articles of Agreement and Declaration of Trust creating each of the trusts were nearly identical.

2. Margaret Hunt Hill was the beneficiary of the MHTE. Ordinarily, the MHTE would pass to Margaret's three children, however, before her death, Margaret's son, Albert Hill, Jr. ("Hill Jr.") executed an instrument disclaiming his interest to his three children, including Albert G. Hill, III ("Hill"). However, Hill Jr. later rescinded the disclaimer, purporting that he was incompetent when he said the 2005 disclaimer and an "updated" disclaimer in 2007.

3. On November 8, 2007, Hill filed a lawsuit in Texas state court against his father, Hill Jr. and the then trustees of the MHTE and HHTE, alleging that he and others committed violations of the federal Racketeer influenced and Corrupt Organizations Act, fraud, breach of fiduciary duty, and other torts in connection with both the MHTE and the HHTE. The action was removed to the United States District Court for the Northern District of Texas.

4. Three years of litigation ensued in which the trustees of the trusts produced thousands of financial and accounting documents. Ultimately, Hill and the former MHTE and HHTE trustees entered into a written Global Settlement and Mutual Release Agreement, which was filed with the Court on may 14, 2010. Pursuant to the settlement agreement, the MHTE would be divided into separate sub-trusts for all beneficiaries, including Hill. Each sub-trust would be separately administered by a new successor trustee.

5. The original Articles of Agreement of the MHTE provided that the trust's books and records be open for inspection. The Articles also provided that a successor trustee would succeed to the same duties and liabilities as his predecessor. The settlement agreement, however, did not require that the former MHTE trustees hand over any additional MHTE documents to any beneficiary or successor trustee of a MHTE sub-trust and specifically prohibited the successor trustees from investigating the prior management of MHTE.

6. Before the District Court entered its final judgment, both parties submitted final judgment proposals and Hill attempted to add new terms to the agreement – he sought to have the agreement require the MHTE trustees to grant complete access to MHTE's books and records for inspection by Hill. In November 2010, the District Court approved the settlement agreement, rejected Hill's new terms, adopted a new provision prohibiting new trustees from investigating past conduct, provided for broad general releases, and entered final judgment.

7. After the MHTE was divided, Hill filed an appeal, alleging that the final judgment differed from the settlement agreement. Meanwhile, Hill learned that the district court judge had an undisclosed conflict of interest and Hill moved to recuse the Judge. His motion was denied and Hill also appealed the court's denial of his motion. The Fifth Circuit consolidated the two issues (collectively, the "First Appeal") and affirmed the District Court.

8. While the First Appeal was pending, Hill filed a motion before the district court to enforce the final judgment and to compel the transfer of books and records of the former MHTE to successor trustees. After the case was reassigned to a second district judge, the judge finding that Hill's motion to enforce final judgment contradicted his previous position that the final judgment did not grant him access to the MHTE books and records, denied his motion. After the issuance of his order, the second district judge recused himself *sua sponte*. Hill appealed the denial of his motion to enforce and compel (the "Second Appeal") and filed a complaint speculating about the second district judge's reason for recusing himself after denying Hill's motion to enforce and compel.

9. On appeal, the former MHTE and HHTE trustees contended that the waiver doctrine precluded Hill's Second Appeal. The Fifth Circuit had already entered a judgment, affirming the District Court's decision denying Hill with access to the MHTE's books and records. The former trustees argued that to the extent Hill argued in this Second Appeal that the right to have access to

the documents should have been included in the final judgment or that it was contemplated in the settlement agreement, his argument was waived.

10. The Fifth Circuit ruled that waiver doctrine did not preclude the Second Appeal as the First Appeal argued that a right to documents was wrongfully excluded from the settlement agreement, but the Second Appeal argued that a right to inspect documents was part of the agreement. Nevertheless, the Fifth Circuit found that Hill's arguments in the Second Appeal were without merit.

11. In particular, it noted that there was no express language in the settlement agreement that indicated that the successor trustee must be given the same books and records maintained by the former trustees and that Hill's attempt to add such a provision was evidence that he knew such a provision was not part of the final judgment and settlement agreement. Hill also unsuccessfully attempted to argue that inapplicable Texas statutory law required that he receive the MHTE's books and records.

12. In the alternative, Hill argued that because the second district judge recused himself two months after his rulings, the judge's conflict existed at the time that he entered his order and that the case should therefore be remanded. The Fifth Circuit disagreed, noting that Hill made no attempt to identify what the conflict could be and that the judge, who recused himself *sua sponte*, had no obligation to disclose his reason for recusal. Moreover, the Court noted that even if the judge was indeed operating under a conflict, two judges prior to the recused judge had issued the same order, thus such a conflict still would not have an effect on the denial.

XIV. CONSTRUCTION & CONDITIONS.

A. ***Estate of George McFadden,* 2014 PA Super 203 (2014).** Ambiguous perpetuities termination provision construed to allow trust to exist for longest possible period allowed under the rule against perpetuities.

1. George McFadden signed a will in 1928, and then an entirely new will in 1930 after the stock market crash. His will created a long-term trust for his wife and descendants, *per stirpes.* The trust terms provided for the termination of the trust "upon the expiration of the period of twenty-one years after the death of the last survivor of the children and issue of deceased children of mine living at my death".

2. A dispute arose whether George's grandchildren living at his death would be included as lives in being for purposes of the perpetuities termination provision. The trial court found the provision ambiguous and rules that the grandchildren would not be included, based largely on the plain reading of the perpetuities termination provision and the inclusion of the word "deceased", since all of George's children were living at his death.

3. On appeal, a three judge panel of the Superior Court affirmed, but the Superior Court *en banc* reversed the trial court as a matter of law on the following grounds: (1) the provision is ambiguous and extrinsic evidence is

permitted on the settlor's intent regarding the termination date; (2) reading the perpetuities clause in isolation leads to the trial court's result, but this is not dispositive; (3) other provisions of the trust, such as the consistent use of "or" to separate children from grandchildren in the distribution provisions, whereas the perpetuities provision used "and"; (4) the 1930 will took advantage of changes to the law and reflected an intent to create a trust that would last for the longest period permitted by the law; (5) while George clearly signed his 1930 will "in the gloomy light cast by [the 1929 stock market crash]" the trial court erred by focusing on that extrinsic evidence too heavily and selectively; and (6) while the court's conclusion is less certain that it would be if the trust terms were not "at best baroque and at worst byzantine", the best inference from the will as a whole and the totality of the extrinsic evidence is that George intended his trust to last for the longest period allowed under the rule against perpetuities and should be construed accordingly.

B. ***Matter of Kirschner v. Fischer*, 2014 NY Slip Op 03626 (New York Appellate Division, First Department, May 20, 2014).** New York Appellate Division determines that no trust assets pass under a trust provision for the distribution of property in the amount of assets "includable in the grantor's gross estate for Federal estate tax purposes" where the decedent died in the year 2010 and elected to pay no Federal estate tax.

1. Janet Fischer established two grantor retained annuity trusts (GRATs). Pursuant to section (C)(2)(a) of each GRAT, upon the expiration of a two year term, if Janet was not then living, the trust remainder was to pass as follows:

    a. *a fractional share of the trust property, the numerator of which is equal to the amount of said trust property which is includible in the Grantor's gross estate for Federal estate tax purposes, and the denominator of which is equal to the value of the entire trust property, as finally determined in the Federal estate proceeding in the Grantor's estate, shall pass to the Grantor's estate.*

2. Section (C)(2)(b) of each GRAT provided that the balance of the property was to pass: "to the Grantor's children NANCY FISCHER KIRSCHNER, CHARLES A. KIRSCHNER and BARBARA SNOW, in equal shares if all of them are then living . . ." Under the terms of Janet's will, 45% of the estate assets were to pass to Janet's daughters, Nancy Fischer Kirschner and Barbara Snow. Janet died in 2010 before the GRATs expired. The federal estate tax expired in 2010, the year of Janet's death and the executors of Janet's estate elected to pay no estate tax.

3. Nancy filed an action in New York County Surrogate's Court seeking a determination that the entire remainder of each GRAT was to pass to Janet's estate. Janet's son, Charles A. Kirschner, argued that pursuant to Section (C)(2)(a) of the GRATs, as Janet's estate paid no estate tax, the fraction of the assets in the GRATS "includable in the Grantor's gross estate for Federal estate tax purposes" was zero. Nancy, relying on EPTL 2-1.3(a)(1), argued

that the fraction of the assets in the GRATs "in the Grantor's gross estate for Federal estate tax purposes" is what would have been paid in estate taxes had the executors not elected to forego paying the estate tax. EPTL 2-1.13(a)(1) provides that if a decedent, who dies after December 31, 2009, passes property via a will or trust "based upon the amount of property that can be sheltered from federal estate tax" by referring to a phrase relating to the estate tax "then such beneficiary designation, will or trust shall be deemed to refer to the federal estate tax law as applied with respect to decedents dying in two thousand ten, regardless of whether an election is made not to have the federal estate tax apply to a particular estate." If this statute applied, the amount "includible" would be the entire estate.

4. The Surrogate's Court ruled that EPTL 2-1.3(a)(1) was inapplicable and that section (C)(2) of the GRATs was unambiguous despite the expiration of the estate tax in 2010. The Surrogate's Court therefore determined that the amount "includible" in Janet's gross estate for estate tax purposes was zero.

5. The First Department affirmed. It reviewed the legislative history of EPTL 2-1.13(a)(1) and noted that its narrow purpose was to "prevent the thwarting of the well-intentioned estate plans of those who, in good faith reliance on the existence of an estate tax in 2010, bequeathed significant portions of their estates to persons other than their spouses, so they could take full advantage of the spousal estate tax exemption." The Court noted that there was no evidence that the GRATs were created with the specific goal of taking advantage of spousal exemptions or were structured for similar purposes. It found that "includible in the Grantor's gross estate for Federal estate tax purposes" is not analogous to the "amount that can pass free of federal estate taxes, or that is otherwise based on a similar provision of the federal estate tax," as referenced in EPTL 2-1.13(a)(1). The Court found the plain language in the GRATs to be unambiguous and thus upheld the decision of the Surrogate's Court.

C. ***James Michael Aldrich v. Laurie Basile*, 136 So.3d 530 (Florida, March 27, 2014).** Florida Supreme Court holds intestacy law applies to after acquired property when decedent's Will does not contain a general devise or residuary clause.

1. Ann Aldrich used an online "E-Z Legal Form" to create her last will and testament. The form included a section for specific bequests in which Ann hand wrote that all of the following listed property is to go to her sister, Mary Jane. She also wrote that "if Mary Jane dies before I do, I leave all the listed to James Michael". Following the creation of her will, Ann's sister died and Ann received money and property from her sister's estate. Sometime later Ann tried to amend her will by a handwritten "addendum" which stated that "all my worldly possessions pass to my brother James". Unfortunately this addendum was not properly exercised under Florida law.

2. After Ann's death, James Michael as personal representative asks the court to determine who should inherit Ann's after acquired property. James Michael argues that Ann intended for all of her property to pass to her brother and

therefore any property not specifically devised in the Will should still pass to the beneficiaries as if specifically devised.

3. Ann's niece argues that any property not specifically devised in the Will should pass under Florida's intestate succession laws.

4. The trial court ruled in favor of James Michael citing F.S. 732.6005(2) which states that "a will shall be construed to pass all property that the testator owned at death, including property acquired after the will is executed". The appellate court reversed and found that F.S. 732.6005(2) does not control because subsection (1) of the same statute provides that "the intention of the testator as expressed in the will controls".

5. The Florida Supreme Court found that, regardless of what Ann intended, her Will was unambiguous in the language and only bequeathed the property listed and not all of the property she owned at her death.

6. Under Florida law and the uniform probate code, a Will with a residuary clause disposes of all the decedent's property even property acquired after the execution of the Will. However, absent a general devise or residuary clause any after acquired non-specifically bequeathed property passes via intestate succession as such laws are intended to distribute property not addressed under the Will.

7. The Real Property Probate and Trust Law Section of the Florida Bar submitted an amicus brief in line with the nieces' argument of partial intestacy for wills that did not contain residuary clauses. The concurring opinion highlighted that cost cutting measures and do-it-yourself legal forms are not always the cheapest method when the results lead to very costly and time consuming litigation.

XV. **ISSUE.**

A. ***Knudson v. Scherer,* 2014 WY 129 (2014).** In a case of first impression, the Wyoming Supreme Court rejects the doctrine of equitable adoption for purposes of intestate succession.

1. Ronald Scherer was present at the birth of Lilyana, thereafter lived with her mother, and believed he was her father. A later paternity test showed he was not the father, but he treated her as his daughter for his lifetime and supported her financially and emotionally. He signed cards as "Dad" and stated on multiple occasions he considered Lilyana to be his heir, and made her the beneficiary of a POD account at a local bank.

2. Ronald died intestate in 2009. Lilyanna petitioned to be declared as his heir under equitable adoption. Ronald's brother, Robert, moved to dismiss the suit. The trial court dismissed the suit and Lilyanna appealed.

3. On appeal, the Wyoming Supreme Court affirmed the trial court and refused the recognize the doctrine of equitable adoption on the grounds that: (1) the

intestate succession statutes are clear and do not include persons by equitable adoption; (2) Wyoming could include those persons expressly as has been done in California, but has not and the court will not presume it was an oversight; (3) equitable adoption is not simple or clear to administer, and including it would undermine the objectives of the probate code; (4) while evidence of the decedent's intent has not been heard, the decedent could have carried out an intent to benefit Lilyana by adopting her or leaving a will, and did neither.

XVI. DISCLAIMERS & POWERS.

A. ***Cessac v. Stevens*, 127 So3d 675 (Dist. Ct. App Florida, 1st Dist. Nov 20, 2013)**. Florida first district, court of appeals affirms lower court decision that will did not exercise special power of appointment because it lacked specific reference to the power.

1. Decedent is a lifetime beneficiary of three trusts and in each she is granted a special testamentary power of appointment, but if not exercised the remaining trust assets are divided and distributed to her then living descendants (Stevens being one of them). Decedent's will bequeaths the residue of her estate to Cessac and mentions the three trusts by name, and stating that the assets within the trusts are part of the residue of her estate.

2. Stevens files a declaratory action to determine whether the mentioning of the trusts is enough to exercise decedent's power of appointment. The Magistrate issues a report that the references fail to meet the specific requirements needed to exercise the powers, and the trial court follows the magistrate's report finding that reference to the trusts without specific reference to the power of appointment is not enough to exercise the power.

3. On appeal, the court affirmed that the references were not specific enough to directly exercise the power and were also not specific enough to apply an equitable construction or reasonable substantive compliance because there was no reference to the power and specific reference to the power is required.

B. ***Midwest Trust Company et al. v. Reed Brinton*, 2014 Kan. App. Unpub. LEXIS 680 (Kan. Ct. App., August 15, 2014).** Trust beneficiary's exercise of testamentary general power of appointment was not valid because it did not strictly comply with the condition precedent of approval by the trust protector.

1. Decedent, Reed Byers, created a revocable trust agreement for the benefit of his daughter, Wendy, and her two sons, David and Reed Brinton. Under the terms of the trust, Wendy was granted a general power of appointment over the trust assets. If her power was not exercised, a small portion of the trust assets were set aside for her husband, Bill, and the remaining assets were divided equally between David and Reed. The trust also provided that Wendy's exercise of her power of appointment had to be approved prior to her death by the Trust Protector. The trust named Thomas McKittrick as the initial Trust Protector and Thomas Van Dyke as successor, if the initial

Protector was unable or unwilling to serve. McKittrick was Byers' long time CPA and Van Dyke was Byers' attorney.

2. Wendy amended her revocable trust to disinherit her son, Reed, and also executed a second codicil to her Will in which she exercised her general power of appointment to appoint the assets in the Byers trust to her revocable trust. Van Dyke approved the codicil as a valid exercise of her power.

3. Wendy died in 2009 and Bill died in January 2011. In September 2011, Reed filed a claim against Bill's estate stating that Wendy's exercise of the general power of appointment was invalid and any assets distributed from the Byers Trust for the benefit of Bill should be paid back to the trust.

4. Both sides moved for summary judgment. The lower court determined that the exercise was invalid as not approved by the Trust Protector because (1) the approval did not come from McKittrick and (2) the facts presented did not show that McKittrick was either unwilling or unable to serve as Trust Protector. The trustees of Wendy's Trust and the estate planning attorneys for Wendy and Byers appealed the summary judgment.

5. On appeal, the Court of appeals affirmed the lower court on the grounds that: (1) the language in the trust was clear and unambiguous, McKittrick was the initial Trust Protector, and absent facts that show he was unable or unwilling to serve, the power of appointment required his approval before it could be validly exercised; (2) substantial compliance was not available because Kansas has never recognized substantial compliance for the exercise of a power of appointment; and (3) even if under the Uniform Trust Code it could recognize substantial compliance, the issue at hand was not whether Wendy's exercise of the power substantially complied to the terms of the trust, but whether the condition precedent to her exercising the power was met, and it was not.

XVII. CREATION, VALIDITY & FUNDING.

A. ***Watson v. Underwood,* 2014 S.C. App. LEXIS 40 (2014).** Creation of an irrevocable trust by agent under power of attorney is valid even where trust incorporates terms of will.

1. In 2006, Watson (aged 88) filed a complaint with the sheriff that her daughter Long had been harassing and assaulting her physically for years, and that Long had supported Watson's husband's mental abuse of Watson. Watson told her attorney and her other two children that Long abused her and only wanted her money.

2. Watson signed a durable power of attorney with her other daughter Underwood as agent, which included the power to create and fund irrevocable trusts and make gifts. The same day, Watson executed a will that gave $1 gifts to her husband and Long, and gave the residue to her other two children. Watson's attorney prepared both documents.

3. In 2009, Long moved her mother out of her assisted living facility during the night, and without notice to her other children. Two weeks later, Watson's husband died, and Long took funds from his account with his power of attorney (and concealed his death from the bank) that were supposed to pass by survivorship to Watson.

4. Shortly thereafter and in response to concerns about protecting Watson from Long, the attorney prepared and executed an irrevocable trust with the attorney and Watson's daughter Underwood as co-trustees. The trust was for Watson's lifetime benefit, and upon Watson's death the trust incorporated the terms of the 2006 will by reference. The trust was funded with three bank accounts, a car, and Watson's real property.

5. Two months later, Long again moved Watson out of her new assisted living facility. That same day, Watson revoked the power of attorney, and thereafter executed a codicil to her 2006 will that named Long as sole beneficiary. The next month Long suffered a stroke and needed 24-hour supervision. Watson then sued her attorney and Underwood challenging the creation and funding of the irrevocable trust, and sought to terminate the trust (under the South Carolina UTC version of the "*Clafflin* Doctrine" providing for termination by consent of the settlor and all beneficiaries).

6. The attorney and Underwood moved for partial summary judgment on the power to create an irrevocable trust by power of attorney, which the trial court granted, finding that (a) the power of attorney authorized the creation of the trust, (b) that power is properly delegable to the agent and the trust is not a "will", (c) the deed transferring property to the trust was valid. Watson appealed.

7. On appeal, the South Carolina Supreme Court affirmed the trial court on the grounds that: (a) the power of attorney specifically granted the agent the power to create this trust; (b) simply because the trust incorporated the 2006 will by reference does not impede Watson's right to change her will, or execute a new will, that would specify how assets not in the trust would pass at her death and modify any burial plans; (c) the execution of the trust did not amount to the execution of a will; (d) the power of attorney by its unambiguous terms was effective upon its execution, and therefore Watson's deposition that she intended it to be operative only upon her disability is inadmissible; and (e) other issues raised by Watson, such as the claim for *Clafflin* style termination, were either not preserved for appeal or not appealable at this time.

B. ***Karen Nevitt v. Sabrina Burnett et al*, 2014 N.C. App. LEXIS 818 (NC Ct. App., August 5, 2014).** Under the North Carolina Uniform Trust Code, deed from Grantor to himself as trustee of his revocable trust is a valid transfer without recordation of the deed.

1. Karen Nevitt, as both executor of the estate of David Robotham and beneficiary under the David Robotham Revocable Trust, petitioned the court

to determine whether David had properly conveyed his house to his trust prior to his death.

2. On August 2, 2011, David executed his revocable trust agreement which stated that he intended for his trust to hold his personal residence for the benefit of Sabrina Burnett for her life. On the same day that he executed his trust, he signed a deed from himself as grantor to himself as trustee of his revocable trust, but the deed was never recorded. David's attorney told David that the transfer would not be completed until the deed was recorded.

3. The trial court determined that, because the deed from grantor to trustee remained in control of the grantor until his death, the deed failed to meet the delivery requirement and title was not validly transferred into the trust.

4. On appeal, the Court of Appeals reversed on the grounds that: (1) under the North Carolina UTC, property may be held in trust without a transfer of title if the property owner declares himself trustee of the property; (2) North Carolina added a non-uniform provision to their declaration statute such that the declaration is valid "unless the transfer of title of that property is otherwise required by law"; and (3) the trust agreement combined with the unrecorded deed created a valid declaration to trust funded with real property, and recording the deed did not affect the transfer of title between grantor and trustee but merely denied the deed the protections available by recording.

C. ***In Re Estate of Audrey Deinlein*, 2014 U.S. Dist. LEXIS 99793 (E.D. KY, July 23, 2014).** Disclaimer of an estate interest does not defeat a federal tax lien.

1. Under her will, Audrey Deinlein left her estate to her three sons, Chris, Paul and Jack. Each child petitioned to serve as executor, and they entered into a settlement agreement in which Chris released his claim to become executor and disclaimed his interest (he had received distributions during her lifetime that were treated as advancements under the agreement). Audrey had paid $185,000 to Chris during her lifetime to help with his expenses. When Paul and Jack, as co-executors, sold Audrey's condo the U.S. government filed a claim against Chris's one-third interest to satisfy $450,000 in federal tax liens.

2. The court allowed the lien against Chris's share of the estate and despite the agreement and disclaimer on the grounds that: (1) under federal tax law, the government has the right to satisfy any tax deficiency by imposing a lien on "all property and rights to property, whether real or personal, belonging to the taxpayer"; (2) property and rights to property are determined under state law; (3) under Kentucky law, advancements only apply to intestate distributions, and because Audrey died testate the law of advancements could not apply to the distributions that Chris received during her lifetime; (4) although it was known that Audrey had wanted the debts satisfied before her estate was divided, there was no written documentation that the payments were to be treated as advancements, and could not be advancements by default; (5) although Kentucky's disclaimer statute relates back to the date of death and creates the legal fiction that the disclaiming person never had an interest in

the property, the U.S. Supreme Court has already specifically rejected the legal fiction in *Drye v. West* (1999); (6) following *Drye,* Chris's disclaimer was a property right that allowed him to direct whether or not he was going to receive the property; and (7) the property right was one that triggered sufficient control to create a tax lien on the estate assets.

XVIII. **AMENDMENT, REVOCATION, REFORMATION & TERMINATION OF NON-CHARITABLE TRUSTS.**

A. ***O'Connell v. Houser,* 2014 Mass. LEXIS 841 (October 28, 2014).** Reformation of trust affirmed by state supreme court under *Commissioner v. Bosch* principles on adequate proof that reformation was proper to avoid loss of grandfathered GST-exempt status.

1. George Houser died in 1983. Under his revocable trust, he created a marital and family trust, both for his wife Mary's benefit, and gave his wife a power of appointment over the marital trust. At his wife's death, the unappointed assets passed into separate trusts for his children and he gave each child a testamentary limited power of appointment over the child's respective trust. The trusts were grandfathered exempt from the GST tax. The trusts terminated 21 years after the deaths of George's "issue by blood" living at George's death.

2. Mary died in 1993. She exercised her power of appointment over the marital trust to direct the assets to her 1991 trust. She allocated her GST exemption to a new GST exempt family trust that would last until 21 years after the deaths of her "issue" living at her death. At both George's and Mary's deaths, their respective "issue by blood" were the same persons.

3. Their son Horace died in 2009 without issue, and exercised his power of appointment over the separate trust for his benefit created by his father, and appointed the assets to Mary's new GST exempt family trust. The trustees petitioned to reform Mary's new trust to define the perpetuities measuring lives as her "issue by blood", rather than just "issue" which could include adopted persons, alleging a drafting error that would cause loss of grandfathered GST exempt status for appointed assets by extension of the vesting period by including adopted persons as measuring lives.

4. The county court ordered the reformation. Following the *Commissioner v. Bosch* principles, the trustees filed an uncontested appeal to the state supreme court and noticed the IRS Commissioner, who did not appear. The Massachusetts Supreme Court affirmed the reformation on its finding adequate proof of a drafting error that causes a failure of the settlor's intent, through the trust terms, the over-all estate plan, the affidavit of Mary's counsel, and proof of other circumstances known to Mary at the time she created her trust.

B. ***Bank of America v. Babcock,* 2014 Mass LEXIS 840 (October 28, 2014).** State supreme court rejects suit to construe trust terms to protect marital deduction under *Commissioner v. Bosch* principles where there is no alleged drafting error or misconstruction of trust terms.

1. Hollis Plimpton, Jr. amended his revocable trust to allow for gifts to his descendants and charities during his lifetime, and provided for a QTIP trust after his death. After his death, the corporate trustee became concerned that the IRS would misconstrue the trust, conclude the gifting provisions applied to the marital trust, and find that the marital trust did not qualify for the marital deduction. The trustee petitioned the county court to confirm qualification for the marital deduction, and then following the *Commissioner v. Bosch* principles, the trustees filed an uncontested appeal to the state supreme court.

2. The Massachusetts Supreme Court rejected the uncontested appeal and ordered the county court to dismiss the petition without prejudice on the grounds that: (1) there is no allegation of a drafting error; (2) there is no evidence of an adverse position taken by any taxing authority; (3) there is no allegation of real uncertainty in the construction of the trust, and all parties agree it was correctly drafted; (4) a careful reading of the trust leads to the result intended by the settlor; (5) there is no claim of serious doubt about how to administer the trust; (6) the claimed possibility that the trust may be misconstrued in the future is not an appropriate situation for declaratory relief, since there is no doubt or error alleged, and there is not cause for reformation without an allegation of error; and (7) understandable precautionary measures do not justify judicial involvement under the guise of *Bosch.*

C. ***Turner v. Kent*, No. 64A05-1310-TR-510 (Indiana Court of Appeals, July 31, 2014).** Incorporation of specific gift of real property by reference is invalid and will not be construed as a trust amendment.

1. Alexander and Selma Kazluski created a joint revocable trust in 2004. The trust allowed for incorporation of a separate list of specific gifts, with the residue being distributed equally to their three children, Sally, Linda, and Stanley, after their deaths.

2. Alexander died in 2005. In 2008, Selma signed a separate writing purporting to make specific gifts of real property to Stanley and Linda. Selma then died in 2010 and Linda took over as trustee. Sally and Stanley petitioned to have the court declare that the attempted specific gifts were invalid. Linda claimed the gifts were valid. The trial court invalidated the gifts and Linda appealed.

3. On appeal, the Indiana Court of Appeals affirmed on the grounds that: (1) the document was clearly an intent to incorporate specific gifts by reference into the trust instrument; (2) the Indiana Trust Code allows incorporation of specific gifts by reference, but only of tangible personal property and does not expressly address, and therefore prohibits, gifts by reference of real property;

and (3) the concurring opinion would also hold the document was invalid as a trust amendment for lack of clarity of intent.

D. ***Richard C. Head v. George A. Head, Successor Trustee*, 2014 Ore. App. LEXIS 267 (Crt App Oregon, March 5, 2014).** Although courts generally have expansive powers under the theories of equity, such powers do not expand to trust modifications when neither party requested such modifications.

1. Mom and Dad have mirror estate plans with fixed A residue B martial funding clause. At Mom's death her estate is under the applicable exclusion amount. Per the terms of the trust, her assets should have been placed in Fund A with discretionary income and principal to Dad, remainder to children.

2. During Dad's life, he as Trustee encroached all of the trust assets and terminated the trust. He then amended his estate plan to eliminate one of his children, Richard, as a beneficiary. Upon Dad's death and under both his trust and Mom's trust son, George, is appointed successor Trustee. Son, Richard, files suit against George for Dad's breach of fiduciary duties regarding the encroachment of Mom's trust assets. George claims Dad did not breach his duties but merely exercised his discretionary power to appoint principal to himself.

3. Trial court determines that "under the law, it appears clear that the remedies [Richard] is requesting should be granted. However, the bothersome question is how would that result be equitable?" The trial court then finds that the trust should be modified under Oregon Trust Code such that Fund A was not necessary and the trust assets were to be distributed outright to Dad.

4. The court of appeals reverses and finds that the trial court erred in modifying the trust pursuant to the Oregon Uniform Trust Code because such modification must first be requested by a party, and neither party requested the trust be modified, but instead requested how to interpret the terms of the trust and actions of the trustee.

E. ***Daniel D. Peck, Trustee v. Constance L. Peck*, 2014 Fla. App. LEXIS 2571 (Ct App Florida, 2d Dist. Feb. 26, 2014).** Both Florida's Uniform Trust Code and Common Law provide that a trust can be terminated upon the consent of the settlor and all beneficiaries even if such termination would frustrate the purposes of the trust.

1. In 1992, father, Bernard, prepared an irrevocable trust for his daughter, Constance, and funded the trust with annual exclusion gifts. Per the terms of the trust, Constance is both settlor and Co-Trustee of the trust. The trust provides for mandatory income distributions to Constance as well as increasing withdrawal rights, $5,000 per year until age 50, $10,000 per year until age 55 and $15,000 per year thereafter. Constance also has a testamentary power of appointment which she exercised in her will to appoint the assets to her then living children. Further, the power of appointment provides that Constance may bind and represent the beneficiaries of the power. Upon Bernard's death and per the terms of the trust, his son, Daniel, is appointed Co-Trustee with Constance. In 2012, Constance with the

consent of her children filed a petition to terminate the trust and pay the assets to Constance. Daniel objected to the termination stating that the purpose of the trust was to protect the assets from Constance's financial instability.

2. The trial court found that although the Florida Uniform Trust Code requirements for trust termination had not been met, the Trust Code merely supplements the common law, and "Florida common law provides that a trust can be terminated if the settlor and all beneficiaries consent, even if the trust is irrevocable and even if the trust's purposes have not been accomplished."

3. The court of appeals affirmed the trial court's termination, and further opined that Bernard may have been able to draft the trust agreement such that any modification was prohibited after his death and required his consent during his life if that really was his true intent.

F. ***Barlow v. Olguin,* 2014 N.M. App. LEXIS 37 (2014).** Will can effectively revoke or amend a revocable trust under the New Mexico Uniform Trust Code.

1. Darrell Schlicht executed a revocable trust in 1991, which he amended four times. Darrell and his wife, Verlea, were named as co-trustees. The trust gave the residue upon Darrell's death to Verlea, and if she died before distribution to her, to Darrell's nephew Barlow or his descendants, and named Barlow as successor trustee. In the trust, Darrell reserved the right to amend or revoke the trust during his lifetime by a written instrument signed by Darrell and delivered to the trustee.

2. On December 16, 2010, Darrell executed a will that purported to revoke the trust terms concerning how the assets pass upon Verlea's death, and instead gave those assets pursuant to Darrell's will. Darrell's new will passed the assets to his long time caretaker and named the caretaker as executor. The next day Verlea died, and the day after that Darrell died.

3. The caretaker moved to be appointed as trustee of the revocable trust to distribute the assets to the probate estate, and Barlow objected. The trial court held that the UTC permitted amendment of a trust by "substantial compliance" with the method provided in the trust terms, and that the will demonstrated substantial compliance and manifested Darrell's intent, revoked the trust and all provisions in favor of Barlow, and appointed the caretaker as trustee for the purpose of transferring assets to the estate. Barlow appealed.

4. On appeal, the Court of Appeals affirmed the trial court on the grounds that: (a) the trust terms provided one method for amending or revoking the trust, but did not expressly state that the method was the *exclusive* method for doing so; (b) the settlor "substantially complied" under the UTC with the method under the trust terms; (c) because the method in the trust was not exclusive, under the UTC the settlor also validly amended or revoked the trust by a later will that expressly refers to the trust and devised property that would otherwise pass under the trust terms, and there was clear and convincing evidence of the settlor's intent to amend or revoke the trust; (d) even if the

trust terms were an exclusive method of revocation, the trust terms are not inconsistent with a duly executed will signed by the settlor and delivered to the trustee during the settlor's lifetime, notwithstanding the fact that the will does not "speak" until the settlor's death.

G. ***Purcella v. Olive Kathryn Purcella Trust*, 325 P.3d 987 (Supreme Court of Alaska, April 18, 2014).** Alaska Supreme Court rules that grantor of self-settled irrevocable trust did not produce evidence sufficient to establish that trust was the product of undue influence or sufficient to reform, modify or terminate the trust due to a purported mistake of fact or law or due to unanticipated circumstances.

1. Olive Kathryn Purcella ("Mrs. Purcell") filed a petition seeking to reform or terminate the Olive Kathryn Purcella Trust (the "Trust"), a self-settled irrevocable trust established by Mrs. Purcella for her own benefit. The Anchorage superior court, after trial, denied her petition and Mrs. Purcell appealed.

2. After the passing of Mrs. Purcella's husband, Mrs. Purcella's daughter-in-law, Donna (who was married to Mrs. Purcella's son, Steve), began helping Mrs. Purcella manage her financial affairs. Mrs. Purcella set up a joint account with Donna so that Donna could help her write and sign checks. Donna discovered that one of Mrs. Purcella's other sons, Mark, had been making aggressive and unreasonable demands for money from Mrs. Purcella.

3. As a result, at some point in 2008, Mrs. Purcella's attorney, Bill Ingaldson ("Mr. Ingaldson"), began discussing with Mrs. Purcella the possibility of creating a trust. It was later disputed whether Mr. Ingaldson or Donna first suggested this trust to Mrs. Purcella. Mr. Ingaldson ultimately referred Mrs. Purcella to an estate planning attorney named John Colver ("Mr. Colver"), who ultimately drafted the Trust for Mrs. Purcella. The Trust named Donna as trustee. Mr. Colver mentioned to Mrs. Purcella that, in addition to protecting her assets from Mark, the Trust would also serve as a Medicaid planning tool.

4. During the Trust's administration, Donna had some conflicts with Mrs. Purcella. For example, Donna refused to pay one of Mrs. Purcella's cell phone bills as Mark, who used the same cell phone account, accrued large charges on the account. Mrs. Purcella also frequently asked Donna for money, but Donna refused many of her requests as Mrs. Purcella wanted to give the money to Mark.

5. Ultimately, in 2010, Mrs. Purcella filed a petition to terminate or reform the Trust. She argued that Trust should be reformed "to conform to her intentions due to a mistake of fact or law in the expression of the trust and/or inducement to create the trust." Alaska Statute 13.36.350(a) provides that an unambiguous irrevocable trust may be reformed "to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression in trust or inducement to create the trust." To reform under this provision, the petitioner must prove the settlor's intent by clear and convincing evidence.

6. The Court determined that Mrs. Purcella did not meet her burden of proof. Numerous witnesses, including Donna, Mr. Colver, and Mr. Ingaldson, all testified that Mrs. Purcella understood the effect of the Trust at the time of the transfer and intended to transfer all of her property to the Trust. While Mrs. Purcella testified that she "never intended to transfer all of her property into a trust" and that "nobody ever explained" the Trust to her, the Court found the other witnesses' testimony to be more credible. Alaska Statute 13.36.345(a) provides that a court may modify an irrevocable trust's terms "if because of circumstances not anticipated by the settlor, modification or termination would substantially further the settlor's purposes in creating the trust." Mrs. Purcella also argued that she did not anticipate that circumstances would arise where she would have "no control as to when or if her bills would be paid, or when or how here money was to be spent."

7. However, the Court ruled that a "misunderstanding about the effect of a legal instrument is not an unanticipated circumstance." A settlor's mistake regarding the legal effect of a trust is not an unforeseen fact about the future, but a mistake that would only warrant reformation if the provisions of Alaska Statute 13.36.350(a) were met (as discussed *supra*, they were not).

8. Alaska Statute 13.36.306 provides that a court may modify or terminate an irrevocable trust "if all of the beneficiaries consent" and if the trust's continuation is unnecessary to fulfill a "material purpose" of the trust. Mrs. Purcella argued that, as she was "both . . . the settlor and sole life beneficiary of the trust," she was entitled to modification or termination under this provision.

9. The Court noted that Mrs. Purcella never argued before the trial court that this statute applied to this case. Thus the argument was waived. Nevertheless, the Court noted that not all beneficiaries consented to a modification or termination. Mrs. Purcella was only the lifetime beneficiary of the trust. The Trust remaindermen would have needed to consent as well.

10. Mrs. Purcella further argued that the Trust was the product of Donna's undue influence. The Court, noting that in Alaska, undue influence must be proven by clear and convincing evidence, concluded that Mrs. Purcella presented no evidence to support her claim. The Court was unconvinced by Mrs. Purcella's testimony that the Trust was Donna's idea. Nevertheless, it noted that even if this was so, this would not by itself constitute clear and convincing evidence that Donna exerted improper influence on Mrs. Purcella. Moreover, Mrs. Purcella's relationship with Donna was not a confidential relationship that would trigger a presumption of undue influence. Thus the Supreme Court affirmed the superior court's decision denying Mrs. Purcella's petition.

H. ***In the Matter of the Estate of John Wagner*, 2014 N.Y. App. Div. LEXIS 5649 (NY Sup. Ct., August 8, 2014).** Divided court rejects trust terms that provided for distribution of all assets to current beneficiary on termination of uneconomical trust.

1. John Wagner created a trust that provided for income, but not principal, to Sally Baumann for life, along with the right to live in the residence held in trust. The trust provided that upon her death the trust assets would be distributed to his then living grandchildren.

2. The trustee petitioned to terminate the trust as uneconomical because the income generated was less than the cost of the maintaining it. The trust terms provided that in the event that the trust is terminated as uneconomical all trust assets are to be distributed to the current income beneficiary. The grandchildren, as remainder beneficiaries, contested the trust terms and claimed they should receive the assets upon termination. The trial court determined that the trust terms were unambiguous, and held that on termination the trust assets should be distributed to Sally as the sole current income beneficiary. The grandchildren appealed.

3. On appeal, the majority opinion of the court of appeals reversed the trial court on the grounds that: (1) giving the document a "sympathetic reading" in its entirety, the grantor had an overarching intent and dominant purpose of benefitting both Sally and his grandchildren; (2) the trust terms must be construed in a manner that meets the dominant purpose; and (3) because the grantor's intent was to benefit both the income beneficiary and remainder beneficiaries, the trial court erred in holding all assets should be distributed to Sally. The court of appeals remanded the case to the lower court to determine the division of assets between the income and remainder beneficiaries.

4. The dissenting opinion would have upheld the lower court decision because the terms of the trust were unambiguous and specifically provided that if the trust was terminated as uneconomical the distributions were to the income beneficiary.

I. ***Gerald McCarthy v. Rozlyn Taylor, et al.*, 2014 Ill. App. LEXIS 610 (Ill. App. Ct., August 22, 2014)**. Handwritten notations on a copy of the trust are a valid amendment.

1. In 2006, Abraham Lincoln Reynolds, III, created a revocable living trust with himself as trustee, Cherie Coles as first successor trustee, and Gerald McCarthy as second successor trustee. At Reynold's death, the trust was to be divided 10% to McCarthy, 80% to Coles, and 10% to Elaine Lawell. If Coles predeceased Reynolds, her 80% was to go to McCarthy. Coles did predecease Reynolds in 2006. In 2010, Reynolds amended his trust by executing a typewritten notarized document that he delivered to McCarthy who was then serving as successor trustee. The trust provided that Reynolds could amend or revoke it, or remove the successor trustee, by written notice delivered to the successor trustee, and if completely revoked, all trust property held by the trustee would be transferred and delivered back to Reynolds or as he "otherwise may direct in writing".

2. Prior to his death in 2012, Reynolds contacted his attorney and gave him a copy of the original trust with handwritten markings. Under the markings, the original 80% to Cherie was changed to 70% to Roslyn, the 10% to McCarthy was changed to 20%, and the remaining 10% to Elaine was changed to Devon Morris. The successor trustee was named as Roslyn instead of McCarthy. McCarthy filed a complaint with the court alleging that the amendment was invalid because it did not meet the formal requirements for an amendment under the terms of the trust or Illinois law.

3. Relying on the "otherwise may direct in writing" language in the trust, the trial court held that the handwritten amendments were valid on the grounds that the only requirement for the amendment was that it had to be in writing, and delivery and signature were not required.

4. On appeal, the Court of Appeals affirmed the trial court on the grounds that: (1) the trust was ambiguous as to whether delivery was required because while the amendment clause required delivery to the successor trustee, an additional clause in the trust stated the grantor's intent for the trust to remain private and that the trust was not be disclosed to anyone during the grantor's life; (2) based on this ambiguity, delivery was not absolutely required for a valid amendment; (3) the trust agreement did not explicitly contain a requirement for a signature on amendments; (4) there were no specific words required to express the intent to create an amendment; and (5) the 2010 amendment did not establish a required form for all future trust amendments.

XIX. **NO-CONTEST CLASUES.**

A. ***Winston v. Winston, et. al.,* 2014 Mo. App. LEXIS 972 (Court of Appeals of Missouri, September 2, 2014).** Missouri Court of Appeals holds that (1) the beneficiaries did not violate no-contest clauses where they did not seek to void the trusts; (2) the "Investment Trustee's" power to consent to, or veto, distributions was not subject to his fiduciary duties and that he did not have to act in the beneficiaries' best interests in exercising this power; (3) trust agreements contemplated the hostility that arose between the trustee and the beneficiaries; and (4) that no changed circumstances existed justifying reformation of the trust agreements.

1. Dr. Bernard Winston ("Decedent") established certain trusts for the benefit of his son, Dr. Thomas R. Winston ("Thomas"), and Thomas' two children (the "Twins"). In one of the trust agreements (the "1990 Trust" agreement), Decedent named himself trustee and, in an amendment to the 1990 Trust agreement, named Thomas an "Investment Trustee." The amendment provided that any proposed distributions to be made from the 1990 Trust to the twins would be subject to Thomas's consent as "Investment Trustee. "

2. Another trust agreement (the "1993 Trust" agreement) named Thomas and United Missouri Bank of Kansas City ("UMB") as co-trustees. The 1993 Trust agreement contained similar consent provisions, requiring Thomas' consent for all proposed distributions to the Twins.

3. The 1990 and 1993 Trusts contained a "no-contest" clause, providing that if any beneficiary contested the validity of either trust, his interest in the trust would be revoked.

4. After Decedent's death in 1996, UMB, who was named Decedent's successor as trustee of the 1990 Trust, became the general trustee of that trust. In July of 2010, Thomas filed an action against UMB, alleging breach of fiduciary duty and requesting an accounting and turnover of property. In August of 2010, UMB filed a third party petition against the Twins requesting approval of its resignation as corporate trustee, appointment of a successor corporate trustee, approval of its final accounting, and its release. The Twins filed an answer and a counter-petition against Thomas. In their counter-petition they alleged that Thomas breached his fiduciary duties to them.

5. With respect to the 1990 Trust, the trial court ruled that the Twins had not violated the no-contest clauses by bringing their claims and that Thomas had breached his fiduciary duty to the Twins by failing to consider their best interests in determining whether or not to consent. The court, however, declined to remove Thomas as Investment Trustee, declined their request that the 1990 Trust be split in thirds, and declined their request that Thomas' power of appointment be removed. However, the court reformed the 1990 Trust agreement to remove Thomas' power to consent to distributions to the Twins and ordered the corporate trustee to make specific distributions to the Twins.

6. With respect to the 1993 Trust, the trial court also deleted Thomas' consent power. However, the court held that Thomas did not breach a fiduciary t duty as trustee to make distributions from the trust and denied the Twins' request for punitive damages. The court awarded the Twins attorneys fees to be paid personally by Thomas.

7. On appeal, the Court upheld the trial court's ruling that the Twins did not violate the no-contest clauses. The Court noted that none of the allegations or relief sought by the Twins' counterpetition questioned the legal sufficiency of the Trusts and acknowledged that the Trusts were valid. Accordingly, the Twins' claims were not claims that contested the validity of either Trust.

8. However, the Court found that the trial court erred with respect to its ruling that Thomas had to exercise his consent over distributions from both Trusts, acting in the Twins' best interests. With respect to the 1990 Trust, the Court ruled that the general trustee (not the Investment Trustee) must exercise its discretion within certain limitations. Only after this discretion has been exercised by the general trustee in accordance with its fiduciary duties does the possible distribution come before Thomas for his free, voluntary, and unfettered consent. The Court ruled that no fiduciary duty is expressly or impliedly connected to Thomas' consent power.

9. With respect to Thomas' consent power with respect to the 1993 Trust, the Court noted that while Thomas served as general trustee of that Trust, his consent power was "absolute and separate from his position as trustee and the

duties and responsibilities of that position." Once again, the Court found that nothing in the Trust agreement indicated that any fiduciary duty was connected to Thomas' separate consent power. Accordingly, the Court of Appeals ruled that the trial court had erred in ruling that Thomas also had to exercise this consent power, acting in the Twins' best interest.

10. The trial court had also ruled that there was clear and convincing evidence that circumstances changed such that the Trusts must be reformed to effectuate the Decedent's intent. In particular, the court found that after Decedent's death, Thomas' relationship with the Twins deteriorated and ultimately, he become estranged from the Twins. The Court ruled that Decedent's intent would be thwarted absent a reformation to eliminate Thomas' participation in distributions. However, the Court of Appeals, in analyzing the Trusts' language, found that hostility and estrangement was not unforeseeable by Decedent when he executed and amended the Trusts. Thus the Court determined that the trial court's conclusion that there were changed circumstances was a misapplication of law.

11. Finally, on appeal, Thomas argued that the trial court's award of attorney fees to the Twins, to be paid by him personally, was erroneous. Thomas argued that the trial court erred as its award was based on the Twins prevailing on most issues and as the trial court erred in ruling in the Twins' favor on those issues (no contest clause, breach of fiduciary duty, modification). In the alternative, if the Twins did prevail on some of these issues, Thomas argued that the matter had to be remanded for a recalculation with only fees for work done on successful claims chargeable to him. The Court of Appeals reversed the trial court's fee award, noting that it found that Thomas did not have a fiduciary duty attached to his consent/veto power and that therefore Thomas had not breached his fiduciary duty.

XX. CHARITABLE MATTERS (GENERALLY).

A. ***Lechowicz v. Costco Wholesale Corporation,*** **2014 Conn. Super. LEXIS 2277 (2014).**

Terms of deed granting standing to local citizens not effective to grant citizens, rather than attorney general, standing to enforce terms of a charitable gift, where citizen cannot show unique interest in gift or harm.

1. Alix Stanley gave several parcels of real property in New Britain, Connecticut to the City of New Britain, one of which became the Stanley Golf Course. Under the deed, Stanley authorized the city to sell the land after obtaining the approval of several city boards, and conditioned on the funds being held in trust to maintain Stanley Park. The deed also granted standing to sue concerning the gift to the citizens of New Britain.

2. The city entered into an agreement to sell part of the property to Costco for $4.1 million to be developed as a retail warehouse, after obtained all the necessary approvals under the deed terms and setting up a trust for the sales proceeds. The sale was completed and Costco began work on the property. A citizen, concerned with preserving open space in the city, sued to challenge the sale and sought an injunction.

3. The trial court dismissed the suit for lack of standing on the grounds that: (1) only the attorney general has standing to sue concerning a charitable gift unless the plaintiff can show a special interest in the gift, which is not the case here; and (2) the deed terms conferring standing on the citizens of New Britain is ineffective because persons cannot convey judicial standing by agreement.

B. ***Littson v. Schaub,* 2014 U.S. Dist. LEXIS 150808 (E.D. California 2014).** Probate exception bars federal court from hearing challenge to validity of amendment to trust creating private foundation.

1. Robert and Gloria Wallace create a private foundation under a trust agreement, with the drafting attorney as managing trustee and Robert as controlling trustee. Robert directed multiple distributions from the foundation to The Friendship Club, but the Interstate Community Foundation was the named remainder beneficiary of the foundation after their deaths. In 2010, Robert purportedly amended the trust to name The Friendship Club as remainder beneficiary and to name a new trustee. After Robert's death in 2013, The Friendship Club sued in Nevada state court to assert its rights to the assets. The original attorney-trustee opposed claiming the amendment was invalid and that the designation of the Community Foundation was irrevocable, sought an accounting from the successor trustee, and asserter claims of mismanagement of the trust. The trustee removed the case to federal court, and The Friendship Club moved to remand to state court.

2. The federal district court ordered the case back to state court on the grounds that: (1) all claims in the case ask the court to determine the validity of the amendment to the trust agreement, or are dependent on that determination, which is a determination of the validity of a testamentary instrument; and (2) accordingly, the probate exception bars federal court jurisdiction.

XXI. CY PRES & TERMINATION OF CHAIRTABLE TRUSTS.

A. ***Old National Bancorp v. Hanover College,* 2014 Ind. LEXIS 683 (2014).** Trustee that failed to seek stay of court order and transferred assets to charity lacks standing to appeal termination of charitable trust.

1. Hanover College sued for discretionary judicial termination of two charitable trusts for its benefit under the UTC, alleging that preserving the trusts was wasteful, provided lower investment returns, and impaired the administration. The bank trustee opposed the petition in its capacity as trustee, and did not intervene in the case in its individual capacity.

2. The trial court ordered the termination, the trustee did not seek a stay of the order, and the trustee turned the assets over the College to be added to its endowment. The trustee appealed. The Court of Appeals dismissed the trustee's appeal on the grounds that the trustee failed to seek a stay, and therefore its position as trustee ended and it lacked standing to bring the appeal.

3. On appeal, the Indiana Supreme Court affirmed on the grounds that: (1) there is no merit to the trustee's argument it was appealing in its individual capacity, based on the conduct of the trustee, its arguments, and the fact that the costs were paid out of the trust; (2) the bank did not intervene in the case in its individual capacity; and (3) by failing to seek a stay, the trustee lost the ability to pursue the appeal as representative for the trust, and the trustee *conceded* it lacked standing to bring the appeal in its capacity as former trustee as a result.

XXII. **TAX ELECTIONS.**

A. ***Walton v. Estate of Swisher,* 2014 Ind. App. Unpub. LEXIS 114 (2014).** Agreement to release claims to later tax benefits from DSUE election precludes later demand for payment for benefits of portability.

1. Mary died in 2011 with an estate of $100,000 and her daughter Kathleen was appointed as personal representative. Kathleen through her own counsel entered into a contract with Mary's surviving husband, Glenn, that provided: (a) Glenn would pay all of Mary's outstanding medical and nursing bills and an additional $5,000; (b) Glenn waived his survivor's allowance; (b) Mary's estate would release all claims to any tax benefits received by Glenn's estate; and (c) Glenn's advisors would prepare a Form 706 for Mary's estate. Pursuant to the agreement Glenn's attorneys prepared a Form 706 for Mary's estate making the election for portability of Mary's DSUE, which Kathleen filed and subsequently closed the estate.

2. Glenn died in 2012. Mary filed a claim against Glenn's estate for $500,000 for the benefits Glenn's estate received through the portable DSUE and an additional claim for Mary's living expenses.

3. The probate court granted Glenn's estate summary judgment, which the court of appeals affirmed on the grounds that: (1) Kathleen had standing to bring her claims; (2) Kathleen, while represented by her own counsel, relinquished any and all claims to tax benefits received by Glenn or his estate; (3) the Unified Tax Credit is clearly a tax benefit, and therefore claims were waived and Kathleen cannot now complain she should have bargained for more; (4) because Kathleen was represented by her own counsel, Glenn's counsel had no duty to explain the Unified Tax Credit to Kathleen; and (5) the agreement does not provide for payment of legal expenses that are not associated with nursing care.

XXIII. **SPENDTHRIFT & ASSET PROTECTION TRUSTS.**

A. ***Estate of Creamer,* 2014 Phila. Ct. Com. Pl. LEXIS 322 (2014).** Spendthrift provision in will protecting outright gifts to son is subject to UTC exception for court orders of child support, and son's children have standing to object to elective share claims of widow to the extent support claims are not satisfied from estate.

1. Roy Creamer died in 2012. He left nothing to his wife, gave certain real property to his son, and left the residue of his estate equally to his seven

children. His will included a spendthrift provision that protected the estate assets while in the hands of his co-executors, his son and his daughter.

2. Roy's widow filed an elective share claim that the co-executors recognized. At the daughter's request, the son resigned as co-executor following a pattern of disruption of the administration from bipolar disorder, substance abuse, bizarre delusions, brain injury from an automobile accident, a coma, recurring rehab, and often being drunk and high.

3. The son was under a support order for his children by Patricia Smith. Patricia sued to compel the executor to account, challenged the widow's election, and sought removal of the executor for favoring her brother over her brother's children.

4. The court held that Patricia lacked standing to seek an accounting, challenge the elective share, or remove the executor since she was not a beneficiary under the will or an heir. The court, however, ordered that any gifts to the son under the will be paid first to satisfy the support order against the son on the grounds that: (1) while Pennsylvania recognizes spendthrift clauses, it also recognizes exceptions including for support orders; (2) the Pennsylvania UTC, which applies to the will by analogy, includes a statutory exception to spendthrift protection for judgments or court orders for the support and maintenance of children; and (3) of the support order is fully satisfied from the estate, the children have no standing to bring claims, but if the judgment is not fully satisfied they have standing to bring claims such as challenging the elective share.

B. ***Mennen v. Wilmington Trust Company,*** **2013 Del Ch. LEXIS 204 (2013); C.A. No. 8432-ML (January 17, 2014).** Fiduciary exception to the attorney-client privilege does not apply to trustee's legal advice in connection with trustee's petition arising out of failed investments directed by co-trustee. Master recommends dismissal of claims to recover against trust for co-trustee's benefit under spendthrift clause, and rejects creation of public policy exception to clause for family member claims beyond support claims.

1. George S. Mennen created a trust in 1970 for the benefit of John Mennen, with Wilmington Trust Company and Jeff Mennen as co-trustees. At the same time, he created separate trusts for his other children, including a trust for Jeff. The trusts contained spendthrift provisions. The trusts were funded with Mennen Company stock. Owen Robert, and not Jeff, was the individual co-trustee of the trust for Jeff's benefit.

2. In 2012, Wilmington Trust filed a petition to remove Jeff as co-trustee of John's trust, alleged that the trust was a directed trust that required Wilmington to follow Jeff's directions concerning investment, and alleged that Jeff's investment directions caused the trust to lose a significant portion of its value. Wilmington also sought investment information it claimed Jeff was withholding. The beneficiaries of John's trust, after receiving notice, did not respond to the suit for a number of years.

3. In March of 2013, the beneficiaries sued the co-trustees seeking damages exceeding $100 million. The beneficiaries alleged that after the Mennen Company was sold to Palmolive, Jeff used the liquid assets in John's trust to fund investments in, or loans to, fledgling companies founded by Jeff's friends on whose boards Jeff served, and that as a result of the trust value was lost. The beneficiaries alleged the corporate trustee did nothing to prevent Jeff's self-dealing. Jeff was not able to influence the investments of the trust for his own benefit, which as a result still had substantial assets. The beneficiaries of Jeff's trust added the trustees of Jeff's trust to the suit and sought to recover against the trust for Jeff's alleged wrongful actions.

4. During discovery, the co-trustees separately asserted the attorney-client privilege or work product doctrine protected several categories of documents. Wilmington refused to produce any external or internal communication with counsel concerning its petition and refused to produce a privilege log. Wilmington asserted an advice of counsel defense, but refused to produce documents related to that defense. The beneficiaries sought to compel Wilmington to produce (1) all privileged documents up to the date they filed their action, (2) later documents not related to the defense against their claims, and all advice related to Wilmington's duties and powers under the trust agreement. The beneficiaries claimed that under *Riggs National Bank v. Zimmer*, Wilmington must produce all documents related to its petition because that action was for their benefit and they were therefore the ultimate clients.

5. The Chancery Court held that the fiduciary exception to the privilege did not apply, and Wilmington could withhold privileged communications related to its petition on the grounds that: (a) *Riggs* is still good law notwithstanding changes to the Delaware rules of evidence stating that the trustee is the "real client"; (b) the beneficiaries have the burden of proving the exception applies; (c) it is not surprising that Wilmington would seek legal advice for its own protection and bring the petition for its own protection; (d) Wilmington clearly sought legal advice for its own protection and to minimize its potential exposure following the bankruptcy of the trust's largest investment, and it was concerned at that time that the beneficiaries might bring suit against it; (e) pending litigation is not a prerequisite to a finding that the trustee has a legitimate personal interest in the legal advice; (f) the sharp decline in the value of the trust, and the real possibility that both guardians *ad litem* appointed in the petition action would bring claims against Wilmington, supported Wilmington's view that it was adverse to the co-trustee and the beneficiaries prior to the filing of the beneficairies' lawsuit; and (g) while not dispositive, Wilmington's payment of the legal fees (rather than charging them to the trust) weighs in favor of finding Wilmington intended to be the primary beneficiary of the legal advice received.

6. The court ordered Wilmington to create a practical privilege log.

7. With respect to documents containing legal advice related to Wilmington's duties and powers as set forth in the trust instrument, including whether the

trust is a "directed trust", the court applied the fiduciary exception and ordered Wilmington to produce such documents because under *Riggs* "a beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust" and beneficiaries must have "knowledge of the affairs and mechanics of the trust management" in order to hold the trustee to the proper standard of care. However, any such documents produced in connection with the petition action or the suit by the beneficiaries would remain privileged.

8. The court noted that if Wilmington pursued an advice of counsel defense any documents related to that defense would be required to be produced. The court ordered the co-trustee to produce the three documents he was withholding.

9. *Master's Report.* The individual co-trustee of Jeff's trust sought summary judgment on all claims against Jeff's trust, which the master for the Delaware chancellor recommended granting on the grounds that: (1) Jeff's trust includes a spendthrift clause; (2) by statute and by earlier common law, Delaware recognizes the enforceability of spendthrift clauses; (3) the beneficiaries are tort claimants against Jeff, which are considered creditors under the Delaware statute whose claims are barred by spendthrift clauses; (4) *Garretson v. Garretson*, which resolved an ambiguity in the Delaware statute to determine that a spousal support obligation is not a "creditor", does not provide an exception for other family creditors to whom the debtor does not owe a support obligation; (5) not all familial obligations fall under the *Garretson* exception; (6) there is no authority suggesting that the general assembly intended to permit the courts to develop unenumerated public policy exceptions to an unambiguous statute merely by preserving existing common law when passing statutes; (7) there was no policy exception to spendthrift clauses at the time the spendthrift statute was enacted; (8) other states do not recognize a tort exception, the comments restatements lacking citation are not support for the exception or a "persistent wrongdoer" exception, and the statute does not allow the court to create exceptions based on its own perception of public policy; and (9) the beneficiaries cannot apply "impoundment" principles to reach Jeff's trust because it is a separate trust under a separate instrument, and not a mere sub-part of a pot trust for the family, there is no case law supporting applying impoundment that far, Jeff's trust has beneficiaries other than Jeff, and impoundment would violate the Delaware spendthrift statute provisions.

C. ***Safanda v. Castellano*, 2014 WL 3881338 (Bankruptcy, ND Illinois, 2014).** Spendthrift provision in South Carolina trust does not protect assets from bankruptcy trustee where debtor instructed family member trustee to apply provision and convert outright gift to a trust, thereby causing the trust to be a device similar to a self-settled trust and subject to creditors.

   1. Faith Campbell created a revocable trust under South Carolina law in 1997. Upon her death in 2011, the trust terms provided for outright distribution of the trust assets to her nieces and nephews, including niece Linda. Bank of

America declined to serve as trustee, and Linda's husband was appointed as trustee.

2. The trust included a spendthrift clause that provided that any outright gift to a beneficiary that would fall to creditors would terminate, and be replaced by a spendthrift trust for the benefit of that beneficiary, with distributions limited to education and support.

3. Linda's attorney notified the trustee that Linda was insolvent and that the trustee was obligated under the trust terms to create the spendthrift trust for Linda, which the trustee did. Linda then released the trustee in connection with the creation of the trust. Around the same time, Linda filed for bankruptcy protection.

4. The bankruptcy judge ordered that the assets of the spendthrift trust for Linda's benefit would be reachable by the bankruptcy trustee for her creditors, and ordered the trustee to turn over the assets to the bankruptcy estate, on the grounds that: (1) the Bankruptcy Code permits the bankruptcy trustee to avoid certain directly or indirectly created self-settled trusts and "similar devices"; (2) by the letter to the trustee and the release, combined with the fact that her husband was a trustee and not disinterested, Linda indirectly created the trust for her benefit; (3) Congress intended the "similar device" provision to be interpreted broadly; (4) the trust was created in direct response to her wishes; (5) the court will not ignore the family relationship of the trustee and the fact that the trust was not subject to court supervision, and Linda would be able to influence, if not instruct, the trustee's actions; (6) South Carolina trust law does not control the determination; and (7) Linda was a beneficiary of the trust and transferred the assets with the intent to avoid creditors.

D. ***Scott v. Dondero,* 2014 Del. Ch. LEXIS 166 (2014).** Court stays wife's claims concerning Delaware trust until Texas court resolves Texas divorce action and interpretation of premarital agreement.

1. Dana Breault formed a Delaware trust in 2010 for the primary benefit of James Dondero, with Grant Scott as independent trustee, James as initial and family trustee, and Commonwealth Trust Company as administrative trustee. Since 2011, James and his wife Rebecca have been engaged in divorce litigation and Rebecca claimed the trust was sham being used to evade James's obligation under their premarital agreement.

2. On behalf of her children as beneficiaries, Rebecca demanded an extensive accounting from the trustees and threatened litigation for failure comply within 60 days. The independent trustee sued to declare Rebecca had no right to the information and that the trustees were prohibited from giving her information. Rebecca counterclaimed alleging the trust is a sham to defraud her funds in the divorce proceedings, and asserted claims now as a creditor and not as representative for his children.

3. The chancellor stayed the action *sua sponte* pending the Texas court's resolution of the various claims in the divorce proceedings which would determine whether Rebecca was in fact a creditor of James.

4. James and the independent trustee then moved to lift the stay and proceed to adjudicate whether Rebecca could compel disclosure from the trustees. The chancellor denied the motion to lift the stay on the grounds that: (1) the court issued the stay so that the Texas court could determine whether Rebecca is actually a creditor, and so that the parties could not use the Delaware litigation to seek discovery they could not successfully obtain in the divorce litigation or leverage one action through litigation in the other; (2) nothing has changed justifying a lifting of the stay; and (3) the claimed concerns about the reputation of the independent trustee, where the action is not a slander action, are not sufficient to justify lifting the stay, and the trustees brought the action only to forestall Rebecca's attempts to get information about the trust.

E. ***In re BankcorpSouth Bank, Relator*, 2014 Tex. App. LEXIS 4052, (Ct App Texas, 5th Dist. April 14, 2014)**. The Texas spendthrift statute does not have an exception for spousal support.

1. William Slicker was the beneficiary of an irrevocable trust created by his parents, with BankcorpSouth Bank as trustee. The trust contained a spendthrift clause which provided that the trust assets would not be subject to "claims for alimony or separate maintenance".

2. As part of the divorce proceedings between William and his wife Phyllis, the trial court ordered the trustee to withhold mandatory and discretionary distributions to William and to pay the mandatory distributions to Phyllis as spousal support. The trustee filed writ of mandamus to reverse the trial court's order.

3. The court of appeals granted the mandamus, on the grounds that while Texas statutes governing family law issues provide wage garnishments for spousal support, the Texas spendthrift statute does not provide a similar mechanism to allow spouses to encroach upon trust assets for unpaid support. Therefore, the trial court abused its discretion in issuing the order to pay trust assets to Phyllis as spousal support.

F. ***In re Marriage of Milias, Case No: 2012CA1969 Not Published Pursuant to C.A.R. 35(f) (Colo. Ct. App., March 20, 2014).*** Appreciated trust assets considered martial property subject to division upon divorce.

1. Emily and Michael married in 1999. In 2003, Michael's parents created a series of GRATs, each with a term of four years and funded with interests in a company Michael's father owned. Michael and his siblings were the remainder beneficiaries of each of the GRATs. The parents' gift tax returns valued Michael's remainder interests in the GRATs at $2340 and $1.

2. After the 4 year term, Michael's appreciated interest in the GRATs was valued at $7,321,000. Michael transferred the interest to a new 2007 trust for which Michael was the named grantor and sole current beneficiary, with his father as Trustee. The 2007 trust allowed discretionary distributions of income and principal to Michael and allowed the trustee to delay distributions if it was in Michael's best interest. Michael had the power to amend the trust with the consent of the trustee.

3. During Michael and Emily's divorce proceedings, the trial court determined the 2007 trust was revocable because Michael had essentially retained the ability to change its terms, the trust was subject to Emily's equitable distribution claims, and Emily should be awarded 30% of the trust assets.

4. On appeal, the court of appeals affirmed on the grounds that: (1) Michael's remainder interest in the GRATs were property interests upon the creation of the GRATs with the values set by the gift tax return; (2) while the initial value of the gift as reported on the gift tax return is separate property, the appreciation of separate property during the marriage is martial property subject to equitable division; (3) because Michael contributed the appreciated GRAT assets (i.e. martial property) into the 2007 Trust, and the trust itself was a marital asset, all of the trust assets were subject to equitable division; and (4) the trial court did not err in awarding Emily 30% of the trust assets.

5. Michael's parents created another irrevocable trust for his benefit before he married Emily, with his aunt as trustee. Under the 1988 Trust, the trustee had the sole and absolute discretion to distribute or retain principal and income until Michael turned 40. Upon turning 40, Michael had the right to withdrawal all of the assets. The trial court determined that because Michael would not turn 40 until after the proceedings were finished, he did not have a property interest in this trust. The court of appeals found that the condition of Michael living to age 40 was no different than conditions that subjected Michael's interest in the GRAT to Emily's claims, and the trial court erred in not finding that Michael had a property interest in the 1988 Trust. The court of appeals remanded the case to the trial court to determine if any of the trust property should be characterized as marital property.

XXIV. MEDICAID.

A. ***In the Matter of the Estate of Arnold Melby*, 841 N.W.2d 867 (Iowa, Jan. 10, 2014)**. Under Iowa law the power to invade the trusts to pay for expenses due to last illness provides for Medicaid recovery.

1. In the early 90s, Husband and Wife create mirror image irrevocable trusts for each other's benefit and fund each trust with 50% of their farm. Between 2000 and 2002 wife receives Medicaid benefits and at her death the Iowa Medicaid department determines she did not have an interest in the trust that would trigger a repayment of the benefits received. Husband begins receiving benefits in 2002 and continues until his death in 2007. At his death, the department determines he does have an interest in the trust that would provide for repayment and the department erred in determining that his wife

did not have an interest in her trust and therefore her benefits are also subject to repayment.

2. The lower court determined that the department could only seek repayment from the trust's income because the Melby's interest in their trusts were limited to income, and the provisions that allowed the Trustee to pay expenses related to their last illness did not apply to Medicaid because under the Iowa statute those expenses were not debts to the Melby's but debts to the estate. Therefore, the Trustee was not obligated to use principal to pay them.

3. On appeal the Iowa Supreme Court ruled in favor of the repayments from the trust's principal because the policy for Medicaid payments and benefits is to provide care for those who need it and in order to continue to provide care it must be able to seek recovery from all available funds. Therefore the statutes governing repayment cannot be construed to create a debt for repayment only after the beneficiary has died but instead the debt is created upon receipt of the benefit but payment is postponed until death. To the extent the language of the trust requires payment of the grantor's debts, the trust assets are subject to Medicaid claims.

B. ***Zahner v. Mackereth*, 2014 WL 198526 (W.D. Pa. Jan. 16, 2014).** Timing and purpose of annuity purchases make a difference in determining whether the annuity is a countable resource or exempt resource for Medicaid eligibility.

1. Three different individuals (Zahner, Claypoole, and Sanner) bought annuities before and after applying for Medicaid eligibility as well as undertaking other transactions in order to become Medicaid eligible. In each case the Pennsylvania Department of welfare denied the applications for Medicaid because the annuities deemed illegal transfers. The individuals filed suit in district court and all parties sought summary judgment. The district court denied the department of welfare's motion and granted summary judgment in favor of the Medicaid applicants only with respect to the annuities purchased pre-application.

2. First issue to determine is whether the Pennsylvania statue directing that all annuities are assignable invalidates annuities purchased for Medicaid eligibility purposes. Under Federal Medicaid statues, if an annuity remainder is designated to Medicaid repayments and the annuity states it is non-assignable then such annuity is not counted as resource when applying for Medicaid benefits.

3. Court determined that Federal preempts the Pennsylvania statute, and to the extent annuity, purchased prior to the application for benefits, meets the Federal standards it be excluded from applicant's resources.

4. Annuities purchased after an applicant has applied for aid are not per se prohibited as invalid transfers, but they are subject to a different standard than those purchased beforehand. The court determined that although the law states that the annuity can be for either a term of year or the annuitants lifetime, the term "should bear a reasonable relatedness to the beneficiary's

life-expectancy" and should have "qualities of a legitimate estate planning investment" and not the "hallmarks of an illegitimate asset-shelter scheme".

XXV. WILLS & PROBATE.

A. ***In re Matter of Buchting*, 111 A.D.3d 1114 (2013)**. Presumption of duly executed will arises where the execution of the will is supervised by the drafting attorney.

1. Surviving spouse filed petition to admit decedent's will to probate. Decedent's children from previous marriage filed objections on lack of due execution, lack of testamentary capacity and undue influence.

2. Two attesting witnesses invoked their 5th Amendment right and refused to testify, but attorney who drafted the will and supervised the execution did testify.

3. Trial Court found the surviving spouse had proved due execution based on the attorney's testimony and admitted the will to probate.

4. Appellate Court affirmed in part and reversed in part, holding that surviving spouse established due execution because a presumption of due execution arises when the execution is conducted by the drafting attorney and the children presented no evidence to rebut the presumption. However, the will should not have been admitted to probate because the other issues of lack of testamentary capacity and undue influence had yet to be addressed.

B. ***Estate of Truong Tran*, 2014 N.Y. Misc. LEXIS 3501 (NY Surr. Ct., August 5, 2014)**. Decedent's DNA sample is an estate asset.

1. Shortly after Truong Tran died, the medical examiner plucked a hair from his body and ran a DNA analysis comparing Tran's DNA to several alleged family members.

2. Five non-marital grandchildren of Tran petitioned to be named administrators of the estate, and sought to have their DNA compared to the sample. The DNA diagnostic center refused to release any information about the sample or run any further tests because it received conflicting directions from multiple parties. The grandchildren petition the court seeking to compel the diagnostic center to release information about the DNA sample's viability and ability to run further comparisons, and asked that the costs of the new comparisons be paid from the estate.

3. The temporary administrator died and a new temporary administrator was appointed. The administrator petitioned for a determination that the DNA sample is an estate asset that he has sole control over, and that the cost of the new comparisons should not be paid from the estate. The guardian *ad litem* supported the petition.

4. The court determined that (1) the DNA sample is an asset of the estate and subject to the sole control of the administrator, who has exclusive authority to

take action regarding the sample; and (2) the cost of any additional comparisons should be paid by the persons seeking the tests, but they may be able to seek later reimbursement.

C. ***In the Matter of the Estate of Peter Heiman*, 2014 N.C. App. LEXIS 746 (NC Ct. App., July 15, 2014).** Nondisclosure by personal representative of pending litigation was not material and, therefore, surviving spouse was provided fair and reasonable disclosure of the property and made a valid waiver of her spousal election.

1. The decedent, Peter Heiman, named his daughter from a prior marriage as executor and sole beneficiary under his will. His surviving spouse filed for an elective share of the estate, and later signed a settlement agreement to receive an IRA and a partial distribution of another IRA in satisfaction of the elective share. The executor did not disclose that the designated beneficiary of the IRAs was a nonexistent trust, and that the executor had sued to determine the proper IRA beneficiary.

2. Despite accepting the IRA assets, the spouse refused to dismiss her claim against the estate. The trial court determined that the spouse was provided a fair and reasonable disclosure of the estate assets because the lawsuit was not disclosed, and therefore the settlement was not an effective waiver of her spousal election. The court ordered the estate to pay the spouse the $25,000 difference between the IRA proceeds and the spousal election.

3. On appeal, the Court of Appeals reversed the trial court on the grounds that: (1) the nondisclosure of the lawsuit against the company holding the IRAs was not material because it did not affect the actual calculation of the spousal election; (2) the IRA was included in the estate inventory; (3) the spousal election was 25% of the estate assets which could have been calculated without the disclosure of the lawsuit; and (4) the spouse's signing of the settlement agreement was valid and based on a fair and reasonable disclosure of the estate property.

D. ***In re Estate of Reynolds*, 2014 WL 1633034 (Ariz. Ct. App., April 24, 2014).** Under Arizona law the right of publicity exists and can be enforced by the estate after death.

1. Lois had three children, Robin, Sylvia and Doug. Robin wrote two articles describing Lois's quality of life as she aged. The first, titled "I Want to Die Like a Dog: Poignant Insights on Aging Gracefully", was published while Lois was alive. The second article was published after Lois's death. Sylvia, as personal representative of Lois's estate, asked Robin to sign an agreement to refrain from "any publication actually or reasonably perceived to be about or relating to Lois".

2. Lois's estate inventory included a claim against Robin for right of publicity (tort claim based on unauthorized use of a person's name, likeness, or identity for commercial benefit) in the name of Lois Catherine Reynolds. Robin filed a petition to close the estate and asserted that the estate could not file a claim for right of publicity against her because such a claim did not survive Lois's death. The trial court agreed on the grounds that: (1) following the

Restatement Second, the right of publicity is more like a property right that is assignable, descendible, and enforceable by the estate; (2) under Arizona law, all "every cause of action [subject to a list of exceptions] shall survive the death of the person", and the exception of privacy does not apply because the right to publicity is not based on an emotional interest but a commercial interest.

3. On appeal, the court of appeals held that: (1) Arizona recognizes the right of publicity; (2) the right is descendible and survives the death of the holder; (3) the right is not limited to celebrities; and (4) the right need not be exploited during life in order to be asserted after death. However, the court of appeals found that Robin's commentaries did not exploit Lois's name for commercial trade and did not give rise to a claim for right to publicity.

E. ***James Michael Aldrich v. Laurie Basile*, 136 So.3d 530 (Fla., March 27, 2014).** Intestacy law applies to after-acquired property where decedent's "E-Z Legal Form" online will does not contain a general devise or residuary clause.

1. Ann Aldrich used an online "E-Z Legal Form" to create her will. The form included a section for specific bequests in which Ann hand wrote that certain property would pass to her sister if she survived, and otherwise to her brother. The will did not include a residuary clause.

2. Ann's sister died and Ann inherited property from her sister that was not listed as a specific bequest in her will since it was after-acquired. Ann tried to amend her will by a handwritten "addendum" which stated that "all my worldly possessions pass to my brother James". The addendum was not executed with the requisite formalities and was invalid.

3. After Ann's death, her brother as personal representative asked the court to determine who should inherit Ann's after-acquired property, and took the position that Ann intended for all of her property to pass to him as set forth in the invalid addendum. Ann's niece, as one of the intestate heirs, argued that any property not specifically devised in the will should pass under Florida's intestate succession laws.

4. The trial court ruled for the brother on the grounds that F.S. 732.6005(2) provides that "a will shall be construed to pass all property that the testator owned at death, including property acquired after the will is executed". The appellate court reversed and found that F.S. 732.6005(2) does not control because subsection (1) of the same statute provides that "the intention of the testator as expressed in the will controls".

5. On further appeal, the Florida Supreme Court held that regardless of what Ann intended, her Will was unambiguous and only bequeathed the property listed which was less than all of her property owned at her death. Under Florida law and the Uniform Probate Code, a will with a residuary clause disposes of all the decedent's property even property acquired after the execution of the Will. However, absent a general devise or residuary clause, any after acquired non-specifically bequeathed property passes by intestate succession. A concurring

opinion noted that cost cutting measures and do-it-yourself legal forms are not always the cheapest method when the results lead to very costly and time consuming litigation.

F. ***In re Estate of Thompson*, 434 S.W.3d 877 (Ark., May 22, 2014, rehearing denied June 19, 2014).** Fraud on marital rights causes revocable trust assets to be included in estate for elective share purposes.

1. Ripley and Ann married in 2001. Prior to the marriage Ann was a successful registered nurse, but she left her job because Ripley promised to take care of her, and did so for the first few years of their marriage. He created a will and revocable trust, named Ann as a co-trustee of the trust, and provided at his death that Ann would have mandatory income and discretionary principal distribution rights, and a "5 or 5" withdrawal right. Ripley funded the trust with a portion of MD Thompson & Son Company, a family owned company that had assets in farmland and banking.

2. In 2008, Ann was diagnosed with breast cancer, their home was contaminated with mold, Ann suffered a stroke, and Ripley suffered from heart disease, diabetes, and dementia. In early 2009 he moved to a nursing home where he stayed until his death in 2010. While in the nursing home, Ripley amended his trust and removed Ann as co-trustee and limited her inheritance to an outright specific request of $100,000. Ripley died in 2010. The trust assets were valued at $5.8 million and his probate estate assets valued at $230,000.

3. Ann filed for an elective share and alleged that the trust assets should be subject to her election as a result of fraud on her marital rights. Under Arkansas law, the trust assets would not be subject to the elective share unless assets are fraudulently conveyed to the trust to prevent the spouse from having an interest in them. Arkansas did not adopt the Uniform Probate Code section that provides that assets held in revocable trusts are subject to estate creditors and are therefore part of the augmented estate.

4. The trial court held that: (1) by changing the 2009 estate planning documents Ripley had committed fraud on Ann's spousal rights; and (2) the trust assets were subject to a constructive trust and included in the estate solely for the purpose of determining the spousal election value.

5. On appeal, a divided Arkansas Supreme Court of Arkansas, over one dissent, affirmed the trial court on the grounds that: (1) the estate plan changes showed intent to commit fraud and deprive Ann of her spousal share; (2) because of that fraud, the trust assets should come into the estate solely for the purpose of valuing the elective share; and (3) for all other purposes, the trust remained intact and valid.

XXVI. **DAMAGES & REMEDIES.**

A. ***Miller v. Bank of America, N.A.,* 2014 NMCA 053 (New Mexico Court of Appeals 2014).** Trustee breached duties by investing in nonproductive commercial real estate and borrowing from an affiliate to generate phantom income to distribute to the beneficiaries, and measure of damages should include both inflation adjustments and prejudgment interest without reduction for the phantom interest distributed to the beneficiaries.

1. Under his will, Rudolph Miller created a marital trust and a family trust. The bank became trustee in 1985 and administered them until they terminated in 2004.

2. In 1991, the trust assets consisted of real property in Virginia, Hawaii, and New Mexico. Although the trustee had little experience with commercial property management, in 1991 the trustee acquired a commercial building in Albuquerque for the trust. The will provided that the trustee could not invest in unproductive property, but could retain unproductive inception assets. Before 1995, the purchased property became unproductive and a drain on the other trust assets. The drain on the trust assets was not communicated to the beneficiaries.

3. Despite the trust officer suggesting exploring sale of the property, the bank ultimately recommended borrowing $395,000 to renovate the building, and advocated selling the other properties to reduce the loan balance. The beneficiaries did not object to the plan. The bank borrowed from its affiliate more than the $395,000 disclosed to the beneficiaries, sold the other properties, but did not apply the sales proceeds to reduce the debt. Rather, the bank invested $800,000 into the building and generated "phantom income" that it distributed to the beneficiaries (the trust terms did not permit distribution of principal).

4. The trial court found that the trustee breached its duties and awarded a surcharge, but for less than the amount sought by the beneficiaries. Both parties appealed.

5. On appeal, the court of appeals affirmed the determination of liability but reversed the court on the measure of damages on the following grounds:

    a. The trial court based its findings on at least eight trustee duties, the bank only contested four of them and conceded its duty to not invest in unproductive property, the trial court did not correlate any particular breach with a portion of the damage award, and a breach of any one was sufficient to cause the damages to the beneficiaries;

    b. The bank could not establish consent or ratification by the beneficiaries because they had limited information about the bank's actions, had many unanswered questions, the bank misrepresented the value of the property on the books, the bank did not communicate that the property was draining trust assets, did not communicate its lack of

experience in managing commercial real estate, and did not challenge the trial court's findings supporting the inference that the beneficiaries did not give informed consent; The trial court erred by not including in the damage award an inflation adjustment of 33.5% (set by expert testimony) for 1991 to 2003 to restore the trust to its position in the absence of the trustee's breach, and the inflation adjustment is not duplicative of prejudgment interest. Inflation adjustments keep the beneficiaries whole for the changes in the value or purchasing power of the dollar, whereas interest compensates beneficiaries for the lost use of the property;

c. The trial court erred by reducing the compensatory damages by the amount of income (or $400,000 in phantom income) distributed to the beneficiaries because the trustee breached the trust terms by distributing the phantom income (which was actually principal) to the beneficiaries, the real return on the assets was negative, no evidence was offered to show that the $400,000 in phantom income exceeded the amount that would have been distributed to the beneficiaries in the absence of the breach, and the beneficiaries did not pursue damages for lost income in which case income actually received would be part of the damage calculation; and

d. The court correctly denied additional damages for disgorgement of profits made by the bank through its loan from its affiliated lender because the disgorgement would be double recovery under the damages calculation as adjusted by the court of appeals to include inflation adjustment.

B. ***Fetter v. Brown,* Tex. App. LEXIS 11209 (2014).** Where trust has not terminated, surcharge award is properly payable to successor trustee and not beneficiaries, and award is not excessive or subject to offset because of trustee-beneficiary's interest in the trust.

1. James and Florence Fetter created a trust for the benefit of their living children, or their issue. Their daughter Annette died in 2003 and her three children became beneficiaries of her 50% share of the trust. James died in 2004. Florence amended the trust to appoint her son Stuart as co-trustee, and then died in 2010. Before Florence's death, her granddaughter Allison was helping move her into a nursing home and became suspicious that her uncle had looted the trust, due to the absence of trust bank statements after 2006, Florence's credit card being declined, and Stuart's failure to pay nursing and funeral home bills.

2. The grandchildren beneficiaries sued Stuart for breach of trust. In response to their accounting demand, Stuart provided bank statements for the trust and income tax returns. In depositions, Stuart admitted making wire transfers out of the account to himself personally that he called gifts, although he admitted no gift tax returns had been filed.

3. The trial court found that Stuart breached his duties as trustee by taking all of the trust assets for himself, and surcharged him $1.4 million in actual damages, $700,000 for punitive damages on a finding of actual malice, and interest of $229,000, payable to the grandchildren. Stuart appealed claiming the bank statements and his own testimony were inadmissible hearsay, and that the damage award was excessive for not crediting him back his 50% interest in the trust.

4. On appeal, the court affirmed the trial court on the grounds that: (1) the bank statements provided by Stuart, which he stated were in satisfaction of his accounting obligations, and his own testimony were admissions by a party opponent and therefore not hearsay; and (2) the damages are re-directed to be paid to Allison as successor trustee, and not to the grandchildren, and therefore are not excessive or subject to offset as a result of Stuart's 50% interest in the trust.

XXVII. JURISDICTION & VENUE.

A. ***Matter of Aboud Inter Vivos Trust,* 129 Nev. Advance Opinion 97 (Nevada Supreme Court, December 19, 2013).** Court's *in rem* jurisdiction in a trust accounting action does not give court jurisdiction over assets in partnership held in trust or *in personam* jurisdiction over former trustee and alleged improper purchaser of partnership assets.

1. In 1979, Betty Jo and her husband created a joint revocable trust and funded it with land and a restaurant called "The Griddle". Her husband died in 1998, and the trust assets were divided into (1) a survivor's trust and (2) an irrevocable residual trust for the benefit of their four children, David, Michael, Michelle, and Robin. Betty Jo and Michelle's husband, Michael Sheppard, were named as co-trustees of both trusts.

2. Betty Jo and her children created a family limited partnership, with Betty Jo, Sheppard, and the survivor's trust as general partners, and the residual trust and the other children as limited partners. The co-trustees transferred all trust assets into the partnership and took back pro rata partnership interests. All of the trust beneficiaries consented to the transaction.

3. Sheppard then resigned as co-trustee and general partner, and the partnership was amended to name Betty Jo and the survivor's trust as general partners.

4. In 2005, Betty Jo, as general partner and sole trustee, transferred all of the partnership assets (other than The Griddle) to a Nevada corporation formed and wholly owned by her son David called I.C.A.N., in exchange for two promissory notes and David's renunciation of any benefits under the residual trust. Betty Jo then transferred The Griddle to I.C.A.N. for no consideration. She then resigned as trustee and David's girlfriend Ashley was appointed as trustee.

5. Her daughter Michelle sued to compel Ashley to account for the residual trust, which the district court ordered upon taking jurisdiction over the trust. After Ashley provided the accounting, Michelle sued to remove Ashley as trustee

and sought a preliminary injunction on any transfers of the trust assets, which the court granted over Ashley's and Betty Jo's argument that an injunction would be precluded by the arbitration provisions in the partnership agreement. The court also ordered Betty Jo to account for the partnership. The court then granted Michelle summary judgment suspending Ashley's powers as trustee and appointing an independent successor trustee, who was ordered to account for the trust.

6. The successor trustee reported that Betty Jo had breached her duties to the partnership by undervaluing the assets in the sale to I.C.A.N. Following Michelle's motion (and without filing and serving a complaint on the parties) to surcharge the parties, the court reviewed the successor trustee's report, determined Betty Jo breached her duties and adopted the report, ordered I.C.A.N. and David to pay certain property taxes, and ordered the successor trustee to complete his accounting. The order was mailed to the family members but not I.C.A.N.

7. Following receipt of the second accounting, and another similar (and also not served) motion by Michelle, the court found that Betty Jo breached her duties as trustee and general partners, entered judgment against Betty Jo and I.C.A.N. for $782,000 and imposed a constructive trust on I.C.A.N.'s assets. The order was mailed to Betty Jo and I.C.A.N. Betty Jo and I.C.A.N. objected to the order on the basis of lack of subject matter jurisdiction and disregard of the partnership arbitration provisions. The trial court rejected their objection, and they appealed.

8. On appeal, the Nevada Supreme Court held that the district court did not have jurisdiction to award damages and impose a constructive trust on the grounds that: (1) the only assets held in the trusts were partnership interests (with the consent of the beneficiaries); (2) the property transferred to I.C.A.N. was partnership, and not trust, property; (3) the court's *in rem* jurisdiction over the trust assets did not extent to the assets I.C.A.N. acquired from the partnership; and (4) similarly, *in rem* jurisdiction over a trust does not allow a personal judgment against Betty Jo and I.C.A.N.

B. ***Ashford v. Ann K. Fauvor Kan. Trust*, 2013 WL 6389519 (Kansas Ct. of Appeals 2013).** Kansas court lacks personal jurisdiction over Arkansas trust with respect to claims that do not concern Kansas property held in trust.

1. The decedent executed two revocable trusts prior to her death. The terms of the two trusts were nearly identical, with both providing that the administration of the trusts was to occur in Arkansas and that they were governed by Arkansas law.

2. One trust held real property located in Arkansas (the "Arkansas Trust") while the other trust held real property located in Kansas (the "Kansas Trust"). The terms of the Kansas Trust provided that the trust "will comply with the laws of the State of Kansas insofar as real property owned by a Trust."

3. Two of the beneficiaries brought an action in Rice County, Kansas District Court against the Kansas Trust, the trustees of the Kansas trust, and the woman to whom the trustees delegated their duties to administer the trust. The beneficiaries asserted fives causes of action for improper administration of the Kansas Trust based on various provisions of Arkansas law.

4. The defendants asserted that Kansas lacked personal jurisdiction over the defendants. The District Court dismissed the case, finding that all parties were residents of states other than Kansas, and that the claims arose out of the administration of the trusts and must be adjudicated in Arkansas. The District Court did not specify whether it was dismissing the action for lack of personal jurisdiction or subject matter jurisdiction.

5. On appeal, the Kansas Court of Appeals noted that the District Court did have subject matter jurisdiction to resolve disputes over trust administration. However, the Court found that there was no personal jurisdiction over the defendants on the grounds that: (1) the principal place of administration of the Kansas Trust was Arkansas; (2) neither the trustees nor the beneficiaries resided in Kansas; (3) while the Kansas Trust owned real property in Kansas and while the defendants had been to Kansas to deal with Kansas farmers on behalf of the Kansas Trust, the claims did not arise out of the defendants' contact with Kansas residents; and (4) as the claims concerned the administration of the Kansas Trust in Arkansas and did not involve any claims arising from the Kansas property, the District Court lacked personal jurisdiction in this case.

C. ***Littson v. Schaub,* 2014 U.S. Dist. LEXIS 150808 (E.D. California 2014).** Probate exception bars federal court from hearing challenge to validity of amendment to trust creating private foundation. ***Discussed infra.***

XXVIII. **STANDING & PARTIES.**

A. ***Old National Bancorp v. Hanover College,* 2013 Ind. App. LEXIS 601 (2013).** Trustee that does not seek a stay of order terminating trusts, and does not intervene in its individual capacity, lacks standing to appeal immediate order of termination.

1. Hanover College petitioned a court to terminate two trusts and distribute the trust assets to the College. The trustee objected, but the trial court ordered the termination. The trustee appealed the order of terminations.

2. The Indiana Court of Appeals held that the trustee lacked standing to appeal in this case because: (1) the court order of termination took effect immediately, but the trustee did not request a stay of those orders while the appeal was pending; (2) therefore, the trustee had lost its ability to represent the trusts and could not appeal in its representative capacity; and (3) the trustee did not intervene in the case individually, and therefore could not appeal individually where it was not a party individually at the trial court level and did not intervene to be added in that capacity, and could not be added as a party for the first time at the appellate level.

B. ***Ronald Louis Smith, Jr., Personal Representative of the Estate of Ronald Louis Smith v Harry Wayne Casey, individually, K.C. & The Sunshine Band, Inc. et al*, 741 F.3d 1236, (US Ct App 11th Cir. Jan. 22, 2014).** Estate of song author does have standing for copyright infringement action through the copyright registration by the producer when such registration listed the author and stated that the work was "not for hire".

1. Four issues were before the federal district court, but after the court found the estate lacked standing to file a copyright infringement claim it dismissed the other three issues as futile. Eleventh Circuit Court of Appeals reversed the summary judgment regarding lack of standing and allowed the estate to amend its petition to include the proper parties but affirmed that the infringement action is not ripe.

2. During the 1970s, Ronald Louis Smith wrote several songs for Sunshine Sound Enterprises. While under contract with Sunshine Sound Enterprises, Smith typically assigned his composition rights to Sunshine in exchange for royalty payments. However, no agreement was entered into when he wrote the song *Spank*, but a Sunshine affiliate publishing company, Harrick Music, registered a copyright for *Spank* that listed Smith as the author and stated the composition was not for hire.

3. Smith and Sunshine's relationship ended in 1980 with Smith signing a Release Agreement that directed that he would continue to receive royalties under the Recording Agreements but did not address who had ownership of the compositions that made up the recordings.

4. Smith never received royalties from Sunshine Sound or Harrick Music for *Spank* and prior to Smith's death he was pursuing actions to revoke Harrick's authority to use the composition including sending cease and desist letters.

5. Smith's son, as personal representative of the estate, filed suit against Sunshine Sound and Harrick Music claiming infringement for the continued use from the time the cease and desist letters were sent.

6. Under copyright law, the legal or beneficial owner of an exclusive right under a copyright may bring a claim for infringement of the right. Further, a beneficial owner includes an author who has transferred legal title of a copyright in exchange for percentage royalties based on sales or license fees. However, registration or preregistration of the copyright is a precursor to perusing an infringement claim.

7. The district court held that the estate lacked standing because it could not rely on the registration of the copyright by Harrick Music even though that registration listed Smith as the author. The court of appeals reverses finding instead that "where a publisher has registered a claim to copyright in a work not made for hire . . . the beneficial owner has statutory standing to sue for infringement."

8. Although the estate won on the standing issue, the court of appeals found the claim was not ripe because "regular Copyright Office procedures" were still pending.

C. ***In the Estate of James T. Spencer, Incapacitated/Disabled Person*, 417 S.W.3d 364 (Ct App Missouri, East. Dist, Div 2, December 24, 2013).** Under the Missouri Uniform Trust Code, a contingent future beneficiary does have standing to bring a declaratory action regarding Trustee's actions.

  1. Husband and wife, James and Mary, create coordinated estate plans to benefit the surviving spouse and then the children. At the death of the surviving spouse the business assets are to be distributed to daughter, Betty, and all other assets are to be divided equally among the other four children, Patricia, Kathleen, Joan and John. As part of their estate plan, Mary and James specifically title certain assets in each other's name, and as a result, James owns most of the business assets, and Mary owns the non-business assets. Mary dies, and James executes a third amendment to his revocable trust, with Betty as Trustee, in which among other things apportions his expenses 20/80 between his assets and the trust created by Mary, and provides that his revocable trust is now irrevocable.

  2. Four days after the third amendment is executed, John files a petition to appoint a guardian for James, and later John also files a motion to declare the third amendment invalid. Betty, as Trustee, files a motion to dismiss the action against the trust amendment for lack of standing. The probate court granted Betty's motion to dismiss finding that John lacked legal standing to file a motion against James's trust.

  3. The Court of Appeals reverses the probate court's decision regarding standing. First, finding that John's motion to declare was actually a petition for declaratory judgment and "any person interested in the administration of a trust may file a petition for declaratory judgment seeking a declaration of rights or legal relations to determine questions arising in the administration of the trust." Further under Missouri Uniform Trust Code (MUTC), "the court may intervene in that administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law . . . including a request for instructions and an action to declare rights." The MUTC defines an interested person as "including beneficiaries and any other person have a property right in or claim against a trust estate which may be affected by a judicial proceeding."

  4. Standing to oversee a Trustee's actions is based on the "strong policy considerations of ensuring that someone has the power to enforce the trustee's fiduciary duties."

  5. Although John is not the current primary beneficiary of the trust, he is an interested person because he is a contingent future beneficiary and therefore he has standing to bring a declaratory judgment action regarding Trustee's performance of her duties.

D. ***See Kastner v. Intrust Bank, infra*.** Claims against trustee dismissed where beneficiary is not a "qualified beneficiary" under the Kansas Uniform Trust Code, for failure to provide expert testimony on the standard of care, and for lack of factual support.

E. ***Bookman v. Davidson*, 2014 Fla. App. LEXIS 6472 (Court of Appeal of Florida, First District, May 5, 2014).** Florida Court of Appeal rules that a successor personal representative possesses the power and authority of his predecessor, including the power to prosecute a malpractice claim that could have been brought by his predecessor against the predecessor's estate administration attorney, and that any Florida Circuit Court has jurisdiction to hear claims that pertain to settlement of estates.

1. Appellant, Alan B. Bookman ("Appellant"), the successor personal representative of the estate of Deborah E. Irby, brought a legal malpractice action against appellee Dale Davidson ("Appellee"). Appellee was an attorney hired by the initial personal representative of the estate to aid her in the administration of the estate. The trial court granted Appellee's motion for summary judgment, finding that the Appellant was not in privity with Appellee as Appellee was hired by Appellant's predecessor. Thus the trial court ruled that Appellant did not have standing to bring his claim.

2. The trial court also dismissed Appellant's claim for disgorgement of $195,000 of legal fees that the predecessor had paid to Appellee. The court ruled that it was "more appropriate" that this claim be made in the separate estate proceedings that were pending. Moreover, the trial court ruled that it lacked subject matter jurisdiction to consider the claim for disgorgement.

3. The Appellate Court reversed the summary judgment, noting that it need not address the privity issue. The Court noted that under the Florida Probate Code, the initial personal representative had the authority to hire Appellee and that, "a successor personal representative has the same power and duty as the original personal representative." Moreover, under that Code, a personal representative has the authority to prosecute lawsuits.

4. As Appellant essentially stepped into the initial personal representative's shoes, all of the predecessor's power and rights "including the right to bring suit against appellee on behalf of the estate" transferred to Appellant as the successor personal representative. The Court therefore remanded the action for further proceedings.

5. The Appellate Court also ruled that the trial court did not abuse its discretion in ruling that it was "more appropriate" that the disgorgement claim be heard in the probate proceedings. However, the Court noted that "any circuit court has exclusive jurisdiction" over proceedings relating to the settlement of estates, including this trial court. Thus the Appellate Court remanded the matter for the trial court, in its discretion, to hold a joint trial of all claims if the trial court found that the joint trial would not prejudice the parties or cause inconvenience.

F. ***Doris Guyear, Heir of Leroy Guyear, Deceased v. Joey Blalock, et al.*, 2014 Tenn. App. LEXIS 425 (Tenn. Ct. App. July 23, 2014)**. Surviving spouse failed to meet the standing requirement necessary to enforce a promissory note.

1. In 2004, Leroy Guyear sold his business to Joey and Teresa Blalock for a total of $220,000, with a $132,000 down payment and note for the balance. The Blalocks failed to make payments on the note. After Leroy's death, his surviving spouse, Doris refused to open a probate estate, and instead sued the debtors directly (as a holder in due course, next of friend, and member of the original partnership that sold the business) to enforce the note.

2. The trial court dismissed her claims on the grounds that the promissory note was Leroy's individual property and she failed to establish her ownership. Doris appealed.

3. On appeal, the court of appeals affirmed on the grounds that: (1) Doris could not bring an action based on "next friend" status because Leroy had not filed a complaint prior to his death, and next friend status only applies to substitute a person on behalf of a decedent for claims filed while the decedent was living; (2) Doris was not the sole heir of Leroy's estate because under Tennessee intestate law Doris split the estate with her adult daughter and could not therefore be sole owner; (3) had Doris opened probate she could have established standing as personal representative and holder of all of Leroy's assets; and (4) Doris never filed a valid complaint in her capacity as partner of a partnership.

XXIX. ABUSIVE LITIGATION.

A. ***Ringgold-Lockhart, et. al. v. County of Los Angeles, et. al.*, 2014 U.S. App. LEXIS 14979 (9th Cir., August 4, 2014).** 9th Circuit vacates district court's order that declared plaintiffs "vexatious litigants" and imposed a pre-filing condition on the plaintiffs as a result of their various filings relating to their challenge of the Los Angeles County Probate Court's removal of one of the plaintiffs as trustee. 9th Circuit rules finds that the district court did not make proper substantive findings of frivolousness or harassment and that the order was too expansive.

1. In 2005, Nina Ringgold ("Ringgold") was removed by the Los Angeles Probate Court as trustee of the Aubry Family Trust (the "Trust"). Ringgold and her son, Justin Ringgold-Lockhart ("Ringgold-Lockhart"), who was a beneficiary of the Trust, challenged her removal in state court, lost, and was declared a vexatious litigant.

2. Ringgold and her son (collectively, the "Ringgolds") then brought a federal lawsuit challenging the Probate Court's authority to remove Ringgold. The federal district court issued an order on December 6, 2011, once again declaring Ringgolds vexatious litigants and imposing a pre-filing condition on them. The court ordered that the Ringgolds would need permission from the court "prior to filing any action that relates to the [Trust] or the administration of state courts or probate courts." The Ringgolds appealed the court's vexatious litigant order.

3. The 9th Circuit noted that "the right of access to the courts is a fundamental right protected by the Constitution." Thus the Court noted that district courts must fulfill four requirements before they can impose a pre-filing restriction: (1) the court must give litigants notice and an opportunity to oppose the order before it is entered; (2) the court must compile an adequate record for appellate review (including listing all cases and motions that led to the court's ruling); (3) the court must make substantive findings of frivolousness or harassment; and (4) the court must "tailor the order narrowly as "to closely fit the specific vice encountered."

4. The 9th Circuit determined that the district court satisfied the first two procedural requirements -- it gave the litigants notice and an opportunity to oppose its order and it complied an adequate record for appellate review. However, the Court found that the district court had not satisfied the third and fourth substantive requirements.

5. With respect to the third requirement, the Court noted that the district court should have looked at both the number and the content of the filings to determine whether the Ringgolds' filings amounted to frivolousness or harassment. Moreover, the district court should have considered whether other, less restrictive options, could have adequately protected the court and the parties.

6. The district court found the Ringgolds acted vexatiously primarily on the basis of the current case and an earlier federal case. The 9th Circuit noted that two cases is far fewer than what other courts have found "inordinate." The 9th Circuit also noted that not all of the Ringgolds' motions were baseless. Moreover, the district court had failed to consider whether other remedies were adequate to curb what it viewed as the Ringgolds' frivolous motion practice. The Court noted that the district court could have imposed Rule 11 sanctions in lieu of the pre-filing requirement.

7. The 9th Circuit also found that the district court had not satisfied the fourth requirement – the pre-filing order was not "narrowly tailored to the vexatious litigant's wrongful behavior." First the Court noted that while it was reasonable for the district court to order that the Ringgolds could not make duplicative or frivolous filings, it should not have also ordered that the Ringgolds' were to file only "meritorious" actions. It noted that "courts cannot properly say whether a suit is 'meritorious' from pleadings alone."

8. Moreover, 9th Circuit noted that a pre-filing restriction that extended to "any action that relates to the [Trust] or the administration of state courts or probate courts" was far too expansive. In the underlying case, the Ringgolds had challenged the remuneration structure of California state Courts. However, the pre-filing order went well beyond remuneration issues, covering all administrative matters regarding all state courts. Moreover, the term "administration" was an indefinite term open to broad interpretation. While it is not uncommon for a district court to enjoin a litigant from relitigating a *particular* case, in such cases, courts generally tailor the scope of the litigation restriction to prevent the litigant from reopening the same litigation.

9. Accordingly, in light of constitutional concerns and the undue chilling of the litigants' free access to the courts, the 9th Circuit vacated the district court's pre-filing order and remanded the matter for further proceedings.

XXX. STATE TAXATION & CHOICE OF LAW.

A. ***Gray v. Division of Taxation*, 28 NJ Tax 28 (Tax Court of New Jersey, May 5, 2014).** New Jersey Tax Court rules that irrevocable trusts with retained interests are not subject to New Jersey Inheritance Tax where transfers were completed and became irrevocable more than three years prior to grantor's death and where no interest is retained by grantor upon her death.

1. Beatrice Jochman ("Decedent") created two irrevocable trusts -- a qualified personal resident trust (a QPRT) and a grantor retained unitrust (a GRUT; collectively, the "Trusts"). The Trusts were established and funded in September 2004 and each had a six year term, during which Decedent had a retained interest that expired in September 2010. At the time, actuarial tables indicated that Decedent was expected to live in excess of six years. Decedent thereafter died in August 2011.

2. After her death, the Director of New Jersey's Division of Taxation included the Trusts' respective values as part of Decedent's estate when making an assessment of New Jersey inheritance taxes. The Director relied on two New Jersey statutes. The Director relied on N.J.S.A. 54:34-1(c), which provides that inheritance tax is imposed: 1. where a transfer is "made in contemplation of the death" of the grantor of the trust or 2. where a transfer is a testamentary substitute, i.e., where it is "intended to take effect . . . at or after such death." The Director contended that his decision to include the Trusts in Decedent's estate was based on each of these statutory provisions and that his decision was "presumptively valid."

3. With respect to the first provision on which the Director relied, a statutory presumption exists that a transfer was "made in contemplation of death," if the transfer was "made without adequate valuable consideration and within three years prior to the death of the grantor." N.J.S.A. 54:34-1(c). However, no presumption exists if the transfer was "made prior to such three-year period."

4. Nevertheless, the Director argued that as Decedent's right to income and housing during the Trusts' six year term continued within three years of Decedent's death, a presumption existed that the transfer was made in "contemplation of death." The Court disagreed, noting that the Trusts were established six years and eleven months before Decedent's death. Moreover, the Court found that the Director failed to otherwise meet his burden to prove that the transfers were in contemplation of death.

5. With respect to the second provision pertaining to transfers that are deemed testamentary substitutes, a transfer is not "intended to take effect . . . at or after death" where "the transferor is entitled to some income, right, interest or power . . . if the transferor, more than 3 years prior to death, shall have

executed an irrevocable and complete disposition of all reserved income, rights, interests and powers in and over the property transferred." The Court noted that Decedent made complete and irrevocable dispositions nearly seven years before her death and retained no interest in the Trusts after the six year terms.

6. Moreover, although Decedent retained income from the GRUT and beneficial enjoyment of her residence funding the QPRT, she retained no powers to revoke or modify the terms of the Trusts. The trustee of the two Trusts was obligated to manage the Trusts' property in accordance with the Trust instruments upon expiration of the six year terms. Decedent had no control so as to make another disposition of those properties. Thus as Decedent surrendered her power to revoke and alter the Trusts' terms in September 2004, which was more than three years prior to her 2011 death, the Court determined that the transfers were completed gifts in 2004.

7. Accordingly, the Court granted summary judgment in favor of the taxpayer, ruling that there was no basis to impose inheritance tax on the Trusts' assets.

B. ***Linn v. Department of Revenue,*** **2013 Il. App. (4th) 121055 (December 18, 2013).** After Illinois trust decanted to Texas trust that lacked contacts with Illinois, imposition of Illinois state income tax on trust income violated the Due Process Clause.

1. In 1961, A.N. Pritzker, an Illinois resident until his death in 1986, created 20 *inter vivos* trusts, governed by Illinois law, with Illinois assets, and with an Illinois trustee. One of the trusts was for the benefit of his daughter Linda.

2. In 1968, other beneficiaries (not including Linda) obtained the approval of the Illinois court for the trustee of their trusts to exercise the power under the trust agreement to decant the trust assets to new trusts.

3. In 2002, the trustees of Linda's trust exercised their power under the trust agreement to decant the assets of Linda's trust to a new Texas trust for Linda's benefit, with a new Texas trustee. The original Illinois trust protector of Linda's new trust was later replaced with a Connecticut protector. The new trust provided that it was governed by Texas law, other than with respect to the definitions of income, principal, and power of appointment, which would still be defined under Illinois law. In 2004, a Texas court approved reformation of the new trust to defined all terms under Texas law, conditioned on a favorable IRS ruling that the reformation would not cause the loss of the trust's grandfathered GST-exempt status.

4. In 2006, all trust beneficiaries resided outside Illinois, there were no Illinois assets, and all fiduciaries were outside Illinois. The trustee filed a non-resident return in Illinois. The Illinois Department of Taxation reclassified the trust as a resident trust, taxed the trust income, and imposed a deficiency liability of $2,729. After paying the tax under protest, the trustee sued the Illinois Department of Taxation contesting the constitutionality of the state

taxation of the trust income. The trial court granted summary judgment for the Department, and the trustee appealed.

5. On appeal, the Illinois Appellate Court reversed the trial court, granted summary judgment for the trustee, and declared that the income tax applied to this trust violated the Due Process Clause of the U.S. Constitution due to lack of contacts with Illinois, on the grounds that: (1) unlike in *Chase Manhattan Bank v. Gavin, 733 A. 2d 782 (Conn. 1999)*, the trust is not testamentary, and an *inter vivos* trust has a more attenuated connection with the state, does not owe its existence to the grantor's state law, and does not have the same tie to the state; (2) the trust resulted from the trustee's exercise of its power of appointment; (3) with income tax, the focus is on the tax year in question, and therefore what happened historically with the trust in Illinois has no bearing on the tax year; (4) the trust was not part of the probate estate of an Illinois resident and the Illinois probate court has no jurisdiction over the trust; (5) the trust is governed by Texas law and does not have the benefits and protections of Illinois law; (6) the trust has nothing and has sought nothing from Illinois, all business is conducted in Texas, and all beneficiaries and property are outside Illinois.

C. ***Hussemann v. Husseman* (Iowa Supreme Court May 23, 2014).** Iowa Supreme Court, applying the "balancing approach" under the Restatement (Second) of Conflict of Laws, honors the choice of law provision subjecting a post-nuptial agreement to Florida law despite the fact that the spouses, who had resided in Florida, thereafter became domiciled in Iowa after the agreement's execution.

1. Herbert Hussemann, Sr. and Velma J. Hussemann executed a post-nuptial agreement in 1991, while residents of Florida. Under the agreement, Velma waived her right to take an elective share in Herbert's estate. The agreement included a choice of law provision that provided that "(a)ll questions relating to the validity and construction of t[he] agreement shall be determined in accordance with the laws of the State of Florida." On the same day that the agreement was signed, Herbert also created an inter vivos trust for the benefit of his children from a previous marriage. Herbert funded the trust with all of his assets.

2. Herbert and Velma continued to live in Florida for another fourteen years. In 2005, they moved to Iowa, where they remained until Herbert's death in 2012. Following Herbert's death, Velma filed a petition before the Iowa District Court, claiming her elective share of Herbert's trust pursuant to section 633.238 of the Iowa Code. In February 2013, the trustees of the trust filed a motion for judgment on the pleadings and Velma filed her own motion for judgment. Velma argued that the entire post-nuptial agreement was void as it violated Iowa's public policy against postnuptial agreements.

3. The District Court found that the undisputed choice of law provision took the agreement out of the purview of Iowa law, including Iowa's public policy, and within the purview of Florida law, which allows for post-nuptial agreements. Therefore the District Court granted the trustees' motion for judgment.

4. On appeal, the Iowa Supreme Court affirmed.

    a. The Supreme Court noted that Iowa follows the Restatement (Second) of Conflict of Laws (the "Restatement"). Section 187 of the Restatement provides for a "balancing approach" with respect to the law to be applied to a contract -- if a state has a "materially greater interest" than the chosen state in the determination of a particular issue and if the application of the chosen state's law would be contrary to a fundamental policy of that state, that state's law, as opposed to the chosen state's law, is to be applied.

    b. In evaluating the interests of each state, the courts are to consider the place of contracting, the place of negotiation, the place of performance, the location of the contract's subject matter, and the domicile of the parties. See Restatement Section 188. The Iowa Supreme Court noted that the contract was negotiated and executed in Florida, that the couple lived in Florida when it was executed, and that most of Herbert's property affected by the property consisted of intangibles. Thus under the Restatement's balancing approach, Iowa did not have a "materially greater interest" than Florida.

    c. The Court also noted that Florida has a significant interest in assuring that a Florida marriage is recognized and carried out in a manner consistent with its own law. Likewise, Florida has an interest in preserving and protecting the Decedent's inter vivos trust, which was formed in Florida under Florida law. Accordingly, the Court ruled that section 187 of the Restatement dictated the application of Florida law.

D. ***De Rosa v. Director, Division of Taxation*, 2014 N.J. Tax LEXIS 17 (Tax Court of New Jersey, July 17, 2014).** New Jersey Tax Court rules that the New Jersey Inheritance Tax is based on the distribution of assets as directed under the terms of a decedent's will and is not based on a post-death agreement among beneficiaries to alter the disposition of estate assets.

1. Peter DeRosa ("Mr. DeRosa") was named Executor of the estate of his father-in-law, Joseph Rendeiro ("Decedent"). Pursuant to the terms of Mr. Rendeiro's last will and testament (the "Will"), Decedent's sister, Ms. Pereira, was to receive $25,000; Decedent's granddaughter, Ms. Fagin, was to receive $10,000; and Mr. DeRosa was to receive the residuary.

2. Ms. Fagin challenged the Will in the probate proceedings, alleging undue influence of Mr. De Rosa over Decedent and alleging Decedent lacked testamentary capacity. That matter was settled – pursuant to the terms of the parties' agreement, Ms. Fagin would receive $400,000 from the Estate, Ms. Pereira would receive $25,000, and Mr. DeRosa would receive the reduced residuary.

3. Thereafter, the Estate filed its New Jersey Inheritance tax return, reporting a total inheritance tax due of $178,925.57 plus interest on the reduced residuary passing to Mr. DeRosa after the $400,000 distribution to Ms. Fagin

per the terms of the settlement. The Director of Taxation, however, issued a Notice of Assessment to Mr. Fagin, increasing his amount of tax owed to $239,279.22 plus penalty and interest to reflect the larger residuary that was to pass to Mr. DeRosa if only $10,000 was distributed to Ms. Fagin, as contemplated in the Will.

4. Mr. DeRosa appealed to the New Jersey Tax Court, which considered what amounts should be considered passing to each of Ms. Fagin and Mr. DeRosa to determine the amount of Inheritance Tax owed. The New Jersey Inheritance Tax is based on the value of property transferred at death and the transferee's relationship to the decedent. The personal representative of the estate is personally liable for payment of this tax.

5. The Tax Court noted a split among the states regarding the effect of an agreement settling a will contest that distributes the estate other than as directed in a will. The majority view is that a succession tax is computable in accordance with the terms of the will, unaffected by the compromise agreement. These courts have reasoned that the tax is fixed on the date of death and is applicable only to inherited property. Since a will cannot be altered by an independent agreement executed after the testator's death, property passing pursuant to such an agreement cannot be deemed "inherited."

6. Here, the New Jersey Tax Court followed this majority view. It distinguished a scenario in which the testator himself makes a contractual agreement to make a testamentary disposition. Unlike in that scenario, agreements between beneficiaries to redistribute an estate's assets occur subsequent to the transfer occurring via the Will, which is subject to transfer inheritance tax. Accordingly, the Tax Court found that the Director of Taxation properly assessed the transfer inheritance tax based on the terms of the Will.

XXXI. LIFE INSURANCE.

A. ***Torti v. Hoag,* 2014 U.S. Dist. LEXIS 148471 (2014).** Court refuses to dismiss claims against trustee and trustee's insurance broker business for loan to settlor from cash value in life insurance subject to split-dollar arrangement.

1. In 1997, Layton Stuart created trusts for his family with a professional colleague as trustee. Debra Hoag, an insurance broker, sold the trustee a $20 million insurance policy on Layton's life under a split-dollar arrangement that prohibited loans against the cash value in the policy.

2. In 2011, the trustee resigned and appointed Hoag as successor trustee. Hoag, as trustee, loaned all of the $1.7 million of cash value in the policy to Layton, who used the funds contrary to the trust purposes.

3. Layton died in 2013, and the United States seized the death benefits under the policy and filed a civil forfeiture complaint.

4. Richard Torti became successor trustee, and sued Hoag and her insurance company, Gentry Partners for various claims arising out of the loan, and also sued John Hancock. All of the defendants moved to dismiss.

5. The court refused to dismiss the breach of fiduciary duty and negligence claims against Hoag and her company on the grounds that: (1) the allegations of a loan violating the split-dollar terms and for purposes contrary to the trust terms state a valid claim for breach of fiduciary duty and negligence by Hoag as trustee; and (2) the allegations that Hoag was president and agent for her company, and that company employees facilitated the loan, are enough to state a claim against the company under *respondeat superior.*

6. The claims against John Hancock were dismissed for failing to adequately plead that Hoag was an agent for John Hancock.

7. Claims for deceptive trade practices were dismissed due to an insurance activity exception. Claims for deceit and conspiracy, and for the government seizure of the death benefits, were dismissed for pleading deficiencies.

B. ***Noveletsky v. Metropolitan Life Insurance Company,* 2014 U.S. Dist. LEXIS 134760 (2014).** Claims against trustee of ILIT dismissed where settlor selected the policy, the trust terms exculpated the trustee for receiving a commission on the policy sale and waived any responsibility over the policy as an investment, and the high premium burden on the policy, while a burden on the settlor, was not proven to be harmful to the trust or its beneficiary.

1. In 1999, Hollie Novaletsky's father died and left her Novel Iron Works. The company lacked liquidity to pay estate taxes and the estate taxes were deferred for 10 years under IRC 6166. Concerned about liquidity when her son would inherit the company at her death, Hollie contacted her friend Francine, a MetLife insurance agent, about buying $5 million of life insurance. Francine referred the matter to MetLife agent Alan Silverman.

2. Silverman recommended a $5 million whole life policy, did not recommend term insurance, and did not present the option of a universal life policy though he knew that type of policy would have premium half as large as the whole life policy. Silverman stated that under the recommended policy she would only have to pay premiums for up to 12 years. Silverman recommended the policy be purchased by an ILIT.

3. Hollie took Silverman's advice, and created an ILIT for the benefit of her son, drafted by a lawyer referred by Silverman, and with her friend Francine as trustee. Francine as trustee then purchased the policy recommended by Silverman and selected by Hollie. Silverman split the $80,000 commission on the policy sale with Francine, which was not disclosed to Hollie.

4. For 10 years, Hollie used her annual company bonus to make gifts to the trust to pay the insurance premiums, and a *Crummey* letter was issued in connection with each gift. Francine did not send any other accountings to the son as beneficiary. MetLife statements were sent to Hollie, who sent them to

Francine unopened, who sent them back to Hollie unopened. Due to economic changes, the policy dividends declined, it became clear that there would be no cap on Hollie's need to make gifts to pay the premiums, and she learned that Francine shared the $80,000 commission.

5. Hollie removed Francine as trustee, and the new trustee exchanged the policy for a universal life policy with essentially the same death benefit, but no additional premiums, using the cash value in the policy for the transaction.

6. Hollie sued Francine, Silverman, and MetLife alleging multiple causes of action. The court granted summary judgment for Francine on the grounds that:

    a. Expert opinions were flawed and failed to establish any harm to the trust or its beneficiary from the transaction, and harm to Hollie is not a breach of trust because Hollie is not a trust beneficiary;

    b. Hollie's attorney drafted the trust and therefore there is not a presumption that exculpatory clauses in the trust are unenforceable;

    c. The trust terms waive the duty of loyalty and permitted Francine to buy the insurance from herself and receive a commission without reporting it, and this interpretation does not violate public policy and is in accord with the nature of an ILIT as a single asset trust from which Francine did not expect extensive duties and for which she received no compensation;

    d. Francine, as trustee, had no duty to second guess the policy chosen by Hollie and Silverman, and no duty to ensure that the lowest possible premiums would be paid by Hollie since she was not a trust beneficiary. Francine's duties were to the son, she was appointed for the purpose of purchase the policy Hollie selected, and had no duty to rock the boat or question Hollie's selection;

    e. There is no evidence that the policy was a bad choice from the perspective of the trust (even if it was a bad choice for Hollie);

    f. The expert testimony is flawed and does not establish harm to the trust;

    g. So long as the trust holds only cash and insurance, the trust terms waived the duty to diversify or make investment recommendations, which permitted Francine to dispatch her duty by maintaining the status quo level of insurance; and

    h. As an insurance policy, the policy remained robust, and only was a problem as an investment, but Francine had no duty over investments under the trust terms;

i. Even if Francine breached her duty to inform the beneficiary under the trust terms directing an annual accounting, there is no proof of any harm from the breach.

7. Claims for negligence, misrepresentation, and unfair trade practices against the trustee were also dismissed.

8. Claims against Silverman were dismissed on the grounds that: (1) only the trustee, and not Hollie, can bring a claim for rescission because the trustee bought the policy; (2) Hollie did not suffer an actionable loss due to a lack of proof of monetary harm.

9. Claims against MetLife for vicarious liability were dismissed as a consequence of the dismissal of the claims against the other parties.

XXXII. **DELAWARE.**

A. ***IMO Daniel Kloiber Dynasty Trust,* C.A. No. 9685-VCL (Del. Chancery Court, August 6, 2014).** Delaware chancellor refuses to temporarily enjoin Kentucky divorce court from enforcing orders restricting the assets of a Delaware trust for the primary benefit of one spouse while the divorce proceedings are adjudicated.

1. Glenn Kloiber established an irrevocable Delaware trust in 2002, and funded the trust with $15,000. The next year, Glenn's son Dan sold 99.45% of his shares in a company to the trust for a $6 million note. In 2007 and 2008, the trust sold its interest in the company for a combined $310 million. Thereafter, the trust held cash, marketable securities, and interests in LLCs with Dan as the sole manager.

2. The trust is for the primary benefit of Dan, with Dan also having a lifetime and testamentary special power to appoint the trust assets among his issue, charity, and the "wife of the Grantor's son" as defined to mean the person to whom Dan is married and cohabitating. The "wife of the Grantor's son" is also a discretionary current trust beneficiary, and subject to Dan's power of appointment, a successor current trust beneficiary with the same rights as Dan's. Dan's issue are also current beneficiaries and, subject to the powers of appointment, the presumptive remainder beneficiaries either outright or in trust.

3. The Delaware corporate trustee has custody of the trust assets and the duties to maintain trust records and file tax returns. In every other aspect of the trust administration, the trustee is directed or controlled by the following:

   a. The Special Trustee (initially Dan), with respect to investments, special holdings, and discretionary distributions, and removal and replacement of the corporate trustee;

   b. The Advisory Committee (Dan's brother and two brothers-in-law) also with respect to removal and replacement of the corporate trustee, if

there is no Special Trustee, and after Dan's death to remove and replace Trust Protectors;

c. Holders (Dan's three siblings and their spouses), any one of whom may act alone, with respect to appoint the trust assets for Dan's benefit, Dan's issue, or the "wife of the Grantor's son"; and

d. The Trust Protector (one of Dan's brothers-in-law), with respect to the power to grant the trustee additional powers, amend the trust, change the trust situs and governing law, and re-constitute the Advisory Committee if it has no members.

4. Dan separated from his wife Beth in 2010 and filed for divorce in Kentucky that year. Beth claimed the trust assets were marital property subject to equitable division. The Kentucky court entered status quo orders that restricted Dan's actions with respect to the trust without Beth's consent or approval of the Kentucky court. The trustee and the trust were not parties to the divorce proceedings. Dan did not object at the time to the orders. Beth also sued Dan, the trust, the trustee, and the drafting attorneys seeking to void Dan's sale of assets to the trust as a fraudulent transfer, which was discussed by the Kentucky court with a pending appeal. Dan sought a writ of prohibition from the Kentucky Court of Appeals to block the status quo orders, which was rejected. In March of 2014, the Kentucky court stated it would add the trust as a party to the divorce proceedings, and Beth sought to add the trustee as a party.

5. In May 2014, Dan resigned as Special Trustee and appointed his son Nick as successor, and also resigned as manager of the LLCs held in the trust, without informing the Kentucky court. Nick as Special Trustee directed the trustee transfer trust assets without Beth's consent or the approval of the Kentucky court. Two days later, the trustee petitioned the Delaware Chancery Court for declarations that the Delaware court has exclusive jurisdiction over trust matters, the trustee may rely on Nick's instructions, Beth's fraudulent conveyance claim is time barred, and the Kentucky court orders are unenforceable against the trustee and the trust. Nick generally admitted the trustee's allegations, other than the trustee's allegation that the sale to the trust was a "qualified disposition" under Delaware law.

6. The Kentucky court then added the trustee, the trust, and Nick as Special Trustee as parties to the divorce proceedings, and Beth filed claims against the trustee. Nick has not yet been served with process. The court also ordered Dan to revoke his resignation as Special Trustee and retake the position within 3 days. Dan sent a letter to Nick doing so, but Nick signed an affidavit refusing to surrender the position of Special Trustee back to Dan asserting it would breach his duties to do so. The Kentucky court held Dan in contempt and issued a rule to show cause against Nick. Minutes before Dan was scheduled to be incarcerated, the Kentucky Court of Appeals stayed the contempt order. The trustee amended its petition in the Delaware proceedings to further seek to eliminate the reach of the Kentucky court concerning the trust and its assets, and Beth sought a status quo order in the

Delaware action. Nick then petitioned the Delaware court for a temporary restraining order blocking Beth from seeking to enforce the Kentucky status quo orders.

7. The Delaware chancellor rejected Nick's petition for a TRO on the following grounds:

   a. The Delaware Qualified Dispositions in Trust Act, which grants the Delaware chancery court exclusive jurisdiction over actions concerning qualified dispositions, specifies which among the many Delaware courts will handle those matters, but does not unilaterally preclude sister states from hearing claims under Delaware law, which would not be permissible under Full Faith & Credit principles. Beth is not a party to the trust agreement, and has not agreed to be bound by its forum provisions. Also, Nick and Dan disagree with the trustee's assertion that the sale to the trust was a qualified disposition, and Beth's claims (if the Kentucky court awards her relief in the form of support or alimony) may be subject to exceptions in the Act.

   b. The Kentucky court is not interring with Delaware's "primary jurisdiction" over the trust because: (1) at the time of the orders, no court had primary jurisdiction over the trust; (2) the trustee was not required to file accountings with the court; (3) the trust terms go to great lengths to eliminate the court's role in the regular administration of the trust; (4) the trust terms provide multiple tools (including fiduciary powers and powers of appointment) for removing the trust from Delaware and changing its governing law, and do not mandate that Delaware law continue to apply where the trust situs is changed; and (5) the selection of Delaware law and its courts is merely an option within the discretion of those who control the trust and is not a commitment to oversight of the trust by Delaware or its courts.

   c. The Delaware court will not assert primary jurisdiction over the trust because: (1) there is only a colorable claim of Kentucky interference with the Delaware court where the court is not supervising the trust, the trust terms minimize the court's role, and where the trust terms allow departure from Delaware situs and law; (2) Nick will not suffer irreparable harm with the TRO because his concerns can be heard before the Kentucky trial, appellate, and supreme courts, thereby providing him an adequate remedy at law and due process; (3) there does not appear to be a "collision course" to a jurisdictional conflict between Kentucky and Delaware because (a) the Delaware court has also issued a status quo order restricting the trust assets, (b) while Delaware has an interest in having its own laws implemented correctly, it has not have an interest in having its laws deployed to defeat another state's marital property law; (c) the Delaware court will address the validity of Dan's resignation as trustee, but that determination will help and not hinder the Kentucky court's proceedings by clarifying who has control over the trust; (d) if there is a later final and non-appealable Kentucky judgment against the trust, only then will

important questions of Delaware law arise; (e) there are intermediate questions unrelated to Delaware law that should be adjudicated first, including whether Dan had the rights under Kentucky property law to transfer the assets to the trust; and (f) the court need not prematurely mark off jurisdictional territory or act as a quasi-appellate court for interlocutory review of Kentucky divorce proceedings.

XXXIII. TORTS, SLAYERS & BAD ACTORS.

A. ***Axiotis v. Michalovits*, 2014 WL 486658 (Superior Ct. of Conn. 2014).** Connecticut recognizes tort of interference with inheritance rights.

1. Plaintiff brought action against his brother and his brother's wife claiming that they tortiously interfered with his expected inheritance and further claiming that they were liable to him for common-law fraud. The issues before the Court were whether Connecticut recognizes such actions and whether the plaintiff had alleged sufficiently detailed facts in support of his fraud claim.

2. The plaintiff claimed that the defendants deprived him of his inheritance by fraudulently procuring the execution of a pretended will and fraudulently preventing him and his conservator from opposing the probate of the will and appealing from the decree admitting it to probate.

3. The court found that there is a cause of action in Connecticut for tortious interference with an expected inheritance, noting that the claim is similar, if not identical, to a cause of action for interference with business relations. The Court was persuaded by other Connecticut Superior Court decisions in which the courts concluded that Connecticut would recognize a cause of action for intentional interference with an expected inheritance. The Court further found that the plaintiff had standing to bring his common law fraud claim. Accordingly, the Court denied the defendants' motion to dismiss.

B. ***Beim v. Hulfish*, 2012 WL 1912261 (N.J. Super 2012)**. Appellate court includes increased estate taxes as potential damages in wrongful death action; New Jersey Supreme Court reverses.

1. In 2008, a 97 year old man, whose wife had died years before, was injured in a car accident and subsequently died. His heirs alleged that had he survived until 2009 (or a subsequent year) his federal estate taxes would have been lower due to the higher estate tax exemption (or temporary tax repeal) available for that year. The trial court rejected the damages as too speculative, but the appellate court held that the higher taxes may be considered as part of the damages in a wrongful death action.

2. On appeal, the New Jersey Supreme Court reversed on the grounds that: (a) the state wrongful death act provides a cause of action as one that would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury; (b) the survivor's cause of action is limited to claims that could have been

asserted by the decedent had he lived; (c) death taxes were not intended as permissible damages by the legislature; and (d) estate taxes are unrelated to any contributions the decedent would have made to his heirs if he had remained alive, and are therefore not the type of pecuniary loss that can be recovered in a wrongful death action.

C. ***Morris v. Morris*, 2014 Ga. App. LEXIS 191 (Ct App Georgia 3d Div. March 20, 2014)**. Georgia Court of Appeals affirms North Carolina slayer statute does not apply to slayer's irrevocable trust governed by Georgia law.

1. The Derek Morris Irrevocable Trust was created under Georgia law with settlement proceeds from a car accident in which Derek and several of his family members were injured. In 2005, Derek married, had a daughter, Iza Lily, and moved to North Carolina. While living in North Carolina the marriage deteriorated, and Derek killed his daughter then himself.

2. Derek's wife, Sarah, as administrator of Iza Lily's estate, filed a wrongful death action against Derek's estate and received a default judgment for an undisclosed amount.

3. Martha Morris, Trustee of the Derek Morris Irrevocable Trust, filed a declaratory action to determine to whom the trust assets should be distributed. Under the terms of the trust, at Derek's death the trust terminated and distributed to his then living descendants, but if none, to Derek's then living siblings, *per stirpes*.

4. The Georgia trial court entered summary judgment in favor of Sarah, finding that under North Carolina's slayer statute Iza Lily survived Derek and therefore her estate would be the appropriate beneficiary of the trust. The court of appeals reversed and found that although North Carolina's slayer statute may apply to probate assets, the trust is not a probate asset because it was irrevocable and Derek was never the trustee. Further, North Carolina law does not apply because the terms of the trust direct that it is to be governed under Georgia law, and under the Georgia Trust Code the "law designated in a trust agreement shall determine the meaning and effect of the provisions thereof, unless the effect of the designation is contrary to the public policy of the jurisdiction having the most significant relationship to the matter at issue."

5. The court determined that Georgia has the most significant relationship to the Trust because, despite Derek moving out of Georgia, the trust administration, Trustee, and trust assets never left Georgia. The terms of the Trust were not contrary to Georgia public policy because, unlike North Carolina, Georgia does not have a similar slayer statute.

6. The court also determined that Sarah could not reach the trust assets as Derek's creditor under an exception to the spendthrift clause because the wrongful death judgment did not attach until after his death.