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

(2025 Edition)

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

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THE PAST YEAR'S SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES (2025 Edition)*

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

Dana G. Fitzsimons Jr.
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I. ELDER ABUSE & GUARDIANSHIP

A. *Beckford v. Baskin (In re Beckford),* 2025 Fla. App. LEXIS 4302; 2025 LX 185886; 50 Fla. L. Weekly D 1257; 2025 WL 1600541 (Court of Appeal of Florida 2025). An attorney who rendered services to a guardian on a ward's behalf while the guardian was appointed — albeit incorrectly — remains entitled to attorney's fees.

1. Charles Beckford is Wayne Astor Beckford's son. Donna Beckford is Wayne's wife. After Wayne suffered an aneurysm in June 2020, Charles and Donna each petitioned the trial court to be Wayne's guardian. Donna is a convicted felon. Florida law provides that no person who has been convicted of a felony shall be appointed to act as guardian. Nonetheless, the trial court believed that it had discretion to appoint her as guardian. The trial court entered an order appointing Donna.

2. Charles appealed. The court of appeals reversed, holding that state law disqualifies any individual with a felony conviction from being appointed guardian. On remand, Donna resigned as Wayne's guardian. The trial court appointed successor guardians. Donna's counsel sought attorney's fees for past services. Charles objected and asserted that counsel was not entitled to fees for representing an "illegal" guardian. Counsel did not seek fees relating to the appeal or the guardianship litigation itself.

3. The court awarded attorneys' fees to counsel. Charles appealed and the court of appeals affirmed on the following grounds:

a. A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward. A "guardian" is a person who has been appointed by the court to act on behalf of a ward's person or property, or both.

b. The trial court appointed Donna to act on Wayne's behalf. Thus, she was a "guardian." The court of appeals reversed the appointment order, and Donna resigned as guardian. Nevertheless, an attorney who rendered services to a guardian on a ward's behalf while the guardian was appointed — albeit incorrectly — remains entitled to attorney's fees. The legislature did not condition entitlement to fees on a person's qualifications to serve as guardian. The legislature declined

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to do so, and, instead, provided for attorney's fees where services were rendered to the ward.

B. *Conservatorship of D.H.,* 2025 Cal. App. Unpub. LEXIS 3825; 2025 LX 100873; 2025 WL 1720209 (Court of Appeal of California 2025). California may apply Lanterman-Petris-Short Act to appoint guardian for mentally ill person physically present in California despite claim of out-of-state residence.

1. A team from the Los Angeles County Department of Mental Health first made contact with D.H. in May 2022, when he was living on the street in Long Beach. At that time, he was dirty and not wearing shoes. He said that he was new to the area and that he planned to "get back on the bus" at the station. D.H. had food and appeared to be resilient and able to obtain his basic needs despite homelessness. D.H. declined mental health and homeless services. The team came across D.H. again in September 2023. He was still homeless and appeared ungroomed, malodorous, dirty, wearing dirty clothes with no shoes on, and was exhibiting mental health symptoms, including delusional thought content and disorganized thought process. At the time (nearly 16 months after his last contact with the team) D.H. said he had been living in California for six months.

2. In December 2023, D.H. was placed on an involuntary psychiatric hold under section 5150 at a hospital in Panorama City after he refused housing, clothing, shoes, and urgent medical attention. His pants were covered with feces, but he refused new clothing due to his delusions and paranoia. He had also wrapped hair around his fingers, which restricted circulation to the point of possible auto-amputation if untreated. Dr. Conrado Sevilla, who was in charge of the hospital, evaluated D.H., determined he was gravely disabled as a result of a mental disorder (schizophrenia), referred the matter to the Office of the Public Guardian for the County of Los Angeles, and recommended conservatorship.

3. In January 2024, the Public Guardian filed a petition for the appointment of a conservator of the person and estate of D.H. under the Lanterman-Petris-Short Act ("LPS Act" or "Act") in the Superior Court for the County of Los Angeles. The Public Guardian conducted a conservatorship investigation and recommended conservatorship for D.H.

4. Counsel for D.H. challenged the authority of the County of Los Angeles to proceed with Conservatorship proceedings in this county and state as he is a lifelong resident of Texas and intends to return to Texas. D.H. argued mere presence in the county is insufficient to establish jurisdiction in Los Angeles County.

5. The parties stipulated that at some point in the past D.H. had a Texas identification card and that his last recorded house or apartment was in Texas. Dr. Chang, a psychiatrist who worked for the Los Angeles County Department of Mental Health who interacted with D.H. while D.H. was homeless in late 2023, testified that D.H. told him that he had been in California for six months and that he wanted to return to Texas. D.H. testified that he grew up in California, that he moved to Texas with his family when he was a teenager, and that he lived in Texas for almost 48 years. D.H. said that he went to Tracy, California, in 2022 and that he was evaluated by the Tracy Rehabilitation Center, which gave him a bus ticket to Dallas, Texas. D.H. said that he got off the bus in Los Angeles for a two-day layover, but that he was unable to reboard the bus to continue his trip. D.H. said he wanted to return to Texas as soon as possible.

6. The court ruled that jurisdiction was proper in California and that venue was proper in Los Angeles County. The jury found D.H. was gravely disabled by a mental disorder,

within the meaning of the LPS Act. The court granted the petition and appointed the Public Guardian conservator over the person and estate of D.H., with the conservatorship to terminate on July 15, 2025.

7. DH appealed and the court of appeals affirmed on the following grounds:

a. The LPS Act governs the involuntary detention, evaluation, and treatment of persons who, as a result of mental disorder, are dangerous or gravely disabled. The Act authorizes the superior court to appoint a conservator of the person for one who is determined to be gravely disabled [citation], so that he or she may receive individualized treatment, supervision, and placement. A person is "gravely disabled" under the LPS Act if, "as a result of a mental health disorder, a severe substance use disorder, or a co-occurring mental health disorder and a severe substance use disorder, the person is unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care."

b. The term "jurisdiction" has different meanings, depending on the context in which it is used. Its fungible nature and its relationship with the related doctrine of venue can often cause confusion. In its truest sense, jurisdiction refers to a court's authority to try the case before it. This is a court's jurisdiction in a fundamental sense, the competency or inherent authority to hear a case and render a valid judgment. In contrast to jurisdiction, venue concerns which county superior court having fundamental jurisdiction is the proper court geographically to try the action. Jurisdiction and venue can become intertwined, but in most actions, venue rules are not jurisdictional.

c. Section 5352 provides that a professional may initiate a conservatorship inquiry by making a recommendation to "the officer providing conservatorship investigation of the county of residence of the person prior to his or her admission as a patient in such facility" and that, if the investigating officer "concurs with the recommendation, he or she shall petition the superior court in the county of residence of the patient to establish conservatorship." Section 5352.5 also provides that, where a person has been placed in a state hospital or mental health facility before a mental health professional has made a conservatorship recommendation, the recommendation should be made to the conservatorship investigator for "the county of residence of the person prior to his or her admission to the hospital or facility or of the county in which the hospital or facility is located." Although sections 5352 and 5352.5 refer to the proposed conservatee's "county of residence," they relate to venue, not jurisdiction. In both statutes the reference to "county of residence" is geographic, i.e., it designates which county's public official will undertake the conservatorship investigation and which county's superior court will hear the public official's petition. These two venue statutes do not have any bearing on the court's jurisdiction.

d. And even the (irrelevant) Probate Code provisions governing venue contemplate nonresidents of California may be subject to conservatorship proceedings in California, even if the nonresidents are here only temporarily. The LPS Act provides that, with certain exceptions, the procedure for establishing, administering, and terminating a conservatorship under the Act is the same as that provided in the Probate Code. Probate Code section 2202, subdivision (a),

addresses the proper venue for conservatorship proceedings over nonresidents of California: "The proper county for the commencement of a proceeding for the guardianship or conservatorship of the person of a nonresident of this state is either of the following: (1) The county in which the proposed ward or conservatee is temporarily living; or (2) Such other county as may be in the best interests of the proposed ward or proposed conservatee."

e. The California Conservatorship Jurisdiction Act governs which state or states have jurisdiction over a conservatorship proceeding. But that act does not apply to proceedings under the LPS Act. D.H. does not argue this exclusion creates a jurisdictional gap or loophole that prevented the court from exercising jurisdiction over him. Nor does D.H. argue the Public Guardian failed to comply with the notice and service provisions of the LPS Act that provide a basis for the court's personal jurisdiction.

f. To the extent D.H. contends (as he did in the trial court) California could not apply the LPS Act to him while he was physically present in California because he said he wanted to return to Texas, such a contention lacks merit. A state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Adding a residency requirement to the LPS Act would compromise the state's ability to protect the community from the conduct of individuals gravely disabled by a mental health condition and to provide compassionate care to individuals who find themselves within the state's boundaries at a period of extreme crisis.

g. The goals of the Act include ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision, and placement services for the gravely disabled by means of a conservatorship program. The Act also serves to protect the mentally ill from criminal victimization [citation] and from the myriad forms of suffering endured by those unable to care for themselves. Discriminating among gravely disabled people based on their residence would leave people like D.H. — who because of a grave disability cannot return to the state he says he wants to go to — without assistance when they desperately need it.

C. *Daspin v. Daspin,* 2025 U.S. Dist. LEXIS 229278 (United States District Court for the District of New Jersey 2025). Court sua sponte appoints pro bono counsel to represent victim of elder financial abuse.

1. Pro se Plaintiff Edward Michael Daspin ("Plaintiff") filed a complaint against Defendants Matthew Daspin ("Matthew") and Karen Polanco ("Polanco") (together, "Defendants"). Between the date the Complaint was filed and July 24, 2025, when the Rule 16 initial pretrial scheduling conference occurred, Plaintiff filed twenty separate documents on the docket. In that time, Plaintiff also filed an amended complaint without leave, an untimely motion to compel without leave, and a premature application for summary judgment with 410 pages of disorganized exhibits. Since appearing at the conference, and despite the Court's explicit instructions as to how the matter would

proceed moving forward, Plaintiff made an additional eleven filings including several attempts to amend his Complaint.

2. Although difficult to discern, the Complaint appears to allege a pattern of elder abuse of Plaintiff by Matthew and Polanco. Plaintiff attempted to file an order to show cause with temporary restraints seeking the return of his golden retriever, Abigail, and $112,000 that Plaintiff claims Matthew owes him. Plaintiff is an eighty-six-year-old man who is hearing impaired and takes thirty prescriptions daily. Matthew is Plaintiff's nephew and Polanco is Matthew's girlfriend. Plaintiff claims Matthew owes him $100,000 from a loan and $12,000 for oil and electricity bills Matthew charged to him. Plaintiff claims on June 25, 2023, Matthew fraudulently signed Plaintiff's name to a bill of sale for Abigail and Plaintiff's SUV to Matthew. According to Plaintiff, in this bill of sale was a statement that Plaintiff could keep Abigail with him until he died. Plaintiff claims that this bill of sale was fake and intended to make Plaintiff judgment proof so he could not be sued. Plaintiff claims that even if it were a valid bill of sale, Matthew breached the contract by taking Abigail from him before he died and refusing to return her. Plaintiff states Matthew falsely told him that Abigail drowned in the ocean in Puerto Rico, but in reality, she survived. Plaintiff alleges that he will have a heart attack and die if Abigail is not returned.

3. Defendants filed an Answer stating that Matthew had power of attorney over Plaintiff since 2020, and that he took care of Plaintiff, including managing his bank account. Defendants allege that, as of 2020, Plaintiff had approximately $87,534.20 in assets, which Matthew used to pay Plaintiff's bills "including rent, moving expenses, funeral home, dental, eyes, hearing aids, hospital, etc." Defendants claim Plaintiff did not return to his rented home for several months due to health issues, refused Matthew's attempts to place him in a nursing home, and created dangerous conditions at home by leaving the gas on. Defendants contend that Plaintiff was not able to take care of himself upon release from the health care facility where he was residing and cannot return to the premises he rented from Matthew. Finally, Matthew claims he is owed $17,956 from Plaintiff for out-of-pocket expenses including unpaid rent.

4. Plaintiff claims he practically raised his nephew, Matthew, including paying for his college. Matthew was like a son to Plaintiff, and Plaintiff thought he could trust him. After Plaintiff lost his wife, experienced some business hardships, and sold his home, he had a finite amount of assets remaining, roughly $120,000. Plaintiff entrusted the money to Matthew in exchange for Matthew's promise to allow Plaintiff to live in an apartment on one of Matthew's properties for the rest of his life, pay his bills, and take care of him. Instead, Plaintiff alleges Defendants took his money and removed him from the residence while Plaintiff was hospitalized for several months. Plaintiff claims he is now penniless, has nowhere to live, and is staying with a friend. Plaintiff also claims that Matthew took his Social Security checks. Finally, Plaintiff alleges that, while he was hospitalized, Defendants took his beloved dog, Abigail, and Plaintiff's car. When Plaintiff demanded the dog be returned, Defendants told him she drowned in Puerto Rico, where Defendants maintain a residence. Plaintiff claims this is untrue because Defendants later offered to return the dog if Plaintiff dropped this lawsuit.

5. Matthew admitted to the court that he does not actually have a signed power of attorney for his uncle — despite his specific allegations to the contrary. Matthew advised he can provide a full accounting of expenses paid and how the money was used. Matthew claims he never promised to support his uncle indefinitely or allow him to stay in the

apartment rent-free for the rest of his life. Matthew explains that Plaintiff was hospitalized with health issues for several months, and he cared for the dog during this time period. Unfortunately, the dog drowned in Puerto Rico, so she could not be returned upon Plaintiff's release from the medical facility. While Plaintiff was hospitalized, the rent was not being paid so, eventually, Matthew re-leased the apartment.

6. The court was concerned about Plaintiff's ability to manage the litigation given his age, hearing impairment, and apparent inability to understand basic court procedures, and sua sponte appointed counsel for Plaintiff on the following grounds:

a. Where an unrepresented Plaintiff in a civil suit is indigent, and where good cause exists for the appointment of pro bono counsel, the District Court has discretion and authority to appoint pro bono counsel even in the absence of a specific motion to do so.

b. Only after determining that a plaintiff's claim has merit in fact and law should the Court proceed to consider and evaluate the following factors: (1) the pro se party lacks the ability to present an effective case without an attorney; (2) the legal issues are complex or, the ultimate legal issues are not complex, but the pro se party lacks the familiarity with the rules of evidence and discovery needed to translate understanding of the law into presentation of the proofs; (3) factual investigation will be necessary and the party is not adequately able to pursue said investigation; (4) the case is likely to turn on credibility determinations; (5) the case will require expert testimony; and (6) the party is unable to attain and afford counsel on his/her own behalf.

c. While the written documents submitted by Plaintiff are difficult to understand, when he appeared on the record he more clearly articulated the basis for his claims against Defendants. While unartfully pled, if Plaintiff's claims are true, he pleads a classic case of elder abuse. Given Matthew's representation in his first pleading that he had power of attorney over his uncle, only to later recant this statement on the record, the Court has reason to find that Plaintiff's claims may have some facial merit.

d. Plaintiff's submissions are the opposite of cogent; they are almost incomprehensible. All of Plaintiff's submissions to the Court are unclearly written, improperly filed, disorganized, and impossible to follow. Plaintiff was unable to follow basic instructions of the Court even after appearing before the undersigned and being provided with detailed instructions about next steps. For this reason, Plaintiff appears to be unable to understand the law or properly present his case, and the first factor weighs in favor of appointing pro bono counsel.

e. While this case is not overly complex, resolving these issues will require analysis of contract law and conducting an accounting of expenses paid, among other things.

f. Here, the case will likely turn on credibility determinations because of the nature of the allegations.

g. Since Matthew indicated he will provide an accounting of how Plaintiff's money was spent, an accounting or economic expert will likely be retained.

h. Plaintiff advised the Court under oath during the initial scheduling conference that he was penniless, that Matthew had taken what little was left of his assets, and that he was currently homeless and staying at a friend's place. He also indicated that his sole source of income is Social Security. Although Plaintiff came up with the funds to pay the filing fee, that alone is not indicative of financial ability to retain counsel to litigate this case. The fact that Plaintiff has proceeded without counsel thus far strongly suggests he cannot afford it.

D. *Est. of Harris v. Reilly*, 2025 MT 126 (Supreme Court of Montana 2025). Court abused its discretion by granting voluntary dismissal without awarding sanctions in view of the extremely late hour of the motion to voluntarily dismiss the suit, the extensive preparation already undergone, and the attempt to mislead the court.

1. On June 7, 2021, Michael Reilly approached William G. Harris III about purchasing his home. Harris, who was developmentally disabled to the point of being unable to read or understand the value of money, signed a contract to sell the home to Reilly for $30,000, which was $84,000 less than its appraised value. While preparing to finalize the sale, Reilly's closing agency notified him that it would need a signed release of information from Harris to verify that there were no pending liens on the property. Reilly went to the Butte Sheltered Workshop ("Sheltered Workshop") — a vocational rehabilitation center for the developmentally disabled — to find Harris. The Sheltered Workshop staff informed Reilly of Harris's disability, explained that the Sheltered Workshop was Harris's payee, and refused to allow Reilly to speak with Harris regarding the contract. Reilly left the Sheltered Workshop without speaking to Harris. Reilly returned to the Sheltered Workshop at least once more in search of Harris but was once again turned away by the Sheltered Workshop staff.

2. Harris died on December 19, 2021. On April 20, 2022, Reilly sued Harris's Estate for specific performance of the contract to purchase Harris's home. On June 10, 2022, the Estate filed an amended answer and counterclaim alleging negligence, negligence per se, Montana Consumer Protection Act ("CPA") violations, and punitive damages. The District Court set a jury trial for September 11, 2023, on both Reilly's and the Estate's claims.

3. The Friday before trial was scheduled to begin, and almost a year-and-a-half after filing his complaint, Reilly moved to voluntarily dismiss his complaint. In his motion, Reilly represented to the District Court that the Estate did not object to his motion. The District Court granted the motion the same day and dismissed Reilly's complaint with no effect on the counterclaims. That evening, the Estate filed an objection to the dismissal, noting that it had received Reilly's motion at 4:00 p.m. that day. The Estate's objection requested that the District Court require Reilly to pay the Estate's attorney fees and costs for defending the complaint as a sanction based on Reilly's decision to dismiss his complaint on the eve of trial, after extensive discovery and after the Estate had incurred substantial costs. The District Court did not rule on the Estate's objection.

4. Trial on the Estate's counterclaims took place from September 11, 2023, through September 13, 2023. The Estate presented evidence at trial of Harris's developmental disability, the discrepancy between the contract price and the appraised value of Harris's home, and the interactions Reilly had with the Sheltered Workshop staff. At the close of evidence, Reilly moved for a directed verdict that the Estate had not presented sufficient evidence for a jury to find that Reilly's actions had caused Harris emotional or dignitary harm. The District Court granted the motion but determined that it would be up to the

jury to decide whether or not Mr. Reilly took advantage of a disabled individual and, if so, what damages are a result of that. Reilly did not object to that determination nor seek clarification. Nor did Reilly object to the jury instructions or verdict form provided to the jury.

5. The jury found that Reilly exploited Harris, violated the Consumer Protection Act, and that Reilly's conduct rose to the level of Actual Malice. The jury awarded the Estate $48,000 in damages but did not specify what portion of the award was attributable to compensatory or punitive damages. The jury ultimately awarded $28,900 in compensatory damages and $45,000 in punitive damages. The Estate moved for an award of attorney fees and treble damages pursuant to the CPA. Reilly responded on September 29, 2023, arguing for the first time that the Estate lacked standing to bring a claim under the CPA because they had not proven at trial that Harris met the definition of a "consumer." The District Court agreed that the Estate lacked standing to bring a CPA claim and determined that even if the Estate had standing to bring such a claim that the damages awarded by the jury were sufficient to further the purposes of the CPA such that an award of treble damages and attorney fees was unnecessary.

6. On appeal, the Supreme Court of Montana affirmed the judgment awarding the Estate $28,900 in compensatory damages and $45,000 in punitive damages against Reilly; affirmed denial of the Estate's request for treble damages and attorney fees under the CPA; but reversed the District Court's dismissal of Reilly's complaint without sanctions and remanded with instructions to award the Estate attorney fees and costs, on the following grounds:

> a. In light of the district court's failure to consider the amount of time and money spent preparing for trial, it was an abuse of discretion not to compensate the defendant in some fashion both for costs proper and for attorneys' fees. It is important for a district court to consider "the lateness of a plaintiff's motion for dismissal, and the extensive preparation on the part of the defense when ruling on a motion to dismiss five days before trial. After pursuing a claim for nearly a year-and-a-half, seeking specific performance of a contract with a developmentally disabled individual who was unable to read or understand the value of money and required a payee to handle his financial affairs, Reilly waited until the Friday afternoon before a Monday morning trial to dismiss his claims, well after the Estate had already completed its preparation to defend against his claims. His motion was, at best, dishonest when it affirmatively asserted that the Estate did not object to the dismissal. The District Court's grant of the dismissal does not appear to have considered these factors, and the District Court did not rule on the Estate's motion for sanctions filed later that same day. Given the extremely late hour of Reilly's filing, the extensive preparation the Estate had already undergone, and Reilly's apparent attempt to mislead the District Court that the Estate had not objected to the motion, the District Court abused its discretion by granting the dismissal without awarding sanctions. Reilly offers no explanation — either in his motion to dismiss in the District Court or on appeal to this Court — for his literally last-minute motion to dismiss. The record evokes absolutely no explanation as to why Reilly would have pursued a claim for nearly a year-and-a-half, only to abandon it the Friday afternoon before trial, and Reilly offers no explanation either below or on appeal. The District Court should have granted the Estate its full costs and attorney fees incurred before Reilly's motion to dismiss was filed.

b. A private CPA claim for damages requires proof of the following elements: (1) that the defendant "used or employed" an "unfair or deceptive act or practice in the conduct of any trade or commerce"; (2) in regard to which the claimant was a "consumer"; and (3) which caused the claimant to suffer direct or indirect financial detriment or detrimental financial impact.

c. Statutory elements of a claim are generally not jurisdictional unless the statute indicates that they are. Because Reilly totally fails to cite to any authority in support of his argument that the CPA's "consumer" requirement is a rare jurisdictional element, the court declined to hold that it is.

d. The court does not consider issues raised for the first time on appeal. Reilly waived the remainder of his "consumer" argument when he failed to object to the jury instructions.

e. Awarding treble damages and attorney fees under the CPA is purely a discretionary function of the district court and is intended to be compensatory and remedial rather than punitive. The District Court provided a plausible explanation for its discretionary denial of the Estate's request, and the court cannot conclude that it abused its discretion in doing so.

f. Reilly did not object to the verdict form that set forth generally the damages that would fairly compensate the Estate, on behalf of Harris, for Reilly's malicious exploitation of a developmentally disabled adult.

E. *In re And Helene P.*, 2025 N.Y. App. Div. LEXIS 4930 (Supreme Court of New York, Appellate Division 2025). Guardian loses ability to pay gifts from guardianship estate on death of ward.

1. On September 16, 2021, Thomas J. Manzi was appointed to serve as guardian of the person and property of Dora P. ("Dora"), an incapacitated person, pursuant to Mental Hygiene Law article 81. In July 2022, Helene P. ("Helene"), one of Dora's children, moved to compel Manzi to pay an alleged gift to her in the sum of $300,000 from the guardianship estate or, in the alternative, to direct Helene's siblings, Susan P. and Kenneth P., to return certain funds to the guardianship estate that they had allegedly received from Dora as gifts prior to Manzi's appointment. While that motion remained pending, on June 24, 2023, Dora died. The Supreme Court dismissed Helene's motion for lack of jurisdiction. Helene appealed.

2. On appeal, the appellate division affirmed on the following grounds:

a. The death of an incapacitated person deprives a guardian of the authority to continue representing that person and his or her property, unless the court that appointed the guardian enters an order modifying his or her authority to allow for the representation of the estate of the incapacitated person.

b. Manzi's authority as the guardian of Dora's property expired upon Dora's death, including his authority to pay an alleged gift to Helene from the guardianship estate Although the Supreme Court and the Surrogate's Court have concurrent jurisdiction over matters involving a decedent's estate, no representative of Dora's estate was appointed. Wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court.

F. *In re Est. of Cooper,* 2025 Minn. App. Unpub. LEXIS 697 (Court of Appeals of Minnesota 2025). State law prohibits marriage by developmentally disabled person committed to the guardianship or conservatorship of the commissioner of human services, but not private guardianship or conservatorship, validity of a marriage is not affected by obtaining marriage license by fraud or perjury, violation of a district court order is not a basis to render a marriage void, and not available after the death of either party to the marriage.

1. Decedent Irvin John Cooper Sr. and Judith Cooper were married for 60 years. The couple had four children, including Brian Cooper and appellant Angela Forsman. In April 2020, Judith passed away. Shortly thereafter, decedent met respondent Kathy Cooper. At that time decedent was approximately 80 years old; respondent is almost 20 years younger than decedent.

2. In May 2021, Brian Cooper was appointed both emergency guardian and conservator for decedent after the district court found that decedent was "incoherent and incapable of making decisions for himself." The district court also found that respondent (who was unnamed at the time) was exerting "undue influence" over decedent, took his wallet and computer from his home, and made at least one unauthorized charge of over $4,000 on a credit card of decedent. The district court further determined that there was an "urgent need" for a harassment restraining order ("HRO") against respondent to protect decedent. An ex parte HRO was filed on July 27, 2021, which prohibited respondent from having contact with decedent. In the meantime, Brian filed a petition for general appointment of guardian and conservator. Brian later withdrew the petition and he and decedent stipulated to the appointment of Arctos Wealth Management and Fiduciary ("Arctos") as limited conservator. Respondent was involved in the proceedings and admitted that she coached decedent through communications with his attorneys on the conservatorship matter.

3. In October 2021, Arctos filed correspondence alleging that, at the time, respondent claimed to be decedent's fiancé and that she continued to interfere with decedent's financial affairs. The district court subsequently named Arctos as emergency guardian for decedent because respondent appeared to be interfering with decedent's ability to meet his attorneys and to be sending correspondence falsely in his name. In fact, the district court found that, during a Zoom court hearing, respondent repeatedly interfered with the court's communication with decedent and whispered answers to him and when told by the court to stop, changed to writing answers for him which he then read verbatim.

4. Arctos filed an HRO petition on behalf of decedent, seeking to prevent respondent from contacting decedent. The district court granted the petition and entered an ex parte HRO against respondent. But despite the ex parte HRO, respondent and decedent traveled to Iowa where they wed on October 19, 2021. Although Iowa law states that a marriage license does not become valid until three days after the issuance of the license, respondent filed an application for waiver of the three-day waiting period. On the application, respondent provided the following reason for waiving the three-day waiting period: "We're involved in a civil matter. We need to be married so that we can have full spousal protection from each party testifying against the other and we need to have any other legal rights afforded to married people including the right to continue living together."

5. The district court determined that decedent was incapacitated and found that: decedent spent $4,000 on respondent's cat; bought respondent a car she did not need

and likely could not legally drive; risked infection with the COVID virus by driving respondent to the hospital at her request, knowing she had been infected; and ignored medical advice when he left his care facility with respondent and without his prescribed medications. The district court also found that decedent stayed with respondent for several days after he broke his hip, enduring significant pain, which indicates that respondent failed to seek proper medical care for decedent. The district court determined that, after listening to decedent's testimony, decedent would do or say just about anything to not be alone, and that he desperately wants female companionship so he will not be alone. The district court concluded that decedent's cognitive impairment as well as his impaired practical judgment leave decedent vulnerable to exploitation and harm. The district court, therefore, granted the petition for appointment of a guardian and conservator, appointing Arctos as decedent's guardian and conservator.

6. The district court issued an HRO, prohibiting respondent from having any contact with decedent. The district court found that respondent had contact with decedent in violation of the ex parte HRO by, among other things, taking decedent to Iowa and marrying him. Arctos filed a notice of restriction of visitation and communication and suspension of supervised visitation in an attempt to restrict decedent from communicating, visiting, or interacting with respondent. Arctos alleged that respondent surreptitiously placed an unmarked opaque black plastic bottle of pills in decedent's bedroom, physically endangering decedent. Arctos further alleged that the pills were a non-approved medication called Kratom, which produced both stimulant and sedative effects, and is known to pharmacists for its potentially harmful effects and drug interactions.

7. In December 2022, decedent was taken to an Iowa hospital where it was determined that he should be transported to a hospital more equipped to handle his condition. He was then flown to a hospital in Wisconsin where decedent was diagnosed with terminal cancer. Decedent's treatment providers noted that decedent was malnourished, tired, and weak, and that, because of his condition, he was not a good candidate for any form of treatment. Respondent was then arrested for violating the HRO, and decedent was transferred to a facility in Duluth, where he passed away on February 13, 2023.

8. At the time decedent passed away, decedent had two wills: one executed in 1987 (the "1987 will"), and one executed in 2022 (the "2022 will"). The 1987 will left most of decedent's estate to his four children if their mother and grandmothers predeceased them. The 2022 will left decedent's estate to respondent and specifically disinherited his children.

9. In February 2023, Brian commenced this probate action requesting a determination that the 1987 will is valid. After the district court granted the petition, appellant brought a motion seeking to invalidate the marriage between respondent and decedent. In the alternative, appellant sought to have the marriage declared a nullity.

10. The district court held that the marriage between respondent and decedent was not void, annulment was barred by statute, and equitable powers were not available. The district court, therefore, denied appellant's motion to invalidate the marriage.

11. Brian appealed, and the court of appeals, with one concurring opinion, affirmed on the following grounds:

> a. A void marriage is a marriage that is invalid from its inception, that cannot be made valid, and that can be terminated by either party without obtaining a divorce

or annulment. A void marriage does not exist, has never existed, and needs no formal act to be dissolved. Under Minnesota law, all marriages which are prohibited shall be absolutely void. Prohibited marriages include those between (1) certain persons related by blood, (2) persons who are already married to another, and (3) persons who have not both attained the full age of 18 years. In addition, developmentally disabled persons committed to the guardianship of the commissioner of human services and developmentally disabled persons committed to the conservatorship of the commissioner of human services in which the terms of the conservatorship limit the right to marry may marry on receipt of written consent of the commissioner. The commissioner shall grant consent unless it appears from the commissioner's investigation that the civil marriage is not in the best interest of the ward or conservatee and the public. The local registrar in the county where the application for a license is made by the ward or conservatee shall not issue the license unless the local registrar has received a signed copy of the consent of the commissioner of human services.

b. The statute contemplates only the prohibition of marriages in which developmentally disabled persons are committed to the guardianship or conservatorship of the commissioner of human services. The statute says nothing about individuals who are under a private guardianship or conservatorship. Thus, as the district court determined, because decedent was not subject to the protection of a guardianship or conservatorship of the commissioner of the department of human services, he was not one of those people. In other words, because decedent was the subject of a private guardianship and conservatorship, the protections are not applicable to this marriage.

c. Appellant argued that the marriage was void because Minnesota law requires that both parties to the marriage be present together at the time of solemnization, and, because respondent was the subject of an HRO that prohibited her from contacting decedent, the two could not have legally solemnized their marriage. Appellant never argued to the district court that the marriage was void for failure to follow those requirements, and that issue is not therefore before the appellate court. Because lack of proper solemnization is not listed as a basis to void the marriage, a lack of respondent and decedent's ability to legally solemnize their marriage does not render the marriage void.

d. The validity of a marriage is not affected by the fact the marriage license was obtained by fraud or perjury. A violation of a district court order is not a basis to render a marriage void under the statute. Although respondent's failure to obtain a valid marriage license may have made her marriage to decedent voidable, it did not make the marriage void. Therefore, the district court did not err in determining that the marriage between respondent and decedent was not void under Minnesota law.

e. Appellant further contends that the marriage between respondent and decedent was void under Iowa law. But, because appellant never made this argument in district court, it is not properly before the appellate court. Appellant's argument fails on the merits because the marriage is not void under Iowa law for similar reasons the marriage is not void under Minnesota law.

f. Generally, the decision to grant equitable relief is within the sound discretion of the district court and its decision regarding such relief will not be reversed absent an abuse of that discretion. If a marriage is not void, it may be voidable. Minnesota law sets forth several circumstances when a marriage may be voidable. Proceedings to annul a voidable marriage can be brought by certain persons within certain time limits. But in no event may an annulment be sought after the death of either party to the marriage. Thus, a statutory action to annul the marriage was not available here.

g. It is well settled that equity follows the law, and appellate courts may not disregard statutory law or grant relief prohibited thereby. And the supreme court has emphasized that the "task" of appellate courts is not to make legislative policy but to interpret and apply existing statutes. Here, as addressed above, the statutory language is clear that the marriage between respondent and decedent is not void. And although the marriage may have been voidable before decedent passed away, Minnesota law is clear that in no event may an annulment be sought after the death of either party to the marriage. Because decedent had already passed away by the time appellant brought her motion, the district court was statutorily bound to deny the motion. Although the equities do indeed rest with appellant in this case, equity follows the law, and the law states that the marriage between respondent and decedent cannot be annulled.

h. The concurring justice wrote separately to identify that applicable statutes and case law leave appellant without a remedy to have the marriage between her father, Irvin, and respondent Kathy Cooper declared void (invalid from its inception) or voidable (annulled). Appellant has presented a compelling, uncontested record to demonstrate that, at the time of the marriage, Irvin lacked the capacity to marry. The district court found that Irvin "suffered from significant cognitive impairments, and had been legally determined to be incapacitated as the subject of a guardianship and conservatorship." The court's order appointing a private guardian and a private conservator also found that Irvin was "incoherent and incapable of making decisions for himself." This record does not suggest that Irvin ever regained a competency that would allow him to ratify an initially invalid marriage. Despite the compelling and uncontested evidence that this marriage should never have occurred, the law does not provide appellant with any relief. Had Irvin been under a different guardianship and conservatorship — under the protection of the commissioner of human services — the marriage would have been declared void. Minnesota is one of at least twelve states that has not enacted laws that would allow for a challenge to a marriage or inheritance rights after death when there are allegations that fraud induced the decedent to marry. Some states have rectified that problem.

G. *In re Floyd,* 2025 Md. App. LEXIS 690 (Appellate Court of Maryland 2025). Permanent guardian of settlor's property steps into settlor's role as settlor-trustee of revocable trusts, and could take any action with regard to the trusts that settlor may have taken with court approval.

1. In 2007, Thelma Floyd married. Her husband brought to the marriage his two stepsons and his home in Temple Hills, Maryland. In 2014, her husband died, and Floyd and her stepsons agreed that she would reside at the home for life, or until she moved out, at which time the home would transfer to the stepsons. In August 2014, Floyd memorialized

this agreement in a revocable living trust, naming herself the settlor-trustee and her brother and a stepson as successor trustees. The Temple Hills property was deeded to the trust.

2. In 2016, Floyd was diagnosed with frontotemporal dementia. In light of her diagnosis, Floyd modified the 2014 trust with an affidavit stating that Floyd would not sell the property during her lifetime and that the property would be left to her stepsons upon her death or if a permanent disability required her to leave the property. In September 2018, Floyd set up a second revocable living trust. She again named herself the settlor-trustee but this time named Sharon Bates as successor trustee. The 2018 Trust did not mention her stepsons and bequeathed all of Floyd's property to Bates.

3. In October 2021, the circuit court declared Floyd incapacitated, and Bates began to act with power of attorney over Floyd's affairs. Shortly thereafter, the Department of Family Services for Prince George's County filed a petition to remove Bates, raising questions regarding her care of Floyd's finances and person. A hearing was held at which the Department raised concerns about why there was a $400,000 transfer to a bank account that listed Bates as beneficiary; about admissions that, despite having power of attorney, Bates never checked the balances on Floyd's account; and about how Floyd wore unclean clothing, did not take showers or baths, and did not have supervision throughout the day. After a hearing, the circuit court appointed Karen Sylvester as guardian of Floyd's person and Thomas Leahy as guardian of Floyd's property.

4. Leahy brought an action against Bates alleging that she had engaged in fraudulent financial transactions involving Floyd's assets. Bates was found liable for conversion, unjust enrichment, constructive fraud, breach of fiduciary duty, civil conspiracy, and financial exploitation of Floyd's funds. Bates appealed, and the court of appeals affirmed the judgments against her.

5. Bates appealed the appointment of both guardians, and the court of appeals affirmed. Leahy, in his capacity as guardian of Floyd's property, filed a motion with the circuit court to abandon Floyd's interest in the Temple Hills property and transfer the home to the stepsons. Leahy also asked that he be named successor trustee of both trusts. The circuit court named Leahy the successor trustee of both of Floyd's trusts and allowed him to transfer the home to Floyd's stepsons.

6. Bates appealed and the court of appeals affirmed on the following grounds:

> a. Bates assumes that the 2018 Trust controls, while Leahy and the stepsons assume that regardless of the validity of the 2018 Trust, the property, deeded to the 2014 Trust, is still subject to the 2014 Trust. While this is certainly an interesting question, resolving it requires a finding of fact that is beyond the scope of appellate review authority. However, the question of which trust controls is not material to the appointment of Leahy as successor trustee or the transfer of the property.
>
> b. Bates raises that there is newly discovered evidence. That there is newly discovered evidence should take the form of a motion filed with the circuit court. Bates, however, raises it for the first time in this appeal, and the appellate court is precluded from addressing it.

c. Bates's argument that the circuit court, in reaching its decision on the motion to transfer the home, improperly relied on the unsworn testimony of the stepsons' lawyer is without merit. Bates argued that because the lawyer was not sworn in prior to addressing the court, her arguments lack trustworthiness. The lawyer was making a legal argument on behalf of her clients, not presenting factual testimony. Lawyers are not sworn in before making legal argument. A lawyer, moreover, must take an oath at the start of their career to uphold the legal and ethical obligations of the profession and to abide by the rules of the court. This is sufficient, without further evidence to the contrary, to ensure that the argument made by the stepsons' lawyer was made with integrity.

d. The appellate court previously held that there was no error when Leahy was appointed the permanent guardian of Floyd's property. Revisiting whether the circuit court erred in appointing Leahy as the guardian of Floyd is precluded by the law of the case doctrine.

e. Bates previously contested the appointment of Leahy as guardian. The circuit court heard and disagreed with Bates's arguments against the appointment, this court of appeals affirmed the circuit court's decision, and the Supreme Court of Maryland denied certiorari. There was no subsequent trial with substantially different evidence regarding the guardianship, no new controlling authority that would result in a different decision, and the previous decision of the appellate court was not clearly erroneous. None of the exceptions to the law of the case doctrine are applicable here. Leahy remains the guardian of Floyd's property.

f. Leahy filed a motion to transfer the home to the stepsons, arguing that the affidavit to the 2014 Trust was a contract which obligated him to transfer the home to Floyd's stepsons. Over Bates's objections, the circuit court granted the motion based on its understanding of contract law. The court of appeals affirmed the transfer of the home because it was within Leahy's powers as a guardian of Floyd's property pursuant to the Maryland Trust Act, not contract law.

g. When a guardian is appointed, they are vested with all property of the protected person that is held at the time of appointment or acquired later. If the property vested is held by a revocable trust, the guardian of the property of the settlor may exercise the powers of the settlor with respect to revocation, amendment, or distribution of trust property but only with the approval of the court supervising the guardianship and only if the trust instrument does not provide otherwise.

h. Floyd was the settlor of the 2014 and 2018 Trusts. When Leahy was made permanent guardian of Floyd's property, he stepped into Floyd's role as settlor-trustee of both trusts. Once Leahy was appointed guardian of Floyd's property, he, as guardian of the property of the settlor, could take any action with regard to the trusts that Floyd may have taken, given that he first ask for and receive court approval for each action.

i. Here, Leahy filed a motion asking the circuit court to transfer the home to the stepsons. The circuit court considered the motion, the Trusts, and the affidavit. It also heard from Leahy, the stepsons, and Bates. At the hearing, there was no allegation of a conflict of interest, nor any evidence presented that the actions of Leahy were contrary to the best interest of Floyd. The court found that it was in

Floyd's best interest to have one trustee for the two trusts and granted Leahy's motion to transfer the house to Floyd's stepsons.

H. *In re Guardianship of Malone,* 2024 Tenn. App. LEXIS 514; 2024 LX 12457; 2024 WL 4903798 (Court of Appeals of Tennessee 2025). Court retention of supervision of trust for minor incorporates the trust into the court's order.

1. Katherine Malone died in an unfortunate accident in Idaho on August 3, 2017. A logging truck owned by Kevin Flory Trucking overturned and spilled its load as she was jogging by. She had one daughter, Beatrice Rose Malone ("Rosie"). Rosie's father is Patrick Malone ("Mr. Malone"), Katherine Malone's ex-husband. All resided in Nashville, Tennessee.

2. The Probate Court granted Mr. Malone's petition for guardianship, naming him as the legal guardian of Rosie's real and personal property. Rosie, as her mother's heir, would inherit Katherine Malone's house and its contents, and was expected to inherit or receive life insurance proceeds, Social Security benefits, and other assets. The probate master issued an order that required that the guardian, Patrick Malone, shall immediately notify the court should he receive any asset of the guardianship estate in excess of $15,000 and be placed on the first available docket of the probate master to review the issue of bond.

3. Mr. Malone petitioned the Probate Court to allow him to set up a trust for Rosie. The trust was negotiated by Mr. Malone and his attorneys, and Katherine Malone's parents, James William Rose and Jennie Adams Rose ("the Roses") and their attorneys. The trust would receive all guardianship funds and proceeds from a Dearborn Life Insurance policy. The child will also receive certain funds from several retirement accounts, Fidelity and GE pension, a distribution from the Estate of Katherine Malone when it is settled, and the proceeds from the sale of the home of Katherine Malone, which vested in the child at death. It is anticipated the total funds to be received will be in excess of $500,000.00. The child may also receive a substantial settlement or judgment from a wrongful death lawsuit as a result of her mother's accidental death. All funds would be professionally managed and invested. Mr. Malone and Pinnacle Bank would be co-trustees.

4. The Roses thought Pinnacle Bank should be the sole trustee. They also sought designation as trust protectors "for the purposes of having access to accountings and financial statements concerning the trust." Mr. Malone labeled them "obstructionists" and alleged that they possessed "ill will toward the guardian at every hearing." Mr. Malone opposed the Roses involvement "with the trust in any way."

5. The Probate Court granted Mr. Malone's request to establish a trust known as the Beatrice Rose Malone Irrevocable Trust, finding that it was "in the manifest best interest of the child." Mr. Malone and Pinnacle Bank were appointed co-trustees, with Raymond James appointed as investment advisor. The Roses were named "Limited Trust Protectors," with the limited rights of: (1) receiving monthly trust statements; (2) receiving trust tax returns; (3) having the right to inspect the trust records relating to disbursement of principal or income; and (4) ability to call any matter concerning the trust disbursements to the Court's attention, but no further or other rights with respect to the trust. The trust was to remain court supervised, with the co-trustees filing an annual status report.

6. The trust instrument contained the following language: "additional amounts shall be contributed to the Trust as may become available to Rosie." Furthermore, the trust states

that, "This Trust is created by operation of law as it is implemented by the Court, and shall be a court-supervised trust until Rosie attains the age of eighteen (18) years of age ("Majority Age")." Before the creation of the trust and afterward, Mr. Malone asked the Probate Court for three payments of attorney's fees from Rosie's funds, in part for research by Tennessee attorneys regarding filing an Idaho wrongful death action. The Probate Court approved a portion of these fees. By this time, Mr. Malone had filed a wrongful death case in Idaho.

7. In the annual status report, Mr. Malone mentioned that he had filed a wrongful death suit in Idaho and criticized the Roses for interference. He concluded the report by stating: "The Guardian submits that any wrongful death claim damages recovered from the pending lawsuit filed on behalf of Rosie as sole heir will be deposited to Rosie's Trust established by the Court at Pinnacle Bank." Mr. Malone filed a Verified Petition for Minor's Compromise in the Idaho wrongful death case. The petition contains a three-sentence paragraph about the Tennessee Trust and the following frank statement: "A significant amount of animosity and distrust exists between Patrick and the Roses. That animosity ultimately led to the Roses seeking appointment as 'trust guardians' over the Trust. It also led to the Roses incorrectly seeking to pursue R.M.'s wrongful death claim as an asset of Katherine's estate. For this reason, Patrick will be seeking to establish a separate trust in which to place the proceeds of this settlement."

8. Mr. Malone also claimed that the Tennessee Trust "is more restrictive than advisable on the use of trust proceeds for the benefit of Rosie during the life of the Trust." Mr. Malone created a trust ("the Missouri Trust") in Missouri, where he and Rosie had moved. He served as a co-trustee along with Blue Ridge Bank and Trust Company. The Idaho court approved the wrongful death settlement. Out of the $1,000,000.00 settlement amount, the court approved $250,532.58 in attorney fees and costs. The court ordered that "the remaining balance of $749,467.42 shall be paid to the Beatrice Rose Malone Irrevocable Trust for deposit into an irrevocable trust for the benefit of R.M." Mr. Malone deposited the money into the Missouri Trust.

9. After learning of the settlement and the Missouri Trust, the Probate Court issued a temporary restraining order restraining and enjoining Mr. Malone "from spending any money from the Missouri Trust or the funds received pursuant to the Idaho Court settlement." The Roses sought to have the proceeds of the wrongful death settlement transferred to the Tennessee trust and to have Mr. Malone found in civil contempt for violating the Probate Court's order. The Roses, Mr. Malone, and Blue Ridge Bank and Trust filed motions for summary judgment. The trial court granted summary judgment to the Roses, finding Mr. Malone in contempt of court. The funds in the Missouri Trust were ordered to be transferred into the Tennessee Trust.

10. Mr. Malone and Blue Ridge Bank and Trust appealed, and the court of appeals, with one dissenting justice, affirmed on the following grounds:

> a. Civil contempt consists of four elements: (1) the order alleged to have been violated must be "lawful"; (2) the order alleged to have been violated must be clear, specific, and unambiguous; (3) the person alleged to have violated the court order must have actually disobeyed or otherwise resisted the order; and (4) the person's violation of the order must be "willful." Mr. Malone, the party without the burden of proof, sought to demonstrate that the facts did not satisfy the four requirements of Konvalinka.

b. The first element of civil contempt, a lawful order, is met by the July order. The Probate Court retained supervision of the trust. A court-supervised trust is not the norm and denotes the court's interest in continuing oversight and enforcement of the trust provisions. Retaining supervision of the trust does, in a very real and practical sense, incorporate the trust into the court's order. Supplementing the court's supervision is the appointment of the Roses as Limited Trust Protectors. They serve as the eyes and ears of the court concerning trust disbursements. The terms of the trust provide clear, specific, and unambiguous direction as to what funds were to be deposited into the trust.

c. The trust stated: "Further and additional amounts shall be contributed to the Trust as may become available to Rosie." "Shall" is ordinarily construed as mandatory. This language leaves no doubt that any money to which Rosie became entitled must be placed in the trust. Was the Probate Court's order disobeyed? Absolutely. The funds available to Rosie were required to be placed in the Tennessee Trust. Instead, Mr. Malone placed the funds into the Missouri Trust.

d. Willfulness in the civil contempt context does not require the same standard of culpability that is required in the criminal context. Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. Mr. Malone knew what he was doing. He negotiated and signed the Tennessee Trust document. In his 2019 annual status report, Mr. Malone stated that, "The Guardian submits that any wrongful death claim damages recovered from the pending lawsuit filed on behalf of Rosie as sole heir will be deposited to Rosie's Trust established by the Court at Pinnacle Bank." Two months later, on July 11, 2019, Mr. Malone filed an Amended Property Management Plan. It mentioned the wrongful death claim lawsuit, but noted that, "[n]o funds have been received by the guardian as the case has not yet gone to trial or been settled." Approximately three and one-half months later, Mr. Malone filed the settlement petition in the Idaho case that proposed the Missouri Trust.

e. Mr. Malone claimed that the Probate Court's order violates the Full Faith and Credit Clause of the United States Constitution. The Full Faith and Credit Clause provides, in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." However, this is not a case in which the Full Faith and Credit Clause is at issue. No one is challenging the appropriateness of the Idaho forum or the validity of the Idaho court's decision. This situation is more analogous to a creditor seeking funds from a debtor's bank account.

f. One dissenting justice would reverse because the order here was not sufficiently specific to support the finding of contempt. The Court's Order may not have explicitly included a catch-all provision, but the Tennessee Trust did. The Court adopted the Tennessee Trust in its Order and found the Petition and Trust "in the manifest best interest of the child." The Order and the Tennessee Trust language are clear, specific, and unambiguous. The trouble lies in the question of how fully the terms of the Tennessee Trust were incorporated in the terms of the probate's court order. Yes, the Tennessee Trust was attached as an exhibit to the order approving its creation, and yes, the court found that it was "in the manifest

best interest of the minor child." The order also provided that "[t]he trust shall be court supervised." But that statement does not completely describe the role of the court in relation to the Tennessee Trust. By the terms of the trust, the court's supervision ends when the child reaches the age of 18; however, the Tennessee Trust continues until the child reaches the age of 25. The language of the order simply does not provide notice of the terms of the Tennessee Trust or the obligations of the trustee that will be enforced by the court's contempt power. Thus, the necessary specificity is lacking.

I. *In re Guardianship of Flyte,* 2025 SD 21; 19 N.W.3d 513; 2025 S.D. LEXIS 29; 2025 LX 159596 (Supreme Court of South Dakota 2025). State law does not authorize the appointment of for-profit entities to serve as guardians and conservators except as expressly provided by the provision authorizing the appointment of a bank or trust company as conservator.

1. Gerda Flyte is a 90-year-old woman living on her ranch in Oral, South Dakota. She owns agricultural land worth two to three million dollars and leases it to nearby ranchers that run a cow-calf operation. She is affected by worsening dementia and other health conditions that impact her daily life. Gerda and her ex-husband Charlie Flyte had two children together — Charlene Monfore and Roger Flyte.

2. Charlene filed a petition seeking appointment as Gerda's sole temporary, and permanent, guardian and conservator. Accompanying the petition, Charlene submitted a letter from Certified Nurse Practitioner ("CNP") Sarah Schryvers, Gerda's primary care provider, informing the court that in her opinion Gerda — on account of her dementia and heart problems — was unable to live independently or manage her financial or medical affairs without assistance. CNP Schryvers recommended that Charlene be appointed as Gerda's legal guardian. The court appointed Charlene as temporary guardian and conservator, and scheduled a further hearing to determine whether the appointment should become permanent.

3. Roger objected, raising significant concerns about Gerda's physical, emotional, and financial well-being while in Charlene's care. Roger also alleged that the presence of Charlene's son, Matthew, on the ranch had negatively impacted Gerda's safety and well-being. Roger asserted, in part, that Matthew's influence over and manipulation of Charlene led to deficient medical care for Gerda, mismanagement of her finances, disruption of previously functional family relationships, physical altercations, law enforcement involvement, civil proceedings, and use of the ranch for religious services without Gerda's permission. The circuit court appointed counsel for Gerda. Charlene's role as temporary guardian and conservator continued — with extensions — until March 17, 2023, when the circuit court held a two-day evidentiary hearing to determine who should serve as Gerda's permanent guardian and conservator.

4. Charlene, age 64, testified that she was formerly married to Jay Monfore and had two sons, Matthew and Jesse. Charlene, who lived in the area, is a former nurse and has taken care of Gerda on and off since 1996 when Gerda had a stroke that affected her short-term memory. Gerda temporarily lived in Hot Springs following the stroke so Charlene could more easily check on her. A year or two later, Gerda moved back to her ranch. Charlene testified that Gerda did well living independently for approximately ten years after returning to the ranch. In 2010, Charlene noticed Gerda needed more assistance and in 2016, Charlene retired from nursing and moved to the ranch to care for Gerda full-time. Charlene explained that Gerda's dementia had worsened, and she began

implementing systems to help Gerda remember to do daily tasks such as taking her medication. In the spring of 2018, Charlene's younger son, Matthew, age 28, moved to the ranch to help Charlene care for Gerda. Matthew lives in Gerda's three-bedroom, 1,700-square-foot ranch house with Gerda and Charlene and does not pay rent. Matthew attended the Cornerstone Bible Institute in Fall River County and identifies himself as a minister.

5. In the fall of 2019, Matthew brought his father — Charlene's ex-husband Jay — to the ranch to care for him while Charlene was away on a trip. Jay has Parkinson's disease for which he requires significant care and assistance. Charlene testified that Jay had an apartment in Hot Springs but moved into the ranch house full-time in 2020. Jay also does not pay rent to Gerda.

6. Dr. Sally Clark, Gerda's dentist from 2012 until May 2022, testified via Zoom that in 2015, Gerda had numerous broken teeth and teeth that had big cavities, and Dr. Clark was worried they would break off in her mouth. Because of her dental condition, Gerda could only eat food brought to room temperature. Gerda did not come back to her office until May 2022, almost seven years after the 2015 visit. In May 2022, someone visiting the ranch noticed that Gerda's jaw was red. Roger looked in Gerda's mouth and saw that it was seriously infected. Charlene sent pictures of Gerda's mouth to Dr. Clark's office, and Dr. Clark asked to see Gerda immediately. Dr. Clark referred Gerda to Dr. Brian Richman, an oral surgeon, and all of her remaining teeth were removed on June 27, 2022.

7. Gerda also had a history of falling, which led Roger and Charlene to prioritize removing rugs and other trip hazards from the ranch house. In the fall of 2020, Gerda fell in the living room. Roger landed in South Dakota late on Friday night, two days after the fall. They called an ambulance the following morning, and Gerda was transported to the hospital in Rapid City. After examination, the doctors concluded that Gerda had broken her hip in three places during the fall and she needed hip replacement surgery. Roger stayed at the ranch for three weeks, caring for Gerda, sleeping near her bed, and helping her recover.

8. Roger also testified about his concerns that Gerda was not receiving necessary medications because Charlene and Matthew did not believe in conventional medicine. Gerda had a history of mini-strokes and took several prescription medicines including Warfarin, a blood thinner. Charlene testified that she and Matthew, based on advice of doctors Matthew found online, decided to take Gerda off her prescription medications and put her on supplements instead. However, none of the online doctors ever met or examined Gerda, nor did they have access to her medical records. Charlene admitted that she took Gerda off her medications but denied an accusation that she did not believe in antibiotics. She testified that in fact she had administered all of Gerda's antibiotics to combat her dental infection.

9. Roger also challenged Charlene's ability to manage Gerda's financial affairs. In 1996, Gerda executed a power of attorney appointing Charlene and Roger as co-attorneys-in-fact granting them both authority over her medical and financial affairs. Roger testified that he "never really did much with it" and that Charlene primarily managed Gerda's finances because she was in South Dakota while Roger lived in Arizona. In April 2018, Charlene asked Roger if they could close Gerda's "one remaining IRA" at Wells Fargo bank. During a trip to Arizona, Charlene and Roger went to Wells Fargo, but they would not accept the joint power of attorney because they felt "it was antiquated." When

Charlene returned to South Dakota, she took Gerda to Wells Fargo to try to close the account, but Wells Fargo again refused, this time because Gerda did not have a driver's license. Charlene testified that she did not inform Roger of the new power of attorney for eight or nine months. Roger stated that he did not know he had been removed as a joint POA until 2021. Charlene testified that she managed Gerda's finances and that Gerda received approximately $1,500 per month from Social Security and between $12,000 and $14,000 per year in lease payments for her ranch land. The Social Security payments, according to Charlene, were used to pay for many of Gerda's expenses including for the electricity for the wells that water the cattle and the property insurance. Charlene is the named insured on insurance policies for the ranch and Gerda's vehicle. Charlene explained that Gerda, despite not being the named insured, pays Charlene for the portion of the insurance premiums attributable to the ranch and Gerda's vehicle.

10. Roger's business began to suffer during the COVID-19 pandemic and ultimately closed. Around that time, Roger was also divorced from his wife. Roger visited South Dakota in January 2022 and asked Gerda and Charlene if he could move to the ranch. Roger testified that Gerda was excited about the prospect of his return, and Charlene stated that she could use help caring for Gerda. Roger stated that Charlene said he would need to "stay busy; you know, get a job; be employed" if he was going to be at the ranch. Roger explained that his lease in Arizona ended in March 2022, and he moved to the ranch in April. He lived in a park-model mobile home owned by Charlene and her son, Jesse, that was parked near Gerda's house on the ranch. Charlene testified about her concerns that Roger was financially irresponsible and had a gambling problem. Roger testified that he was financially "drained" by his business slowing in 2018, and he was required to pay back taxes. He also testified that he has "never been a good financial planner." When his business slowed, he asked Charlene for a 30-day $15,000 loan. Both Charlene and Roger agreed that he paid the loan back late.

11. Matthew testified that he operates a church headquartered at the ranch called Jesus is King Mission. Several witnesses testified that Matthew regularly posts religious signs on Gerda's property and hosts church services in Gerda's house, with Charlene's permission. Matthew testified that he used to publicize the services at the ranch but stopped posting the address because of "terrorist threats" that he received because of his evangelization activities. The court heard testimony that Matthew's religious fervor led the Oglala Sioux Tribe to banish him from the Pine Ridge Indian Reservation and to require all future missionaries operating on the reservation to register with the Tribe.

12. Matthew invited numerous individuals associated with the church to stay at the ranch. Matthew testified that some, but not all, of those people paid rent. The proceeds from those who did pay rent were split between the church and Charlene. Both Roger and Jesse testified that Matthew's religious fervor and aggressive demeanor, including constantly recording Roger with his cell phone, had become a point of contention between Matthew, Roger, and Charlene. Jesse testified that he lived in Arizona and used to frequently visit South Dakota, but no longer does so because Matthew makes him feel unsafe. Jesse also testified that Matthew's controlling presence has changed Charlene, including the way she cares for Gerda.

13. Gerda is a confirmed Lutheran and longtime member of Bethesda Lutheran Church in Hot Springs. Matthew admitted that his religious views differ greatly from Gerda's, and that he and Charlene do not attend Bethesda Lutheran. Roger and Charlene both testified

that Roger used to take Gerda to Bethesda Lutheran, but Charlene no longer allows him to do so.

14. Charlene, Roger, and Matthew's contentious relationship led to law enforcement involvement on at least two occasions. Roger testified that on September 25, 2021, he called the police because Matthew was threatening Gerda and Jay. The incident began, according to Matthew, when he showed Jay and Gerda a video comparing certain groups to Nazis. Roger testified that Gerda grew up in Nazi Germany, and this video was traumatic for her to watch. The report and body camera video show Deputy Belt speaking to each person, after which he determined that Gerda was confused and unable to correctly state the year or current president. At the conclusion of his investigation, Deputy Belt determined that he did not have probable cause to arrest Matthew but warned him that if he did not keep his distance from Jay, he would come back and arrest him.

15. Charlene summoned law enforcement to the ranch again in May 2022. Charlene and Matthew were recording everything Roger did at the ranch, which led to an argument. Matthew then made fun of Roger for having previously contemplated suicide, which led to Roger "pushing Matthew against a wall." Roger was charged with simple assault but eventually pled to a reduced charge of disorderly conduct for which he served a short jail sentence and was ordered to have no contact with Matthew. Following this incident, Roger testified that he was "basically excommunicated" from Gerda's house due to the no-contact order. Because Matthew was living in the house, Roger testified that he could not enter for fear of violating the order, despite living on Gerda's property in the mobile home nearby. When he wanted to be with Gerda, Roger testified that he would text Charlene that he would like to take Gerda for a drive, an activity that they both previously enjoyed and engaged in often. However, Charlene eventually stopped allowing Roger to see Gerda without Charlene present.

16. The circuit court declined to appoint either Charlene or Roger, instead appointing Black Hills Advocate, LLC ("BHA"), a for-profit corporation. Charlene appealed, and the South Dakota Supreme Court reversed and remanded on the following grounds:

> a. When appointing guardians and conservators, the general inclination in this area is to appoint family members, but the best interests of the protected person is the overriding interest.
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> b. The circuit court found that not only does Charlene allow her son to exploit his grandmother's property and safety, but she does so while admitting that Matthew's religious beliefs are contrary to Gerda's beliefs. The circuit court was very concerned that Charlene will continue to encourage his behavior if she is allowed to serve as Gerda's guardian or conservator. However, the circuit court did not base its determination on Matthew's religious views, but on the concrete effects that his presence and religious activities had on Gerda and the use of her property. Matthew's religious services provoked terroristic threats aimed at Gerda's home address. Charlene implies that those threats were insignificant because the quality and nature of the threats were not ascertained. But as Roger notes, the court's obligation was to focus on what was in Gerda's best interests and who could best promote the protected person's welfare, including her physical safety. There is ample evidence to support the circuit court's findings. Further, Charlene failed to establish that any of the circuit court's factual findings

were clearly erroneous. The circuit court did not abuse its discretion by declining to appoint Charlene as Gerda's guardian and conservator.

c. When a protected person has sufficient capacity to form a preference, they may at any time nominate any individual or entity to act as his guardian or conservator. After such a nomination, if the nominee is otherwise eligible to act and would serve in the best interests of the protected person, the court must appoint the nominee. However, if the protected person does not nominate anyone, the court shall appoint as guardian or conservator the individual or entity that will act in the protected person's best interests. When considering who or what entity to appoint, one of the factors to be considered is the existence of potential conflicts of interest.

d. SDCL 29A-5-110 describes guardian and conservator eligibility requirements. Any capable adult individual may serve as guardian or conservator, unless they work for an agency, entity, or facility that provides "substantial services or financial assistance" to the protected person. This prohibition may be waived by the court if it finds that the best interests of the protected person would be served best by the individual.

e. Similarly, for entities, any capable public agency or nonprofit corporation is eligible to serve as guardian or conservator as long as it is not providing "substantial services or financial assistance" to the protected person. Notably, unlike the provision for appointment of individuals, the court cannot waive the above requirement for entities, even if the court finds that the entity would act in the protected person's best interest. The terms of SDCL 29A-5-110 also permit the court to appoint banks or trust companies to serve as conservators. If no individual or entity is qualified and willing to serve as guardian or conservator, the South Dakota Department of Human Services may serve as either or both, provided that the Department is already furnishing services or financial assistance to the protected person.

f. Here, it is neither appropriate nor necessary to apply the negative implication canon to this question. When a statute includes a list of potential methods to accomplish an objective, it is implied that any action not listed is excluded. When there is not a list, the negative implication canon should not be applied. SDCL 29A-5-304 clearly contemplates sua sponte appointment by the circuit court. When the protected person does not nominate any person or entity, SDCL 29A-5-304 provides that a circuit court "shall appoint as guardian or conservator the individual or entity that will act in the protected person's best interests." Additionally, even if the protected person effectively nominates an individual or entity to serve as their guardian or conservator, the circuit court must ensure that "the nominee is otherwise eligible to act and would serve in the best interests of the protected person." The court is required to make an appointment based on the best interests of the protected person. Where, as here, the circuit court determines that neither option presented by the parties would serve the protected person's best interest, it is inconsistent with the text of the statute to restrict appointment to those options.

g. The Legislature provided a set of qualifications for those appointed as guardians and conservators. A "qualification" is not equivalent to a "consideration." SDCL

29A-5-110 establishes the base qualifications for an individual or entity to serve as a guardian or conservator. Unless a proposed guardian or conservator meets those qualifications, or there is a showing of good cause to permit an exception, a court lacks statutory authority to make the appointment. Here, the Legislature unambiguously evinced its intent to exclude for-profit entities as qualified guardians and conservators. It is, therefore, unnecessary to consider the canons of construction promoted by the parties. Had the Legislature wished to allow for-profit entities to be appointed as guardian or conservator, it could have omitted "non-profit" from the statute, altering the statutory language to read "any public agency or corporation may be appointed. . . ." But the Legislature chose to include "non-profit." This interpretation is bolstered by the explicit consideration that the Legislature gave to conflicts of interest and the protection of vulnerable individuals from abuse. State law excludes nonprofit or public agencies from serving as guardian or conservator if they provide "substantial services or financial assistance" to the protected person. Similarly, an adult individual is excluded from appointment if they are employed by "any public or private agency, entity, or facility that is providing substantial services or financial assistance" to the protected person. SDCL 29A-5-110. In the individual context, this prohibition is waivable if the best interests of the protected person would be served by the individual. However, the theory that for-profit entities are categorically excluded is supported by the court's inability to waive the above prohibition for an entity. Finally, the exception allowing for banks and trust companies to be appointed as conservator is telling. Banks and trust companies would not need to be explicitly included if for-profit entities were available by default for appointment.

h. SDCL 29A-5-110 does not authorize the appointment of for-profit entities to serve as guardians and conservators except as expressly provided by the provision authorizing the appointment of a bank or trust company as conservator. Accordingly, the circuit court lacked statutory authority to appoint BHA.

J. *In re Trust,* 2025 Minn. App. Unpub. LEXIS 249; 2025 LX 65273 (Court of Appeals of Minnesota 2025). Child not yet appointed as conservator for parent did not have standing to file a set-aside petition challenging transactions made by parent before the establishment of the conservatorship.

1. Donald Le Duc and Mary Le Duc had three children: Gary Le Duc, Bruce Le Duc, and Margaret Nolde. Donald and Mary also had five grandchildren, including Jennea Le Duc, who is a child of Bruce. Donald and Mary's estate plan consisted of two wills and a trust, which they adopted in 2010 with the assistance of an attorney. Their wills provided that their assets would pass to the trust, of which Gary, Bruce, and Margaret are the only beneficiaries.

2. In 2017, Jennea was interested in buying a house. Bruce told Jennea that Donald and Mary might lend her money for the purchase so that she would not need to borrow from a commercial lender. Jennea met with Donald and Mary at Bruce's home and discussed possible terms, including amount, interest rate, and repayment period. They agreed on a loan of $200,000, with a 3.5-percent interest rate, and a 30-year repayment period, which resulted in a monthly payment of approximately $900. Jennea later testified that, one week later, Donald called her and said that he and Mary had decided that Jennea did not need to continue paying back the loan after they passed away.

3. Jennea suggested to Donald and Mary that the agreement be put in writing. Jennea prepared a written loan agreement, which was signed by Donald, Mary, and Jennea in July 2017. Jennea completed the purchase of a house and began making monthly payments. In late 2018, Jennea became concerned that Margaret and Gary might challenge the loan. Jennea hired an attorney to rewrite the loan agreement, and Donald and Mary were advised by a different attorney. On January 2, 2019, Donald, Mary, and Jennea signed an amended loan agreement, which states that, upon the death of both lenders, Jennea would "inherit the remaining principal and accrued interest under the note." On the same date, Donald and Mary executed codicils to their wills, which state that, if either of them died and was not survived by the other, they would give to Jennea "the remaining principal balance and accrued interest" of the loan.

4. In August 2019, Donald granted Margaret power of attorney. In May 2020, Margaret and Gary learned about the loan while sorting through papers in Donald and Mary's home. At that time, neither Donald nor Mary remembered signing the loan agreement or meeting with an attorney to change their wills. Mary passed away in September 2020 at the age of 97.

5. On November 20, 2020, Margaret filed a petition for the appointment of a conservator for Donald. On the same date, she filed a petition to set aside the loan to Jennea. Jennea moved to dismiss the set-aside petition on the ground that Margaret had not been appointed conservator and, thus, lacked standing to file it. The district court denied Jennea's motion. The district court also stated that Margaret had an obligation to act based upon her designation as a power of attorney for Donald Le Duc in her fiduciary capacity to protect his assets and affairs, and that Jennea's and Bruce's conduct tolled the statutory two-year look-back period and that the two-year period may be extended due to fraudulent concealment.

6. The district court granted Margaret's conservatorship petition and appointed her conservator. On the same date, the district court filed a separate order in which it granted Margaret's set-aside petition and struck from the loan agreement the provision that would relieve Jennea of making payments on the loan after Donald's and Mary's deaths. In January 2024, Jennea and Bruce filed a joint motion for amended findings, judgment as a matter of law, or a new trial. Donald passed away in February 2024 at the age of 101. The district court denied the post-trial motion in June 2024.

7. Bruce and Jennea appealed and the court of appeals reversed on the following grounds:

> a. The district court erred in its April 2021 order by denying Jennea's motion to dismiss Margaret's set-aside petition because Margaret was not a conservator when she filed the set-aside petition and because the loan agreement that Margaret seeks to set aside was entered into more than two years before Margaret was appointed conservator.
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> b. The relevant statute provides, "If a person subject to conservatorship has made a financial transaction or gift or entered into a contract during the two-year period before establishment of the conservatorship, the conservator may petition for court review of the transaction, gift, or contract." By its terms, the statute applies when a conservator seeks to void a contract or transaction the conservatee

entered into before the conservatorship started if that contract or transaction was entered into under duress or coercion.

c. The plain language of the first sentence of the statute authorizes only one person to file a set-aside petition: the conservator. The negative implication of that provision is that a person who has not been appointed conservator may not file a set-aside petition. A person who was not the conservator of his father did not have standing to file a set-aside petition challenging transactions made by his father before the establishment of the conservatorship.

d. Because the appointment of a conservator, and a petition filed by the conservator, are conditions precedent of a set-aside action, Margaret's failure to have satisfied those conditions at the time she filed the petition makes her set-aside action a legal nullity.

e. No matter how compelling the circumstances for equitable intervention, equity cannot breathe life into a claim that has never been anything more than a nullity. Margaret could have authorized the commencement of a lawsuit in Donald's name based on her power of attorney. But Margaret did not do that. Her set-aside petition makes no reference to her power of attorney or her status as Donald's attorney-in-fact. Equitable tolling is an equitable doctrine, which cannot be invoked because, as stated above, a set-aside claim is a statutory cause of action with strict jurisdictional requirements requiring dismissal upon a failure to comply. Furthermore, equitable tolling would not apply in the circumstances of this case because Margaret's failure to first be appointed conservator and then timely commence a set-aside action was not due to "circumstances beyond her control."

f. The doctrine of fraudulent concealment also is an equitable doctrine. For that reason alone, fraudulent concealment cannot be the basis of the district court's jurisdiction over the parties' dispute. Furthermore, Margaret cannot show that Jennea fraudulently concealed the loan because Jeannea had no duty to disclose the loan to Margaret, with whom she did not have a fiduciary relationship. Margaret was not Donald's attorney-in-fact when Donald and Jennea entered into either the 2017 or the 2019 loan agreement, and Margaret has not cited any legal authority for the proposition that a third party has a duty of disclosure toward a principal's attorney-in-fact. Thus, the district court erred by relying on equity in asserting jurisdiction over Margaret's set-aside petition.

K. *Izquierdo v. Izquierdo,* 2025 Fla. App. LEXIS 6887; 2025 LX 307242 (Court of Appeal of Florida 2025). A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, and removal of all assets during lifetime terminates the trust.

1. This case is primarily an inheritance dispute between two brothers: Appellant Antonio Izquierdo and Appellee Carlos Izquierdo. Prior to 2016, their mother ("Mother") had five bank accounts with designated payable-on-death beneficiaries. In May 2016, Antonio, who was a joint account holder, closed the Mother's accounts and opened new accounts in his name held in trust for his Mother. In July 2016, Antonio initiated guardianship proceedings and sought to be appointed as plenary guardian of his Mother. Carlos filed a counter-petition for appointment. Antonio and Carlos were ultimately appointed as co-guardians.

2. In March 2017, the court ordered all the Mother's funds in Antonio's possession to be transferred into a single guardianship-restricted depository account (the "Guardianship Account"). The order contained no language preserving the accounts or the named beneficiaries. Neither Antonio nor Carlos objected. Antonio closed the accounts and transferred all funds to the Guardianship Account.

3. The funds remained in the Guardianship Account until the Mother passed away in February 2019. In December 2023, more than seven years after the Mother's original accounts were closed, Antonio filed the underlying Adversary Petition in probate court seeking to recognize the funds in the Guardianship Account as Totten Trust funds held in trust for the named beneficiaries of the closed accounts. The name "Totten Trust" was derived from the name of William H. B. Totten, as administrator, who was one of the parties in the leading case, *In re Totten*, 71 N.E. 748 (1904). In that case, the New York Court of Appeals held that a person depositing his own money in a savings bank in his own name as trustee for another does not establish an irrevocable trust until the depositor completes the gift by some unequivocal act or declaration during his lifetime, or unless the depositor dies before the beneficiary without revocation.

4. Carlos moved to dismiss arguing that because the accounts were closed and all funds were transferred to the Guardianship Account before the Mother's death, the funds should be probated.

5. The trial court dismissed Antonio's Petition. Antonio timely appealed and the court of appeals affirmed on the following grounds:

> a. The alleged Totten Trust accounts were closed and all funds transferred to the Guardianship Account before the Mother passed away. A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration. Moreover, neither party objected when the court required the accounts to be closed and the funds transferred, and no language was included in the order to preserve the named beneficiaries.
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> b. Here, the funds were not merely withdrawn from the alleged Totten Trust accounts. All funds were withdrawn and transferred to a separate Guardianship Account, and the alleged Totten Trust accounts were closed. Placing a bank account in the name of one individual "in trust for" another individual creates a tentative or Totten Trust. Such a trust is tentative because partial revocation occurs every time there is a withdrawal, and the trust is revocable during the lifetime of the depositor/settlor.
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> c. As a matter of law, the alleged Totten Trusts were terminated when the accounts were closed and the funds transferred.
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> d. In another consolidated case, Appellant Teresita Pena, Antonio's wife, argues on behalf of their son, Erik. Erik was one of the named beneficiaries of the alleged Totten Trusts. Teresita argues that the order transferring funds from the alleged Totten Trusts to the Guardianship Account violated Erik's due process rights because he was not given notice. The order transferring funds was entered in a separate guardianship proceeding. But this is an appeal from an order dismissing

the underlying Adversary Petition in the probate court. As such, Teresita cannot challenge the order transferring funds in this appeal from a dismissal order in a different underlying probate proceeding.

e. But even if the appeal were proper, Erik's father, Antonio, certainly had notice. In appellate proceedings, the burden is on the appellant to demonstrate error. Teresita has not met her burden here.

L. *Succession of Lynch,* 2025 La. App. LEXIS 1336; 2025 LX 229605 (Court of Appeal of Louisiana 2025). Agent under power of attorney acted outside authority by creating and funding trust to deprive estate of assets solely for the purpose of circumventing intestacy laws, and agent's actions are null and of no effect.

1. John Garner Lynch ("Lynch") died on August 31, 2021, at the age of 85. At the time of his death, he was a patient at Willis Knighton Medical Center, where he had been since the 18th of August, after being diagnosed with COVID-19. Both Lynch and his fourth wife, Katherine Lynch ("Kathy"), were admitted to Willis Knighton with COVID-19. While hospitalized, Lynch was predeceased by Kathy, by one week. Lynch was survived by two of his children, Susan Carol Lynch Hunt ("Hunt") and Martha Elizabeth Lynch Riley ("Riley"), and predeceased by three other additional children. He was also survived by two grandchildren, Nathan Hammett ("Hammett") and Katie Elizabeth Smith ("Smith"), who are the children of his predeceased son and daughter, John Garner Lynch, Jr. and Lisa K. Lynch Smith, respectively.

2. Following Lynch's death, Rudy Allen Nolin ("Nolin"), a good friend of Lynch's, filed a petition to probate his last will and testament (the "2018 Testament"), which was dated March 19, 2018, and requested to be appointed independent executor. In the 2018 Testament, Lynch left his entire estate to Kathy (his wife at the time), and did not name any successor or alternate legatees. Lynch nominated Kathy to be independent executrix of the will, and if she could not serve, he nominated Nolin and Martha Crosslin ("Crosslin"), another good friend, as successor executors, in that order. The trial court admitted the will to probate and, as Kathy predeceased Lynch, confirmed Nolin as independent executor.

3. Subsequently, Hunt, Riley, Hammett, and Smith (hereinafter collectively referred to as the "Heirs") filed a petition for intervention and rule for accounting/discharge, naming Nolin as a defendant. The Heirs' petition asserted that in the 2018 Testament, Lynch had bequeathed his entire estate to his wife, Kathy and that bequest had failed by her predeceasing him. As such, without any alternative legatees named, as his intestate heirs are entitled to be recognized as owners and sent into possession of all Lynch's property and assets.

4. In response, Nolin filed peremptory exceptions of no right of action and no cause of action. In those motions, he stated that on March 19, 2018, the same date Lynch signed the will in question, he also executed a durable power of attorney (the "POA") and appointed Kathy as his agent, Nolin as successor agent, and Crosslin as an additional successor agent. Nolin noted that the POA authorized the agent to form trusts and transfer Lynch's property. Nolin explained that because no one could visit Lynch in the hospital, he could not execute a new will, and the POA was used to transfer all his property to a revocable trust, a plan conceived by Lynch's attorney and Nolin. Numerous

documents were prepared by counsel to effectuate the plans for Lynch's assets in furtherance of what they described as their understanding of Lynch's desires.

5. On August 27, 2021, Nolin signed a declination to serve as agent under the 2018 POA, Crosslin accepted the appointment as successor agent at Nolin's request, and she immediately executed documents presented to her by Nolin to create the John Garner Lynch Trust (the "Trust"). Nolin explained that Lynch was named the beneficiary of the Trust for the remainder of his life, and that at his death, the Trust would be for the primary benefit of Nolin and the secondary benefit of other named friends. Lynch died within days of the trust being created and within a few hours of his assets being conveyed to the trust by Crosslin and Nolin. Nolin declined to become Lynch's agent but named himself in the documents as the trustee of the Trust. Apparently, Nolin, at the direction of counsel, interjected Crosslin as the agent so that it would not appear as though Nolin was acting as agent to convey Lynch's property to himself as trustee and then as beneficiary. Nolin accepted the transfers between 10:00 and 10:15 a.m. on August 31, 2021, and Lynch passed away at 2:12 p.m. that same day.

6. Nolin argued that there were clerical errors in the Warranty Deed, including incorrectly naming the trust as the "John Garner Trust," but that these errors were corrected by a Notarial Act of Correction after Lynch's death. Lynch never identified Nolin as his universal legatee, never requested his property be placed in a trust, and was never informed by Nolin (trustee), Crosslin (agent), or counsel ("attorney") that a trust had been created.

7. Nolin argued that the Heirs had no right of action to demand an accounting because all Lynch's assets were transferred to the Trust and were no longer a part of his estate. He contended that the Heirs have no ownership interest in this property and no right to demand an accounting. He also argued that the Heirs had no cause of action to remove him as independent executor.

8. The Heirs filed a petition to annul and an amended petition to remove the executor and for accounting. They requested that Nolin be removed as executor and that Hunt be appointed independent executor, or in the alternative, that the court appoint an independent third-party executor.

9. The trial court granted Nolin's exception of no right of action related to the Heirs' request for an accounting of the Trust and dismissed their claim with prejudice. It denied Nolin's exception of no cause of action related to the Heirs' request for his removal as executor and granted the Heirs' request to remove Nolin as independent executor, denied their request to appoint Hunt as executrix, and named a third-party executor. It granted Crosslin's exception of no cause of action related to the Heirs' request for an accounting of actions taken by her as agent and dismissed the Heirs' claim without prejudice. It denied Crosslin's exception of no right of action related to the Heirs' request to nullify the Trust and referred it to the merits.

10. The Heirs amended their petition against Crosslin and alleged that she engaged in numerous acts that exceeded her appointment as agent, including that she used the POA to create the Trust, which was not used for the benefit of Decedent's descendants and when Decedent was not interdicted; that she attempted to transfer Decedent's property to the Trust, when the Trust is not for the benefit of Decedent's descendants; and that she attempted to donate Decedent's entire estate to the Trust.

11. During Crosslin's testimony, she confirmed she and Lynch had been friends since the 1980s. She was a nurse at the hospital where Lynch received his final medical care and saw him three times while he was hospitalized. She acknowledged she did not tell Lynch that she accepted the appointment as his agent under the POA and that she never spoke with him about creating a trust for his property. Lynch was in "very bad shape" in the ICU on high-flow oxygen but was not on a ventilator. She testified that Nolin and attorney showed up at her house, stood in her driveway, and told her that she needed to sign the paperwork for the POA and the Trust. She executed those documents in her driveway without examining them and had nothing else to do with the Trust. Crosslin identified a 2014 last will and testament ("2014 Testament") for Lynch, in which his third wife at the time, Marlene, who also predeceased him, was named the sole legatee. In the 2014 Testament, Lynch again made no provisions for his children or any other alternative legatees. Crosslin testified that Lynch's relationship with his children was better during his marriage to Marlene but that in 2018, at the age of 82, when Lynch married for the fourth time, to Kathy, his contact with his children deteriorated. Crosslin testified that she also did not spend as much time with Lynch after his latest marriage and stated, "I think his relationship was different with everybody after he married Kathy." When asked why the Trust was necessary for Lynch, when she had full power of attorney to manage anything that might arise while he was in the hospital, Crosslin stated that she created the Trust because counsel recommended it. Crosslin confirmed that neither she nor Nolin was ever named as a beneficiary of any of Lynch's wills, including the 2014 Testament and the 2018 Testament.

12. Nolin acknowledged that he was never named as a beneficiary of any of Lynch's wills. Nolin testified that Lynch told him he wanted Nolin to "take care of" his property but never stated that he wanted Nolin to become the owner of his property. Nolin testified that while Lynch was in the hospital, people had broken into his property and stolen items from him. Nolin confirmed that he could have taken care of Lynch's property while he was alive without the Trust. He did not know for sure that Lynch was still alive when he signed the documents.

13. Regarding what apparently prompted Lynch's property to be placed in a trust, Nolin testified that while Lynch was in the hospital, some of his properties were being broken into and his things were being stolen. Those circumstances prompted Nolin to participate in a telephone call with Lynch, while Nolin was in the presence of Williams and Williams's associate. There is no indication Lynch asked for the telephone conversation to be recorded or even knew that it was. Nolin and Williams point the Court to this telephone call as evidence of instructions from Lynch that they implemented through the juggling of the role of agent and creation of the trust to benefit Nolin to the exclusion of Lynch's children, who would have inherited from Lynch through intestacy.

14. Counsel testified that it was his idea to use the power of attorney and to create the Trust. Lynch never asked for a trust and was never made aware by him or anyone else that a trust had been created and that his property had been conveyed to it. When asked whether he had tried to draft a new will for Lynch after his fourth wife Kathy died, counsel testified that COVID-19 restrictions may have prevented him from visiting with Lynch in person, and that "well, I didn't need to, I had a power of attorney."

15. The trial court found that Lynch's desire to disinherit his heirs was clear. It determined that due to Kathy's death and his own final illness, Lynch was unable to execute a

testament reflecting his wishes, so he equipped his friends, Nolin and Crosslin, with legal means to achieve his desires regarding his possessions. The trial court determined that the POA granted the "broadest possible authority over Lynch's affairs" to Kathy, Nolin, and Crosslin, citing the language in the POA that stated: "To make gifts, grants, or other transfers without consideration, either outright, in trust, or otherwise to or for the benefit of Appearer's children and their descendants, the spouses of all of Appearer's descendants, and such other persons as Agent may determine to be in Appearer's best interest or in the best interest of Appearer's estate." It also found that the Trust was validly created. The trial court decreed that the Trust was validly created and that the Act of Assignment and Warranty Deed transferred Lynch's assets to the Trust, not including his IRA or property in Texas. It denied the Heirs' petition to annul and dismissed it with prejudice.

16. The Heirs appealed and the court of appeals, with two dissenting justices, reversed, vacated, and remanded on the following grounds:

> a. The actions of the appellees and attorney acting on their behalf appear to have at all times been well-meaning and in good faith. The primary concern is not the motivation of the parties in this matter but, rather, the mechanism to achieve their desired results, which if endorsed by this Court, could create a blueprint for undue influence to potentially be asserted by those of lesser moral character, which could victimize both testators, legatees, and heirs. Good faith here, however, is insufficient grounds to allow the actions and results of endorsing the conveyance of all of the decedent's property to a beneficiary (as trustee and successor beneficiary) he never designated, by means of a trust he never requested, and the existence of which he was never advised.
>
> b. Lynch's friends encouraged him to put something in his will about who would receive his estate if he outlived his wife. Lynch elected not to follow those recommendations, even after speaking with his attorney on the subject in preparing his last will and testament in 2014 and again in 2018. Lynch had already outlived two wives when he had counsel prepare his 2018 Testament, and he knew his children would inherit if his wife at the time were also to predecease him. Lynch had lived with his 2014 Testament controlling, along with the knowledge his children would inherit for years between the death of his third wife and his marriage years later to his fourth wife. In the 2018 Testament, he knowingly continued that apparent intentional plan.
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> c. The district court relied, at least in part, on a telephone call between Lynch, Nolin, and counsel to support the argument that Lynch intended to disinherit his children and bequeath all of his property to Nolin. The transcript reveals Lynch made no mention of a great many of his assets and never identified Nolin to receive any assets other than one or two guns. Even Nolin testified that Lynch never made such a request or declaration. The telephone conversation was not intended to be an estate planning conference or direction by Lynch for his assets to be conveyed to Nolin. Lynch's intentions and discussion reflected in the transcript of the telephone call are irreconcilable with the provisions of the trust document and the naming of Nolin as beneficiary of Lynch's assets. The call was initiated to tell Lynch that his property had been very recently vandalized, items belonging to him had been stolen, and there presently existed a risk of additional

thefts and damage. A review of the telephone conversation illustrates that Nolin prompted Lynch about what he wanted him to do with the property that may not be secured while he was in the hospital. All people involved in the telephone conversation, most especially Lynch himself, expected that he would be soon leaving the hospital. When Nolin and Williams inquired about his property and possible charitable donations, Lynch said, "Don't iron your dress just yet." We interpret this colloquialism to mean that Lynch was not prepared and had no present desire to outline plans for inheritance of his assets and that Lynch did not intend to engage in a conversation effectively concerning global estate planning on this phone call. The record simply does not support an interpretation of this telephone conversation as a directive from a dying man to his lawyer and friend to dispose of all his assets for the benefit of Nolin. A fair review of the telephone call and transcript establish Lynch never said anything approaching the results of implementing the trust, conveying his assets to it, or naming the beneficiary. The provisions of the trust are a gross overreach. The court declines the invitation to elevate the limited telephone conversation as a call of action and of equal significance to contemplated and long-standing estate plans. Lynch did not empower Nolin or Crosslin to create a trust, convey his assets to it, or name Nolin as its beneficiary.

d. Although there is testimony that at different times Lynch mentioned not wanting his children to inherit, he never actually was able to reflect on those expressions and never executed a testament that would provide for alternative legatees in their place. Interestingly, Lynch never undertook any efforts to disinherit his children at any time, if that was in fact, as suggested by Nolin, Lynch's true intention. His actions, and inactions, over several years and after the death of previous wives, speak volumes about his actual desires. Importantly, as previously referenced, the record indicates that Lynch did not care what happened to his assets if his wife predeceased him.

e. Nolin and Crosslin replaced Lynch's volition with their own by use of the POA and directed Lynch's assets through the trust and to Nolin. Nolin may have given all the assets away in an attempt to satisfy what he believed Lynch wanted, but there was no requirement to do so, and this blueprint empowers those who, unlike Nolin, have motives for personal gain.

f. The term "procuration" refers to the same contractual relationship that is known as a power of attorney. A power of attorney is subject to the rules of mandate to the extent those rules are compatible with the nature of the representation. Under the rules of mandate, the authority to alienate or encumber a thing must be expressly given. Self-dealing also requires express authority. When the authority to self-deal involves the sale of immovable property, that authority must be specific and in writing. While Nolin was never officially a mandatory of Lynch, the timing of his declination to serve and the obedient compliance of Crosslin to sign, without question, the documents handed to her, is unmistakable evidence of collaboration and control. Nolin declined to serve as his close friend's agent seemingly for the sole reason so that he could then benefit from Lynch's estate as the beneficiary of the Trust. His testimony is that he would have administered and conveyed some of Lynch's property as indicated in the recorded telephone call, but Nolin would become owner of all of Lynch's estate and the trust

document clearly indicated it was for the future benefit of Nolin above all else, which would include those mentioned in the recorded telephone call.

g. The mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principal sustains as a result of the mandatary's failure to perform. Here, Crosslin did not act fraudulently, and her actions were not for her personal gain, but she exceeded the authority granted to her and assisted and collaborated with Nolin in his obtaining almost immediate ownership of Lynch's estate when there was no indication that is what Lynch actually desired or requested. These actions could be described as self-dealing. Crosslin, as Lynch's agent, had a fiduciary duty, which she promptly abandoned by immediately signing documents presented to her by Nolin and counsel without further inquiry. Crosslin breached her fiduciary duty to Lynch as his agent.

h. A mandatary is not allowed to speculate for his own profit in handling his principal's affairs. Nolin declined to serve as the agent to specifically avoid the appearance of self-dealing. Thus, Crosslin accepted her appointment as Lynch's agent. Crosslin had a duty to confirm with Lynch that he desired, as the Trust documents provided, that Nolin was allowed, after Lynch's death, to transfer all of Lynch's assets to himself. Nolin and Crosslin worked in conjunction, when her loyalty was owed to Lynch and what was in his best interest. As Lynch's agent, Crosslin's actions must comport with the authority granted her in the power of attorney. The Trust was used in this matter solely to rewrite how Lynch's estate would devolve after his death. The record reflects that Lynch had politely ignored her previous recommendations to him to name an alternate legatee in his will to effectively disinherit his children. The actions taken by counsel, Nolin, and Crosslin clearly replace Lynch's volition with their own.

i. Nolin may very well have the most honorable of intentions, but the mechanism and process of obtaining ownership of all of Lynch's assets creates a troubling blueprint. Crosslin acted outside the authority granted to her as agent, and that the documents relating to the Trust, the act of assignment to the Trust, the warranty deed, and any other efforts to deprive Lynch's estate of assets solely for the purpose of circumventing Louisiana's laws of intestacy are declared null and of no effect. The Trust is null and void and all transfers of property, real and personal, corporeal and incorporeal, of John Garner Lynch are null and void. The assets of John Garner Lynch are the property of the estate of John Garner Lynch and the matter is remanded for further proceedings as may be necessary.

17. One dissenting justice would hold that Lynch gave his representative broad and express authority to form a trust and to transfer his assets, and the actions taken by Crosslin as agent to create the Trust and transfer property to it were for Lynch's best interest, as he was the beneficiary of the Trust.

18. A second dissenting justice would hold that the transfer of assets to the trust was permissible pursuant to a valid power of attorney, noting the evidence was abundantly clear decedent had no intention of leaving his property to his heirs and the law strongly favors fulfilling the desires of decedent. While cognizant of the concern raised by the majority of providing a blueprint for potential undue influence by those of lesser moral character, resulting in the victimization of testators, legatees, and heirs, such a concern

should not invalidate actions taken to fulfill the desires of the decedent where there is no suspicion of undue influence or bad faith on the part of anyone involved. Such a determination should be made on a case-by-case basis. The unique facts of this case provide a reasonable and well-supported justification for why, how, and when the transfer of assets were made pursuant to the clear authority granted in the valid power of attorney. The desires of Lynch were unrefuted that his heirs receive nothing, he took steps after his wife's death, limited by his capacity and circumstances in isolation, to ensure these desires were fulfilled, and he had previously granted a broad power of attorney giving his agent the authority to do what happened here.

M. *Thompson v. Barrow*, 2025 Del. Ch. LEXIS 238 (Court of Chancery of Delaware 2025). Court could infer that agent's use of principal's assets to buy himself beer after helping principal made him feel connected to principal, and in equity these de minimus expenditures were in principal's best interest.

1. Ralph Welton Barrow, Jr. and his wife Anna Lee Ernest Barrow built a legacy of four children and a substantial estate. Petitioner Barbara Thompson is one of those children; respondent William E. Barrow is another. On June 3, 1992, Ralph and Anna executed their respective wills and trusts, each leaving all property to the surviving spouse and, upon the survivor's death, to their four children in equal shares; both wills named William and Barbara as co-executors of each parent's estate, and co-trustees of the trusts.

2. In their final years, Ralph and Anna turned to their children to help make decisions for them. In 2018, Ralph executed a valid and operative power of attorney naming William as his agent (the "POA"). William has a bachelor's degree in finance and owned his own computer-aided engineering design consulting firm. Ralph's POA included a section titled "Periodic Reports": "My agent shall prepare written, semi-annual reports regarding my finances, including income received and expenses incurred by my agent for me during the previous six-month period. These reports shall be mailed within 30 days of the end of each six-month period to Barbara." William also signed an Agent's Certification in which he promised to "keep a full and accurate record of all actions, receipts, and disbursements on behalf of" his father "in the absence of a specific provision to the contrary" in the POA.

3. Ralph suffered from dementia in his final years, so William had occasion to act as Ralph's attorney-in-fact. Ralph and Anna moved out of their primary residence in Newark, Delaware, to obtain more care in the fall of 2019. William created a joint bank account for Ralph and himself in July 2019. William frequently went to the Newark residence and a vacation home in Ocean View, Delaware, to maintain and clean out the properties, pick up mail, and pay his parents' bills — what William called "the company business." William used Ralph's van to travel to both properties, and used Ralph's funds for the van's gas and maintenance, rather than using his own car and requesting reimbursement. William used the van for one personal golf trip, but paid for the gas himself.

4. William also used Ralph's funds to pay for food and beer for himself when he was working on his parents' properties and finances. This was consistent with Ralph's own generosity to those who helped him. Before Ralph's decline, when Ralph's children helped him at the Ocean View property, he insisted on feeding them and taking them to the VFW Post for drinks. In William's words, using Ralph's funds to pay for refreshment while he was helping his father "was consistent with what [his] father would do if he was still able to do it."

5. In or about March 2021, William sold Ralph's van and truck to CarMax, and transferred the van's license plate to himself, but did not pay the transfer expenses himself. This license plate has some value in Delaware: it begins with PC and has only four digits. A vehicle Anna had owned also had a low-digit Delaware license plate; William facilitated the sale of that car to Ralph's grandson, and the plate was transferred to William's sibling, the grandson's father.

6. Anna died in February 2020. After her death, but while Ralph was still living, William closed out her accounts at USAA. In the middle of 2020, William obtained online access to Anna's USAA accounts to do so; that logon was also linked to Ralph's USAA accounts, including Ralph's IRA. When William logged on, he saw the "beneficiaries" tab for Ralph's IRA listed Anna as the primary beneficiary and William as the secondary beneficiary — it "jumped out at [him]." William "immediately" told his siblings he was the secondary beneficiary on Ralph's IRA, and that he would split the money among the four siblings. William and the siblings all knew the funds in Ralph's IRA would pass to William as secondary beneficiary, because Anna had died.

7. In the process of notifying USAA of Anna's passing to close out her accounts, William told USAA on a phone call that Anna was the primary beneficiary of Ralph's IRA, and USAA removed Anna as primary beneficiary.

8. In the summer or fall of 2020, Victory Capital Management ("VCM") bought USAA's business line that serviced Ralph's IRA. USAA directed William, as Ralph's attorney-in-fact, to create an online account with VCM, which he did in November 2020. Most of the account information was prepopulated, but the primary beneficiary field was blank. William designated himself as the account's primary beneficiary. He did so to replicate the designations he had seen at USAA, but updated to reflect that Anna had died. He remained the account's secondary beneficiary, even though he did not input that information himself on VCM's website.

9. Ralph died in June 2021. Upon his death, the roughly $43,000 in his VCM IRA were transferred to William, who reinvested them as a beneficiary IRA.

10. During William's tenure as Ralph's attorney-in-fact, he did not send any semi-annual reports as the POA described them. But he offered Barbara access to Ralph's investment account statements, gave her contemporaneous online access to Ralph's accounts, added her to Ralph's joint account with William, and was "transparent with regard to what was occurring with the account." William kept his siblings apprised of how he was handling his parents' estate, and strategic decisions were made as a family. He also consulted with his parents' counsel and financial advisors, until his parents' counsel had to withdraw due to a conflict presented by this litigation.

11. Barbara first started asking William for more financial information in June and July 2021, presumably in her capacity as executor of Ralph's estate. Barbara started asking questions after she expressed interest in buying the Ocean View property and William, as Ralph's agent, told her it was not for sale. William asked Barbara how she would like the information presented, but got no response. At that time, Barbara already had access to Ralph's accounts. In August 2021, William provided her with the check register for Ralph's joint account, which Barbara found insufficient. William again asked what more she wanted but got no response. William also directed his financial advisor to give Barbara

complete access to Ralph's file, and that advisor sent Barbara information accordingly. Barbara did not ask about the license plate.

12. On April 10, 2023, Barbara sued William for breach of fiduciary duty and unjust enrichment, seeking retitling of the VCM account, an accounting, and a constructive trust. Her complaint did not mention the license plate. After Barbara sued William, he decided to keep the funds from Ralph's IRA rather than split them among his siblings. The magistrate held William breached his fiduciary duties by failing to provide Barbara regular accountings, by transferring the license plate to himself, by using Ralph's van, and by using Ralph's funds for groceries and beer. The final report concluded Barbara did not meet her burden to prove William named himself primary beneficiary of Ralph's IRA. Both parties took exception.

13. The court dismissed Barbara's exceptions, and sustained William's exceptions on the van, gas, food and beer, and the disclosure obligations, on the following grounds:

a. The common law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duty principles of trust law must, therefore, be applied to the relationship between a principal and her attorney-in-fact. An attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure.

b. The preponderance of the evidence at trial shows William would have received the funds in Ralph's IRA even if he had not named himself primary beneficiary. The evidence shows William was named the secondary beneficiary while the account was at USAA, and after it was transferred to VCM. William testified to that fact, and VCM documents support it. William testified he "immediately" told his siblings at a family meeting that he was named the USAA secondary beneficiary. Another sibling, who was sequestered for William's testimony, testified William told the siblings he learned he was secondary beneficiary "the first time he had checked," and that William was "surprised." There is no evidence that William named himself secondary beneficiary at USAA or at VCM. The evidence at trial demonstrated William simply updated the primary beneficiary on Ralph's IRA account after Anna's passing.

c. William did not benefit from doing that. William did not transfer Ralph's IRA to himself by naming himself primary beneficiary. When he did that, he was already the secondary beneficiary, and Anna had already died. William was going to receive the funds anyway. Put differently, William did not actually transfer Ralph's IRA to himself; somebody else, perhaps Ralph, did that by naming William the secondary beneficiary at USAA. That designation became operative when Anna died, and that designation transferred to VCM. Barbara failed to prove William's self-designation as the primary beneficiary was a self-dealing transaction. Her exceptions are dismissed.

d. The preponderance of the evidence shows that apart from one golf trip, William's use of the van was for Ralph's benefit. It follows his use of Ralph's funds for the van's gas and maintenance was also for Ralph's benefit. That use was not self-dealing.

e. William's use of Ralph's funds to pay for his own food and refreshments constituted a use of Ralph's assets for William's personal benefit and therefore amounted to self-dealing. So those transactions are voidable in equity. Under the no-further-inquiry rule, there are only a few offramps from voiding self-dealing transactions. One is for William to show they were fair and preapproved or ratified by Ralph after receiving full disclosure. Given Delaware's strict prohibition on self-dealing, and William's close relationship with Ralph, those approval and ratification requirements are stringent. It is not enough to show the principal likely would have approved the transactions; rather, the agent must show the principal actually consented to the transactions after full disclosure.

f. William used Ralph's funds to buy food and refreshment for himself while working on his parents' affairs. It was Ralph's practice to buy his kids food and drink when they came to help him. But the trial record affords no basis to conclude that Ralph preapproved or ratified William's specific transactions under the POA. Given Ralph's deteriorating health at the time, such knowing consent may not have been possible. The trial record does not support the conclusion Ralph gave knowing consent to those particular transactions.

g. Because Ralph is only a part of this case in memory, there is another offramp from voiding the transactions. In Ralph's absence, the court can approve the transactions if it finds they were in Ralph's best interest. The preponderance of the evidence at trial proves Ralph showed hospitality to his kids when they helped him, and that doing so was important to Ralph. According to everyone except Barbara, who has an ax to grind about the Ocean View property, William was a faithful and diligent caretaker of Ralph's property. He devoted substantial time and energy to the "company business" in Ralph's best interest and used some of Ralph's funds on food and drink while doing so — the way Ralph would have wanted. It was important to Ralph that he buy his kids a beer when they came to help him. Based on the tenor of William's testimony, it is reasonable to infer that having his dad buy him a beer after working on his dad's "company business," the way William used to have one with Ralph after they finished a task, made William feel connected to his father. In equity the court found that these de minimus expenditures were in Ralph's best interest. William is not liable for those expenditures.

h. William's transfer of Ralph's low-digit Delaware license plate to himself was a self-dealing transaction. So the transfer is voidable at Ralph's estate's behest, unless William can convince the court an offramp applies. There is no evidence that Ralph gave his informed consent to the transfer of the plate; nor is there any basis to conclude that transfer was in Ralph's best interest.

i. There is good cause to expand the record here. Barbara's counsel brought up the license plate for the first time at trial. The parties did not engage in post-trial briefing before the Magistrate. The Magistrate found William breached his fiduciary duties and was unjustly enriched by transferring the license plate to himself. William's first opportunity to respond to that theory was on exception. Barbara's responsive brief did not dispute that she knew about the license plate transfer at the time of the transfer, or that her silence would lead William to think it was approved. And Barbara's acquiescence would be dispositive. It appears

Barbara knew about the license plate transfer in 2021, acquiesced, then surprised William with an attack on that transfer for the first time at trial in 2025, securing a holding that William breached his fiduciary duties without consideration of Barbara's acquiescence. Here, that circumstance comprises good cause to open the record on exception. William may submit an affidavit offering facts as to what Barbara knew, when she knew it, and how that knowledge affected him. Barbara may file a responsive affidavit as to what she knew, when she knew it, and if there was any effect on William. If the affidavits present a dispute of fact, further testimony will need to be taken.

j. In response to Barbara's request, William promptly gave Barbara the check register to Ralph's joint account. William disclosed the transactions on Ralph's behalf to Barbara, in real time and, redundantly, after she asked; and Barbara has made no showing that the information she received was incomplete. William satisfied his statutory duty of disclosure.

k. William also owed disclosure obligations under the POA to provide Barbara with "written, semi-annual reports" of "income received and expenses incurred." The POA is a contract. Delaware courts interpret contract language from the perspective of an objective and reasonable third party. Powers of attorney, however, are construed more strictly than ordinary contracts. The principal's intent controls the interpretation of the instrument. At the same time, Barbara's claim is one for breach of fiduciary duty: that is an equitable claim, and it is a maxim of equity that "equity regards substance rather than form." Ralph intended William to disclose his income and expenses twice a year to Barbara. William did not do that: he did more than that. He gave Barbara real-time access to that information. Ralph's intent was satisfied. And when comparing the substance of William's disclosures to Barbara, rather than their form, it is clear he met his disclosure obligations. William did not breach his disclosure obligations under the POA. There is no reason to order him to perform a duplicative accounting.

N. *Adams v. Fields,* 2025 Tenn. App. LEXIS 305; 2025 LX 390443; 2025 WL 2402084 (Court of Appeals of Tennessee 2025). Testimony by agent under power of attorney regarding statements by principal and decedent were intended to legitimize her use of funds that would have otherwise been part of the estate and is within the scope of testimony barred by the Dead Man's Statute.

1. In April 2022, Kathryn Claire Adams ("Adams"), daughter of Randolph D. Miller ("Miller"), filed a complaint in her capacity as executrix of his estate against Charlene S. Fields ("Fields"), Miller's longtime companion since 1998. Adams brought claims for conversion, breach of fiduciary duty, fraud, improper possession of real property, and other miscellaneous claims.

2. According to Adams's complaint, Miller was in the final stages of terminal cancer when he executed a durable power of attorney ("POA") appointing Fields his attorney-in-fact on April 12, 2021. Although Miller was lucid at the time, he was in a weakened state and needed assistance with his affairs. Adams alleged that within days of her appointment as Miller's attorney-in-fact, Fields used the POA to withdraw large sums of money from an existing line of credit Miller had with Regions Bank. Miller died eleven days after he executed the POA.

3. Fields allegedly used these sums for her own benefit without Miller's knowledge. Fields also allegedly wrote numerous checks on Miller's bank account, which were used for improvements to one of Miller's properties, 1103 Cove Point Road, LaFollette, Tennessee ("the Cove Point Property"), which Fields knew she would inherit based on the terms of Miller's will. Miller's will provided for his children to inherit his residence at 475 South Shorewood Lane, Caryville, Tennessee ("the Shorewood Property"), but after his death, Fields did not vacate the premises. Adams filed a notice of lien lis pendens on the Cove Point Property. Adams sought damages in the amount of nearly $360,000. Adams filed an amended complaint which was substantially similar to the first. Fields filed an answer denying the substance of Adams's allegations and claims.

4. An assistant bank vice president testified about a check payable to "cash" in the amount of $15,000 for "withdrawal" endorsed by Fields, and that Fields deposited approximately $166,000 from Miller's home equity line of credit ("HELOC") into Miller's checking account and then into her account. McMillan also testified about checks written for "Charlene's life insurance" and flooring and windows.

5. Adams testified that she had not visited her father very often because she has a handicapped son and lives in Ohio. She has known Fields since 1998 when Fields began dating Miller. She testified that Fields continued to live at the Shorewood Property eighteen months after Miller's death. She further explained that she had been unable to locate some of Miller's personal property, including "collections and paintings from his European ancestors," located at the Shorewood Property. She valued these items at $37,000. Adams had requested Fields vacate the Shorewood Property, but she did not do so. While Fields lived there, Miller's estate paid all utilities, HOA fees, dock fees, and mortgage payments totaling $11,000. Adams never specifically requested rent from Fields. Adams testified that Fields tried to keep Miller's children away from him. Michelle Strohmenger ("Strohmenger"), Adams's sister, testified that when she would call her father, Fields would answer and not let her talk to him. Fields told her that Miller did not wish to see any of his children. During a visit on April 19, 2021, Adams and her daughter witnessed Miller in excruciating pain. Fields, his full-time caregiver, gave him Aleve rather than prescribed pain medication. Adams's daughter testified that it was "hard to keep track of conversation" with him and that he was moaning with pain and was short of breath. Fields had him transferred to the hospital after Adams and her daughter left. He was released from the hospital into hospice care, slipped into a coma on April 21, 2021, and died on April 23, 2021.

6. Fields attempted to testify about Miller's statements about the money transfers, about his desire for a mausoleum, and improvements to the Cove Point Property. The Trial Court sustained Adams's objection based on the Dead Man's Statute, and would not allow Fields to testify about what Miller said on these points, despite Adams's witnesses having testified about Miller's previous statements. The Trial Court pointed out that Fields had not objected to Adams's and her witnesses' testimony.

7. Fields testified that she did not direct Miller's finances, that he would tell her what to do, she would write checks, and he would sign them. Fields testified that she did not transfer money from the HELOC to her account, that she had never used the POA, that she did not sign any of the checks presented by Adams, and that she did not take any of Miller's money. Fields testified that she could not vacate the Shorewood Property until Adams removed her personal property from the Cove Point Property.

8. Mr. Miller was 74 years of age at the time of the disputed transaction. He was a cancer patient. Although he previously managed his own affairs, at the time in question, he was very weak and experiencing significant pain. Defendant was his primary caregiver. Visits and phone calls from his children were not welcomed by Defendant. Defendant often made excuses to discourage them from talking with their father by phone or visiting. During the relevant time period, Mr. Miller received no independent advice. He was in an emotional state. Frankly, he was a few short days from death at the time of these transactions. At the time of the April 19 and 20, 2021 transactions, he was hospitalized and being set up with hospice care.

9. The Trial Court found that Adams had proven by clear and convincing evidence that Fields exerted undue influence over Miller, resulting in her receipt of and benefit from funds totaling $241,129.75. The Trial Court awarded the estate $37,000 for the personal property missing from the Shorewood Property. The Trial Court placed a lien on all property, real or personal, to be received by Fields via Miller's will. After the Trial Court denied her motion for a new trial, Fields appealed.

10. On appeal, the court of appeals affirmed on the following grounds:

a. The dominant rule in Tennessee and elsewhere is that the existence of a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, gives rise to a presumption of undue influence that may be rebutted only by clear and convincing evidence of the fairness of the transaction. A confidential relationship arises as a matter of law when an unrestricted power of attorney is granted in favor of the dominant party and is, in fact, exercised by the dominant party. Fields was the dominant party in the confidential relationship and clearly benefitted from the gift. Thus, a presumption of undue influence arose, and Fields must establish that the transaction was fair by clear and convincing evidence.

b. A presumption of undue influence can be rebutted by showing a lack of suspicious circumstances. The following "suspicious circumstances" are relevant to the analysis: (1) the decedent's advanced age and/or physical or mental deterioration; (2) the dominant party's active involvement in the transactions at issue; (3) secrecy concerning the transaction's existence; (4) the lack of independent advice; (5) the decedent's illiteracy or blindness; (6) the unjust or unnatural nature of the transaction; (7) the decedent being in an emotionally distraught state; (8) discrepancies between the transaction and the decedent's expressed intentions; and (9) fraud or duress directed toward the decedent.

c. The "Dead Man's Statute" provides: "In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors."

d. The purpose of the Dead Man's Statute is to protect estates from spurious claims and prevent interested parties from giving self-serving testimony regarding conversations or transactions with the deceased when the testimony involves transactions or statements that would either increase or decrease the deceased's

estate. The statute is designed to prevent the surviving party from having the benefit of his own testimony, when, by the death of his adversary, his representative was deprived of his executor's version of the transaction or statement.

e. Adams filed her original and amended complaints as the executrix of Miller's estate and made claims that Fields converted Miller's property to her own use and benefit. Her excluded testimony regarding statements by Miller were intended to legitimize her use of funds that would have otherwise been part of the estate after Miller's death. Without Fields's transactions, Miller's estate would have been larger. Her attempted testimony is within the scope of testimony involving "transactions or statements that would either increase or decrease the deceased's estate."

f. As for Fields's complaint that the Trial Court allowed Adams, her sister, and her daughter to testify about Miller's statements, she did not contemporaneously object to their testimony. It is well-settled that the failure to object during trial constitutes a waiver of the issue on appeal.

g. Suspicious circumstances establish that Fields unduly influenced Miller, particularly given his weakened physical and mental state at the time of the transactions. Fields's reliance on her own testimony is insufficient to demonstrate that she did not unduly influence Miller.

h. A conservator of personal property or executor of an estate is qualified to testify about the value of a deceased's property. The conservator of an absent or deceased party's property stands in the shoes of the absent or deceased party and, therefore, may testify with regard to the value of the absent or deceased party's property. Fields's bare-bones argument that Adams did not purchase the items or know whether they were moved to his most recent residence without supporting case law or any countervailing evidence as to the items' values in the record leaves the court with no other viable option than to affirm the Trial Court's finding as to these items' values, particularly given that the Trial Court evidently found Adams credible.

II. BUSINESS INTERESTS

A. *Keynetics S'holder Tr. v. Keynetics Inc.*, 2025 Del. LEXIS 384; 2025 LX 414801 (Supreme Court of Delaware 2025). Voting trust dissolved as sanction for violating court orders barring attempts to violate stock transfer restrictions that would jeopardize company S-corporation status.

1. Keynetics is a Delaware S-corporation. An S-corporation's stock may only be held by "permissible" stockholders, or it risks losing its pass-through tax benefits. A corporation is not a permissible S-corporation stockholder. To protect its S-corporation status, Article 4.3 of Keynetics' Certificate of Incorporation — the "Charter Restriction" — allows it to issue stop transfer notices that prohibit transfers of its stock "reasonably likely" to affect its tax status.

2. The trust in this case was a Delaware voting trust that holds record title to Keynetics stock. Voting trusts are only permissible S-corporation stockholders if all beneficiaries are also permissible stockholders. Gary Lutin is the chairman of the trustee corporation, Fair

Value Investment, Inc. Lutin has communicated many times with Keynetics' representatives on behalf of the Trust and Trustee. The court found that Lutin personally controls the Trust and the Trustee.

3. In 2017, the Trust acquired record title to its Keynetics stock when three individuals — the Trust "Participants" — deposited their shares with the Trust. Later, the Trust became bound by Keynetics' Charter Restriction. In return for their deposits, the Participants received beneficial ownership interests in the Trust through instruments called Trust Certificates. The Trust Certificates correlate with the number of Keynetics shares owned by the individuals.

4. Five times in 2021, the Trustee notified Keynetics of agreements to transfer beneficial interests in the Trust from the Participants to a buyer named John Tully. Tully, however, refused to agree to the Charter Restriction. The Trust argued that the restriction did not apply to a transfer of beneficial interests in the Trust. Keynetics disagreed. It first issued stop transfer notices and then filed a Motion to Enforce the Charter Restriction, to prevent the transfer to Tully. After a hearing on the Motion, Tully agreed to the Charter Restriction and obtained Trust Certificates. Keynetics and the Trust entered a stipulated order and final judgment ("Final Judgment"). The Final Judgment stated that "Trust Certificates, including the corresponding beneficial ownership interest in Keynetics' common stock held in record name by the Trust," were bound by the Charter Restriction. The judgment was not appealed.

5. More transfer attempts followed. The Trustee notified Keynetics of an October 2023 agreement for Tully to transfer his beneficial interest in the Trust to an impermissible stockholder — the corporation Keynetics-Clickbank Investments, Inc. ("Clickbank"). Lutin was Clickbank's president. The Trustee offered Keynetics an alternative to this transfer: Keynetics could buy the shares instead. Keynetics refused to buy the stock and instead issued a stop transfer notice for the transfer agreement. The Trustee rejected the notice and claimed the Charter Restriction and Final Judgment (together, "Transfer Restrictions") did not bar the transfer. That November, Keynetics filed a motion to enforce the Final Judgment. Two weeks later, the court issued an Order to Show Cause to the Trust. The Trust never responded.

6. The court entered a Supplemental Order and Final Judgment ("Supplemental Judgment") "clarifying" that the earlier-stipulated Final Judgment prohibited the transfer "of any interest in the Trust, the Trust Certificates, or the shares of Keynetics common stock held in record name by the Trust," unless permitted by the Transfer Restrictions. The Court also ordered the Trust to pay all Keynetics' legal fees and costs, totaling $117,450 ("First Fee Award"). The Trust did not appeal the Supplemental Judgment.

7. Undeterred, the Trust tried twice to transfer beneficial interests in the Trust — these times, from a Participant to the Trust itself — for the stated purpose of paying the First Fee Award. Again, Keynetics issued stop transfer notices, and then filed a Motion to Enforce the Final and Supplemental Judgments, as well as for contempt. The Trust did not formally respond to a second Order to Show Cause, but Lutin appeared at the hearing on the Motions. Afterwards, the court in the "Second MTE Order" held the Trust in contempt of the Final Judgment and First Fee Award; imposed a per diem fine on the Trust of $3,000 for each day it remained in contempt; declared the transfers void ab initio; ordered the Trust not to proceed with the challenged transfers; awarded Keynetics its expenses (the "Second Fee Award"); found Lutin jointly and severally liable with the Trust

for the Second Fee Award; imposed a per diem fine on Lutin of $3,000 for each day the Trust is in contempt of the Second Fee Award; and held the Trust will be dissolved if it fails to pay either the First Fee Award or the Second Fee Award within thirty days of the entry of the Second Supplemental Judgment.

8. The Second MTE Order became final on March 27, 2025. Even this second round of sanctions, however, did not deter the Trust. After the court issued its Second MTE Order, the Trustee sent yet another agreement, this time to transfer beneficial ownership interests in Keynetics stock (as opposed to in the Trust) from Tully to Clickbank. Shortly thereafter, Keynetics issued another stop transfer notice. The Trustee responded by claiming the notice was invalid because the Transfer Restrictions did not apply to beneficial interests in the stock. Keynetics filed a third Motion to Enforce. The Trust, finally appearing in court, argued it was impossible to comply with the previous orders to pay fees because it had no assets with which to pay them. It asserted that, due to its status as a voting trust, it held only non-transferable record title to the stock, and that the transferable beneficial interest was held by the Participants and Tully. It claimed, therefore, it had no power to sell any of the stock to pay the fees and was immune from any monetary sanction. The court was unconvinced. The Trust's status as a voting trust, it observed, made no difference: "The fact that the Trust holds stock for the benefit of holders of beneficial interests does not matter, any more than the fact that a corporation owns assets for the ultimate benefit of its stockholders." What mattered was that the Trust was a jural entity under Delaware law. And in any event, the court held, the Trust's governing document required the Trustee to pay any contempt sanction. Finally, the court found that the Trust and its Trustee had shown an ability to pay the debts, as they had employed several law firms. The court therefore rejected an impossibility defense for the earlier-imposed sanctions.

9. The court then issued new sanctions. It held that the most recent transfer attempt, like the previous attempts, violated the Final and Supplemental Judgments. Noting its lesser sanctions had proven ineffective, the court issued a permanent injunction: (1) requiring the Trust to withdraw its consent to the latest transfer agreement and not to recognize any similar assignment; (2) ordering the Trust dissolved; (3) approving $109,793 for the Second Fee Award and awarded Keynetics an undetermined Third Fee Award; (4) holding Lutin and the Trustee jointly and severally liable with the Trust for the amounts due; and (5) barring each from participating in any entity holding Keynetics stock.

10. The Trust and Lutin appealed from the court's last order, and the Delaware Supreme Court affirmed on the following grounds:

> a. The Court of Chancery found that the Trust owned or controlled both the record and beneficial ownership of the Keynetics stock held in trust. If the Trust disagreed with the court's ruling, it could have appealed. Whether correct or not, the court's unappealed orders became final. The Trust is barred from raising new arguments involving the same parties that could have been raised in the earlier proceeding.
>
> b. Although a statutory trust shall have perpetual existence, and may not be terminated or revoked by a beneficial owner or other person except in accordance with the terms of its governing instrument, a court is not included in the list of individuals or entities prohibited from terminating the trust. Thus, there is no statutory bar to equitable dissolution of a statutory trust as a sanction for contempt.

c. The court can hold a party in contempt who fails to obey a restraining or injunctive order, or to obey or to perform any order. It has broad discretion when choosing a remedy for contempt. Even though it must be exercised with great restraint, the court's equitable power to dissolve a trust for contempt, like its power to dissolve a solvent corporation, is justified upon a showing of gross mismanagement, positive misconduct by the corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented. That showing has been made here.

d. Lutin controlled the Trustee, which controlled the Trust. Lutin controlled Clickbank. Multiple times, the court ordered the Trust not to engage in transfer attempts. The Trust's controller — Lutin, acting for Clickbank — did so anyway when he sought to have Clickbank — an impermissible entity — take possession of Trust Certificates and Keynetics stock. These attempts persisted even after the court specifically warned Lutin that any further violations would result in the Trust's dissolution. Orders bind not only the named parties, but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. Parties in privity with the Trust — namely, Lutin and Clickbank — defied the court's orders, even after being warned what consequences would follow. An extreme remedy was warranted under the circumstances.

e. Lutin controlled the Trust, the Trustee, and the Clickbank corporation, each of which acted to further violations of court orders that jeopardized Keynetics' S-corporation status and resulted in needless litigation. Imposing sanctions on Lutin and the Trustee was necessary to ensure court orders were no longer defied through the carrying out of prohibited acts through non-party aiders and abettors.

III. ACCOUNT CLOSING

A. *In re Mode,* 2025 Pa. Super. Unpub. LEXIS 1254; 2025 LX 48301 (Superior Court of Pennsylvania 2025). Court is divested of jurisdiction over trust when all trust assets are distributed pursuant to court order.

1. Martha-Lisa Flinsch is the daughter of Charles J. Mode. Mr. Mode settled the Mode Family Trust, which originally left all of his assets to Ms. Flinsch. Thereafter, he remarried and amended the trust three times. Mr. Mode's third amended trust gave $1,900,000 to North Dakota State University Foundation & Alumni Association ("NDSU"), $150,000 to Mr. Mode's second wife, and $55,000 to Ms. Flinsch.

2. Mr. Mode died in 2020. On April 3, 2023, the corporate trustee filed a First and Final Account of the Trust in the orphans' court. The trustee sought authorization to distribute the res under the terms of the third amended trust document. The trustee provided Ms. Flinsch with notice of the proceedings. Ms. Flinsch did not object to the Account or to the proposed distributions, and the orphans' court issued an order approving distribution of the res per the third amended trust. No one appealed. The trustee distributed the res according to the order.

3. Four months later, Ms. Flinsch petitioned to have the amended trusts voided. She alleged undue influence, lack of testamentary capacity, and fraud. NDSU preliminarily objected to the petition on various grounds, including lack of subject-matter jurisdiction

and res judicata. The Commonwealth of Pennsylvania (as parens patriae) intervened and joined the preliminary objections. Ms. Flinsch filed an amended petition. NDSU and the Commonwealth renewed their preliminary objections. The orphans' court sustained the preliminary objections and dismissed the amended petition based on lack of subject-matter jurisdiction and res judicata.

4. On appeal, the superior court affirmed on the following grounds:

a. Notably absent from Ms. Flinsch's appellate brief is the phrase "subject-matter jurisdiction" and any argument specifically addressing the subject-matter-jurisdiction issue. Instead, Ms. Flinsch claims that she has standing to file her petition and focuses the remainder of her argument on res judicata. No colorable argument can be made that the orphans' court retained subject-matter jurisdiction once the distribution became final.

b. The subject-matter jurisdiction of the orphans' court does not last forever. The jurisdiction of the orphans' court is complete and exclusive. It continues as long as the trust res is administered by the trustee, and it ends when that res is delivered to the beneficiary or the ones entitled thereto under the testamentary documents. Here, the trustee has distributed the res to the beneficiaries of the trust based on the order. Ms. Flinsch did not appeal that order, and it has become final. Hence, the res is gone, and it will never return to the trust.

c. A trust terminates when no purpose of the trust remains to be achieved. Following Mr. Mode's death, the sole purpose of the trust was to distribute the res to the named beneficiaries. When the trustee completed that task, no purpose of the trust remained to be achieved. Therefore, the trust terminated, and the orphans' court's subject-matter jurisdiction terminated, as well.

d. Accordingly, the orphans' court properly determined that it lost subject-matter jurisdiction over the trust — and, hence, over Ms. Flinsch's petition for citation — when the trust ceased to exist.

B. *In re Proceeding Commenced by Cox,* 2025 N.Y. Misc. LEXIS 163 (Surrogate's Court of New York, New York County 2025). Court enforces refunding agreement to compel charitable trust distributees to provide funds to defend claims filed against estate after fully distributed.

1. Mamdouha S. Bobst ("Decedent"), a primary beneficiary of the estate of her predeceased husband, Elmer Bobst, died on September 10, 2015. Her will, as amended by codicil, was admitted to probate in this court and letters testamentary issued to the nominated executors, Patricia Nixon Cox ("Cox"), Carlton Rochell, Jr. ("Rochell"), and BNY Mellon, N.A. ("BNY Mellon"). Under her will, Decedent bequeathed her residuary estate to the trust she had established on November 9, 1988, and restated and amended thereafter (the "Mamdouha Bobst Trust" or "Trust"). In addition to serving as executors of Decedent's estate, Cox, Rochell, and BNY Mellon also serve as successor trustees ("Trustees") of the Trust.

2. The Trust provides that upon the grantor's death, four charities, Memorial Sloan Kettering, New York University, Princeton University, and the American University of Beirut ("Charitable Beneficiaries"), shall receive the Trust's remainder in equal shares. The Trust also provides the following: "Upon the Grantor's death and to the extent that the assets of the Grantor's residuary probate estate (excluding income thereof) are not

sufficient, the Trustees shall pay over to the Grantor's legal representatives out of the trust estate such amounts as such legal representatives shall certify to the Trustees as the amounts required to provide full payment of all debts of the Grantor and all administration expenses of her estate."

3. In April 2018, the Trustees concluded their administration of the Trust and obtained receipts and releases from the Charitable Beneficiaries after providing them with their informal final account ("Trustees' Receipt and Release"). Each of the Charitable Beneficiaries received more than $25 million subject to Paragraph Eleventh of the Trustees' Receipt and Release, which provides that each of the Charitable Beneficiaries agrees: "to refund to the Trustees any part of the distributions received by it from the Trust, the Trustees may require to meet claims, charges, taxes, expenses, commissions, legal fees, and demands of any kind or nature whatsoever (together with all legal and other expenses of defending or adjusting the same) which may at any time accrue or be asserted against the Trust or the Trustees and shall be properly payable by the Trust."

4. More than three years later, Melinda Rockwell ("Rockwell"), Elmer Bobst's great-grandchild, commenced an action in New York County Supreme Court ("Supreme Court Action"), pursuant to the Child Victim's Act, alleging that Elmer Bobst, who died on August 2, 1978, had sexually abused her. Among the multiple defendants Rockwell named were Cox, Rochell, and BNY Mellon, as the executors of Decedent's estate ("Executors"). Because the Executors had fully distributed the estate's assets in accordance with Decedent's will several years before the commencement of the Supreme Court Action, the estate had no funds on hand to cover the cost of the estate's defense in the Supreme Court Action.

5. To pay for such defense, Rochell, as a co-trustee of the Mamdouha Bobst Trust, requested in a letter dated March 1, 2022, that each of the Charitable Beneficiaries contribute $100,000 to a litigation defense fund in order to defend Decedent's estate in the Supreme Court Action. The basis for this request was the refunding provision of the Trustees' Receipt and Release. The same month, Rochell filed a motion to dismiss the Supreme Court complaint. Cox and Rochell, as two of the co-trustees of the Mamdouha Bobst Trust, commenced the instant proceeding seeking an order compelling the Charitable Beneficiaries to comply with the Trustees' Receipt and Release by refunding the Mamdouha Bobst Trust at least $100,000 each and such other assets as may be needed to defend against the Supreme Court Action.

6. The Charitable Beneficiaries objected. Cross-motions followed. The trial court compelled the Charitable Beneficiaries to refund to the Trustees a portion of the Trust funds they received so that the Trust may meet its obligation to Decedent's estate to pay administration expenses that have accrued as a result of the Supreme Court Action on the following grounds:

> a. Petitioners have established their entitlement to a direction to the Charitable Beneficiaries that they refund to the Trustees a portion of the trust funds they received so that the Trust may meet its obligation to Decedent's estate to pay its administration expenses. It is undisputed that the Executors are defendants in the Supreme Court Action and that Decedent's estate is currently insolvent because all of the estate's assets were distributed to the Trust and then to the Charitable Beneficiaries.

b. Notwithstanding the estate's insolvency, however, the Executors remained authorized and, in fact, obligated as fiduciaries to defend the estate and protect its beneficiaries from a potential judgment. That the estate may not have sufficient assets to satisfy a potential judgment does not absolve the estate of potential liability. Any legal fees thus incurred in defending the estate constitute administration expenses that are presumptively payable with estate assets.

c. The Mamdouha Bobst Trust clearly provides that where, as here, the estate's assets are insufficient to pay administration expenses, the Executors may look to the Trust. Further, under circumstances where the Trust, in turn, has no assets, Petitioners may avail themselves of the Trustees' Receipt and Release, which obligates the Charitable Beneficiaries to refund to the Trust any part of the distributions that they received that the Trustees may need to pay claims, charges, taxes, expenses, commissions, legal fees, and demands of any kind that may at any time accrue against the Trust or the Trustees and shall be payable by the Trust. Here, given the estate's insolvency, the administration expenses of the estate incurred in defending against the Supreme Court Action necessarily accrue against the Trust and therefore trigger the Charitable Beneficiaries' obligation to refund to the Trust those funds needed to pay such expenses.

d. The Charitable Beneficiaries have failed to raise a material issue of fact requiring a trial. Their argument that the Trust was intended to apply only to the "period immediately following Grantor's death and before the trust assets are distributed" is without merit. The provision is necessarily triggered by Grantor's death but contains no other temporal limitation and explicitly contemplates payment from the Trust of all the administration expenses of Grantor's estate if required. Likewise, the Trustees' Receipt and Release does not support the Charitable Beneficiaries' contention that they have no obligation to pay any of the estate's legal fees resulting from the Supreme Court Action because the Executors and not the Trustees were named as defendants. The plain language makes clear that the Trustees may require the Charitable Beneficiaries to refund amounts needed to pay for legal expenses that "accrue against the Trust." Here, the Executors have necessarily incurred administration expenses defending the estate (and protecting the interests of the Charitable Beneficiaries) in the Supreme Court Action under circumstances where the estate is indisputably insolvent. The Trust contemplates such a possibility and provides that the Executors may look to the Trust to pay these expenses.

e. The Charitable Beneficiaries' other arguments fare no better. They either mischaracterize Petitioners' arguments or raise irrelevant issues that ignore that the Trust itself and the Trustees' Receipt and Release were intended to ensure that, if necessary, the Trustees would be able to pay the estate's administration expenses either with funds in the Trust or with funds recovered from the Charitable Beneficiaries. Neither the plain language of these provisions nor common sense supports the Charitable Beneficiaries' contention that the Executors should be exposed to personal liability for carrying out the fiduciary obligations attendant to their roles simply because the estate required further administration after the settlement of their final account. Indeed, such an argument runs counter to the statutory framework in New York, which provides that beneficiaries who have received estate assets are liable for the payment of,

among other things, the expenses of administration even after the executors have administered the estate.

f. The Charitable Beneficiaries also ignore that had the Supreme Court Action been commenced prior to final settlement of the Executors' and Trustees' accounts, the Executors, in due course, would have done what they did here — hire counsel to defend the claims against the estate and use estate funds to pay such counsel. If, for any reason, the estate did not have sufficient funds at the time to cover such administration expenses, the Trustees would have paid those expenses pursuant to the Trust. Upon the presentation of the Executors' and Trustees' final accounts, the Charitable Beneficiaries would have had an opportunity to challenge any administration expenses related thereto on whatever grounds they wished. What the Charitable Beneficiaries would not have been able to do in the first instance is what they seek to do now, that is, to transfer the liability for administration expenses incurred in defending the estate's (and thus their own) interests in the Supreme Court Action to one or more of the Executors personally.

g. The court will allow Petitioners to supplement the record, as indicated below, to establish the amount of administration expenses, that have accrued against the Trust, subject to the Charitable Beneficiaries' right to challenge them on reasonableness or other grounds.

C. *Mastriana v. Brown Bros. Harriman Trust Co., N.A.,* 2025 Fla. App. LEXIS 3748; 2025 LX 71077; 50 Fla. L. Weekly D 1083 (Court of Appeal of Florida, Fourth District 2025). There is no right to a jury trial on claims that trustee retained an unreasonable reserve on removal and replacement of a trustee.

1. The successor to the settlor of a substantial charitable trust (the "Trust") appointed appellee Brown Brothers Harriman Trust Co. as trustee. Six years later, the successor removed Brown Brothers as trustee and appointed another. After Brown Brothers' removal, it transferred the assets to the new trustee but withheld $8.9 million — less than ten percent of the Trust's assets — as a reserve.

2. The Trust filed a complaint against Brown Brothers, alleging that it had unreasonably withheld the $8.9 million as reserves, and had imprudently invested these funds. After a non-jury trial, the circuit court found, in a fact-intensive judgment, that $8.9 million was a reasonable reserve and that Brown Brothers had invested the money in good faith.

3. On appeal, the court of appeals affirmed on the following grounds:

a. Given that the trial court was in the best position to evaluate the credibility and weight to be given to witnesses and evidence, competent, substantial evidence supports the final judgment.

b. The Trust's original two-count complaint sought declaratory relief that Brown Brothers had improperly withheld the $8.9 million, and surcharge damages for imprudent investment of the funds. The damages alleged were the loss of appreciation in the Trust's portfolio. The Trust sought a judicial determination of a reasonable amount for Brown Brothers to have reserved, and demanded a jury trial on its surcharge claim. The trial court denied the Trust's demand for a jury trial. The trust was not entitled to a jury trial on these issues.

c. The Trust's claims involved a trustee's duties as set forth in the Florida Trust Code.

d. A trustee who has been removed is required to "deliver the trust property within the trustee's possession" to a "successor trustee" within a reasonable time, "subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes." Until property is transferred to a successor trustee, a trustee who has been removed "has the duties of a trustee and the powers necessary to protect the trust property." A trustee must exercise discretionary powers "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

e. The Trust demanded a jury trial and Brown Brothers moved to strike the demand because, among other things, the Trust's claims sounded in equity and thus did not carry the right to a jury trial. Ultimately, the trial court granted Brown Brothers' motion to strike, thus denying the Trust's demand for a jury trial.

f. Under Florida law, whether one is entitled to a jury trial depends upon whether the right was recognized at common law, at the time the Florida Constitution was adopted. Article I, Section 22 of the Florida Constitution guarantees a jury trial as to those issues triable by a jury at common law, before the first state constitution became effective in 1845. The right to a jury trial in Florida thus turns on "whether the party seeking a jury trial is trying to invoke rights and remedies of the sort traditionally enforceable in an action at law, as opposed to an action traditionally left to the equity side of the court." In evaluating whether a right to jury trial exists, courts examine both the nature of the issues involved and the remedy sought.

g. Similar to Article I, Section 22 of the Florida Constitution, the Seventh Amendment of the United States Constitution guarantees a jury trial in suits at common law. Analysis of whether the federal right to a jury trial attaches to a cause of action involves considerations akin to those that apply to Florida's constitutional right. To determine whether a particular action will resolve legal rights, the court examines both the nature of the issues involved and the remedy sought. First, the court compares the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, the court examines the remedy sought and determines whether it is legal or equitable in nature.

h. Actions by a trust beneficiary against a trustee for breach of fiduciary duty were within the exclusive jurisdiction of courts of equity, so no right of jury trial attached. Courts of equity have original, general, and inherent jurisdiction over trusts and the administration thereof. All trusts, whether express or implied, are within the jurisdiction of the chancellor, even though the relief demanded is for the recovery of money. Proceedings involving trusts are ordinarily within the exclusive jurisdiction of equity.

i. The Trust sought a judicial determination that Brown Brothers' reserve was unreasonable. We have found nothing in the Florida UTC, which directs fact determinations to be submitted to a jury. Even if a claim against a trustee involves the recovery of money, the claim is within the exclusive jurisdiction of equity, so the right to a jury trial does not attach.

j. This approach aligns with the Restatement (Second) of Trusts. Section 197 provides, "Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable." Those exceptions are: (1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment; and (2) If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against him.

D. *Tharrett v. Everett,* 2025 Kan. LEXIS 277; 2025 LX 390115 (Supreme Court of Kansas 2025). When a trust beneficiary accepts a distribution pursuant to a court order closing a trust, the beneficiary cannot then take an inconsistent position and challenge the amount distributed on appeal, and the beneficiary has acquiesced to the judgment and his appeal is dismissed for lack of jurisdiction.

1. Roxine Poznich died testate in 2020 with a revocable living trust. The trust beneficiaries were her five children. There was a bitter dispute between two of those children concerning the trust. Poznich's daughter, Sarah Tharrett, was named as the successor trustee. But Poznich's son, David Everett, sued in May 2021 to remove Sarah as trustee. David's lawsuit was dismissed.

2. In October 2021, Sarah sent a final trust report, including an accounting and a proposed distribution of remaining assets. Once again, David was dissatisfied. All beneficiaries except David executed releases acknowledging and approving the documents. David, proceeding pro se, raised several objections that prevented closing the trust.

3. Consequently, in June 2022, Sarah filed a declaratory action as trustee seeking authorization to distribute the trust estate as provided in the trust report. Sarah also sought costs against David because his actions leading up to the declaratory suit prevented winding up the trust. David filed several pro se pleadings in response in which he accused Sarah of filing the action for an improper purpose due to his failure to execute the release. The parties engaged in extended motions practice. Ultimately, the district court closed the trust and released Sarah from trustee duties. It further ordered Sarah's attorney to distribute the remaining funds from his trust account to the beneficiaries. Finally, the court awarded Sarah $4,000 in attorney fees from David's share of the trust distribution due to "extraordinary services in defense of the estate" by Sarah's attorney regarding David's motions.

4. David, again proceeding pro se, filed his notice of appeal, but he accepted his distribution check shortly thereafter. Sarah subsequently filed a notice of acquiescence with the district court and supplemented the record on appeal. The Court of Appeals then dismissed the appeal for lack of subject-matter jurisdiction on acquiescence grounds. The Court of Appeals held that David had accepted the benefits of the district court judgment, and he was now barred from appealing the judgment. The Court of Appeals further found that the separability, coercion, and self-protection exceptions to acquiescence did not apply. Finally, the Court of Appeals denied Sarah's request for appellate costs and attorney fees based on its earlier finding that it had no subject-matter jurisdiction to review the merits of the appeal. Chief Judge Arnold-Burger concurred, agreeing with the panel that it had no jurisdiction to award costs or attorney fees.

5. David petitioned for review, and Sarah cross-petitioned solely on the attorney fees issue. On appeal, the Kansas Supreme Court affirmed in part and reversed in part, and awarded Sarah attorney fees in the amount of $11,320, on the following grounds:

a. Acquiescence is a question of law subject to unlimited review. It is a jurisdictional issue. Acquiescence occurs when a party voluntarily assumes the burdens or accepts the benefits of the judgment it contests on appeal. Subject to certain exceptions, as a general rule, a litigant who has accepted the benefits of the judgment of the trial court will be deemed to have acquiesced in such judgment and may not thereafter adopt an inconsistent position and appeal from such judgment.

b. David argued that a party cannot acquiesce to a void judgment, and the district court's judgment was void because the district court denied him due process by entering final orders without affording him a meaningful opportunity to be heard and without a full copy of the trust instrument. It does appear the Court of Appeals failed to address David's claim in this respect.

c. The Kansas Court of Appeals has regularly held that a party cannot acquiesce to a void judgment. But the Kansas Supreme Court has never so held, and declined to authoritatively answer this question, but cautioned that early case law from the court suggests this may not be an iron-clad rule. The court assumed without deciding, for the purposes of this case, that the Court of Appeals is correct and that a party can never acquiesce to a void judgment.

d. Even assuming David's allegations about the final orders are true, due process violations do not in and of themselves void a judgment. To void a judgment, a due process violation must so completely extinguish a party's opportunity to be heard that it effectively eliminates a court's personal jurisdiction over the party. The mere inability of a party to fully flesh out an argument is not a due process violation that can void a judgment. Certain imprecise language in case law could suggest to the casual observer that any due process violation raises the specter of a void judgment. The court clarified that the subset of due process violations that may void a judgment are narrow — and are only present when a party is so excluded from consideration of the merits that the court effectively has no personal jurisdiction over that party. And that is demonstrably not the case here. David was personally served in June 2022. He proceeded to file an answer, a motion to dismiss, an amended motion to dismiss, an amended answer and counterclaim, a transcript request, a motion to disqualify opposing counsel, a reply brief to Sarah's consolidated response to his amended motion to dismiss and his counterclaim, a second amended motion to dismiss, and a memorandum in support of his motion to disqualify. He appeared in person at a status conference about two months after he was served. Finally, he appeared in person again at the October 2022 hearing where the district court denied and dismissed all his motions and ordered the trust closed. His void judgment argument has no merit here.

e. Sarah filed a "Notice of Acquiescence." The Court of Appeals correctly ruled that acquiescence can be raised at any time, even sua sponte by an appellate court, because it implicates subject-matter jurisdiction. Therefore, the Court of Appeals properly considered the issue.

f. The attorney for the trust was due attorney fees from all residuary beneficiaries in addition to what was awarded by the district court against David alone. The district court awarded $4,000 in fees exclusively from David's share, but that was not all the attorney fees to which the trust's counsel was entitled. The gift of a share of the residuary estate is, and is intended by the testator to be, indefinite in amount, and to be whatever is left after paying funeral expenses, attorneys' fees, executors' compensation, administrative expenses, debts of the decedent, and taxes. Thus, the Court of Appeals was correct in holding that there is no basis in the record for David's self-protection argument.

g. David's posture — that his right to more money is rooted in the trust and not in the district court judgment — is a creative but ultimately fruitless bit of rhetorical wordplay. Sarah initiated the declaratory judgment action to get a final district court ruling on what was owed to whom under the trust. And David accepted his distribution from the trust that occurred because of the district court's judgment.

h. When a party to an appeal has paid any portion of a judgment rendered against such party, including the costs, such party will not be deemed to have acquiesced in the judgment so long as the issues on appeal cannot affect the payments made and the payment thereof is not involved in the issues on appeal. Likewise, any party to an appeal who accepts such payment shall not be deemed to have acquiesced in the judgment so long as the issues on appeal do not affect the obligation for the payment of or the right to receive such portion of the judgment.

i. In situations where one party's "portion" directly impacts the portions awarded to other parties — where a district court's final order apportions a fixed total "pot" among and between contending litigants — the judgments are inseparable. Acquiescing in the portion one has received necessarily implies acquiescing in the portions received by other parties.

j. Seeking additional money is not separable from the distribution itself. When, as here, a trust beneficiary accepts the distribution awarded to him or her, he or she cannot then take an inconsistent position and challenge the amount distributed on appeal. The benefits received are not separable from any additional distributions to which the beneficiary believes he or she is entitled. David has thus acquiesced to the judgment, and his appeal is dismissed for lack of jurisdiction.

k. The Court of Appeals should have considered Sarah's request for appellate attorneys' fees. Sarah's motion correctly notes that David's supplemental brief argues a litany of meritless and irrelevant points. But David did present colorable arguments regarding void judgments (which were not addressed below) and the separability of his acceptance of his distribution money from his appeal. Thus, even though David has not prevailed, his appeal was not frivolous.

l. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. Sarah has provided an affidavit attached to her motion explaining the nature of counsel's services, listing the number of hours expended on appeal, and applying the reasonableness factors. Sarah has also provided an itemized statement of the attorney services provided to the trust

on appeal. Here, Sarah's counsel is a solo practitioner who spent 47.85 hours on this appeal. (This does not include the hours for which counsel requested compensation at the Court of Appeals.) Counsel's time records are littered with the time spent reviewing and responding to David's numerous and lengthy pro se filings on appeal. Counsel charges $200 an hour and achieved a successful result at the Court of Appeals. The issues raised in the case are also somewhat novel. Sarah requests $9,570 in attorney fees plus the $1,750 in attorney fees incurred at the Court of Appeals.

m. The attorney has defended the trust against appellant's repeated attacks on the process and thus been of tremendous benefit to it, and the reason the attorney fees are relatively high is due to appellant's actions. However, David's appeal was not frivolous. David's attack on the reasonableness factors articulated by counsel is largely stylistic. For instance, David faults counsel for not addressing factor eight, which asks the court to consider whether a fee is fixed or contingent — irrelevant in this instance. We conclude there is sufficient evidence in the record to establish an equitable award to Sarah of her attorney fees for counsel's efforts in representing the trust in the amount of $11,320.

IV. FORFEITURE CLAUSES

A. *Lasiter v. Newland & Assocs., PLLC*, 2025 Ark. App. 348; 2025 Ark. App. LEXIS 383; 2025 LX 145835 (Court of Appeals of Arkansas, Division Four 2025). Challenge to trustee's discretion and validity of marital agreement, and elective share claim, results in forfeiture and required return of $1.4 million in prior distributions.

1. This is a companion case to Newland & Associates, PLLC v. Lasiter. Both appeals arise from a multifaceted dispute relating to the estate of Michael Allen Lasiter, deceased. Caroline Lasiter is Michael's widow. Newland & Associates, PLLC ("Newland Trustee"), Michael's longtime legal counsel and financial, accounting, and estate planning advisor, is the trustee of two trusts and the executor of a pour-over will that it prepared for Michael prior to his death. In this case, Caroline appeals from orders of the Pulaski County Circuit Court granting summary judgment in favor of Newland Trustee, finding that she violated the in terrorem, or no-contest, clauses of the trusts and thereby forfeited all her beneficiary interest in the trusts. She was consequently ordered to return a total of $1,403,724.84 in trust property.

2. Michael was diagnosed with cancer in 2015 and died on May 31, 2016. Caroline and Michael were married in March 2003. The marriage was Caroline's second and Michael's third. Caroline and Michael had two children, and Michael had two adult children from a previous marriage. Michael had accumulated substantial wealth by the time of his marriage to Caroline. Caroline and Michael negotiated a premarital agreement ("PMA").

3. In the PMA, Caroline and Michael agreed that all real and personal property acquired by either party before or during the marriage would remain each party's separate property and would be excepted from the definition of "marital property" under Arkansas law. They agreed to voluntarily relinquish all interest in the other party's separate property, including income, earnings, investments, and any enhancement in value, which accrued during the marriage. Caroline agreed "to waive any and all rights by reason of the marriage" in Michael's companies, including "any appreciation or increase in the value of the companies, which may or may not be attributable to the direct or indirect efforts or

contributions of either party." Caroline and Michael agreed that funds deposited into joint accounts and all "wages earned by either party from any employment source and reported on a Form W-2" would be considered marital property, but all other income earned by either party "from his or her separate property" would not. Additionally, Caroline would acquire a marital one-half interest of the equity in residences Michael owned. Michael also agreed to maintain a term life insurance policy in the amount of $500,000 and to name Caroline as primary beneficiary.

4. They agreed that in the event the relationship was terminated by death, neither party, as the surviving spouse, would "take, claim, demand or receive any interest in the Separate Property that comprises the estate of the deceased party." Additionally, they both expressly waived and released all claims, title, and interest in law or equity to: "a. rights or claims of dower, curtesy, or any similar or statutory substitute, as provided by the statutes of the state in which the parties, or either of them, might die domiciled or owning real property; c. the right of election to take against the last will and testament, if any, of the other; and g. the right to act as administrator of the other's estate, or to nominate or appoint or otherwise designate any person as administrator of the estate of the other."

5. Caroline acknowledged that she was entering into the PMA "freely and voluntarily" and had been "advised fully by legal counsel of her choosing." Caroline and Michael agreed that all terms and provisions of the PMA "shall be binding upon each of the parties hereto" and "enforceable by the respective heirs, personal representatives, transferees, successors, or assigns of the parties hereto" and "may not be modified except in writing signed by the parties."

6. At the time of his death in 2016, Michael had three operative estate planning documents: (1) his Last Will and Testament, a pour-over will; (2) the MAL Irrevocable Insurance Trust (the "Insurance Trust"); and (3) the Michael Allen Lasiter Revocable Trust as Amended and Restated the 19th day of February 2016 (the "Revocable Trust"). Michael executed the Insurance Trust on September 1, 2015, and he named Newland & Associates, PLLC, as trustee with the power to appoint a successor trustee. The primary purpose of the Insurance Trust is "to provide funds for the continued support, health, and education" of Caroline and Michael's children and descendants. The Insurance Trust was funded with two RiverSource policies of life insurance and collected approximately $15 million in proceeds upon Michael's death. The terms of the trust grant broad powers to the trustee, including the authority to modify or amend the trust agreement to achieve favorable tax status and to make loans out of trust property.

7. The Insurance Trust states that Caroline shall be paid $500,000 "outright and without further trust administration" upon Michael's death. It also provides for the creation of a contingent trust share as follows: If Michael "has an active pilot's license at the time of his death, then Two Million Dollars ($2,000,000.00) shall be allocated to a separate trust share specifically for the benefit of Caroline Lasiter." However, in the event Michael "no longer maintains a pilot's license at the time of his death, then the distribution under this Section V(b)(2) shall be void." If the condition precedent is met and the separate trust share created, then the trustee, in its discretion, "shall pay such portion of the net income and principal of this Trust share to, or apply on behalf of, Caroline Lasiter at such time or times as shall be required to maintain and support her in the manner to which she became accustomed" during Michael's lifetime. In determining whether this condition precedent

was met, Newland Trustee obtained the opinion of David Cahoon, an Arkansas attorney and FAA-certified flight instructor and designated pilot examiner. Mr. Cahoon concluded that Michael "could not legally exercise the privileges of his pilot's certificate without a valid and unexpired FAA medical certificate," which he did not have. Therefore, Mr. Cahoon concluded that the provision for the creation of a separate trust share for Caroline was void. Consequently, Newland Trustee did not create the separate trust share. Instead, the $2 million was kept with the other $14.5 million in life insurance proceeds to be distributed to Caroline and Michael's children and descendants in accordance with the terms of the trust.

8. The Insurance Trust includes the following "no-contest" provision: "Any Beneficiary who shall contest in any court any provision of this trust shall not be entitled to any distributions or benefits under this trust. Any and all portions of the income or principal to be distributed as provided herein, otherwise provided to be paid to such person, shall instead remain a part of the trust principal and be equally divided among the remaining Beneficiaries. The Trustee is specifically authorized to defend at the expense of trust principal and income any contest or attack of any nature upon this trust or on any paragraph or provision of this trust."

9. Michael executed the pour-over will on February 19, 2016, and appointed Newland & Associates, PLLC, as executor with the right to appoint its successor executor. The pour-over will leaves all of Michael's real and personal property, along with any residue, to the Revocable Trust, which Michael executed the same day. The pour-over will includes the following "no-contest" provision: "Every heir, legatee, devisee, or beneficiary under this Will, and the trusts created in this Will, or intended to be created, who shall contest in any court any provision in this instrument, shall not be entitled to any devises, legacies, or benefits that they may otherwise be entitled."

10. In the Revocable Trust, Michael named himself as trustee, while being able and willing, then Newland & Associates, PLLC, and he gave Newland & Associates, PLLC, the right to appoint its successor trustee. Michael provided that if Newland & Associates, PLLC, fails to appoint its successor trustee, then the then-acting Trust Protector shall appoint a successor trustee. Michael named his mother, Hannah Finley, as Trust Protector.

11. The Revocable Trust incorporated the PMA: "The Prenuptial Agreement executed on March 10, 2003, by the Grantor and February 26, 2003, by the Grantor's Wife shall remain in full force and effect in accordance with its terms. However, the Grantor reserves the right to make additional provisions for the Grantor's Wife in this Trust, the MAL Irrevocable Trust dated September 1, 2015, or other estate planning devices executed subsequent to the date of this Agreement without waiving the provisions of said Prenuptial Agreement. It is the Grantor's intent that in the event of any conflict between the terms of the Grantor's effective estate planning documents and the Prenuptial Agreement, that the estate planning documents shall supersede the Prenuptial Agreement, provided that such terms do not reduce the Grantor's Wife's rights as provided in the Prenuptial Agreement."

12. In the Revocable Trust, Michael directed the trustee, upon Michael's death, to divide the trust estate into three separate shares, as necessary: the "Marital Deduction Trust Share," the "Lasiter Family Trust Share," and the "Lasiter GST Trust Share." Michael named Caroline as the sole income beneficiary of the Marital Deduction Trust Share as

follows: "Provided that the Grantor's Wife survives the Grantor, the Marital Deduction Share shall be equal to the sum of Five Million Dollars ($5,000,000.00). It is the Grantor's recommendation, but not requirement, that this portion of the Marital Deduction Trust Share be funded with primarily liquid assets. In addition to the Five Million Dollar ($5,000,000.00) allocation, the Marital Deduction Trust Share shall include the Grantor's personal property, unless otherwise specified herein or in a subsequent memorandum to this Trust, and any residences, or interests therein, owned by the Grantor or this Trust at the time of the Grantor's death. It is the Grantor's intent that the Marital Deduction Trust Share qualify for the estate and gift tax unlimited marital deduction."

13. In the Revocable Trust, Michael directed the trustee to "make a monthly distribution of the income of the Marital Deduction Trust Share" to Caroline in the amount of $5,000 "to be used for groceries, gas money, eating out, and other incidentals outside of the normal and ordinary expenses paid by the Trust pursuant to this Agreement" and Michael's directives. In addition, the trustee shall distribute to Caroline $25,000 each year on the anniversary of Michael's death "provided that [she] has complied with all terms of this Agreement and any directives made by [Michael] as determined by the Trustee." Michael included that these distributions, however, "will not preclude additional distributions of principal to or for the benefit of Caroline if the Trustee determines that income distributions are insufficient for [her] continued health, maintenance, and support."

14. In the Revocable Trust, Michael "specifically directs the Trustee to follow any directives, whether written or oral, further detailing the Grantor's intent with regard to management or disposition of Trust assets." The Revocable Trust further states that it is Michael's "specific desire and direction that the Distribution Directives remain confidential and not be disclosed to any beneficiary hereunder, including the Grantor's Wife." Michael included, "In carrying out the Distribution Directives, the Trustee shall be deemed to be exercising absolute discretion as authorized by this Agreement and shall not be liable to any beneficiary hereunder for exercising such discretion and shall not be obligated to disclose the terms of the Distribution Directives forming the basis for the exercise of that discretion."

15. Michael also included in the Revocable Trust a procedure by which any beneficiary may object to any action taken by the trustee pursuant to the Distribution Directives. Relating to this procedure, the Revocable Trust includes a separate "no-contest" provision as follows: "If the beneficiary continues to contest any provision of the Distribution Directives or pursues any legal action for the disclosure of the terms of the Distribution Directives, then such beneficiary shall not be entitled to any benefits under this Trust. Any and all devises, legacies, and portions of the income or principal of this Trust otherwise provided to be paid to such person shall lapse and shall be paid, distributed, and passed as though such person had predeceased the Grantor. The Trustee is specifically authorized to defend, at the expense of the Trust (and primarily to funds that would otherwise be distributed to the challenging beneficiary), any contest or attack of any nature upon the terms of the Distribution Directives and specifically with regard to the confidentiality provision."

16. The Revocable Trust provides that a beneficiary's "right to object to the Distribution Directives shall not extend to the right to object to the terms of this Trust Agreement." Michael included that any objection to the terms of the trust will remain subject to the

risk of forfeiture pursuant to the Revocable Trust's in terrorem clause: "Every beneficiary under this Trust, and any other trusts created under the terms of this Trust, or intended to be created, who shall contest in any court any provision in this Trust Agreement, shall not be entitled to any benefits under this Trust. Any and all devises, legacies, and portions of the income or principal of this Trust, otherwise provided to be paid to such person, shall lapse and shall be paid, distributed, and passed as though such person had died prior to my death leaving no living lawful descendants. The Trustee named in this Trust is specifically authorized to defend at the expense of Grantor's estate any contest or attack of any nature upon this Trust, or on any paragraph or provision of this Trust Agreement."

17. Michael died on May 31, 2016. In the months following his death, Caroline sought the advice and counsel of several attorneys regarding Michael's estate plan. In a thirty-three-page letter, dated September 16, 2016, an attorney provided Caroline with a comprehensive summary of Michael's estate planning instruments. Among other things, counsel advised Caroline that the PMA was in effect at the time of Michael's death. She warned: "As you know, Michael's Will and the Trust specifically provide that anyone who challenges the Will or Trust is thereafter disinherited. Consequently, I do not think it is in your best interest to do that. Again, it appears the Trust has left you in a much better financial situation than you would have been in under the PMA alone. Consequently, this may not be something you want to challenge."

18. Counsel advised that Michael directed the trustee to carry out his confidential distribution directives at the trustee's "absolute discretion." She explained that Michael "put a great deal of time and consideration into the Distribution Directives, and he intends for it to be followed. Therefore, he requests that the Trustee and the beneficiaries be judicious in any deviation for or objection to the Distribution Directives out of respect for [his] wishes." She warned that continued contests to the Distribution Directives or any legal action for their disclosure could result in a forfeiture of benefits under the trust. She also warned: "Any Court asked to rule on the matter would likely favor Michael's directives and intent for confidentiality and discretion on the part of Newland & Associates in carrying out his intent." Counsel further explained that it "is not unheard of for Trust grantors (Michael) to leave confidential directives for the Trustee (Newland & Associates) to follow, specifically with regard to minor children beneficiaries (as there are here) and/or where there are children from different marriages (as there are here)." She continued: "Clearly Michael had a great deal of faith and trust in Newland & Associates, which I understand is concerning to you, for many reasons, not the least of which is you do not know for sure what the Distribution Directives state . . . coupled with the fact you may never have access to the Distribution Directives and any attempt to challenge same in a Court of law could well result in you being disinherited. As such, I strongly urge you to be cautious in your approach to Newland & Associates and your dealings with it."

19. But cautious, Caroline was not. Through counsel, she sent a letter to the trustee seeking to enforce the PMA, making "a claim and a demand" against Michael's estate for $500,000, and threatening litigation "if you do not pay this claim within fourteen (14) days of the date of this letter." Newland Trustee responded that Caroline's "claim has already been satisfied," as she "has already been distributed $500,000 from the proceeds of an insurance policy" on Michael's life. It further offered that Caroline "has also received or is entitled to receive far more benefits" under the Revocable Trust and Insurance Trust than Michael was obligated to provide under the PMA.

20. Through counsel, Caroline sent a letter to the trustee challenging its determination relating to the pilot's license contingency in the Insurance Trust. She demanded the transfer of $2 million to a separate trust solely for her benefit and threatened litigation if it was not allocated to her within 21 days from the date of this letter. Newland Trustee denied this claim because Michael did not have a medical certificate at the time of his death and therefore was not lawfully authorized to exercise his privileges as a pilot in command at the time of his death. Caroline sent a letter to Newland Trustee expressing her intent to pursue a claim against the Estate and to exercise her right to an elective spousal share and claim 1/3 of the Estate, or in this case, an amount well in excess of $15 million, outright and free of trust.

21. And that, she did. The very same day, she filed a petition, alleged that Newland & Associates, PLLC, was disqualified and unsuitable to serve as Executor of the estate and disqualified from selecting its successor, and accordingly, sought the appointment of an administrator so that she may properly present her claim against the Estate.

22. Newland Trustee rejected Caroline's one-time settlement offer for a lump sum distribution to her of $15 million in cash and marketable securities free of trust. In the letter, it also warned Caroline that any argument concerning Michael's intent with regard to allegedly revoking the PMA could implicate the in terrorem clauses, and any election to take against the will would also trigger the in terrorem clauses.

23. Caroline sued Newland & Associates, PLLC, and her attorneys, asserting claims of professional and ordinary negligence, conflict of interest, and breach of fiduciary duty. She filed an amended complaint adding the Insurance Trust as a defendant and asserting claims for breach of the trust agreement and declaratory judgment. Despite her awareness of two professional opinions (one obtained by her own counsel) that Michael could not exercise the privileges of his pilot's license at the time of his death due to the lack of a medical certificate, she alleged that the trustees were negligent in their assessment and review of the pilot's license provision. She sought to have $2 million paid over to her directly and, in addition, claimed that she is entitled to receive a four percent income distribution annually. Caroline filed a "Petition for Special Administration of the Estate" in separate probate proceedings, nominating herself as the special administrator for purposes of an investigation and pursuit of claims of the Decedent and his estate regarding malpractice claims against Michael's former attorneys, CPAs, financial advisers, and insurance brokers. She made these claims despite having previously consented to the appointment of Relyance Bank, N.A., as administrator of the estate in the general probate proceedings. Caroline filed an Election to Take Against the Will, renouncing and disclaiming any and all benefit under the Last Will and Testament of Michael Allen Lasiter. She filed this election despite the existing PMA, which she had previously acknowledged to be valid. Caroline filed a petition for declaratory judgment against Relyance Bank, N.A., as administrator of the Estate of Michael Allen Lasiter, seeking to have the PMA declared null and void. She filed a claim against the estate in the general probate proceedings, seeking an award of damages.

24. Newland Trustee petitioned for a declaration of rights relating to the in terrorem provisions contained in the Revocable Trust and the Insurance Trust. According to Newland Trustee, Michael was concerned about Caroline's "extravagant spending" and ensuring that all his children were provided for and "believed that he needed a strong estate plan to manage these difficult family dynamics." Newland Trustee said that

Michael's estate plan was "at least partially" designed to keep Caroline's "spending in check," and Michael's overall intent was that all four of his children and Caroline "have a secure financial future." Michael, however, according to Newland Trustee, was concerned about Caroline "challenging his provisions regarding the management of assets and distributions to her" and "specifically included the in terrorem provisions" in the trusts. According to the petition, in the first year alone following Michael's death, Caroline received more than $3 million in assets outright and via distributions from the Revocable Trust and the Insurance Trust. In addition, she continued to receive monthly distributions for her benefit averaging approximately $13,000 a month, plus the ability to request additional discretionary distributions. The distributions Caroline received from the Revocable Trust were made from the Marital Deduction Trust Share. According to Newland Trustee, as of March 31, 2019, Caroline had received cash distributions to or for her benefit totaling $956,761.96 in addition to the distribution of various vehicles, boats, and other personal property valued at approximately $457,214.

25. Caroline filed a response and Counter-Petition to Remove Newland & Associates, PLLC, as Trustee of the Revocable Trust and the Insurance Trust. She filed a motion for partial summary judgment. Newland Trustee moved for partial summary judgment seeking judgment as a matter of law that Caroline's pleadings in other court proceedings, and her petition to remove the trustee in the instant proceedings, violated the in terrorem clauses of the trusts. Caroline filed a cross-motion for partial summary judgment.

26. The circuit court concluded that Caroline's legal filings can be viewed in my view as nothing less than contests to the trust, denied Caroline's motion for partial summary judgment, and granted summary judgment in favor of Newland Trustee on the cross-motions. Newland Trustee moved for summary judgment on its remaining claim seeking a determination that because Caroline violated the in terrorem clauses, she forfeited her entire interest in the trusts and must therefore return all funds and personal property, or the value thereof, distributed to her from the Revocable Trust. The court ruled that Caroline was not entitled to compel discovery to audit the trust.

27. The circuit court entered a written order granting Newland Trustee's motion for summary judgment and denying Caroline's motion to compel, and awarded Newland Trustee judgment against Caroline in the aggregate amount of $1,403,724.84, plus post-judgment interest at the rate of 2.5% from the date of entry of the Judgment until paid in full, for all of which execution and garnishment may issue. Caroline filed a motion for a new trial, which the court denied. Caroline then appealed.

28. On appeal, the court of appeals, with one concurring opinion, affirmed on the following grounds:

> a. The circuit court denied Caroline's motion for partial summary judgment on her claims to remove the trustees in the same order granting summary judgment in favor of Newland Trustee on the parties' cross-motions, finding that Caroline violated the in terrorem clauses and forfeited her interest in the trusts. Accordingly, Caroline, having no interest in the trusts, was no longer in a position to question the trustee's fitness.
>
> b. Arkansas courts have recognized the validity of in terrorem, or "no-contest," clauses dating back to at least 1937. Because in terrorem clauses "work a forfeiture," they are strictly construed.

c. The Arkansas Supreme Court defined a "contest" as it pertains to a "no-contest" clause as "any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will." While it takes only one violation of the in terrorem provisions to trigger the forfeiture provisions, at a minimum, Caroline violated the in terrorem clauses of both trusts in four respects. First, Caroline triggered the "no-contest" provision in the Insurance Trust by filing a lawsuit against the trustee seeking to recover damages based on the trustee's exercise of discretion in determining that the pilot's license condition precedent was not met. The trustee's determination in this regard was supported by an opinion from an attorney and aviation professional, which was consistent, no less, with a separate professional opinion obtained by Caroline. The terms of the Insurance Trust provide that the trustee "shall not be liable for any mistake in judgment . . . or for any cause whatever except for the Trustee's own bad faith, willful misconduct, or gross negligence."

d. Additionally, in the lawsuit, Caroline sought to have $2 million paid to her directly in addition to a distribution of 4 percent income annually. The Insurance Trust provides for neither distribution. Moreover, even if the pilot's license condition was met, the terms of the trust do not provide for an outright distribution of $2 million to Caroline. Caroline's lawsuit, therefore, does not seek to enforce the trust provisions as written and intended by Michael but instead mounts a direct attack on Michael's plainly stated intentions in the trust.

e. Second, third, and fourth, Caroline triggered the in terrorem clause of the Revocable Trust by filing an election to take against Michael's will, a declaratory judgment action seeking to invalidate the PMA, and a claim against Michael's estate ultimately seeking to have funds paid over to her outside of trust and in addition to the funds she has already received pursuant to the trust agreement. In the PMA, Caroline voluntarily waived her rights to file an election to take against Michael's will, to claim a statutory spousal share of Michael's estate, and to claim any interest in Michael's separate property. The Revocable Trust incorporates the PMA and expressly states Michael's intention that the PMA is to remain in full force and effect. Michael, moreover, provided far more generously for Caroline in the trust than under the PMA alone. Accordingly, the circumstances in this case, we note, are far different from those in *In re Estate of Thompson*, 2014 Ark. 237, 434 S.W.3d 877, where the supreme court upheld a finding by the circuit court that the decedent intended to deprive his surviving spouse of her marital rights in his property by transferring his property to a trust.

f. In sum, by filing the above-described legal actions, Caroline seeks to circumvent the terms of the Revocable Trust in their entirety and has contested Michael's entire estate plan and his express wishes. We hold that Caroline's actions, as a matter of law, violated the in terrorem provisions and resulted in a forfeiture of her interest in the Revocable Trust.

g. According to Caroline, if the forfeiture is enforced, then Michael's bequest to her in the Marital Deduction Trust Share "would not qualify for the QTIP and the Revocable Trust would be required to pay a substantial amount in additional federal estate taxes." Therefore, she says, the in terrorem clause must be unenforceable. Her argument is unpersuasive. We need only zoom out and view

all the trust provisions to see why. First, the in terrorem clause tells us the result of Caroline's forfeiture: "any and all devises, legacies, and portions of the income or principal" made to her in the trust "shall lapse and shall be paid, distributed, and passed" as though she had died prior to Michael, leaving no living lawful descendants. Next, Section Six of the Revocable Trust directs the trustee to create, as necessary, three separate trust shares, including a Marital Deduction Trust Share — but "[p]rovided that the "Grantor's Wife survives the Grantor[.]" Because of the forfeiture clause, Caroline is deemed to have not survived Michael. Simply put, whatever the QTIP election's fate may be, it has no bearing on the in terrorem clause's enforceability. While the court can appreciate Caroline's purported concern about estate tax consequences that her forfeiture may have caused, the court would be remiss if it were to ignore the fact that it was she who contested Michael's estate plan and testamentary wishes and thereby accepted the risk of forfeiture and any consequences resulting therefrom.

h. Caroline argues that there is no basis under either Arkansas law or the terms of the Revocable Trust for "disgorgement" resulting from her violation of the in terrorem clause. Her apparent difficulty locating any authority that addresses "disgorgement" in the context of an in terrorem clause results from a semantic fallacy. An abundance of authority says that in terrorem clauses result in "forfeiture." Indeed, that is precisely why such clauses are strictly construed and may not extend beyond the grantor's plain intent. What exactly did she forfeit? The plain answer: Everything. The clear intent of Michael, as gleaned from the trust agreement, was to prevent conduct that would frustrate his thoughtfully designed estate plan. To discourage litigation contesting the provisions of the trust agreement, Michael included an in terrorem clause. The plain language of that clause says that any person who engages in such litigation "shall not be entitled to any benefits under this Trust." In this event, "any and all" gifts provided to such person under the trust, whether real or personal property or payments of portions of the trust income and principal, "shall lapse" as if the gift never occurred. Hence, as the clause says, everything that Michael provided for Caroline under the trust "shall be paid, distributed, and passed" as though she predeceased Michael.

i. Although Caroline would have it otherwise, the language of the in terrorem clause plainly does not say that a person who challenges the trust agreement in court risks forfeiture of some, but not all, of the benefits provided for such person under the trust. Caroline is not entitled to keep the more than $1.4 million she received under the trust — particularly in these circumstances, given that she has elected to take against the trust agreement and is pursuing separate litigation to invalidate the PMA so that she can, instead, take her statutory share of Michael's estate.

j. ANW, LLC, was the only entity, out of the three in question, that did not exist when Caroline and Michael executed the PMA. Under the PMA, Michael's interest in ANW, LLC, constituted his separate property unless (1) ANW, LLC, was formed as a separate entity apart from "Lasiter Construction Inc., Contractors Leasing Corporation, and Peck Investments, LLC," and (2) he acquired his interest in it using marital property sources. ANW, LLC, was formed as a subsidiary of Contractors Leasing Corporation. Thus, Michael's interest in ANW, LLC, was his separate property.

B. *Mohr v. Johnston (In re Mohr),* 2025 Ind. App. LEXIS 224; 2025 LX 232934; 2025 WL 1889282 (Court of Appeals of Indiana 2025). No-contest clause not triggered by attempt to open intestate estate where original will was in the possession of drafting attorneys and not turned over to beneficiaries.

1. John R. Mohr ("Father") and Maxine Mohr ("Mother") (collectively "Parents") had two children — Star Johnston and Angel Mohr ("Daughters") — who are now adults. Parents executed a Revocable Trust. Mother died in October 2020, and Father restated the Revocable Trust. Father also later amended the Revocable Trust. The Revocable Trust named Daughters as beneficiaries and successor co-trustees of the Revocable Trust.

2. At some point, Father met with his attorneys to discuss his estate planning. Father executed his new Last Will and Testament ("Will"). The Will contained a pour-over provision, which distributed all of Father's probate estate to the Revocable Trust. Daughters were named as residuary beneficiaries of the Estate and joint personal representatives. The Will also contained the following provision: "If any person directly or indirectly attempts to oppose the validity of my Will or my Revocable Living Trust, including any amendments to my trust, or commences, continues, or prosecutes any legal proceedings to set my Will or Revocable Living Trust aside, then that person will forfeit his or her share, will cease to have any right or interest in my property, and will be considered to have predeceased me for the purposes of my Will." The law firm kept possession of Father's original Will.

3. Father died on June 1, 2023. Daughters met with an attorney with the firm that prepared Father's documents, who asked that Daughters be placed in different rooms because of their "volatile relationship." Both Johnston and Mohr asked for the original Will. Because the firm could not give both Daughters the original, it retained the original Will. Johnston petitioned for the appointment of a personal representative and for supervised administration for Father's estate. Johnston sought to be appointed as the sole personal representative, alleged that Father died intestate, and alleged that she had been unable to locate an original Last Will and Testament of the Decedent. The trial court issued an order appointing Johnston as personal representative.

4. Counsel petitioned for probate of Father's Will without administration. Mohr petitioned to add herself as co-personal representative pursuant to the Will and a motion to consolidate claims. The motion also requested the removal of Johnston as personal representative due to her alleged misrepresentations in her initial petition, actions that caused the Estate to incur costs, and a pattern of behavior to exclude Mohr. Mohr requested that she or a neutral third party be appointed as successor personal representative. Further, Mohr requested that Johnston be sanctioned, that the Will's no-contest provisions be enforced against Johnston, and that Johnston forfeit her share of Father's Estate.

5. The trial court found the level of distrust and acrimony between the parties is such that neither party is appropriate to serve as Personal Representative, removed Johnston as the personal representative, and appointed a neutral third party — Nathan Williams — to serve as successor personal representative.

6. Johnston petitioned to remove Mohr as trustee, to assess damages for breach of trust, and to require Mohr to file an accounting. Johnston alleged that Mohr breached her duties as a trustee by: (1) failing to preserve property of the Revocable Trust; (2) failing to keep

Johnston informed about the administration of the Revocable Trust; (3) intercepting Parents' mail and failing to disclose the contents to Johnston; (4) damaging property of the Revocable Trust; and (5) wrongfully obtaining possession of Revocable Trust property.

7. Mohr argued that Johnston had breached her fiduciary duty as a trustee and requested that the trial court remove Johnston as trustee or, alternatively, appoint an independent successor trustee, and that Johnston's actions triggered the no-contest provision of the Revocable Trust. The sisters filed competing motions for summary judgment.

8. The trial court granted Johnston's motion for summary judgment and denied Mohr's cross-motion for summary judgment, finding that the evidence paints a clear picture of two beneficiaries who do not get along, but it does not support the contention that Johnston took any steps that would result in anything other than a distribution of Father's assets consistent with the provisions of his estate plan. Mohr appealed and the court of appeals affirmed in the following grounds:

a. The probate code defines a "no-contest provision" in part as a provision of a will that, if given effect, would reduce or eliminate the interest of a beneficiary of the will who, directly or indirectly, initiates or otherwise pursues an action to contest the admissibility or validity of the will, an action to set aside a term of the will, or any other act to frustrate or defeat the testator's intent as expressed in the terms of the will. Under state law, a no-contest provision is enforceable according to the express terms of the no-contest provision, with certain exceptions, including: (1) an action brought by a beneficiary if good cause is found by a court; (2) an action brought by an executor or other fiduciary of a will that incorporates a no-contest provision, unless the executor or other fiduciary is a beneficiary against whom the no-contest provision is otherwise enforceable; (3) an action brought by or on behalf of a beneficiary to seek a ruling regarding the construction or interpretation of a will; and (4) an action or objection brought by a beneficiary, an executor, or other fiduciary that seeks a ruling on proposed distributions, fiduciary fees, or any other matter where a court has discretion.

b. The actual provision at issue here is not triggered by actions that "frustrate the intent" of the Will. Rather, the no-contest provision at issue here requires that the court determine whether Johnston directly or indirectly attempted to oppose the validity of Father's Will or Father's Revocable Living Trust or commenced, continued, or prosecuted any legal proceedings to set Father's Will or Revocable Living Trust aside. Johnston did not directly oppose the validity of the Will or Revocable Trust or commence legal proceedings to set aside the Will or Revocable Trust. Johnston did not challenge Father's soundness of mind, allege undue execution of the Will, allege duress or fraud in executing the Will, or make any other objection to the Will's validity.

c. When the original will cannot be located, it is not assumed to have been lost; rather, it is presumed to have been destroyed with the intent to revoke it. Johnston did not have the original will in her possession and, thus, could not seek to admit the original Will to probate. Shortly after Johnston's petition was filed, the law firm, which had possession of the original Will, admitted the Will to probate. Until such time as the Will document was produced by a third party and ordered spread of record by the Court, 12 days after the opening of the estate and 47 days after John Mohr passed away, the decedent was intestate. Although

Johnston's petition could have been clearer about the situation, her claims were not an "indirect attempt" to oppose the Will or Revocable Trust. Many of Mohr's arguments are red herrings. Johnston's efforts to open the Estate are just that and nothing more. Mohr's attempts to read more into Johnston's actions are unpersuasive and do not establish a genuine issue of material fact or demonstrate that Mohr is entitled to summary judgment.

V. INVESTMENTS

A. *Acct. by JPMorgan Chase Bank, N.A.*, 2025 N.Y. Misc. LEXIS 5961; 2025 NY Slip Op 32389 (U); 2025 LX 233865 (Surrogate's Court of New York, New York County 2025). Trustee did not breach duties by diversifying 100% stock concentration upon approval of trust investment committee, and without consultation with trust beneficiary, even where diversified assets performed well after being sold and trust terms permitted, but did not mandate, retention of the position.

1. John D. Rockefeller, Jr. ("Grantor") was the son of American industrialist John D. Rockefeller, Sr., who was a founder of the Standard Oil Company. The trust established under an indenture ("Trust Indenture") dated December 27, 1943, by John D. Rockefeller, Jr., as Grantor, and The Chase National Bank of the City of New York (predecessor to JPMC), as Trustee, for the benefit of his granddaughter Lucy Aldridge Rockefeller now known as Lucy Waletzky ("Trust"), was one of 13 trusts Grantor established at the time for the benefit of each of his grandchildren, was funded with: (1) 1,000 shares of Standard Oil Co., New Jersey, valued at $53,812.50, and 1,600 shares of Socony-Vacuum Oil Company, Inc., valued at $19,500 (together, "Oil Stocks"); and (2) U.S. Treasury bonds valued at $25,013.68.

2. The Trust Indenture directed JPMorgan Chase Bank, N.A. as trustee ("JPMC" or "Trustee") to accumulate income for Waletzky until she reaches age 21, and thereafter, pay her the income from the Trust during her lifetime. The Trustee may also, in its discretion, distribute principal to Waletzky. As for the remainder of the Trust, Grantor provided for Waletzky to have a limited testamentary power of appointment in favor of her descendants, among others.

3. With respect to investments, the Trust terms authorize the Trustee in its discretion to: (1) retain any stocks, bonds, notes, securities, or other property, real or personal . . . for so long a time as it deems wise, although such investments may not be of the character permissible for trust investments by the present or any future laws applicable thereto. In exercising the discretionary powers hereinabove given with respect to the retention of investments, the Trustee shall be under no duty to sell or otherwise dispose of any particular investment or type of investment merely because of the amount or value of such investment or type of investment in relation to the total amount or value of the trust estate; (2) sell . . . any and all stocks, bonds, notes, securities, or other property, real or personal, at any time held by it . . . for such prices, upon such terms, and for such purposes as the Trustee in its discretion may deem advisable; (3) invest . . . in any and all such common or preferred stocks, bonds, notes, securities, or any variety of property real or personal as the said Trustee may deem advisable, whether or not such investments be of the character permissible for trust investments by the present or any future laws applicable thereto, and whether such investments be productive or unproductive, or secured or unsecured, and whether or not the investment in the stock, bonds, or notes of any one corporation or association shall constitute all or the greater part of the issued

and outstanding stock, bonds, or notes of such corporation or association or shall constitute all or the greater part of the principal of the trust estate; and (4) make distribution to any person entitled to a part or all of the principal or accumulated income of the trust estate in any securities or other property held by it.

4. In 1962, Waletzky reached age 21. The Trustee distributed all of the Trust's accumulated income, approximately $170,000, to Waletzky and accounted for its proceedings as Trustee from the date of the Trust's creation on December 27, 1943, to March 8, 1962. This accounting was uncontested and settled on a Receipt, Ratification and Release, executed by Waletzky on June 26, 1962.

5. Thereafter, there were no proceedings concerning the Trust until June 2012, when, on the petition of Waletzky, the court ordered JPMC to account. In accordance with the order, JPMC then filed the instant account for the period March 9, 1962 to June 30, 2012 ("Account") and a petition for its judicial settlement.

6. The only interested parties to the proceeding were Waletzky and her adult child. Only Waletzky appeared. After a prolonged period of pre-objection discovery, Waletzky filed objections in August 2016, the sum and substance of which allege that the Trustee: (1) failed to generate and maintain adequate records of its proceedings during the accounting period and, as a result, adverse inferences should be drawn against it ("Records Objections"); (2) breached its duty to act with prudence when, beginning in 1967, it sold the Oil Stocks, and reinvested the proceeds in lower performing stocks, notwithstanding the historically "strong performance" of the Oil Stocks, the expectation that they would continue to perform "well," and the tax consequences of the sales ("Prudent Investment Objections"); and (3) breached its duty of loyalty and engaged in self-dealing when, upon selling the Oil Stocks, it purchased stock in various companies ("Companies") over which it purportedly sought to gain power and exert influence ("Self-Dealing Objections"). Waletzky sought to surcharge JPMC the amounts required "to increase the value of the Trust to what it would have been worth if the Oil Stocks had not been sold," and "to compensate the Trust for the diminished income payments made during the Accounting Period as a result of selling the Oil Stocks." She also asked the court to deny JPMC's fees and commissions and award her interest and attorney's fees.

7. After Waletzky filed her objections, the parties engaged in further discovery and extensive motion practice. Eventually, the court, on consent of the parties, appointed a referee to supervise the completion of discovery. On the conclusion of this phase of the proceedings, the parties proceeded to a trial of Waletzky's objections.

8. Over the course of the trial, JPMC presented three witnesses: (1) a senior trust officer and managing director with JPMC, who is the trust officer assigned to the Trust since 2008, and who is involved with the administration of 25 to 30 Rockefeller family trusts; (2) an expert in trust administration and fiduciary bank industry and practice; and (3) an expert in economics and the oil and gas industry. Waletzky presented four witnesses: (1) an expert in accounting and valuation of investments; (2) a law professor whom the court qualified as a fiduciary expert in trusts and estates in New York; (3) an expert in accounting and financial reporting; and (4) a trust officer at JPMC from 1992 to 2006, and from 2010 through the time of trial.

9. The expert reports were admitted into evidence and served as their direct testimony on the parties' consent. These expert witnesses were then cross-examined at the trial.

One expert died shortly before the trial began and, on the parties' consent, his deposition testimony was admitted into evidence to serve as his cross-examination.

10. Although Waletzky was present throughout the trial, she did not testify. However, in excerpts of her deposition testimony that were read into the record, Waletzky testified that she has never read the Trust Indenture and that she first learned of the Trust when she was 21 years old. She testified further that during her entire lifetime, she has delegated the responsibility for supervising her assets and investments to financial professionals. For example, she testified that during the 1960s through the 1990s, the Rockefeller Family Office ("RFO") served as her financial advisor, and, among other things, managed and monitored her assets, received all of her financial information, and maintained her financial records.

11. Grantor funded the Trust with approximately $100,000, of which most (about 75 percent) was invested in the Oil Stocks, with the rest in bonds. By March 8, 1962, the end date of the Trustee's first accounting, the Trust had a market value of about $495,000, with approximately 95 percent of those funds invested in the Oil Stocks. When the Trust was established in 1943, decades before the Trustee's files were computerized, JPMC created a physical file to maintain records related to the Trust ("Trust File"). The Trust File was utilized to reflect how the Trust was administered from its inception through the middle 1990s, when JPMC's records became computerized.

12. Included in the Trust File was JPMC's investment diary ("Investment Diary"), which, the credible evidence showed, contains contemporaneous, chronological, typed, stamped, and/or handwritten entries, reflecting the individual transactions of the Trust through 1986. These entries show that JPMC utilized what is known as a Trust Investment Committee ("TIC"). A TIC is composed of senior members of the trust department of a fiduciary bank and, among other things, sets investment policy, establishes lists of approved investments, reviews each trust portfolio annually, and makes recommendations to be implemented by an assigned investment officer. As shown in the Trust File, and consistent with fiduciary bank protocols, investment and administrative (trust) officers were assigned to the Trust during the accounting period.

13. The Investment Diary shows, through stamped entries, that there were TIC reviews of the Trust on at least an annual basis from 1943 to 1968. In addition, the Investment Diary shows, in certain other entries, investment decisions the TIC made and the resulting investment transactions. With respect to the Oil Stocks, the Investment Diary approved retention in 1947, 1956, and 1964. The Investment Diary reflects that beginning in April 1967, JPMC began selling the Oil Stocks. Over the next 15 months, through June 18, 1968, JPMC sold over 70 percent of the Oil Stocks and used the proceeds to invest in the Companies, which represented a broader pool of industries. In addition to these sales and purchases, the Investment Diary also shows that there were TIC reviews of the Trust on August 14, 1967, and September 23, 1968. After June 18, 1968, the Investment Diary shows that the next sale of the Oil Stocks occurred in November 1968.

14. At the time of these Oil Stock sales, the Trust was valued at about $632,000. In June 1970, after these sales, the Trust was valued at about $328,000. In addition, from 1963 through 1968, annual dividends per share increased for both Oil Stocks. When the Oil Stocks were sold, they had been paying $23,820 annually in dividends; the Companies, however, paid $7,149 annually in dividends at or around the same time. In addition, as a

result of selling the Oil Stocks, the Trust incurred capital gains taxes. For the period 1967–1968, for example, the Trust paid $107,000 in capital gains taxes.

15. After JPMC sold the bulk of the Oil Stocks, the Chair of the United States House of Representatives Subcommittee on Domestic Finance, Wright Patman, issued a Staff Report on July 8, 1968, titled "Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy" ("Patman Report"), which purported to analyze interrelationships between banking and other financial institutions.

16. The Trust File shows that after 1968, the manner in which the TIC reviews were documented changed. Rather than stamped entries in the Investment Diary, TIC reviews were recorded in separate review or work sheets. Handwritten entries under these respective columns reflect that the TIC supported continued diversification of the Trust's holdings in the Oil Stocks in 1974 and 1978. Additional shares of the Oil Stocks were sold in 1973 and 1976. Over the next decade, JPMC sold all the stocks in the Trust and invested all the proceeds in trust investment funds. In the 1990s, these trust investment funds were converted into mutual funds in which the Trust held shares. As of June 30, 2012 (the end date of the instant accounting), the Account reflects principal growth of almost $2 million over the accounting period, income distributions to Waletzky of more than $1.6 million, and payment of administration expenses and taxes of about $1 million.

17. The objections allege that JPMC breached its duty to invest the Trust's assets in a prudent manner when it sold the Oil Stocks and diversified the Trust's holdings. Waletzky asserted that JPMC's sale of the Oil Stocks and reinvestment in the Companies (and then the trust investment funds) was "unjustifiable" at the time the sales began in 1967 and thereafter for a number of reasons, including that the Oil Stocks were performing well and were forecast to continue to do so, the Companies were riskier investments than the Oil Stocks, the sale and reinvestment resulted in an immediate decrease in income and principal, and the sales resulted in the Trust incurring unnecessary capital gains tax. In addition, Waletzky asserted she would have received an additional $58,135,650 in income and principal had the Oil Stocks been retained for the entire 50-year accounting period. She further maintained that JPMC's conduct contravened the language of the Trust Indenture, which allowed JPMC to retain the Oil Stocks and/or to distribute the Oil Stocks in kind.

18. The court dismissed objections to the Trustee's accounting on the following grounds:

a. The accounting party has the burden of proving that it has fully accounted for all estate assets and makes out a prima facie case by submitting the account and supporting affidavit to the court. The objectant then bears the affirmative burden of coming forward with evidence to establish that the account is neither accurate nor complete. If that burden is met, the accounting party must then prove by a fair preponderance of the evidence that the account is accurate and complete. However, the objectant has the burden of proof as to any claims of breach of fiduciary duty.

b. In addition to the Account and supporting affidavit, JPMC introduced into evidence (1) the Trust File, which included JPMC's Investment Diary, and (2) transaction records for 1962–1998 ("Transaction Records"), which document the transactions that occurred during that period and which JPMC used as the data source to prepare that portion of the Account. Based on these submissions,

JPMC met its burden to establish prima facie that the Account is accurate and complete. It was then incumbent on Waletzky to introduce evidence that the Account was, in fact, inaccurate or incomplete or that JPMC breached its fiduciary obligations.

c. Waletzky primarily relied on the absence of documentation as to the specifics of the process by which decisions were made regarding the administration of the Trust. However, the evidence showed that JPMC's record-keeping was not deficient by industry standards. In testimony that the court credits, the Trustee's expert explained that based on his extensive industry experience, the records generated and maintained by JPMC are consistent with industry customs and practices (which are based on federal banking regulations) and with his own experience at fiduciary banks dating back to 1970. According to the expert, the records reflect JPMC's process for the Trust's administration and investment decisions in the 1960s (when most of the Oil Stocks were sold) and are consistent with records that would ordinarily and appropriately be generated as part of that process. Further, the expert explained that the Trust File and other records offered into evidence show that during the 1960s, JPMC, like virtually every fiduciary bank in his experience, used a TIC to review the Trust's administration and investments on at least an annual basis. That process involves senior investment officers of the bank reviewing, together with the assigned investment or administrative officer for a given account, whether the investments held in each individual trust account remain appropriate and should continue in that form based upon the trust's particular characteristics, or if changes may be recommended. By their very nature, in addition to meeting the federal banking mandates, TIC reviews serve as a periodic check for asset appropriateness.

d. The expert's testimony was corroborated by testimony that JPMC's trust department in the 1960s and 1970s utilized a TIC, which would have been comprised of senior trust and investment personnel that make the decisions whether to diversify the assets of a trust based on a review of, among other things, the trust instrument, the composition of the trust's assets, market conditions, historical data about the account, tax considerations, the categories of investments, their cost basis and market value, the annual income from the trust's investments, and the ratings of trust holdings by recognized services.

e. The evidence thus showed that there was a structure and methodology to the Trust's administration. JPMC made use of a TIC to administer the Trust throughout the relevant time period, and the use of a TIC, by its nature, involved an analysis by JPMC of appropriate investments for the Trust.

f. Regarding the specific records generated as part of this TIC process, the expert testified that, although the considerations enumerated above are inherent in the TIC review process, it is consistent with industry practice (and federal banking regulations) for the fiduciary bank not to record "[t]he 'whys' and 'wherefores' of a particular investment decision or program as may be in effect or implemented at any given time." Rather, the industry practice is to keep a record of the resulting transactions, in the manner reflected in the Investment Diary and the Transaction Records.

g. The court credited the testimony of the Trustee's expert over Waletzky's expert who testified that JPMC should have documented "an investment plan indicating that it had conducted an analysis" before selling the Oil Stocks. That expert, although an esteemed trusts and estates law professor with particular knowledge regarding the drafting of the Prudent Investor Act, had no experience in corporate trustee administrative or investment practices.

h. The detailed documentation Waletzky asserts is lacking was not required to be generated as part of the TIC trust administration process.

i. Moreover, Waletzky's assertion that certain of JPMC's records, such as the Trust File, are inadequate because they contain purported inaccuracies is unpersuasive. For example, although two documents in the Trust File do not show the same value of the Trust on June 30, 1970 ($352,000 vs. $328,417.88) and the TIC Review Sheet includes the handwritten name of one of Waletzky's cousins (in the account title line) crossed out and replaced by the handwritten name of Waletzky, these minor irregularities (of which there are only a few over a period of many years) are inconsequential, particularly given that the Trust File was maintained with documents prepared manually prior to computerization of JPMC's records. Likewise, the fact that certain Investment Diary entries refer to the "Trust Investment Committee," while others refer to the "Personal Trust Investment Committee," is insignificant.

j. Waletzky's claim that the information in the Trust File should be afforded no weight because it is unreliable as a result of JPMC's failure to locate this file for an unspecified period of time is unpersuasive. In 2013, the Trust File was located in JPMC's file room, outside of the section where trust files related to the Rockefeller family were kept. The credible evidence established nothing more than that the Trust File had been misfiled in JPMC's file room but was ultimately found there.

k. Waletzky failed to offer sufficient evidence to support her claim that the records that JPMC generated and maintained for the Trust relating to the sale of the Oil Stocks and subsequent purchase of stock in the Companies are inadequate.

l. JPMC established, prima facie, the accuracy and completeness of the Account with its submission along with the supporting affidavit. The burden then shifted to Waletzky to come forward with evidence that the Account is not accurate. Although Waletzky points to what she contends are several "errors and irregularities," those are not sufficient to meet her burden.

m. Likewise, Waletzky's reliance on a document prepared for her by the RFO titled "Income and Expenses for Years 1968 and 1967" is misplaced. The document shows a different income distribution for the year 1968 than what is reflected in the Account, but Waletzky offered no evidence that the income distribution reflected in this document, which was not prepared by JPMC, was accurate or that it was based on information originating from JPMC.

n. As for Waletzky's assertion that the Account is inaccurate because the income distributions reflected in Schedule E-I of the Account for the period 1970 to 1979 differ from the taxable income reported on the Trust's federal tax returns, she

failed to establish that the only explanation for the inconsistency was a mistake in the Account.

o. Waletzky also argued that the Account is inaccurate because the Investment Diary reflects a sale of the Oil Stocks on January 26, 1968, while the Transaction Records reflect that the same sale took place on February 26, 1968. However, a discrepancy concerning a single transaction date does not suggest widespread errors and is de minimus in any event, particularly when the Investment Diary was created manually. That the sale price for such transaction was, according to Waletzky, below the purported market price also fails to prove the Account is inaccurate without proof that the shares could not have been sold for that price. Further, her claim that the Investment Diary shows that the sale price was improperly "predetermined" at this lower price is pure speculation.

p. Finally, Waletzky's assertion that the Account is inaccurate because it omits reference to the broker commissions paid on stock transactions and the (transfer) taxes charged to Trust principal for each sale transaction is undermined by the credible testimony that such amounts are routinely reflected in the net sale price or cost basis for the transaction set forth in the Account.

q. Waletzky failed to substantiate her claim that JPMC's records are inaccurate, and that the Account cannot be deemed to be accurate and complete. Under these circumstances, the Records Objections related to this claim are also dismissed.

r. Determining the Prudent Investment Objections required the court to examine the different standards governing the investment practices of fiduciaries during the 50-year accounting period. From 1962 until 1970, the standard for prudent investment was governed by the common law rule that a trustee was "bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs." In 1970, this common-law standard was codified, and the governing standard, which became known as the prudent person rule, provided that "[a] fiduciary holding funds for investment [after May 1, 1970] may invest the same in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital." However, in 1995, the legislature enacted the Prudent Investor Act, which applies to all investments made or held after January 1, 1995, and provides that a "trustee shall exercise reasonable care, skill, and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument."

s. Under all three standards, the test is prudence, not performance. The test is one of conduct rather than performance and it is not sufficient that hindsight might suggest that another course would have been more beneficial.

t. Prior to the enactment of the Prudent Investor Act, which requires a trustee to diversify unless the trustee reasonably determines that it is in the interests of the beneficiaries not to, diversification, although not mandated, was encouraged.

u. Here, the evidence established that JPMC acted to diversify the Trust's holdings. Beginning in April 1967, when the Oil Stocks comprised virtually all of the Trust's assets, JPMC began its diversification plan by selling the Oil Stocks in small lots. Over the next 15 months, through June 18, 1968, JPMC sold more than 70 percent of the Oil Stocks and purchased stock in the following Companies: American Air Filter Company, Inc., Boeing Company ("Boeing"), Columbia Broadcasting System Inc., Consolidated Freightways Inc., Delta Air Lines Inc., Eastern Air Lines Inc. ("Eastern Air Lines"), Giddings & Lewis Inc., International Business Machines Corp. ("IBM"), International Nickel Company of Canada, Ltd., Jonathan Logan Inc., Kearney & Trecker Corp., Moore Corp., Ltd., Northwest Airlines Inc. ("Northwest Airlines"), Robertson H.H. Company, Searle G.D. & Company, Shulton Inc. ("Shulton"), Syntex Corp. ("Syntex"), Texas Instruments Inc. ("Texas Instruments"), Trans World Airlines Inc. ("TWA"), Uarco Inc. ("Uarco"), United Aircraft Corp., Villager Inc., and Xerox Corp ("Xerox"). JPMC sold additional shares of the Oil Stocks in November 1968, and then more shares in 1973 and 1976. The notations in the TIC review sheet in 1974 to "Continue oil diversification" and in 1978 to "Continue to sell oils & Buy TIF's" further confirm JPMC's diversification plan. Although JPMC initially purchased shares in the Companies upon the sales of the Oil Stocks, starting in the 1970s and into the 1980s, JPMC sold all the equities in the Trust in order to purchase trust investment funds, which were converted into mutual funds in the 1990s.

v. This prolonged sale activity over the course of many years, as shown in the Investment Diary, the Transaction Records, and the Account, reflects a deliberate plan to diversify the Trust's investments. The rationale for JPMC's diversification of the Trust's assets would have been to mitigate the risk of a catastrophic loss inherent in a portfolio consisting almost entirely of two stocks in the same industry. A diversification program, such as the one JPMC began in 1967, is not focused on short-term effects, but rather is a long-term investment plan aimed at mitigating risk. Thus, trustees would accept that there may be immediate tax consequences and short-term income and principal losses "up front," because they would then be able to invest the sale proceeds "into a portfolio or portfolios that over time are going to come back and recoup," and protect against the "phenomenal" risk of not diversifying.

w. The records show that JPMC diversified the Trust's assets while the Trust underwent TIC reviews as part of the administration process. Although the Investment Diary notes the TIC's decision to retain the Oil Stocks in 1947, 1956, and 1964, and does not contain a specific notation to diversify prior to the sales of the Oil Stocks in 1967, annual TIC reviews, which occurred in the years prior to and during the sales of the Oil Stocks (1965, 1966, 1967, and 1968), would have incorporated a review of the appropriateness of the Trust portfolio even without a specific notation to that effect. Nonetheless, the TIC Review Sheet specifically noted that, in 1974 and 1978, JPMC was continuing to diversify the Trust's holdings upon the TIC annual review.

x. Under these circumstances, Waletzky did not meet her burden to establish that JPMC failed to invest the Trust's assets in a prudent manner. Indeed, the evidence established that JPMC's conduct amounted to nothing more than the effectuation of a long-term diversification plan enacted upon TIC review. There is simply no

basis in the record to conclude that JPMC's diversification of the Trust's highly concentrated portfolio of two Oil Stocks violated the governing investment standards for fiduciaries.

y. That the Oil Stocks may have ultimately performed well after they were sold is not dispositive. Hindsight is not a basis on which to conclude JPMC acted imprudently. Moreover, while the Trust Indenture authorized JPMC to retain the Oil Stocks or distribute them in-kind, it was not required to do so. Rather, the Trust Indenture afforded JPMC sole and absolute discretion in making investment decisions. Thus, JPMC's decision to diversify by selling the Oil Stocks in no way contravened the language of the Trust Indenture.

z. Waletzky's contention that the concentration of Oil Stocks in the Trust did not justify diversification because JPMC should have considered all of Waletzky's assets, including the assets of other trusts in which she had an interest and her personal asset portfolio, is unavailing. Apart from the fact that Waletzky cites no authority for this proposition, it is not supported by the language of the Trust Indenture.

aa. The court's conclusion is not undermined by JPMC's expert's failure to testify that he had personal knowledge that JPMC's actions were in fact motivated by volatile market conditions that had an impact on the oil industry at the time JPMC sold the Oil Stocks. Such a connection is not dispositive of whether JPMC acted prudently considering the credible and convincing testimony that JPMC would have diversified to mitigate the risk of a catastrophic loss associated with the Trust's near 100 percent concentration in the Oil Stocks.

bb. Waletzky asserted that JPMC's sale of the Oil Stocks and investment in the Companies was not done to diversify and protect the interests of the Trust's beneficiaries, but, rather, was done to further JPMC's own interests in amassing controlling stock positions in the Companies, at least with some of which it was conducting or wished to conduct commercial business. To support her assertions, Waletzky relied heavily on the Patman Report. In addition, according to Waletzky, once the Patman Report was released, on July 8, 1968, JPMC "abruptly" stopped selling the Oil Stocks, without explanation. However, the evidence upon which Waletzky relied to support her assumptions is largely unreliable and fails to establish any connection between JPMC's investment decisions and its commercial banking services. For example, the portions of the Patman Report that were admitted into evidence were undermined by the testimony of David Rockefeller, then-Chair of JPMC's predecessor Chase Manhattan Bank, and Waletzky's uncle, at Congressional hearings held in 1971, which highlighted imprecision in the Patman Report's characterization of data regarding JPMC's voting rights in the Companies. In addition, although, in 1971, Patman sponsored legislation seeking to reform fiduciary banking regulations based, at least in part, on the Patman Report, no such legislation was ever enacted. In addition, Waletzky did not offer any evidence that JPMC invested the Trust's assets in any of the Companies because of commercial relationships it may have had or wished to have with them, or that those in JPMC's trust department were even aware of any such commercial relationships. Rather, her argument amounts to pure speculation, which cannot form the basis of the court's findings.

cc. Federal banking regulations in place at the time led to implementation across the industry of an "ethical wall," which prevented trust departments from considering the bank's commercial banking relationships. The existence of JPMC's use of these practices during the contested period was corroborated by the testimony of David Rockefeller, given at Congressional hearings in 1971 in connection with Patman's proposed legislation. Under these circumstances, there is no basis in this record for the court to find that the persons in JPMC's trust department at the time were even aware of any business relationships JPMC may have had or wished to have with the Companies. Nor did Waletzky offer any evidence to support her theory that the reason JPMC did not sell the Oil Stocks after June 1968 (until it sold 200 shares in November 1968 and then additional shares in 1973 and 1976) was the release of the Patman Report. Indeed, there was no evidence that any persons in JPMC's trust department were even aware of the Patman Report.

dd. The court was also unconvinced by Waletzky's contentions that certain conduct of JPMC established that diversification was not JPMC's motive in selling the Oil Stocks and purchasing stock in the Companies. For example, although Waletzky asserted that the fact that JPMC sold other Trust assets two days before selling the Oil Stocks shows that JPMC's motivation was not diversification of the Oil Stocks, expert testimony noted that the sale of these minor holdings, which comprised only about two percent of the Trust's value, was merely "housecleaning." In addition, while Waletzky maintained that if diversification was JPMC's motive, it would have provided prior notice to or consulted with her prior to the sale of the Oil Stocks, nothing in the Trust Indenture required JPMC to consult with the Trust beneficiary about investment decisions prior to the sale, or at any time. Since the Trust Indenture did not require such consultation, it would not have been customary for a trustee to do so at the time the Oil Stocks were sold. These actions were not contrary to a diversification program, especially given that JPMC had sole and absolute discretion to make investment decisions under the Trust Indenture. JPMC simply acted to diversify the Trust's assets to protect its beneficiaries. Under these circumstances, Waletzky failed to meet her burden to show that JPMC breached its duty of loyalty.

B. *In re Est. of Sanchez,* 2025 NYLJ LEXIS 122 (Surrogate's Court of New York, New York County 2025). Lost profit damages not available for allegations that trustee breached duties by investing in companies that allegedly shared a single overlapping director with the trustee, in common trust funds, or in proprietary mutual funds, and claims of breach from investing in tax-exempt bonds, common trust funds, and proprietary mutual funds cannot be resolved on summary judgment.

1. In 1927, Elizabeth de Sanchez ("Ms. de Sanchez"), as grantor, under agreements with Central Union Trust Company of New York (now through a series of mergers and name changes, known as JP Morgan Chase Bank, N.A.), as trustee ("Trustee"), created seven inter vivos trusts for the benefit of her six children: Emilio Sanchez (two trusts), Jorge B. Sanchez, Julio Sanchez, Marcelo Sanchez, Maria Sanchez de Lamar, and Gabriela Sanchez de Cadenas. Each trust agreement directed the Trustee to pay the trust's net income to the initial beneficiary, monthly, for his or her lifetime. Each trust continued until the death of the last "measuring life" named in the respective instrument. At the time the trusts were created, Maria, Emilio, and Gabriela each had one or more children and

his or her then-living children were the named measuring lives in the respective trust agreements. Jorge, Marcelo, and Julio had no children, and each was designated as the sole measuring life for each of their respective trusts.

2. Each of the seven trust agreements were the same in so far as they related to the investment powers of the Trustee. The agreements gave the Trustee broad powers of investment. During the lifetime of the grantor, the Trustee was authorized, subject to the grantor's consent and direction, to sell or dispose of any securities at any time, to invest and reinvest the same, and to invest in securities that were not allowed trustees under the laws of the State of New York. After the death of the grantor, the Trustee possessed sole investment authority over the trusts. Its investment powers remained broad, but the Trustee was limited to investing in securities as are allowed trustees under the laws of the state of New York. The initial principal, divided equally for the benefit of the grantor's six children, was $498,944.

3. Ms. de Sanchez died on March 15, 1951. Thereafter, in 1953, the Supreme Court, New York County, settled the Trustee's first intermediate accounts for all seven trusts from their inception through the date of the grantor's death. Subsequently, in separate proceedings filed in 1974, after the deaths of Jorge, Emilio, and Marcelo, the Trustee judicially settled in Supreme Court, New York County, an account of the proceedings for their four trusts from March 15, 1951, through July 25, 1972.

4. In 2005, some thirty years later, certain income and remainder beneficiaries of the Jorge, Emilio, and Marcelo trusts moved, in the original Supreme Court proceedings, to vacate the judicial settlements of these trust accountings on the grounds of lack of personal jurisdiction and constructive fraud or other misconduct. By decision and order dated January 3, 2008, the Supreme Court denied the motions to vacate, finding, in relevant part that there was no fraud or misconduct because the family members were notified of the proceedings and had a full and fair opportunity to contest the accounts. This decision was affirmed by the Appellate Division, First Department by its decision and order dated December 30, 2008.

5. During the pendency of the Supreme Court proceedings, certain trust beneficiaries also petitioned to compel the Trustee to account. In response thereto, the Trustee filed its account for Maria's, Emilio's, and Gabriela's trusts. Objections to these accounts were filed in 2005. On August 28, 2008, after the Supreme Court issued its decision on the motions to vacate but prior to the appellate decision, Pedro Arellano Lamar, individually, and in his capacity as personal representative of the estate of Elizabeth Lamar de Arellano, along with Adolfo Arellano Lamar, as beneficiaries, filed supplemental objections to the Trustee's accounts in Maria's and Emilio's trust accounting proceedings, claiming that certain trust investments were tainted by self-dealing and a conflict of interest, which the Trustee failed to disclose in the 1953 and 1975 accounting proceedings. Thereafter, these objectants moved for partial summary judgment on their supplemental objections, and the Trustee cross-moved for summary judgment seeking dismissal of these objections on the ground of res judicata, or, alternatively, to have the motions referred to the Supreme Court. In addressing the motions for partial summary judgment, the court found that the supplemental objections in this matter related to the same investments previously adjudicated by the Supreme Court in the 1953 and 1975 accounting proceedings, and then more recently, by the Supreme Court's 2008 decision denying the motions to vacate the accounting decrees in those proceedings. Accordingly, by decision

and order dated September 3, 2009, the court denied the objectants' motion and granted the Trustee's cross-motion only to the extent of referring the motions back to the Supreme Court, New York County. By decision and order dated March 22, 2010, the Supreme Court denied the objectants' motion for summary judgment on the supplemental objections, granted the Trustee's cross-motion, and dismissed the supplemental objections, holding that the 1953 Order settling the account for these trusts was conclusive as to all issues raised therein and as to any issues that could have been raised, including the supplemental objections alleging self-dealing. This decision was also affirmed by the Appellate Division, First Department, by its decision and order dated February 8, 2011.

6. The Trustee brought accounting proceedings to judicially settle its second and final account of its proceedings for the Maria Trust and its second intermediate account of its proceedings for the Gabriela Trust, covering the period from March 15, 1951, to July 27, 2011. Certain income beneficiaries and remainder beneficiaries of these trusts, the great- and great-great grandchildren of Ms. de Sanchez (all together "Objectants") filed objections to the accounts. The objections are substantially similar, alleging that the Trustee, in making its investment decisions and managing the trust assets, breached its fiduciary duty to the Objectants by: (1) failing to communicate with the trust beneficiaries regarding their investment needs and objectives, and with respect to substantive issues about the trusts; (2) failing to apply the prudent person and prudent investor standards to the trusts at various time periods, including imprudently investing exclusively in bonds from 1951–1967; (3) failing to maintain and retain sufficient records; (4) failing to conduct periodic reviews of the investments, in violation of the Trustee's own policies; (5) failing to evaluate the propriety of investing trust assets in Trustee-sponsored funds or to consider other funds; (6) failing to create an investment plan and failing to manage the investments based on beneficiary needs and market conditions; (7) failing to properly distribute trust assets and converting them; and (8) engaging in self-dealing by investing trust assets in companies in which the Trustee held a substantial business interest and/or overlapping directors.

7. The Trustee moved in both proceedings for partial summary judgment, which the court granted in part and denied in part on the following grounds:

> a. The Trustee argued that the Objectants are precluded, under the doctrine of collateral estoppel, from challenging the Trustee's decision to invest exclusively in bonds from 1951 until 1967. The Trustee relies on the First Department's 2008 decision wherein the court affirmed the Supreme Court's decision denying the movants' motion to vacate the 1953, 1974, and 1975 Orders settling the Trustee's account for the trusts. In its decision, the First Department rejected the movants' argument that the prior orders settling the trust accounts should be vacated on the grounds of fraud or other misconduct under CPLR 5015(a)(3), stating that "[a]fter the trusts were created in 1927, the goal of the investment fiduciary throughout the Great Depression and long thereafter was to preserve the principal while creating a reasonable income. . . . The trust investments were not for growth of assets for the grantor's grandchildren and great-grandchildren, but rather in accordance with her express direction that they be in securities that were 'long term' and 'tax exempt.'" Based on this language, the Trustee argued that the First Department ruled that the Trustee's investment in bonds for the first sixteen years of the accounting period was not, as a matter of law, a breach of its fiduciary duty

and thus the Objectants are collaterally estopped from challenging these investments in their objections.

b. The First Department's 2008 decision simply does not apply to the investment decisions in the Maria and Gabriela trusts from 1951 to 1967. These trusts have not been judicially settled since the 1953 Order. The 1974 and 1975 Orders at issue in the motions to vacate and the subsequent appeal only pertained to the Jorge, Emilio, and Marcelo trusts, and were judicially settled after the death of the initial beneficiaries. Thus, the propriety of the Trustee's bond investments for the Maria and Gabriela trusts for the first sixteen years of the accounting period was not adjudicated by the First Department's 2008 decision, and the Objectants are not collaterally estopped from addressing this issue in the current accounting proceedings.

c. Further, the Trustee's argument that collateral estoppel applies is misplaced because the Trustee ignores the procedural posture of the First Department's 2008 decision. While the decision includes a discussion of general investment standards, this discussion was within the context of the prior motion to vacate based on constructive fraud. The First Department did not evaluate each of the trusts' investment portfolios or engage in any detailed analysis as to the appropriateness of the investments to determine whether the Trustee breached its fiduciary duty.

d. The extensive briefing on the appeals and the underlying motions in the prior proceedings further demonstrate that the issue of the Trustee's breach of fiduciary duty was not before the court. The underlying motions to vacate focused on one dispositive argument: whether the Trustee properly notified the movants of the prior accounting proceedings. While the motion papers discussed, in general terms, the Trustee's allegedly imprudent investment strategy, the legal argument was that the prior orders settling the accounts should be vacated because the Trustee failed to notify the movants of the proceedings. This was the issue decided by the Supreme Court in its decision, which held that the motions to vacate must be denied because "none of the beneficiaries appeared in the accounting proceedings to contest the accounts, and there is no evidence that they were led to believe that they should not contest these accounts."

e. The movants' briefs on appeal had no discussion regarding the Trustee's specific investment strategy or the relevant investment standards. Thus, like the underlying motion, the issue on appeal was whether the Trustee engaged in constructive fraud by making false statements in the accounts or by failing to notify the movants about the proceedings.

f. Viewing the First Department's 2008 decision within this context, it is evident that the First Department did not and could not adjudicate the propriety of the Trustee's bond investments as this issue had not been properly brought before the court. Rather, the only issue litigated was whether prior accounting decrees should be vacated on the ground that the Trustee allegedly engaged in constructive fraud by failing to file full, accurate, and complete accountings and further failing to properly notify the movants about the accounting proceedings, their interest in the proceedings, and their right to contest the proceedings.

g. By contrast, the issue in these proceedings is the prudence of the Trustee's all-bond investments. This issue requires an analysis of different facts and laws. Thus, the allegations regarding the Trustee's bond investments cannot be dismissed on the ground of collateral estoppel as the First Department's decision presented a different issue from the Objectants' current claims.

h. The movants' arguments regarding constructive fraud centered on the Trustee's alleged failure to notify the movants of the prior accounting proceedings and its alleged omission of certain information from the accountings. The movants argued that such conduct constituted constructive fraud and they did not need to show that the Trustee acted with intent to defraud given the parties' fiduciary relationship and the fact that the Trustee benefited from its actions by covering up years of malfeasance. In this context, the movants' reference to the Trustee's alleged malfeasance and imprudent investments was generalized and tangential to its constructive fraud argument and therefore the prudence of the bond investments was not fully and actually litigated by movants. Thus, the Trustee's motion for summary judgment on the ground of collateral estoppel must be denied.

i. The Trustee also argued that in the event it is found liable for breach of fiduciary duty for imprudent investments, its liability is limited to negligence and mismanagement and thus the Objectants' demand for appreciation or lost profits damages must be stricken.

j. It is fundamental that a fiduciary must make the trust whole for any damage resulting from a breach of the fiduciary's duty. The calculation of such damages is predicated upon the type of misconduct or breach of fiduciary duty found. The measure of damages for negligent and imprudent failure to invest and diversify is the value of lost capital. This is calculated by determining the value of the securities at the time they should have been sold, minus their value at the time they were ultimately sold, or if unsold, at the time of the accounting. However, where there has been a breach of trust extending beyond mere negligence and committed for the personal gain of the fiduciary, the award of lost profits may be an appropriate measure of damages for the mismanagement of an investment portfolio. Under this theory, the beneficiaries are entitled to recover the difference between what they would have had if the assets were legitimately managed, estimated in most cases by the market index, minus what they in fact had at the time the misconduct ended.

k. Here, the crux of the objections is that the Trustee breached its fiduciary duty by not actively managing the investments. Towards this end, the Objectants allege that the Trustee imprudently invested the trust assets by failing to communicate with the beneficiaries regarding their investment needs, failing to consider the interest of the remainder beneficiaries, failing to develop an investment plan, and failing to analyze, monitor, and manage the investments on an on-going basis based on beneficiary needs and market conditions, including long periods of inactivity with no trading. These objections sound in negligence and failure to meet prudent investment practices, rather than deliberate self-dealing or faithless transfers of property. Indeed, these allegations are similar to the facts in *Matter of Janes*, where the court imposed liability on the fiduciary not only for its

imprudent failure to diversify but also for its "indifference, inaction, nondisclosure, and outright deception in response to the prolonged and steep decline in the worth of the estate."

l. Furthermore, although the objections include some allegations of self-dealing, these claims lack merit. For instance, the Objectants allege generally that the Trustee engaged in self-dealing by investing in companies in which it had a substantial business interest. In support, the Objectants cite the Trustee's purchase of bonds or stocks from large private and public corporations, such as IBM and the Triborough Bridge & Tunnel Authority, which allegedly shared a single overlapping director with the Trustee. While a corporate trustee is prohibited from purchasing property for a trust from an affiliate or subsidiary corporation in which it has a controlling interest, the allegations in the Objections fail to support an interest in the entities in question of such a substantial nature that there would be a temptation for a trustee to have a conflict of interest. Likewise, the Objectants' allegation that the Trustee engaged in self-dealing by investing in a common trust fund lacks merit as these funds are authorized under New York Banking Law. Finally, the Objectants' allegation that the Trustee engaged in self-dealing by investing the trust's assets in proprietary mutual funds is meritless as these investments are authorized under EPTL 11-2.3(d) and the Trustee has demonstrated that it did not collect double fees as both trustee and fund manager.

m. It is the Objectants' burden to show that a financial loss resulted from the Trustee's imprudent investments. The mere fact that a trust might have been able to earn more money through other investments does not establish a breach of duty, which would warrant a surcharge. The Objectants may not relieve themselves of this burden by relying on an erroneous theory of damages.

n. Here, the Objectants argue that absent lost profit damages, they would be left without a remedy since the nominal value of the trusts increased during the accounting period. However, the fact that there may have been a nominal net gain in the absolute value of the trusts does not absolve the Trustee of its obligation to comply with the prudent person and prudent investor standards and does not bar the Objectants' claims. Thus, contrary to the Objectants' argument, striking the lost profit measure of damages does not necessarily preclude their recovery of damages. Accordingly, the Trustee's motion to strike the Objectants' demand for an award of lost profits damages is granted.

o. The Arellano Lamars Objectants and the Various Objectants (together the "Moving Objectants") move for partial summary judgment on liability on their objections in the Maria Trust accounting proceeding, arguing that the Trustee breached its fiduciary duty to the beneficiaries by failing to comply with the prudent person and prudent investor rules, which were in effect during the accounting period from 1951 to 2011.

p. The accounting here spans two different legal standards for trust administration. Under the prudent investor rule, which was effective for most of the relevant period, a trustee was required to "employ such diligence and such prudence in the case and management of the trust, as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs." Under this rule, the preservation of the fund and procurement of a just income therefrom

are primary objects of the creation of the trust itself, and are to be primarily regarded. In 1995, the Prudent Investor Act became the governing standard for fiduciaries, and the statute imposes an affirmative duty on a fiduciary to invest and manage property with reasonable case, skill, and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.

q. Under either standard, the fiduciary's conduct is not evaluated by outcome but rather is determined in light of facts and circumstances prevailing at the time of the decision or action of the trustee. Further, when evaluating a fiduciary's decisions, it is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge. Rather, the test is prudence, not performance, and evidence of losses does not, by itself, establish imprudence. In evaluating a fiduciary's conduct, the court must consider the fiduciary's actions along with relevant factors such as the size of the trust, the performance of the market, the situation and needs of the beneficiaries, any potential tax consequences, the prospect of inflation and deflation, and the marketability of the investment.

r. The Moving Objectants argued that the Trustee acted imprudently by failing to create an investment plan or investment objectives for the Maria Trust, failing to communicate with the income beneficiaries and remaindermen of the trust, failing to consider the needs and circumstances of the beneficiaries when making investments, and failing to review, monitor, and analyze the investments. According to the Moving Objectants and their experts, these breaches caused significant financial damage to the Maria Trust and its beneficiaries, causing the trust to lose approximately half of its value over the course of the accounting period. In opposition, the Trustee argued that the Moving Objectants have failed to meet their burden to show that the Trustee acted imprudently or that the Trustee's conduct caused any loss to the trust.

s. After the death of Ms. de Sanchez in 1951, the Trustee had sole authority under the trust instrument to make investment decisions. According to the Moving Objectants, the Trustee did not create an investment plan or policy for the assets in the Maria Trust nor did it meaningfully assess its investments. In addition, the Moving Objectants claimed that the Trustee did not communicate with Ms. de Sanchez's daughter, Maria Sanchez de Lamar, the income beneficiary of the Maria Trust, regarding her needs, nor did it consider the needs of the remainder beneficiaries of the trust. During this time, the trust's assets were wholly invested in tax-exempt bonds. The Moving Objectants claimed that the Trustee should have invested in stocks during this period up to the statutory limit of 35 percent, which would have hedged against inflation and preserved the value of the trust.

t. In opposition, the Trustee disputes the Moving Objectants' position that the Trustee failed to communicate with Maria during this period and cites numerous letters between the Trustee and Maria's family. The Trustee also provided Maria with regular biannual account statements and annual security statements, which contained detailed information regarding the trust's holdings. In addition, the Trustee argued that after the death of Ms. de Sanchez, it continued its investment

policy by following the family's preference for investments in long-term and tax-exempt bonds. This was advantageous to Maria, the income beneficiary of the trust, because of the high tax rate on non-resident alien income, and because inflation during this time was low. The Trustee contended that given these facts, and contrary to the Objectants' claims, Ms. de Sanchez's death did not require a change in the Trustee's investment policy or a re-allocation of the Trust's assets to common stock.

u. Whether the Trustee's level of communication and lack of a written investment policy constitutes a breach of fiduciary duty or reflects the family's practice and the industry standard is an issue of fact that cannot be resolved on summary judgment. Even if such conduct was imprudent, it is unclear whether this caused any damages or whether the Trustee's all-bond investments were nevertheless proper in light of the circumstances, particularly since most of the bonds were purchased at the direction of the grantor and were decades away from maturity. Accordingly, summary judgment for this period must be denied.

v. Following the Cuban Revolution in 1959, Maria emigrated from Cuba to the United States. As a result, she could no longer rely on income from her family's property in Cuba and was left with almost nothing, except for the income from the trust and some savings accounts. Despite her changed circumstances, the Moving Objectants claim that the Trustee continued to ignore Maria and her needs by failing to communicate with her. The Moving Objectants claim that during this time, the Trustee should have adjusted its investment policy to account for Maria's present need for more income and her changed tax status by allocating the maximum allowable assets to investments in common stocks. In opposition, the Trustee points out that it did communicate directly with Maria during this time and even helped her apply for U.S. resident status. The Trustee also claimed that it was aware of the family's changed circumstances and adjusted its investments by trading into bonds, which had a higher interest rate. The prudence of the investments cannot be decided on summary judgment.

w. In 1968, Maria corresponded with the Trustee via letter and informed the Trustee that given her new tax status, she no longer needed investments in tax-exempt bonds. She also stated that she wanted to maximize her income from the Trust as she could write off her Cuban losses. The Trustee agreed and stated that it would sell off its investments in tax-exempt bonds and invest half of the assets in common stocks, up to the statutory limit, and the other half in taxable corporate bonds. However, while the Trustee invested half of the assets in common stocks, it mistakenly purchased tax-exempt municipal bonds, instead of taxable corporate bonds, with the other half of the assets. In an internal memorandum in October 1969, the Trustee noted the error but decided to hold onto the bonds to see if it could sell them at cost, rather than at a loss. The Trustee sold the bonds in 1979 and 1983, after the municipal bond market had improved. Whether the Trustee's mistaken investment in tax-exempt bonds in 1968 and its decision to retain the bonds was a breach of fiduciary duty presents an issue of fact that cannot be resolved on summary judgment. Further, whether the Trustee was obligated to affirmatively notify Maria of its error under the relevant standard of care, or whether its regular statements to her were sufficient, also presents an issue of fact. Finally, it is unclear if an investment in taxable corporate bonds, rather than

municipal tax-exempt bonds, would have benefited the remainder beneficiaries of the trust since Maria, as the income beneficiary, would have received the entire income from these investments.

x. The Moving Objectants also argued that the Trustee breached its fiduciary duty during this time by only making a handful of trades and failing to take any action to minimize the adverse impact of rising inflation and an economic recession. However, the level of trading by itself is insufficient to show that the Trustee acted imprudently and the Objectants fail to show what actions should have been undertaken during this time to avoid the losses. There are issues of fact regarding the prudence of the Trustee's investment decisions and the causation of damages, which preclude summary judgment.

y. During 1979–1983, the Trustee liquidated its holdings and invested the trust's assets in its own common trust funds. The Moving Objectants claim that this was a breach of fiduciary duty because the Trustee failed to consider alternative investments and because it continued to be heavily invested in tax-exempt assets, which they claim was not beneficial to Maria or the remainder beneficiaries. In opposition, the Trustee argues that investment in common trust funds is expressly authorized under Banking Law 100-c and that these funds were widely used as investments for personal trusts because they are a cost-effective way of minimizing management costs and maintaining a diversified portfolio. Further, the Trustee's expert contends that taxable holdings would not necessarily have been a better investment given the surge in municipal bond yields in the early 1980s, which made them more beneficial to people in the 30 percent tax bracket like Maria. Thus, there are issues of fact regarding the prudence of the Trustee's investment in its common trust funds and its investment in non-taxable holdings, which preclude summary judgment.

z. The Moving Objectants argue that the Trustee breached its fiduciary duty from 1983–2001 by failing to actively monitor and trade on its investments and by failing to communicate with Maria's children, who became the new income beneficiaries of the trust after she died in 1994. However, the Objectants' generalized allegations of malfeasance are insufficient because they fail to show that the Trustee's actions (or inaction) caused damages to the trust. Moreover, the Trustee points out that it did change its investment strategy after Maria's death by increasing its investment in equities. Accordingly, summary judgment for this period must be denied.

aa. The Moving Objectants argue that the Trustee breached its fiduciary duty from 2001–2011 by divesting the assets from its common trust funds and investing them in its proprietary mutual funds, thereby creating unnecessary risk of the assets at the end of the trust's term. However, once again, the Objectants fail to show that these actions harmed the trust. In fact, the value of the trust increased during this period. Further, the Trustee's expert opines that this may have been a prudent investment strategy as it reflected the Trustee's access to new investment vehicles following JPMorgan's merger with Chase in 2000. Thus, summary judgment for this period must be denied.

VI. DISCOVERY, DISCLOSURE, & INFORMATION ACCESS

A. *Burgauer v. Premier Trust, Inc.*, 2025 U.S. Dist. LEXIS 12534; 2025 LX 139573; 2025 WL 296540 (United States District Court for the Middle District of Florida 2025). Producing discovery related to 13 years as trustee is not overly burdensome and relevant to successor trustee's affirmative defenses to claims.

1. Plaintiff Steven E. Burgauer ("Plaintiff" or "Steven") alleged that Premier Trust, Inc. ("Defendant" or "Premier Trust"), as the prior temporary trustee of the Paul D. Burgauer Revocable Living Trust, dated May 25, 1987 ("Marital Trust"), breached its fiduciary duties by: (1) selling Marital Trust property in Oxford, Florida 34484 ("Florida Property") far below market value; (2) distributing Marital Trust principal to Margaret — the net income beneficiary — in direct violation of the terms of the Marital Trust; (3) paying attorneys' fees and costs from the Marital Trust in state court litigation in Nevada that resulted in Steven's removal as trustee ("Nevada Litigation") despite the lawsuit not benefitting the Marital Trust; and (4) compelling Plaintiff to incur substantial attorney's fees and costs in defending himself in the Nevada Litigation. Among his eight counts asserted in the complaint, Plaintiff asserts a claim for damages in count seven, alleging that Defendant caused him to incur attorney's fees and costs in the Nevada Litigation, and because he prevailed, Defendant should be required to reimburse him for those fees and costs.

2. Defendant asserted various affirmative defenses, including lack of standing, set-off, and unclean hands. Specifically, in its affirmative defense for set-off, Defendant asserts that it would be entitled to a set-off or reduction of any damages awarded to Plaintiff in the following amounts: (1) any distributions that the Trust should have made to Margaret under the terms of the Trust before the sale of the Florida Property and the distribution of the sale proceeds to Margaret; (2) any amounts that the Trust owed to legal counsel for Margaret because Margaret had to retain counsel to file legal action to obtain the distributions that were owed to her under the terms of the Trust; and (3) any amounts that the Trust may owe Margaret as a result of the Trust's improper transfer and use of Trust assets, including, without limitation, the Trust's transfer of the Florida Property to 12375 Holding, and any damages or losses incurred as a result of the line of credit given by the Trust to Burgauer-Albrecht Holding, Inc.

3. During discovery, Defendant served Plaintiff with its first set of interrogatories and requests for production of documents. Plaintiff moved for a protective order to limit the scope of his responses and prevent Defendant from discovering information regarding his activities as trustee of the Marital Trust from 2003 to 2015, arguing that such requests are overbroad and unduly burdensome.

4. The district court denied the motion for a protective order on the following grounds:

a. Generally, parties are entitled to discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. A protective order may be issued for "good cause" to protect a person from annoyance, embarrassment, oppression, or undue burden or expense by forbidding the discovery, forbidding inquiry into certain matters, or limiting the scope of disclosure of discovery to certain matters. The moving party requesting a protective order carries the burden of showing good cause and/or the right to be protected.

b. Plaintiff concedes that Defendant's requests relating to any Marital Trust distributions made to Margaret in 2016 are relevant to establishing the prior

distribution baseline and distribution amount since there are allegations from the Nevada Litigation that Margaret had been receiving distributions in 2016. Plaintiff argued that Defendant's requests are unduly burdensome because it would be extremely time consuming and expensive for Plaintiff and his counsel to produce 13 years of additional documentation from 2003 to 2015.

c. Defendant contended that the requested discovery is not overly broad because discovery on matters relating to Plaintiff's activities as the trustee of the Marital Trust from 2003 to 2015 is necessary to determine the potential issue of damages and substantiate several defenses, including its defense for set-off, which could reduce the amount it would otherwise be liable for. Defendant further asserted that the disputed requests are directly relevant to Plaintiff's damages claim and its defenses for lack of standing, unclean hands, and set-off.

d. Good cause requires a specific demonstration of fact rather than a generalized concern or conclusory statement. Plaintiff failed to make a specific demonstration of fact supporting the need for a protective order. Despite Plaintiff's concern about producing discovery over a 13-year period from 2003 to 2015, he has agreed to provide discovery covering almost a 10-year period from January 1, 2016 to the present date, subject to any privileges that may apply. Plaintiff failed to explain how producing the same or substantially similar information and documentation from 2003 to 2015 would be more difficult or burdensome. Simply put, Plaintiff's generalized concern is insufficient to establish good cause.

e. Defendant's requests are relevant to Plaintiff's damages claim and its affirmative defenses, and proportional to the needs of the case. As Defendant explains, since this case arises from the Nevada Litigation and is related to Defendant's actions taken as temporary trustee of the Marital Trust during that time, the requested discovery is necessary and specifically tailored to substantiate its defenses. The requested discovery is necessary to determine whether Plaintiff lacks standing to pursue his claims because his breach of the Trust will have removed any authority for him to act on behalf of the Trust. The discovery is needed to understand whether Plaintiff has unclean hands and whether any damages he is claiming were caused by his own wrongful conduct, which both prevents his claims and resulted in the Nevada Probate Court orders through which his damage claims arise. Defendant intends to offset against any damage claim for any money distributed to Margaret. To ascertain the proper set-off amount and damages more generally, Defendant must examine the relevant information and documentation from Plaintiff during discovery.

f. If a court denies a motion for protective order, it must award the prevailing party reasonable expenses, including attorney's fees, incurred as a result of submitting the motion unless the motion was substantially justified or other circumstances make an award of expenses unjust. Although Plaintiff did not prevail in this matter, the Court finds that Plaintiff's motion was substantially justified, as reasonable people could differ on the issues Plaintiff raised and whether the scope of Defendant's requests was appropriate. Therefore, Defendant's request for attorney's fees and costs is denied.

B. *Gruen v. Gruen,* 2025 Cal. App. Unpub. LEXIS 2128; 2025 LX 78510 (Court of Appeal of California 2025). Beneficiary could not prove harm from technical breach of duty to inform,

where beneficiary was given online access to account information, and could have requested the trust document and information but failed to do so.

1. Adam Gruen's grandmother, Elsbet Gruen, established a trust in 1997 for the benefit of Claude Gruen (Adam's father) and his wife Nina, with Adam and his four brothers named as contingent remainder beneficiaries. Elsbet named Claude and Nina as co-trustees. The trust became irrevocable upon Elsbet's death in 2004, at which point the trust assets were granted in trust to Claude, with Nina as his successor. The net income from the trust was to be paid to Claude for life, along with trust principal at any time, as Claude and Nina, as trustees, deemed appropriate for their "comfortable support, maintenance, health, medical care, and related emergency needs." Such payments could, but were not required to, take into account other income and cash resources available to Claude. The remaining principal after Elsbet's, Claude's, and Nina's deaths was to be distributed among Claude's five sons, including Adam. The trust required regular accountings to Elsbet during her life and to income beneficiaries after Elsbet's death.

2. The trust provided that "the Trustees shall be held to a standard of good faith and shall use the same judgment and care that a prudent individual would use if he were the owner of the trust assets, taking into account the purposes, terms, and distribution requirements of this trust agreement, and taking into account the current circumstances. Further, the Trustees, in making a decision or distribution, may act on the information and evidence reasonably available to them, and such decision or distribution made in good faith and on evidence the Trustees deem appropriate for the circumstances shall be a full discharge and acquittance to the Trustees and shall be final, binding, and conclusive. And a trustee shall be responsible only for his, her, or its acts or omissions in bad faith." Adam was named as the first successor trustee if Claude and Nina were unable or unwilling to serve.

3. In a July 2011 memo, Claude informed Adam and his brothers of the existence of the trust, and that the brothers were contingent remainder beneficiaries of the trust. He provided the brothers login information that allowed them online access to the trust account. Claude maintained the trust assets in a separate account, and paid trust taxes annually. Nina died in 2017, leaving Claude as the only trustee and direct beneficiary of the trust.

4. In April 2022, Claude asked Adam to step down as successor trustee. Claude testified that he asked Adam to step down because Adam had acted "totally irrational and hateful" regarding the trust and in correspondence with his brothers about Claude and the trust. Adam did not attend a July 2022 Zoom meeting with Claude, Claude's estate attorney, and Adam's brothers regarding the trust due to post-concussion symptoms, but he exchanged emails with them regarding the trust and the administration of Elsbet's estate. Because of the vacillations in Adam's communications with and attitude toward Claude, his brothers, and the trust, Claude reduced Adam's entitlement under his personal estate plan. Adam believed that his brothers had encouraged Claude to do so.

5. In March 2023, Adam sent a letter to Claude, requesting a "full and complete accounting" of the trust dating back to 2004. In April 2023, Adam emailed his brothers and Claude the petition underlying this appeal, before filing it. In his filed petition, Adam alleged that Claude breached the trust and his fiduciary duty as trustee; requested that he be suspended, removed, and replaced as trustee; and asked for an accounting, a surcharge, and declaratory relief.

6. The court held a trial on the petition and issued a statement of decision. The court found that Claude did not breach the terms of the Trust, did not meaningfully breach any obligation under the Probate Code, and did not breach any fiduciary duties owed to Adam, or that any breaches were immaterial, without damages, or if any damages, they were the result of good faith action. Though the record supported a finding that Adam brought his action as leverage to negotiate Claude's own estate plan, the court did not find bad faith by Adam. The court found that Claude breached his duty to give notice of the trust when it became irrevocable, but the evidence demonstrated the breach was not in bad faith and caused no damage. State law required notice when the trust became irrevocable upon Elsbet's death in 2004, but at least by July 2011, Adam had the basic trust information. The court dismissed Adam's claims.

7. Adam appealed and the court of appeals affirmed on the following grounds:

a. Many of Adam's assertions in his opening brief include unpaginated citations to the reporter's transcript below, and consistently cited in his opening brief to the trial court's entire 20-page statement of decision when referring to individual findings, rather than citing to a specific page where those findings can be found. All of Adam's factual contentions based on these inadequate citations are disregarded.

b. There was at least one violation of the notice requirements to be provided when a revocable trust "becomes irrevocable because of the death of one or more of the settlors of the trust." When Elsbet died in 2004, and the trust became irrevocable, Claude was required to provide notice to trust beneficiaries: (1) the identity of the trust settlor and date of the trust's settlement; (2) the name, address, and telephone number of each trustee; (3) the address of the location of trust administration; (4) any additional information required by the trust instrument; and (5) notice that the recipient is entitled, upon reasonable request, to a true and complete copy of the trust's terms.

c. In 2011, Claude notified Adam and his brothers of the existence of the trust and provided them with the number and login information for the account in which the trust assets were held. That notice gave Adam access to detailed trust information and put him on notice of the existence of the trust sufficient to satisfy Claude's duty. At the very least, Adam could not prove damages arising from Claude's failure to notify him in 2004, and the trust absolved Claude of liability for his error because there was no evidence he failed to provide notice in bad faith.

d. Adam did not argue how he has suffered damage due to Claude's failure to provide formal notice in 2004 or that the detailed information he could have accessed starting at least as early as July 2011 was inadequate for him to protect his interests in the trust.

e. Adam similarly argues that Claude failed to keep him reasonably informed of the status of the trust. The most basic action required of a trustee is to promptly inform the beneficiary of the existence of the trust and their status as beneficiaries, so that the beneficiary may exercise their rights to secure information about the trust. Absent a request, a trustee must inform a trust beneficiary of the existence of the trust and of their status as a beneficiary. A beneficiary, like Adam, who claims not to have received adequate information

must prove a causal connection between the trustee's failure to so inform him and any harm to his beneficial interest in the trust. Adam has not established how he was harmed by any failure to inform him of the existence of the trust and his status thereunder before 2011.

f. Adam suggested in his reply brief that he should have been informed of Claude's use of a portion of trust principal in 2007 or 2008 to assist in his purchase and renovation of two condominiums. Adam did not make that argument in his opening brief and it is forfeited. Furthermore, Adam has not indicated how Claude acted in bad faith, as required to establish liability.

g. To the extent Adam argues that he should have been provided with further information beyond being notified of the trust's existence and his status under the trust — the trial court's conclusion that he had sufficient information to make a reasonable request for more information is supported by substantial evidence. A trustee is required to provide further information only upon the request of a beneficiary, and Adam made no such request until 2023. In sum, by 2011, Adam had access to detailed information about the trust account, and he could have requested the trust document and made any further requests he desired at that time. He made no such request until March 2023, just before he filed the petition initiating this litigation. Claude satisfied his duty to keep trust beneficiaries reasonably informed.

h. Adam acknowledges that the Probate Code does not require Claude to provide him an accounting because he is not a current income beneficiary of the trust. While a beneficiary may make a reasonable request for information sufficient to protect their beneficial interest in the trust, a trustee is not required to provide an accounting upon request. A remainder beneficiary, like Adam, has standing to petition the court after requesting an accounting, but the decision of whether to order an accounting is left to the trial court's discretion.

i. Adam requested a complete accounting back to 2004. That request for 20 years of information was inconsistent with Adam's disclaimer nine months earlier that he was not seeking an accounting. There was no evidence of "material wrongdoing" that would justify an accounting, and given the modest size of the Trust and the modest use of its assets, the expense of an accounting from 2004 would be unduly burdensome and inequitable. Adam's objections to the trial court's ruling do not establish an abuse of discretion: he fails to acknowledge that he did not request the limited information he now suggests it would have been reasonable to request, but rather requested a full accounting of 20 years of trust activities. Further, his assertion that the request had to be considered "in light of the lack of any information from" Claude in the previous 20 years fails to acknowledge that Claude provided him access to detailed financial information regarding the trust account in July 2011. Adam's arguments amount to a mere disagreement with the trial court's reasonable exercise of discretion, which is not a basis to overturn the court's ruling.

j. Adam challenges three instances in which Claude used trust principal. He argues that Claude's withdrawal of more than $100,000 in 2007 or 2008 to purchase two condominiums and renovate them, his payment of taxes from trust assets in 2008, and his loan to himself of funds to purchase an income property

all violated his fiduciary duties as trustee. The trust not only grants Claude absolute rights to trust income, but also gives him broad rights to trust principal.

k. State law provides that if a trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability for a breach of trust if it is equitable to do so. The trial court relied on this provision to conclude that even if Claude had failed to maintain adequate trust records, it would exercise its discretion to excuse Claude from that breach in whole, based on the court's findings that Claude acted reasonably and in good faith under the circumstances known to him. Adam did not show that Claude's asserted errors in maintaining records were unreasonable or made in bad faith. Having not received any request for information for the 12 years between Claude's 2011 memo to Adam and his brothers and Adam's filing of his petition, Claude cannot be faulted for not having been able to produce every requested record for the preceding 20 years.

C. *Gick v. Henry,* 2025 Ind. App. Unpub. LEXIS 282; 258 N.E.3d 257; 2025 LX 14509; 2025 WL 784379 (Court of Appeals of Indiana 2025). Beneficiary entitled to award of attorneys' fees for bringing action to successfully compel trustee to account.

1. Lois Jean Johnson died testate on March 4, 2019, and her will established the Lois Jean Johnson Testamentary Trust ("the Trust"). The Trust property included a residential home ("the residence") and approximately 300 acres of farmland in Benton, Warren, and Tippecanoe counties. Frank Gick was named Trustee and beneficiary of the Trust so long as he occupied the residence "as his primary residence within six (6) months of [Johnson's] death, for as long as he is able to occupy [the residence] as his primary residence[.]" The Trust would terminate upon Gick's "death or his disqualification as trust beneficiary." Rebecca Henry was named the sole remainder beneficiary.

2. The residence was severely damaged by a fire on January 21, 2023. On February 22, 2023, Henry requested an accounting and access to financial records relating to the Trust. Gick provided some, but not all, financial records to Henry. Gick informed Henry that he had received insurance payouts, which were to be used to rebuild the residence, and that he had comingled those funds in his personal bank account. Although he had provided Henry with some information, Gick maintained that he had no obligation to provide Henry with any information regarding the Trust's finances.

3. Henry petitioned for an accounting of the Trust. Gick opposed Henry's petition, claiming that he had provided sufficient information to Henry regarding the Trust. Gick also filed a number of counterclaims, all of which were subsequently dismissed after Gick "conceded during the hearing" that Henry's motion to dismiss the counterclaims should be granted. Henry moved for judgment on the pleadings. The trial court entered judgment in favor of Henry and ordered Gick to pay Henry's attorneys' fees.

4. Gick appealed, and the court of appeals affirmed on the following grounds:

a. Indiana Code section 30-4-3-11(a) provides if the trustee commits a breach of trust, the trustee is liable to the beneficiary for reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach. Indiana Code section 30-4-3-22(a) provides that a beneficiary of a trust may maintain an action to compel the trustee to perform his duties and to compel the trustee to redress a breach of

trust. If a beneficiary successfully maintains an action under subsection of this section, she is entitled to a judgment for reasonable attorney's fees.

b. A trustee has a duty to keep the trust property separate from the trustee's individual property and separate from or clearly identifiable from property subject to another trust, maintain clear and accurate accounts with respect to the trust estate, and keep a remainder beneficiary reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to protect their interests.

c. Gick breached his duties. Gick had failed to provide Henry with a full accounting of the Trust, upon being asked to provide one. Gick's failure to do so constitutes "unfulfillment or nonfeasance" of his duties as trustee. The fact that the trial court may not have explicitly used the word "breach" to describe Gick's actions does not change the fact that his failure to perform his statutory duties as trustee resulted in a breach of said duties. Henry successfully maintained an action to compel Gick to perform his duties, i.e., to provide her with an accounting of the Trust. Henry initiated the underlying action after Gick had refused to perform his duties as trustee. The facts of this case support a reasonable inference that Gick had committed a wrongdoing, i.e., refusing to provide a full and complete accounting of the Trust upon being asked for one by a beneficiary.

D. *In re In the Ct. of Appeals of N.C. New Hanover Cnty.,* 2025 N.C. App. LEXIS 498 (Court of Appeals of North Carolina 2025). Where trust instruments specify annual accountings, no further waiver or disclaimer language is needed to override the UTC notice provisions, and court will not recognize an expansive right of inspection of historical documentation, untethered to any allegation of breach or wrongdoing.

1. Richard and Dixey Smith created two revocable trusts in 1998: the Dixey A. Smith Trust and the Richard B. Smith Family Trust. After Richard's death in 2013, Dixey served as sole trustee of both trusts until her death on January 10, 2022. Upon her death, her daughters, Lindsay Smith and Lani Smith Lawrence, became co-trustees. Both trust instruments direct the remaining assets to be divided into four equal sub-trusts for the Smith children. Lindsay and Lani submitted the required tax identification numbers ("TINs") to UBS Financial Services to facilitate funding of their sub-trusts. Scott and his brother Cary refused, citing concerns about trust disbursements. Scott and Cary then demanded "each and every" financial statement, tax return, check copy, and related documentation for both trusts from January 2020 onward, and reserved the right to demand earlier records.

2. The co-trustees responded by producing detailed annual and interim accountings for the period they served, covering January 2022 through January 2024. These accountings included beginning and ending balances, categorized receipts such as dividends and interest, itemized disbursements including trustee fees, legal and administrative expenses, and distributions to beneficiaries. The reports also disclosed realized gains and losses from investments and provided a detailed inventory of trust assets with valuations at the close of each reporting period.

3. The clerk of superior court denied Scott's demand as overbroad and beyond the scope of the trustees' obligations. The superior court affirmed. Scott appealed and the court of appeals affirmed on the following grounds:

a. The trustees had satisfied their obligations under both the terms of the trust agreements and applicable law.

b. North Carolina's Trust Code, codified in Chapter 36C of the General Statutes, provides that the terms of the trust generally govern its administration, subject to limited statutory exceptions. Section 36C-8-813, which addresses a trustee's duty to report and respond to requests for information, is not one of the enumerated exceptions in subsection (b). Accordingly, the settlors of the Dixey and Richard Trusts were permitted to modify or limit the trustees' obligations under § 813(a)(2) through the terms of the trust instruments. The accounting and reporting duties of the trustees in this case are therefore governed first and foremost by the terms of the trust agreements.

c. Appellant contends a trust must explicitly waive the disclosure obligations in § 36C-8-813(a)(2) in order to limit a beneficiary's right to request additional information. However, the Trust Code imposes no such requirement. Section 36C-1-105 allows trust terms to override default provisions unless expressly prohibited, and § 813 is not among the mandatory provisions listed in subsection (b). Accordingly, where, as here, the trust instruments specify the scope of reporting required — namely, annual accountings — no further waiver or disclaimer language is needed to displace the broader default duties of § 813(a)(2).

d. Here, the Dixey Trust and the Richard Trust each require the trustees to provide annual accounts to qualified beneficiaries upon request. The record shows that the co-trustees, following the death of the original trustee, Dixey Smith, furnished Scott with annual and interim accounting reports for the periods from January 10, 2022 through January 31, 2024. These reports itemized trust receipts, disbursements, principal balances, and gains or losses. Respondent does not allege these reports were false, misleading, or substantively deficient under the trust agreements. Instead, he argues they were insufficient under § 813(a)(2) because they did not include underlying source documents such as receipts, invoices, or tax filings.

e. Even assuming § 813(a)(2) applies notwithstanding the trust terms, the statute entitles beneficiaries only to "reasonably complete and accurate information" about the trust property. The trustees' reports satisfy this standard. As noted, they disclose the nature, value, and movement of trust assets in sufficient detail to apprise a beneficiary of the trust's financial condition. Respondent has failed to articulate how the information provided is inadequate for him to understand or enforce his rights under the trust.

f. Moreover, respondent's requests were not limited in scope or tethered to any allegation of trustee misconduct. His demand sought "each and every financial statement, account statement, tax return, check copy, wire request, receipt, invoice, and other disbursement or distribution documentation" from January 1, 2020 through the date of filing, and reserved the right to seek additional documents for prior periods. Yet respondent does not challenge any particular transaction or accuse the trustees of mismanagement. Instead, he asks the court to recognize an expansive right of inspection untethered to need or context — effectively granting all beneficiaries the ability to conduct open-ended audits of

trust history. Such a rule is inconsistent with the structure of the North Carolina Trust Code and the deference it affords to settlors' chosen terms.

g. Finally, respondent's reliance on *Wilson v. Wilson*, 203 N.C. App. 45 (2010), is unavailing. That case involved a superior court action for breach of fiduciary duty in which the trustee refused to respond to discovery requests or disclose any trust information. In *Wilson*, the court held that such disclosures could not be withheld in the face of an active claim of misconduct. By contrast, no such claims have been asserted here. Respondent expressly disclaims any allegation of breach or bad faith. His requests were not made as part of discovery or litigation but as part of a summary trust administration proceeding before the clerk. The factual and procedural distinctions between this case and Wilson are dispositive.

h. The trial court correctly determined that the co-trustees fulfilled their disclosure obligations under the governing trust agreements and applicable provisions of the North Carolina Trust Code. The Trusts expressly require only annual accountings, and the record establishes that the co-trustees provided detailed reports covering the full period of their administration. Respondent has not shown that the information provided was inadequate or that the co-trustees acted in bad faith. His demand for expansive historical documentation, untethered to any allegation of breach or wrongdoing, exceeds the bounds of a reasonable request.

E. *In re Trust of the Thomas Karakash Fam. Trust,* 2025 Minn. App. Unpub. LEXIS 589 (Court of Appeals of Minnesota 2025). By failing to consider co-trustee's rights as beneficiary, and focusing only on role as co-trustee, court erred in dismissing beneficiary's claims for information from other co-trustees.

1. Retreat Lodge is a resort property located on Lake Vermillion in St. Louis County, Minnesota. It occupies roughly 25 acres of land and spans 300 feet of shoreline. Retreat Lodge offers cabin rentals and recreational activities to guests from May to October. Thomas and Ann purchased Retreat Lodge in 1972 and established it as an S-corporation in 1996. Thomas and Ann were the original president and vice president of the S-corporation.

2. In May 1996, Thomas and Ann established individual trusts, naming their children Peter, John, and Teresa as co-trustees and beneficiaries. Each trust owned one-half of the S-corporation's shares. In 2004, John and his spouse Shaun began managing Retreat Lodge as a full-time, year-round position, and received salaries and benefits. In November 2013, Thomas and Ann stepped down from their respective roles in the S-corporation. In their stead, John was appointed president, Teresa was appointed vice president, and Shaun was appointed secretary and treasurer.

3. Ann died in December 2013, and Thomas died in June 2017. The individual trusts merged into the Karakash Family Trust ("Trust") upon Thomas's death. At the time of trial, the sole asset in the Trust was 100% of the S-corporation's shares.

4. In April 2016, Peter brought an action against John and Teresa ("respondents") in his capacity as a co-trustee, seeking an accounting of Ann's individual trust. In April 2017, the district court dismissed the action, reasoning that there was no basis to grant the petition given the legal right of access afforded to Peter as co-trustee. The district court further noted that there was no evidence that respondents engaged in impropriety and that all relevant financial records had been provided to Peter.

5. In March 2019, Peter filed an emergency petition for writ of mandamus requesting access to Retreat Lodge's ledgers. The district court denied Peter's petition in a May 2019 order. In pertinent part, the district court determined that John had provided Peter with tax returns, and that this satisfied John's obligation to "furnish certain financial documents" in response to a written request by a shareholder. The district court also noted that the record contained evidence that Peter was given "liberal access to financial documents and records of the business and trusts and . . . unrestricted access to meet and question" Retreat Lodge's accounting firm.

6. In September 2020, Peter as a beneficiary sued respondents in their capacities as co-trustees. Peter alleged that respondents breached their fiduciary duties to Peter when they violated the duty of loyalty, duty of impartiality, duty of prudent administration, and duty to inform and report. Peter requested, among other forms of relief, that the district court direct respondents "to make a full and complete accounting" of the Trust's assets for the preceding six-year period, reimburse the Trust for respondents' alleged self-dealing, and provide Peter "in his capacity as a beneficiary . . . full rights to use the Trust's assets."

7. John filed an answer and a counterclaim, asserted res judicata as an affirmative defense, and filed a motion to dismiss for failure to state a claim upon which relief can be granted. The district court denied John's motion to dismiss and determined that res judicata did not apply. In ruling on res judicata, the district court noted that this was the first time Peter had brought claims against respondents in his capacity as a beneficiary, such that the parties in this action were not identical to the parties in the prior actions.

8. Peter filed a motion to compel discovery. John opposed the motion, arguing the only documents relevant to the Trust were Retreat Lodge's tax returns, which had been provided. Peter served a subpoena on the Trust's accounting firm, demanding a deposition and the production of certain documents. John filed a motion to quash the subpoena. Peter indicated that the accounting firm had responded and provided the requested documents. And, following the hearing, both parties filed correspondence with the district court indicating that John had agreed to provide certain documents. Accordingly, the district court deferred its ruling on the motion to compel.

9. Peter filed correspondence with the district court explaining that John continued to be noncompliant with discovery. Following a discovery conference, the district court issued an order directing John to produce certain documents. Peter filed additional correspondence with the district court, again contending that John had failed to comply with discovery. The district court issued an order directing John to produce the requested documents. Peter filed further correspondence with the district court, again contending that John had failed to comply with discovery and requesting that the district court order John to produce certain documents. John filed responsive correspondence, arguing that the requested documents were outside of the scope of authorized discovery. John ultimately produced nearly 3,000 pages of documents within a month before trial.

10. At trial, evidence was offered regarding respondents' use of Retreat Lodge's — and, therefore, the Trust's — funds. Peter offered as an exhibit a "beneficial gains summary" prepared from the nearly 3,000 pages of documents respondents disclosed within a month before trial. The beneficial gains summary summarized documentation showing that respondents used Retreat Lodge's funds to pay for meals and entertainment, hotel stays, fishing tournament fees, car insurance, and clothing, among other items. The

accountant agreed that many of these expenses were "necessary and ordinary business expense[s]" and therefore tax deductible under Internal Revenue Service ("IRS") standards. The accountant described other expenses in the beneficial gains summary as "de minimis employee gift[s]," again applying an IRS tax standard that allows "employees [to] receive a certain gift from the entity that's deemed appropriate as being de minimis." Teresa, Shaun, and John generally testified to their belief that the expenses in the beneficial gains summary were appropriate. But Shaun admitted that she occasionally made personal purchases with Retreat Lodge's funds. And when asked whether he keeps the Trust's property separate from his personal property, John expressed that "it's tough to divide," especially during the summer, because operating Retreat Lodge is "a lifestyle."

11. Peter testified that, when he attended trustee meetings, respondents refused to discuss Retreat Lodge's financial information with him. Peter also testified that respondents either ignored his requests for an accounting or told him to pay for an accounting himself. Peter described respondents as directing him to go to the Trust's accounting firm to review Retreat Lodge's financial information. But when he did so, the staff either showed him minimally useful information, such as tax returns or "a ledger that ha[d] single line items on it," or did not have the information he sought. Peter confirmed that he had received Retreat Lodge's tax returns for 2016 through 2020. Teresa described her view that Peter is only entitled to Retreat Lodge's tax returns and explained that she, otherwise, denies his requests for financial information. John likewise testified that Peter only has access to Retreat Lodge's tax returns and is, otherwise, denied access to Retreat Lodge's financial information.

12. Peter testified that he had not stayed at Retreat Lodge since 2012 and that his requests to do so have either been rejected or met with no response. Teresa admitted that Peter is not permitted to use the lake home, which doubles as Retreat Lodge's office, "because of all the angst that is between the family." And John likewise testified that Peter cannot currently stay at Retreat Lodge, but Teresa can.

13. The district court denied Peter's breach-of-fiduciary-duty claims because Peter did not bring the claims as the result of any legitimate claim of a breach of fiduciary duty and, instead, brought the claim to harass, intimidate, and frustrate respondents and their attempts to effectively administer the Trust and its holdings. The district court also issued an order to show cause against Peter sua sponte, asserting that sanctions may be appropriate because Peter frivolously asserted claims and unfounded positions. Peter filed a motion for a new trial and a motion to remove the judge, and argued the judge should remove themself from the case because both the judge and their spouse were social media "friends" with John's counsel, and the judge's order demonstrated "unwarranted and extreme vitriol towards Peter." Peter attached a screenshot of John's counsel's social media page to support the motion. The district court imposed a $25,000 sanction against Peter, primarily on the basis that his claims were frivolous, and denied Peter's post-trial motions.

14. Peter appealed, and the court of appeals affirmed the court's refusal to remove the trustees, but reversed the denial of Peter's motion for a new trial and award of sanctions, and remanded on the following grounds:

a. A district court may grant a party's new-trial motion on any one of seven available grounds, including — as relevant here — where the decision . . . is not justified by the evidence, or is contrary to law.

b. Beneficiaries and trustees have distinct roles and duties under Minnesota law. When a party holds multiple roles with respect to a trust, the role the plaintiff asserts in the complaint governs the applicable law. Peter filed his complaint in his capacity as a beneficiary, which determined the scope of the claims that he could allege and the law that applied to those claims. It was a legal error when the district court failed to evaluate his claims based on his role as a beneficiary. Because this legal error pervaded the district court's analysis, the district court abused its discretion when it denied the motion for a new trial on this basis.

c. Trustees owe beneficiaries a duty of full disclosure. Minnesota law outlines a trustee's duty to inform and report to beneficiaries regarding the administration of the trust: "a trustee shall keep the qualified beneficiaries of an irrevocable trust reasonably informed about the administration of the trust and of the material facts necessary to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of an irrevocable trust."

d. The district court made its determination with a focus on Peter's role as a co-trustee rather than as a beneficiary. The district court concluded: "this information was readily accessible to Peter and he did not need his fellow Trustees to provide the information to him. Peter has been provided beyond what is required for him to be assured Retreat Lodge is being operated in a prudent and reasonable manner, and of what is required of him to carry out his duties as a Trustee. Peter was provided sufficient records to account for the Trust's assets, to ensure he was allowed to meet his fiduciary duties and perform his work as Trustee, and to ensure the property held by the Trust and the administration of the Trust was all done pursuant to the law and in a financially prudent manner. Most concerning is that Peter centered his claims on the allegation that he was deprived financial records and information he needed as Trustee, which he knew was not true and would not be supported by the clear and well-documented evidence. Peter intentionally asserted frivolous claims that were made in bad faith. He asserted his actions were in furtherance of his duties as Trustee even though the clear record demonstrates that is a false assertion."

e. Accordingly, the district court legally erred when it decided the duty-to-inform-and-report claim without considering the financial information respondents, as trustees, must provide in response to Peter's reasonable requests as a beneficiary.

f. The district court's legal conclusions regarding the duty of prudent administration again reflect that the district court made its determination with a focus on Peter's role as a co-trustee rather than as a beneficiary. The district court legally erred when it decided the duty-of-prudent-administration claim without considering Peter's role as a beneficiary, rather than as a co-trustee.

g. Here, despite Peter's unrebutted evidence regarding the use of Retreat Lodge's funds for John's and Shaun's personal use, the district court did not make any

factual findings or legal conclusions regarding the duty of loyalty. Accordingly, the district court legally erred when it failed to decide Peter's duty-of-loyalty claim. Despite Peter's claim that respondents breached the duty of impartiality and uncontradicted testimony that respondents currently exclude Peter from the Retreat Lodge property, the district court failed to make any legal conclusions regarding whether respondents' conduct violated the duty of impartiality to Peter as a beneficiary. Accordingly, the district court legally erred when it failed to decide Peter's duty-of-impartiality claim.

h. The district court legally erred when it determined that it did not matter whether the district court "referred to Peter as a Trustee or Beneficiary." The record shows that, by failing to consider Peter's role as a beneficiary, the district court either applied an incorrect legal standard or failed to consider appropriately alleged claims. On this basis, the district court abused its discretion when it denied his motion for a new trial.

i. The evidence submitted at trial does not support the district court's finding that "Peter . . . has continually been provided financial information." Teresa admitted at trial that she "rejected" Peter's requests for information about Retreat Lodge's operations because "as a Trustee/Beneficiary that is not a concern." She explained that Peter has "no need" for financial information about Retreat Lodge so long as "the land and the buildings are being maintained and the business is thriving." John's testimony likewise indicated that Peter did not have access to Retreat Lodge's financial information, as he described providing Peter with anything more than Retreat Lodge's tax returns as "just a hassle." Indeed, John testified that Peter had been provided only with Retreat Lodge's tax returns since 2015. And although John stated that Peter could have come to Retreat Lodge to review the financial information, John also testified that when Peter did come for that purpose, he refused to give Peter access to "the books." Moreover, Shaun and Teresa both described their view that, since the May 2019 order, Peter was only entitled to Retreat Lodge's tax returns.

j. Further, Teresa indicated in her testimony that any inadequacies in the information provided to Peter had been cured because Peter was provided extensive financial information as part of "this litigation." But the duty to disclose information to a beneficiary is not triggered by litigation. Further, the record reflects that, even during litigation, Peter had to file numerous motions to compel in order to obtain relevant financial information before trial. Thus, the record evidence does not support the district court's findings that Peter has been provided extensive financial information.

k. No rule is more fully settled than that which forbids a trustee's dealing with himself in respect to trust property. There is no "de minimis defense" to whether self-dealing violates the duty of loyalty. The record does not support the district court's findings that Peter had not provided "even minimal support" to show impropriety and that Peter's review of the business records "did not reveal an[y] waste, fraud, or misappropriation." The district court's finding that "Peter . . . has never specifically alleged improprieties . . . in Retreat Lodge's operations" lacks support in the record. Trustees must manage the trust with equal consideration

for the interests of all beneficiaries. Peter has been fully prevented from using Retreat Lodge's property for years.

l. The district court abused its discretion when it sanctioned Peter on the ground that he brought frivolous claims. Primarily, the district court found Peter's claims were frivolous because of his prior lawsuits against respondents. But, unlike the present action, Peter did not bring any of the past lawsuits in his capacity as a beneficiary. In 2016, Peter brought an action against respondents in his capacity as a co-trustee. And in 2019, he brought his claim in his capacity as a shareholder. Further, respondents filed a dispositive motion earlier in the proceedings, making a substantially similar argument — res judicata precluded Peter's claims because of the prior lawsuits. The district court denied that motion precisely because Peter brought this lawsuit in his role as a beneficiary.

m. Just because the judge may know John's counsel does not mean that the judge had bias against Peter. And in smaller legal communities in particular, judges are "bound to know" the attorneys that frequently appear in their courtrooms. But even so, at the show cause hearing, John's counsel asserted that she does not know the judge personally, despite their social media connection. The screenshots Peter included in support of his motion do not contradict this statement, as John's counsel's social media page indicated that the judge and their spouse were but two of her 2,300 total social media "friends." The record therefore supports the district court's determination that Peter failed to show bias. Adverse rulings do not constitute bias. Peter does not specifically point to anything in the record to support his contention that the judge showed "hostility" as opposed to simply disagreeing with his position.

F. *Lindblad v. Blair,* 2025 IL App (1st) 241753-U; 2025 Ill. App. Unpub. LEXIS 814; 2025 LX 86328 (Appellate Court of Illinois 2025). Where revocable trust was fully amended and restated, trustee's duty under Uniform Trust Code to provide a complete copy of the trust instrument does not include the superseded prior versions of the trust and prior amendments.

1. On May 14, 1987, Mignon Buehler established the Mignon Buehler Trust ("Trust") pursuant to the provisions of a trust agreement entered into by Mignon, as grantor and trustee ("Original Agreement"), which she amended and restated at various times between 1987 and 2020. Beginning in 2007 and until her death, Mignon had the same estate planning attorney ("attorney"). The attorney's law firm represented attorney.

2. On January 9, 2020, for the final time, Mignon executed a new will and the pertinent document, titled "Amendment and Restatement of the Trust Agreement Establishing Mignon Buehler Trust" ("2020 Restatement"). The 2020 Restatement named the attorney as the successor trustee after Mignon's death and directed him, as trustee, to distribute her assets as follows: a specific bequest of $500,000 to her son, Eric Lindblad, and the remainder, after debts and taxes, to the decedents of her daughter, Retana.

3. Mignon died on December 9, 2020. On March 29, 2021, the circuit court admitted Mignon's will to probate and appointed the attorney as executor. Mignon had a "pour-over" will, which directed her executor to distribute any assets in her estate to the Trust.

4. The law firm provided Lindblad with two restatements of the Trust, a restatement dated January 29, 2018 ("2018 Restatement") and the 2020 Restatement. On June 4, 2021, Lindblad demanded that the attorney furnish all of Mignon's other estate plan and

trust documents for the period May 14, 1987 through her date of her death for his counsel's review ("Mignon's Estate Planning Documents"). The law firm, by letter, denied his request citing ethical obligations. Lindblad's attorney responded, by letter, on June 10, 2021. The law firm responded and, again, denied the request.

5. Lindblad sued the attorney as trustee of the Trust. Lindblad alleged that, at the time of Mignon's death, the Trust held approximately $8.5 million in assets. Lindblad believed that from May 14, 1987 to January 9, 2020, Mignon made more than two restatements, modifications, amendments, or changes to the Original Agreement. Lindblad alleged and defendant denied that, on March 24, 2021, the law firm informed Lindblad that it had in its possession 20 different "Amendments" to the Original Agreement. Lindblad further alleged that the attorney wrongfully denied him access to Mignon's Estate Planning Documents. Lindblad alleged that, based upon decades of communications with his mother, Mignon's Estate Planning Documents provided him with gifts upon her death far exceeding $500,000 and that any changes to those greater gifts resulted from fraud or undue influence or both and that the changes are statutorily deemed void ab initio. He also alleged that, at an unspecified time, he expressed to the law firm that his mother's mental capacity to make changes to her estate plan and trust documents was also a concern. The only relief sought was a declaration that the attorney deliver to Lindblad all of Mignon's Estate Planning Documents, including the Original Agreement and "all restatements, modifications, wills, codicils, and amendments thereto."

6. Lindblad filed a motion for summary judgment and the attorney filed a cross-motion for summary judgment. The circuit court granted summary judgment in favor of the attorney and against Lindblad. Lindblad filed a motion for reconsideration, which was denied by the circuit court. Lindblad appealed and the court of appeals affirmed on the following grounds:

> a. Lindblad argues that the circuit court too narrowly interpreted the definition of "a complete copy of the trust instrument," where the Original Agreement was never revoked and still constituted part of the trust instrument. He argues that the narrow reading of "Trust Instrument" prevented him from investigating whether he was cheated out of a bequest greater than $500,000 and that he "may have several causes of action recognized in Illinois which he may learn of upon a review of the trust documents he seeks." Blair, on the other hand argues that because the 2020 Restatement fully restated the terms of the Original Agreement, he was not obligated, under section 813.1(b)(6), to furnish the previous renditions of the trust as they were rendered obsolete and not part of the "trust instrument."
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> b. Section 813.1(b)(6) of the Trust Code provides: "Upon the reasonable request of a qualified beneficiary, the trustee shall promptly furnish to the qualified beneficiary a complete copy of the trust instrument." The parties do not dispute whether Lindblad is a "qualified beneficiary," or whether Lindblad made a reasonable request to Blair. At issue here is what documents constitute "a complete copy of the trust instrument." Section 103(39) of the Trust Code defines "trust instrument" as "the written instrument stating the terms of a trust, including any amendment, any court order, or nonjudicial settlement agreement establishing, construing, or modifying the terms of the trust in accordance with Section 111, Sections 410 through 416, or other applicable law, and any additional trust instrument under Article 12." "Terms of the trust" is defined as: "(A) except

as otherwise provided in paragraph (B), the manifestation of the settlor's intent regarding a trust's provisions as: (i) expressed in the trust instrument; (ii) established by other evidence that would be admissible in a judicial proceeding; or (B) the trust's provisions as established, determined, or modified by: (i) a trustee or other person in accordance with applicable law; (ii) a court order; or (iii) a nonjudicial settlement agreement under Section 111."

c. Lindblad focuses on the language of the 2020 Restatement, that Mignon intended to "amend and restate" the Original Agreement but did not explicitly revoke the Original Agreement. He argues that as the Original Agreement was not revoked, it is one of the written instruments stating the terms of the trust and the trustee was obligated to provide him with the Original Agreement and any and all amendments and restatements made between May 14, 1987 and Mignon's death. Blair, on the other hand, argues that the 2020 Restatement, which amended some provisions but otherwise restated the terms of the Original Agreement, is a complete copy of the trust instrument where the 2020 Restatement rendered the Original Agreement and previous amendments and restatements obsolete.

d. Mignon reserved the right to revoke or amend the Original Agreement, by a signed instrument delivered to the trustee. Between 1987 and 2020, Mignon amended and restated the Original Agreement, at least twice. It is not disputed that Mignon followed the method as provided in section 1.3 of the Original Agreement in executing the 2020 Restatement. Following the 2020 Restatement, Mignon did not amend or modify any terms of the 2020 Restatement.

e. Mignon died on December 9, 2020, leaving the 2020 Restatement as the final version of the trust. The 2020 Restatement specified that it was Mignon's "intention to amend and restate the terms of the Original Agreement, with the intent that the Trust shall continue to be known as the 'Mignon Buehler Trust.'" It further stated that "pursuant to Section 1.3 of the Original Agreement, upon executing this Agreement, I hereby amend and restate the Original Agreement and agree to act in accordance herewith." Based on the language of the 2020 Restatement, it was Mignon's express intention that the 2020 Restatement both amend portions of the Original Agreement and otherwise restate the terms of the Original Agreement within its four corners.

f. Here, it is only the 2020 Restatement which is operable and the only instrument from which Lindblad's interest is derived. Here, the 2020 Restatement amended and restated the Original Agreement, and as a result, it replaced and superseded the Original Agreement and any previous amendments and restatements. And because Mignon did not make any further amendments to the 2020 Restatement, the 2020 Restatement is the instrument which states and manifests Mignon's intent regarding the trust. Thus, the clear and unambiguous language of the 2020 Restatement demonstrates that it constitutes the trust instrument.

g. Lindblad also argues that section 813.1(b)(6) should be broadly interpreted in light of section 406 of the Trust Code and that the circuit court's interpretation deprived him of redress available to a trust beneficiary who suspects misconduct. Section 406 is a distinct section of the Trust Code dealing with the validity of a trust when there is fraud, duress, mistake, or undue influence. On the other hand,

section 813.1(b)(6) delineates the responsibility of a trustee and the rights of a beneficiary as to access to the trust instrument. Further, Lindblad filed a declaratory action solely seeking a declaration as to what constituted the trust instrument under section 813.1(b)(6). He has not brought a trust action contesting the validity of the 2020 Restatement and also did not allege facts in his declaratory judgment complaint supporting a claim of fraud, duress, mistake, or undue influence.

h. Because the 2020 Restatement made amendments and otherwise restated the terms of the Original Agreement, any prior amendments also were rendered obsolete. The 2020 Restatement is the written instrument that states the terms of the Trust. The only amendments that Lindblad would be entitled to under section 813.1(b)(6) would be any amendments to the 2020 Restatement itself. Where Blair provided Lindblad with the 2020 Restatement, the written instrument that stated the terms of the trust, he provided Lindblad with a complete copy of the trust instrument and complied with section 813.1(b)(6). Lindblad was not entitled to the declaratory relief which he sought.

G. *In re Webb,* 2025 U.S. Dist. LEXIS 178653 (United States District Court for the Northern District of Ohio, Western Division 2025). Federal preservation of evidence claim cannot be used to circumvent state court order to seal probate records.

1. Brandon Webb petitioned pro se to preserve evidence pursuant to Federal Civil Procedure Rule 27. He asked the court to preserve trust documents that were sealed by the Allen County Probate Court relative to his father's estate, as well as original signed trust documents, all records referencing modifications to the trust, and communications between attorneys, trust officers, and court officials. He stated he was excluded from participating in the sealed estate proceedings and was reminded of a "no-contest" clause in the trust. He claimed that clause is being "weaponized" against him. He indicated that he intended to file a qui tam action under the False Claims Act and seeks to preserve evidence of what he believes to be "fraud, concealment, and misuse of federal or federally linked funds, including but not limited to judicial concealment, probate trust irregularities, misuse of public positions, and improper sealing of documents." He specifically stated the Petition is not a lawsuit.

2. The federal district court denied the petition, and certified that an appeal could not be taken in good faith, on the following grounds:

a. Rule 27 of the Federal Rules of Civil Procedure permits a person to take the deposition of another person under certain circumstances before a lawsuit is filed.

b. Rule 27 applies to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced. The use of Rule 27 is restricted to only that special category of cases where it is necessary to prevent testimony from being lost, such as when a witness is aged or gravely injured and in danger of dying or when there are geographical constraints.

c. Webb seeks only production of documents and audio recordings. Rule 27 provides solely for preservation of testimony through depositions. It does not provide for production of documents or other forms of discovery.

d. Webb does not demonstrate a special circumstance that requires a deposition prior to the filing of an action to prevent testimony from being lost. The case law makes clear that "perpetuation" means the perpetuation of known testimony, and that the rule may not be used as a substitute for discovery to determine whether a cause of action exists. Rule 27 petitioners must know what the deponent will say and make a particularized showing that the testimony needs to be taken in advance of the contemplated action to prevent that testimony from being lost. Here, Webb claims the Allen County Probate Court ordered the records to be sealed in 2022. He states that he has been excluded from participating in the sealed proceedings and a "no-contest" clause in the trust is being "weaponized" against him. It appears that Webb attempts to use this Rule 27 Petition to circumvent the state court's order. This is not a case where testimony will be lost if a deposition is not taken.

e. In addition, Rule 27 requires the Petitioner to show he expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought. Webb indicates that he anticipates filing a potential qui tam action in the future, but gives no indication of why he cannot file that action now and obtain the information he wants in the course of discovery. He fails to fulfill this Rule 27 requirement.

f. Nothing in the Petition suggests Webb has a cognizable qui tam action to be brought on behalf of the United States. A qui tam statute allows a private person to bring an action in the name of the United States that will benefit both the person and the United States Government. The qui tam action is for redress of an injury to the Government, and it is the Government's injury that confers standing upon the private person as a partial assignee of the United States's claims against a Defendant. The False Claims Act ("FCA") is the most commonly invoked qui tam statute. Congress enacted the FCA to prohibit the presentation of fraudulent claims for payment to the Federal Government. It only covers attempts to get the Federal Government to pay under false pretenses.

g. Webb provides no indication of an injury to the United States as a result of a fraudulent demand for the payment of government funds. He declined to name any potential Defendants and states only that the unnamed potential Defendants misused federal funds or federally linked funds. That is not actionable under the FCA. Instead, the Petition appears be an attack on a state court order and an attempt to bypass it and obtain sealed documents. This Court cannot intervene in an ongoing state court action, nor can it overturn state court decisions.

H. *Podlin v. Cichowski,* 375 Ga. App. 481; 915 S.E.2d 662; 2025 Ga. App. LEXIS 168; 2025 LX 90267 (Court of Appeals of Georgia 2025). Trust terms waiving trustee's duty to account do not restrict the trial court's equitable authority to require an accounting.

1. In 2004, Mary Ann Cichowski Mims created an irrevocable trust known as the Cichowski Family Trust (the "Trust"). Mark Podlin, who is a licensed attorney, was Mims's neighbor, and he assisted Mims in creating the Trust. The Trust documents listed Podlin as trustee and listed Mims, Joseph Cichowski ("Joseph"), Mary A. Cichowski, Walter Cichowski, and Katherine Cichowski as beneficiaries. Mims passed away in 2022, and Joseph was appointed as the administrator of Mims's estate. Joseph made a number of requests to Podlin for an accounting of the Trust assets throughout 2022 and 2023.

Joseph made those requests while unrepresented and also made requests through counsel. Podlin did not render an accounting to Joseph despite Joseph's requests. In 2023, Joseph filed a petition for accounting (the "Petition") against Mark Podlin as the trustee of Joseph's sister's irrevocable trust.

2. Podlin filed a motion to dismiss and an answer and counterclaim against Joseph and the third-party defendants, Mary A. Cichowski, Walter Cichowski, Katherine Cichowski, Charles Dorminy, and Dorminy's law firm. Podlin also requested an award of attorney fees. Podlin did not include a copy of the Trust with any of the documents filed in response to the Petition. Joseph and the other third parties named in Podlin's initial answer filed a motion to dismiss the purported counterclaims. The trial court ordered that the requested accounting be had, denied Podlin's motion to dismiss, granted the motion to strike and dismiss as to the purported third-party defendants, and granted Joseph and the third-party defendants' motion for attorney fees in an amount to be determined at a later hearing. Podlin filed a motion for reconsideration, to which was appended an alleged copy of the Trust. The written order stemming from the June 2024 hearing was entered and Podlin's motion for reconsideration was denied. Podlin then filed a motion to recuse the trial judge and vacate and set aside the June 2024 order. The trial court denied the motion to recuse but the record does not include a written order in response to Podlin's motion to set aside. The trial court conducted a hearing on the attorney fees award in July 2024 and a written order was entered which memorialized the verbal pronouncement that was made following that hearing. Podlin failed to attend the hearing. The trial court awarded attorney fees to Joseph and the third-party defendants in the amount of $48,000.

3. Podlin appealed, and the court of appeals, with two concurring justices, affirmed in part and vacated in part, and remanded, on the following grounds:

> a. Podlin identified 19 enumerations of error, but for the vast majority of the enumerations, Podlin failed to follow Court of Appeals Rule 25 (d) in that he largely failed to include any citation to relevant authority beyond occasionally citing the standard of review or an overarching principle of law. Where an appellant lists an enumeration of error but, in support of that enumeration, merely sets forth the applicable standard of review without any substantive discussion, such enumeration will be deemed abandoned. In this case, Podlin's brief largely contained general principles of law applicable to the issue at hand, but then simply recites his version of certain facts without ever applying any particular legal authority to the specific facts and circumstances of this case. Suffice it to say, rhetoric is not a substitute for "cogent legal analysis, which is, at a minimum, a discussion of the appropriate law as applied to the relevant facts." It is not the function of the appellate court to cull the record on behalf of a party in search of instances of error. Instead, it is the obligation of the party asserting error to cite specific authority in support of their contentions.
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> b. A purported copy of the Trust document was attached to pleadings of both parties, but no authenticated copy of the Trust has been introduced into evidence. Assuming without deciding that the copy of the Trust document which was appended to the pleadings is, in fact, a true copy of the document, it lists Joseph as one of several beneficiaries. Paragraph 36 of the Trust document specifically authorizes a beneficiary to periodically request and receive a statement of the financial condition of the Trust, which would include a statement of principal,

income, and expenses. Joseph made such a request, both directly and through counsel, but Podlin failed to provide the requested reports.

c. Podlin contended that the Trust authorized him to remove Joseph as a beneficiary. Podlin appended a document to his initial answer, which purports to evidence his revocation of any interest that Joseph, Mary, or Walter had in the Trust. Podlin argued that because he removed Joseph as a beneficiary of the Trust, Joseph no longer had the authority to request an accounting. However, there was no reliable evidence introduced to rebut Joseph's claim that on the date he first requested an accounting, he was a qualified beneficiary who was authorized to request such an accounting.

d. Podlin also argued to the trial court that Mims waived the general obligation of a Trustee to keep the beneficiaries of the Trust "reasonably informed of the trust and its administration" as contemplated in OCGA § 53-12-243 (d). Podlin advised the court that Mims "said she did not want any accountings." When asked whether those alleged directives from Mims were made in writing, Podlin told the trial court that he received that instruction from Mims via email on three separate occasions but that he cannot locate those emails. Podlin seemed to argue that these alleged communications from Mims excused him from making an accounting of the Trust estate under OCGA § 53-12-243 (d). OCGA § 53-12-243 (d) provides in part that the "duty of the trustee to keep the beneficiaries of the trust reasonably informed of the trust and its administration shall not apply to the extent that the provisions of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee."

e. Putting aside the different arguments of the parties as to whether Mims issued a written waiver of accountings or whether Joseph had legitimately been removed as a beneficiary and whether that removal occurred before or after Joseph requested an accounting, OCGA § 53-12-243 (e) specifically provides: "Nothing in this Code section shall affect the power of a court to require or excuse an accounting." The statute does not restrict the trial court's equitable authority to require an accounting, irrespective of the language of the Trust or the other facts of the case. The trial court determined that an accounting was warranted and acted within its discretion in ordering the accounting. Thus, the enumerations of error which allege that the trial court erred in ordering an accounting are meritless.

f. The trial court's order failed to specify which Code section the attorney fees were awarded under and made no mention whatsoever of the authority found in OCGA § 9-11-11.1 (b.1). Generally, an award of attorney fees in Georgia must be authorized by statute or contract. Inasmuch as attorney fees generally were not recoverable at common law, a statute authorizing the recovery of such fees is strictly construed. When awarding attorney fees, a trial court must make express findings of fact and conclusions of law as to the statutory basis for any such award and the conduct which would authorize it.

g. An award of attorney fees under OCGA § 9-15-14 necessarily requires the trial court to identify whether the award is being made under subsection (a) or (b) of the statute because they authorize different types of awards for different types of alleged misconduct. If the trial court intended to award attorney fees under OCGA § 9-11-1.1 (b.1) as argued by Joseph, the trial court would need to make

this clear and determine the amount of fees awarded pursuant to the requirements of that statute. Implicit in all of these statutes is a requirement that the award be based upon a finding by the trial court that the attorney fees are reasonable. Additionally, some of the statutes cited only authorize an award of attorney fees for sanctionable conduct that is so identified by the trial court. Because the trial court failed to identify which of the several different statutes were relied upon to award attorney fees and also failed to make any required findings of fact, the award is vacated for the trial court to identify the applicable statute or statutes and to make the findings as required under that statute or statutes.

I. *Revah v. Revah,* 2025 Fla. App. LEXIS 8557 (Court of Appeal of Florida, Fourth District 2025). Document dump of third-party financial records and unsworn ledgers filed over a year after litigation commenced are not adequate accountings by trustee.

1. Suzanne Revah's husband, Salomon Revah, died in April 2012. His estate was administered in Palm Beach County, and consisted of two parcels of real property, having a total value of $714,000. His pour-over will directed that his estate assets be transferred to his trust (the "Salomon Trust"). The two properties were the only assets in his probate estate. Their daughter, Cecile, became the successor trustee of the Salomon Trust upon her father's death. The Salomon Trust's two parcels were both sold — one in 2014 and the other in 2017.

2. Meanwhile, in December 2012, Suzanne and Cecile became co-owners of a house in the Woodfield Country Club in Boca Raton (the "Woodfield House"). The purchase price was $510,000 plus settlement charges, and there was no mortgage on the property. The Woodfield House was titled in the names of Suzanne and Cecile as joint tenants with rights of survivorship. The property is worth about $2.2 million today. Cecile purchased the Woodfield House and then reimbursed herself with funds from the Salomon Trust, which she characterized as "dad's money."

3. In April 2014, Suzanne executed a quitclaim deed transferring her entire interest in the Woodfield House to Cecile, leaving Cecile as sole owner. Suzanne took the position that she did not understand the significance of this transaction. Suzanne is illiterate and speaks "French, not English." In February 2021, Cecile executed a deed transferring a 50% interest in the Woodfield House to Suzanne, as Trustee of the Suzanne Revah Revocable Living Trust (the "Suzanne Trust").

4. Just prior to Cecile's resignation as trustee of the Suzanne Trust in January 2022, Suzanne asked Cecile for an accounting. Cecile refused in no uncertain terms. This chain of events, including Suzanne learning that her name was not on the title to her own home, led Suzanne to suspect that Cecile had mismanaged trust assets of both trusts.

5. Suzanne stated that the Woodfield House had "never belonged to Cecile" and that "Cecile's name should have never been on the title, at least not for any permanent purposes." When asked about the joint titling of the Woodfield House, Suzanne testified that this was done behind her back, and Cecile put herself on the title to the house without Suzanne's knowledge.

6. In August 2022, when she was then 90 years old, Suzanne sued Cecile for a trust accounting, damages, removal as trustee, and imposition of a constructive trust over the Woodfield House on the grounds of undue influence and abuse of fiduciary duties. Cecile

sued for unjust enrichment and partition of the Woodfield House. Regarding the accounting claim, Cecile asserted that she had "provided accountings for all assets of her parents that she had knowledge of in mid-2022" when she produced thousands of pages of documents to Suzanne's counsel. Forty days before a summary judgment hearing, Cecile filed three bank account ledgers that she characterized as "accountings" related to the "only bank trust accounts at issue in this case." Each of the ledgers begins in either 2014 or 2015 and shows deposits and withdrawals from the account. Suzanne contended that Cecile had never prepared an accounting and had provided a "virtual records dump" in this case, which was anything but a reasonably understandable report. Based on a report from her forensic CPA, Suzanne argued that Cecile had made extravagant payments to family members, and disbursed funds to herself. Shortly before the summary judgment hearing, Cecile filed a reply that included the new argument that Suzanne's accounting claim was barred by statutory laches.

7. The trial court entered an order granting summary judgment in Cecile's favor that Suzanne's claim for accounting must be limited to the period no earlier than four years prior to filing her Complaint (i.e., August 5, 2018), and held that Cecile accounted for the Salomon Trust assets. Suzanne filed a detailed motion for rehearing that the trial court denied.

8. Suzanne moved for leave to amend her complaint to add claims for conversion and breach of fiduciary duty based on newly discovered evidence. The proposed conversion count alleged that between 2011 and 2022, Cecile converted to her own use more than $431,000 of trust assets. The proposed count for breach of fiduciary duty concerned payments Cecile made to a contractor. The trial court denied Suzanne's motion for leave to amend. The court thus excluded most of the anticipated testimony of Suzanne's forensic CPA. The court found that Cecile was owed $975,776.57 from Suzanne, with $588,142.56 relating to the Woodfield House and $387,634.01 relating to personal expenses incurred by Cecile for Suzanne's benefit. The court found that Suzanne's affirmative defenses based on the statute of limitations and laches failed with respect to Cecile's claims for partition and unjust enrichment. The court ruled that Cecile was entitled to judgment in her favor for $387,634.01 on her claim for unjust enrichment, plus prejudgment interest of $175,632.90 and $1,782.50 for a prior sanctions order, for a grand total of $564,849.41.

9. As to the count for partition, the court determined that Cecile was entitled to a credit against Suzanne's equity for the $588,142.56 in expenses Cecile contributed to the property. However, the court also ruled that Suzanne was entitled to a credit for the purchase price of the property in the amount of $579,902.66. Accordingly, the court ordered the sale of the property, with the proceeds distributed in the following order of priority: (1) brokerage fees; (2) Cecile's attorneys' fees; (3) Cecile's $588,142.56 credit and Suzanne's $579,902.66 credit; and (4) any remaining funds being divided equally between the parties. This split of proceeds does not account for Cecile's separate unjust enrichment judgment of $564,849.41.

10. Suzanne appealed and the court of appeals affirmed in part, reversed in part, and remanded on the following grounds:

> a. Cecile failed to meet her burden of showing that her disclosures in this case complied with the applicable provisions of the Florida Statutes. Under Florida law, a trustee of an irrevocable trust has a statutory duty to "provide a trust

accounting . . . to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee." A trust accounting cannot be an instrument of obfuscation. A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable that adequately discloses the information required.

b. The required contents of an accounting include: (1) a statement identifying the trust, the trustee furnishing the accounting, and the time period covered; (2) a report of all cash and property transactions, significant administrative transactions, and receipts and disbursements; (3) identification and valuation of trust assets on hand at the close of the period, including acquisition and estimated current values; (4) disclosure of significant non-financial transactions; (5) allocation details of income and principal affecting any beneficiary's interest; and (6) a plan of distribution for any undistributed assets in the final accounting.

c. A fiduciary is obligated not only to make prudent decisions, but also to file the annual accountings to keep the beneficiaries informed of income, expenses, and fluctuations in value of the trust assets. The burden is on fiduciaries to adequately account for their use of a beneficiary's funds. Suzanne made a prima facie case that Cecile was a trustee, and that Suzanne did not receive accountings. At that point, the ultimate burden of proof rested with Cecile to account for the property held by her in trust.

d. Viewed in the light most favorable to Suzanne, Cecile failed to serve any statutorily compliant accountings as required. The only documents Cecile produced were (1) a 2022 "document dump" of third-party financial records and (2) unsworn ledgers filed on October 5, 2023, which was over a year after litigation commenced. These documents lack the essential elements of a statutory accounting, as they are not "reasonably understandable" reports and do not include the information required. In addition to not being organized in a report format, the documents were not provided annually as required.

e. The trial court improperly shifted the burden to Suzanne — a 90-something-year- old woman who lacks English proficiency and cannot read — to prove that no proper accountings were served. This shifting of the burden was error. The trial court improperly relied on the unsworn, post-litigation ledgers as satisfying Cecile's statutory duty. Mere bank statements or transaction logs do not constitute a statutory accounting. The absence of sufficient annual accountings for more than a decade establishes a per se breach of trust. Accordingly, the trial court erred in granting summary judgment on the accounting claim.

f. Suzanne failed to preserve her argument that statutory laches does not apply to her accounting claim. On remand, therefore, Suzanne has leave to amend her pleadings to raise the issue of whether the legislature abrogated *Corya* by amending section 736.1008, Florida Statutes, in 2018.

g. A fiduciary's deliberate withholding of material information that the fiduciary has a duty to disclose constitutes fraudulent concealment. Florida's Trust Code contains specific provisions addressing limitations on proceedings against trustees, which are similar to the common law rule. The four-year statute of limitations for breach of trust does not begin to run until a beneficiary receives an

adequate trust disclosure document issued by the trustee. The trial court erred in granting Cecile's motion for summary judgment on Suzanne's constructive trust claim. In the light most favorable to Suzanne, the evidence showed that Cecile, as trustee of the Salomon Trust, effectively used trust assets to purchase the Woodfield House in 2012 and then added her own name to the title as a joint tenant. The property was acquired with trust assets that were to be used for Suzanne's benefit, yet Cecile made herself a co-owner of the property. This self-dealing transaction was voidable under the Trust Code because it was neither authorized by the trust instrument nor approved by any court. A claim for constructive trust to restore ownership of the property to Suzanne was proper as a remedy for this breach of trust. Suzanne, who was elderly, illiterate, and entirely dependent on Cecile for financial and legal matters, was unaware of the 2012 titling transaction until shortly before this litigation commenced. Cecile, as trustee, had a duty to disclose the titling and retitling of the property that was purchased with trust assets. Cecile's deliberate withholding of material information regarding the titling of the property — information Cecile had a duty to disclose as the trustee — constitutes fraudulent concealment.

h. The public recording of the deeds in 2012 and 2014 could not have commenced the running of any limitations period. Constructive notice through public records was insufficient to establish the "actual knowledge."

i. The trial court's financial award to Cecile was also the product of error because the court disallowed Suzanne's damage claims and excluded Suzanne's forensic CPA's report about Cecile's alleged defalcation of trust funds. The error was not harmless because the case turned on Cecile's credibility as a trustee, which the trial court failed to fully scrutinize, thus depriving Suzanne of a fair trial on transactions between the parties dating back to 2012.

j. On remand, Suzanne should be given leave to file an amended complaint. The denial of leave to amend was premised on the erroneous summary judgment rather than an exercise of the court's discretion. The complaint had not previously been amended, so it cannot be said that the privilege to amend had been abused.

J. *Stallard v. U.S. Bank N.A.*, 2025 IL App (3d) 240585-U (Appellate Court of Illinois, Third District 2025). Claim for breach of duty to inform cannot be based on shifting burden onto trustee to prove a negative where records may have been destroyed under record retention policy.

1. Lewis and Betty Stallard were married in 1978, at which time Lewis had three adult children from a prior relationship (including Kathryn Stallard and Barbara Aronson), and Betty had four adult children from a prior relationship. On January 27, 1993, Lewis executed the Restatement of the Lewis Leonard Stallard Declaration of Trust Created May 24, 1986 ("restatement"). According to the restatement, upon Lewis's death and in the event Betty survived him, two sub-trusts were to be created: a family trust and a marital trust.

2. The family trust was to be administered as follows. First, 20% of the family trust was to be immediately distributed to Lewis's children. Second, 20% of the family trust was to be held in trust for five years, during which time Betty was to receive the income therefrom, and after which the remaining principal was to be distributed to Lewis's children. Third, the remaining 60% of the family trust was to be held with the income

therefrom paid to Betty and the principal being available to her for her reasonable support and health only after the principal of the marital trust was exhausted. The family trust was to terminate upon Betty's death, with the principal and accrued or undistributed net income thereof to be equally divided among Lewis's children. From the marital trust, the trustee was to pay Betty "all the net income" and "as much principal thereof" as requested by Betty in writing. Upon Betty's death, if occurring at least three months after Lewis's death, the remaining principal and accrued or undistributed income not effectively appointed by Betty's will was to be added to the family trust.

3. Lewis died on January 5, 1994. The family trust was funded with $600,000, and the marital trust was funded with $93,734. Following Lewis's death, U.S. Bank (f/k/a Firstar Trust Company of Illinois) served as the successor trustee of both the family trust and the marital trust.

4. On February 22, 1994, the original trust officer sent a letter to Kathryn enclosing, inter alia, a list of the assets held prior to funding the sub-trusts. Kathryn sent the successor trust officer a letter requesting that each beneficiary of the sub-trusts receive periodic notifications for the status of the trusts, which she later defined as "transactions, changes in value of the trust, changes in fee structure, changes in trust officers assigned to manage the trust, etc." On May 15, 1994, Kathryn sent another letter wherein she expressed her disappointment that she had not received a response until the day prior with an accounting statement for the marital trust. Kathryn expressed further concern that she had not received an accounting for the family trust, and again requested the same and "any explanation that is appropriate to explain any transactions, changes, etc., in the trust."

5. A trust investment officer sent Kathryn a letter informing her that there was another new trust officer who would be responsible for the trust administration until a suitable replacement was found. He enclosed accounting statements for the family trust, noting that Kathryn was a primary beneficiary. Steve Davidson, Kathryn's husband, sent a letter outlining his concern that the family and marital trusts were underfunded and certain monies were unaccounted for. Betty sent a letter to Kathryn stating, inter alia, "It is scary to see what is happening with our trusts and I, like you, hope they get someone else in the trust dept. I wish they would get [the original trust officer] back but I doubt that he would come back even if they offered the job."

6. A letter dated August 1995 from Kathryn to a then-vice president thanked her for an updated trust report and letter of introduction. Kathryn expressed that she was "pleased that the trust seemed to be in order." She requested, inter alia, that copies of tax filings be sent along with the quarterly reports. On August 9, 1995, the VP responded that they were unable to provide a copy of tax information to each beneficiary or remainderman unless there was a specific reason to do so, explaining that their tax department prepared taxes for more than 5,000 trust accounts.

7. Betty died on March 10, 2023, without appointing any remaining balance of the marital trust in her will. Shortly thereafter, Kathryn emailed the then-trust officer requesting information about the marital trust. The trust officer responded that it would "take some digging," considering it had been 28 years. She stated, "I wish you had questioned the account at any time during the past several years after you stopped receiving statements for that account." The trust officer then stated: "The only thing we can do is to hope that the fiduciary tax area still has files from that long ago, as our records drop off of our trust

accounting system much sooner than that. Especially if an account was closed twenty-some years ago, files may no longer be in existence. However, I did contact the fiduciary tax division and will be curious to hear what information they may have. I will certainly let you know what I learn."

8. Kathryn replied that they never received any reports for the marital trust and that they assumed the "technical legal structure" limited its reporting to Betty. On May 4, 2023, the trust officer wrote: "There is no Marital Trust. We have checked tax records, and bank records, and there is no Marital Trust. There are no closed files, which means that the trust was closed over 7 years ago, and likely more than that. There are no files in storage as it is a bank rule to destroy files after 10 years being closed."

9. Kathryn and Barbara filed a petition for accounting and breach of fiduciary duty in their individual capacities against U.S. Bancorp Investments, Inc. They subsequently filed a motion to voluntarily dismiss, explaining that they misidentified the company managing the trusts. Petitioners sought and were granted leave to file an amended complaint naming U.S. Bank as the responding party. On December 7, 2023, petitioners filed their first amended petition, again setting forth in their individual capacities claims for an accounting and breach of fiduciary duty.

10. U.S. Bank filed a combined motion to dismiss, arguing that petitioners failed to state a claim because neither Kathryn nor Barbara were beneficiaries of the marital trust and, therefore, U.S. Bank did not owe them an accounting or a fiduciary duty. At the hearing on U.S. Bank's motion to dismiss, petitioners argued that whether the marital trust exists remained a question of fact that could not yet be resolved and that, given the high turnover of trust officers, it was "conceivable at least that somewhere along the line somebody did something with the trust assets, you know, recharacterized them. We just don't know." They asked to be afforded the opportunity to investigate further to find out what happened and determine whether U.S. Bank failed to keep adequate records. The court expressed concern that petitioners were shifting the burden onto U.S. Bank and questioned how "less-than-ideal recordkeeping formed a cause of action in this case." While the court understood petitioners' desire to have finality regarding the marital trust, it noted that it could not control U.S. Bank's document retention policies. The court further emphasized that "it is Petitioners' job to go ahead and plead facts, as opposed to U.S. Bank putting evidence on at the pleading stage." The court dismissed the first amended petition without prejudice.

11. Kathryn and Barbara, derivatively and on behalf of the family trust, then sued alleging that the family trust became the vested remainder beneficiary of the marital trust upon Betty's death and, therefore, was entitled to an accounting of the marital trust. Petitioners continued that U.S. Bank had a fiduciary duty to maintain adequate records regarding all trust activities, including the administration of the marital trust, and that in the absence of any documented evidence the Marital Trust assets were distributed or the trust terminated, and in the absence of evidence that the bank has exhausted its efforts to investigate all available sources of possible information, including the IRS, the continued existence of the Marital Trust must be presumed. Petitioners claimed damages in the amount of $93,734 (the original amount with which the marital trust was funded), plus interest or any other reasonable investment return, reasoning that it must be presumed that those assets remained in the marital trust barring any evidence to the contrary. Petitioners also sought attorney fees.

12. U.S. Bank filed a second combined motion to dismiss termination. The court granted U.S. Bank's motion to dismiss for lack of standing and for failure to state a claim. The court agreed that petitioners failed to plead facts to show that the trust did not extinguish during Betty's life. The court concluded that there were no facts to establish standing, damages, or breach of fiduciary duty. The petition was dismissed with prejudice.

13. Petitioners timely appealed and the court of appeals affirmed on the following grounds:

a. Effective January 1, 2020, section 813.2 of the Trust Code provides the statutory authority for a trustee's duty to furnish an accounting for pre-2020 trusts. To qualify for an accounting under this framework, petitioners must have pled facts to establish that they were beneficiaries "then entitled" to receive income or, in the event of termination, entitled to distributions, from the marital trust. Pursuant to the terms of the restatement, the family trust would only become entitled to income or distributions from the marital trust if (1) the marital trust remained funded and in existence at Betty's death and (2) Betty did not appoint any remaining balance of the marital trust in her will.

b. The petition sets forth in a conclusory fashion that the family trust became a vested beneficiary of the marital trust and thus entitled to an accounting. However, this argued inference reflects an improper shifting of the burden away from the petitioners to state facts sufficient to support a claim for accounting and onto U.S. Bank to prove a negative — that the marital trust did not exist at the time of Betty's death.

c. The petition highlights the frequent turnover of trust officers and infers that it led to inadequate recordkeeping, which in turn supports the conclusion of the continued undocumented existence or mismanagement of the marital trust. In their opening appellate brief, petitioners offer additional theories to explain the absence of documents: mismanagement, policy lapses, U.S. Bank's administrative instability, employee negligence, or data breaches. Under these scenarios, because the marital trust is presumed to remain in existence, the family trust became a beneficiary entitled to an accounting upon Betty's death. Petitioners argue that these alternative theories are "at least as reasonable as U.S. Bank's inference" that the marital trust terminated during Betty's life more than 10 years prior to Kathryn's request for documentation following Betty's death.

d. Although petitioners' unease regarding the turnover of trust officers and lack of documentation demonstrating the termination of the marital trust is understandable, it remains to be seen how the discussions between the parties regarding the administrative changes in trust officers (as outlined in detail in the petition) ultimately support the conclusions offered by petitioners. This is particularly true when viewed in conjunction with the other facts alleged in the petition — emails explaining U.S. Bank's 10-year document retention policy, the amount of funds originally placed in the marital trust, and Betty's unfettered access to the income and principal thereof for what would have been up to 28 years. Indeed, per Kathryn's August 1995 letter that was sent after multiple replacements of trust officers, she was satisfied that the "trust seem[ed] to be in order." While it is unclear whether she was referencing the family trust or marital trust, her letter nonetheless supports the determination that the petition is devoid

of any facts to suggest that U.S. Bank's lack of records is due to any wrongdoing, the marital trust continues to exist, or the family trust ever became a beneficiary entitled to an accounting.

e. A trustee is a fiduciary and is bound to keep clear, distinct, and accurate records of all dealings with the estate or trust assets put in her possession, and her failure to do so creates a strong presumption against the propriety of any such dealings. This presumption is triggered by a trustee's failure to keep clear, distinct, and accurate records. The fact remains that petitioners did not allege facts that reasonably support the conclusion that U.S. Bank's recordkeeping was deficient beyond falling short of petitioners' personal preferences.

f. Simply put, petitioners pled unwarranted inferences to reach otherwise unsupported conclusions. Petitioners' argument rests more on what U.S. Bank cannot or did not prove, as opposed to what facts petitioners alleged to bring their claim within a recognized cause of action. Petitioners failed to allege facts sufficient to establish that the family trust was at any point entitled to an accounting under section 813.2 of the Trust Code, and a court must disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant.

g. Petitioners did not allege facts sufficient to support the element of breach in their fiduciary duty claim. Distilled, petitioners again contend that it should be presumed, based on U.S. Bank's lack of documentation, that U.S. Bank breached its fiduciary duty to maintain adequate records unless it can prove otherwise. However, as with petitioners' claim for accounting, this argument improperly shifts the burden onto U.S. Bank to prove a negative and runs contrary to the general rule that a trustee is presumed to have acted in good faith and to have performed his duties under the trust. The burden of proving his breach of trust rests upon the one asserting it. Petitioners cite no statutory provision or other authority in their petition to allege that U.S. Bank's stated procedure of purging records after 10 years passes after the closing of an account is somehow improper. Because petitioners failed to allege facts showing that U.S. Bank breached any fiduciary duty it may have owed to the family trust, the court affirmed the dismissal of their breach of fiduciary duty claim pursuant to section 2-615 of the Code.

K. *Sutherland v. Sutherland*, 567 P.3d 873; 2025 Kan. App. LEXIS 15; 2025 LX 80855 (Court of Appeals of Kansas 2025). Suit to compel discovery of trust information dismissed for lack of standing and because disclosure provision of the UTC was overridden by settlor in trust terms.

1. Norma H. Sutherland passed away on October 28, 2019. Before her death, Norma established a plan to distribute her estate assets that included two trusts: the Norma H. Sutherland Trust UTA 5/13/1996 (the "Revocable Trust" or "RT") and the Norma H. Sutherland Master GST (the "Generation Skipping Trust" or "GST"). The RT was established for the benefit of Norma's husband and their children, while the GST was established for the benefit of her grandchildren and other relatives. In a section titled "Purpose of Trust," the GST stated that it was "intended to be the receptacle following my death of exempt property allocated among certain of my grandchildren and more remote descendants pursuant to the [RT]." Norma named her son, Perry, as the trustee

of the GST and the first successor trustee of the RT. Perry was also a beneficiary of the RT.

2. There apparently is a history of tension between Perry and his nephew, Peter. As far back as 2004, Peter emailed his father expressing concerns about being shut out of the family company and Perry allegedly running the company into the ground. The day after Norma died, Peter sent a letter to Perry advising that he wanted to meet "to discuss the ongoing Family situation and a partition of Family-held assets." Peter also stated that he desired Perry's removal as trustee of Norma's trusts, and that he was willing to handle the matter privately but would not hesitate to file legal action if needed.

3. On December 11, 2019, Peter and the other grandchildren received a letter from an attorney informing them that they were the beneficiaries of the GST. The letter included a copy of the trust instrument signed by Norma on May 15, 2007, and designating Perry as trustee. The letter explained: "The Trust is currently unfunded. The amount with which the Trust will be funded is unknown. That information is not likely to be available for several months, perhaps as long as one (1) year. As further information is available, it will be forwarded to you." The letter also advised that the beneficiaries should pay attention to the GST's "Forfeiture Provisions," which prohibited a range of actions, and it also encouraged them to discuss the trust with their own legal counsel.

4. On August 10, 2020, Peter sent a letter to counsel requesting a copy of the RT instrument "[t]o assist [him] in understanding [his] interests with respect to the trust." The letter also noted various transactions taken by Perry, which Peter alleged "relate[d] to [his] economic interests." Peter stated that he would be happy to review any information Perry was willing to send him about the transactions. He did not receive any response.

5. Peter filed a petition for declaratory judgment and other relief against Perry in his role as both the trustee of the RT and the trustee of the GST. Peter alleged that he had been denied information about the RT, which he contended was critical for him to protect his interests and to ensure that the GST was properly funded. Perry, acting as both the trustee of the GST and the RT, moved to dismiss Peter's petition. In the motion, Perry argued that Peter lacked standing to seek information and an accounting of the RT because he was not a qualified beneficiary of the RT and his status as a beneficiary of the GST did not entitle him to the information he requested. Perry also asserted that Peter already had been provided all the requested information about the GST that he was entitled to receive.

6. Counsel sent a letter to Norma's grandchildren on behalf of Perry as the GST trustee. The letter stated that the tax return for Norma's estate was about to be filed and it was now "likely to be a period of years" before distribution to the GST would occur. The letter included an accounting that showed the trust did not have any assets as of December 31, 2020.

7. The district court dismissed the petition against Perry as RT trustee for lack of standing but denied the motion to dismiss Peter's petition against Perry as GST trustee. The district court found that Peter's petition against the GST trustee could proceed because Peter was a qualified beneficiary of that trust. But the district court found that Peter lacked standing individually to sue the RT trustee because Peter was not a qualified beneficiary of that trust. The district court added the proper party to initiate such an action against

that trust would be the trustee of the GST trust. Perry, acting as the GST trustee, answered Peter's petition for declaratory judgment denying most of the substantive claims. Perry also asserted a counterclaim, alleging Peter had violated the forfeiture provisions of the GST by sending his demand letter, filing his lawsuit, seeking information he was prohibited from receiving by the express language of the RT, and challenging the suitability of the GST trustee.

8. The parties proceeded with discovery. Peter repeatedly asked for a copy of the RT instrument, financial statements, accountings, and tax returns for the RT, and all communications by Perry about the GST and RT. Perry responded that he did not have the requested information or that it was not in the GST trustee's possession or control. Perry did provide certain provisions purportedly from the RT instrument: Article 10 (Forfeiture Provisions), Article 11 (Trust Privacy Policy), and Article 12 (Interpretive Provisions and Definitions). In a sworn affidavit, Perry explained he had received these provisions in a letter from the RT's attorney on November 21, 2019. The letter explained that "Mrs. Sutherland's Revocable Trust [RT] places severe limitations on my ability to provide you with additional information." Article 11 of the RT contained several provisions limiting the amount of information and notification its beneficiaries were entitled to obtain from the trustee. As for what information the trustee was authorized to disclose about the RT, Article 11.05 stated: "To properly inform a beneficiary of the limits of that beneficiary's rights and interests, the trustee is authorized to provide any requesting party the terms of Articles 10, 11, and 12."

9. Before the deadline for completion of discovery, Perry moved for partial summary judgment on Peter's claims against him as GST trustee, but not on Perry's counterclaim against Peter. Perry asserted that all of Peter's requests for relief either had been met or dismissed — he argued that the court had found that Peter did not have a right to the RT information that he sought, that Perry had already provided his name, address, and phone number as the GST trustee, and that the court could not order a blanket declaration about Peter's rights under K.S.A. 58a-604. Around this time, Peter filed a golden rule letter, a motion to compel discovery of additional information about the RT, and notices of intent to issue subpoenas to the RT and to the GST's bank, University National Bank of Lawrence.

10. The district court granted Perry's motion for partial summary judgment on Peter's petition, denied Peter's motion to compel, and denied Peter's request for a subpoena to the RT and the bank. The district court found that Peter already had received the GST trustee's name, address, and phone number. Moreover, the district court noted that Peter had been provided with information about the status of the funding of the GST. Turning to the disclosure of information about the RT, the district court recited portions of the privacy provisions of the RT instrument in Article 11 that expressly limited the disclosure of certain information about the trust to the beneficiaries and limited the beneficiaries' ability to compel disclosure about the trust's assets.

11. The district court explained that Peter was not entitled to receive information related to the administration of the RT because he was not a qualified beneficiary, the trust terms can override the Kansas Uniform Trust Code ("KUTC"), and Norma "unambiguously expressed her intent to keep the trust and tax returns private."

12. Perry moved for summary judgment on his counterclaim that Peter had violated the forfeiture provisions of the GST, and the district court granted Perry's motion and entered final judgment for the GST trustee.

13. Peter appealed. On appeal, the court of appeals affirmed in part and reversed in part on the following grounds:

a. A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. The definitional section of the KUTC defines, "Beneficiary," "Interests of the beneficiaries," "Person," and "Qualified beneficiary" — it does not define "interested person." The only portion of the KUTC that explicitly defines the phrase is K.S.A. 2024 Supp. 58a-111, titled "Nonjudicial settlement agreements," which states: "For purposes of this section, 'interested persons' means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." While not directly applicable to resolving the question before this court, this definition parallels the common definition of the phrase — implying a person with a direct legal stake in the trust.

b. No one can deny that Peter may benefit from the performance of the RT because it is the funding source for the GST of which he is a beneficiary. While this is true, allowing anyone with a remote interest in a trust to demand trust information would produce results that render other provisions of the KUTC meaningless.

c. Peter's lawsuit sought information about the RT. The type of information Peter sought — a copy of the trust instrument and material information about the RT's assets and administration — must be provided to "qualified beneficiaries" under K.S.A. 2024 Supp. 58a-813. More specifically, K.S.A. 2024 Supp. 58a-813(a) requires that "a trustee shall keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." K.S.A. 2024 Supp. 58a-813(b) further details the general requirements relating to a trustee's duty to inform and report to qualified beneficiaries. This is exactly the type of information Peter's lawsuit sought. But as Peter is not a qualified beneficiary — he was not, as of the date in question, "eligible to receive mandatory or discretionary distributions of trust income or principal" — he was not entitled to receive such information.

d. The phrase "interested person" as used in K.S.A. 58a-201(a) refers only to persons who are parties to the trust, that is the settlor, the trustee, and any beneficiaries. Peter concedes that he is not a qualified beneficiary of RT and is at most a contingent beneficiary as he will incidentally benefit from the RT as a beneficiary of the GST, which draws its funding from the RT. But Peter's beneficial interest in the GST does not confer standing upon him to bring a direct action against the RT trustee to compel the disclosure of information. Peter's status as a qualified beneficiary of the GST was insufficient to grant standing as an interested party.

e. The district court did not err in finding that Peter lacked standing individually to sue the RT trustee because Peter was not a "qualified beneficiary" of the RT. Peter's interest in the GST did not make him an "interested person" who could

seek judicial intervention in the administration of the RT. The district court did not err in granting the RT trustee's motion to dismiss Peter's petition for lack of standing.

f. The district court recited portions of the privacy provisions of the RT instrument in Article 11 that expressly limited the disclosure of information about the trust to the beneficiaries and limited the beneficiaries' ability to compel disclosure of the trust's assets. Based on these provisions, the district court concluded that the plain language of the RT instrument displayed Norma's intent to keep information about the trust private, to strictly limit the amount of information its qualified beneficiaries could receive as well as the trustee's duty to inform the beneficiaries. The district court then noted that Peter was not a qualified beneficiary of the RT and that even if he was, he would not be entitled to receive the information about the RT that his lawsuit sought because Norma had "unambiguously expressed her intent to keep the trust and tax returns private. And the KUTC permits settlors to exercise that right. The privacy provisions eliminated the trustee's duty to provide information about the revocable trust to the beneficiaries." The district court explained that it was also denying Peter's subpoena requests and motion to compel the disclosure of the RT instrument based on the same privacy provisions.

g. Perry swore to the authenticity of the isolated provisions of the RT instrument that he received from the RT's attorney. The burden of authentication is "minimal" or "slight" and there is no precise formula for the district court to determine authenticity. Here there was sufficient evidence "to support a finding that the item is what the proponent claims it is." The district court did not err by considering the isolated provisions of the RT instrument that Perry produced in discovery in ruling on the motion for summary judgment.

h. The isolated provisions of the RT instrument provided by the GST trustee in discovery stated in relevant part: "Following my death, it is . . . my express direction that the trustee's duty to inform and report as to the trust activities, trust assets, and the terms of this instrument shall be limited such that no person or entity named as a beneficiary hereunder (whether of personal property, specific property amount or percentage, residual amount or percentage, or contingent interest) shall have the authority to require the trustee to disclose the nature, extent, or identity of any other bequest or beneficial interest; and any state law provisions to the contrary shall not be applicable under this instrument. Except as otherwise provided, no beneficiary (whether of personal property, specific property amount or percentage, or residual amount or percentage) shall be entitled to a report of the nature and extent of the trust assets or the terms of this instrument, nor require a complete accounting of all trust activities, or to obtain state or federal income, estate, or inheritance tax returns applicable to the entire trust, except for such limited information as may affect the future taxation or deductibility of amounts received upon my death, whether such funds passed according to the terms of this instrument or otherwise. To properly inform a beneficiary of the limits of that beneficiary's rights and interests, the trustee is authorized to provide any requesting party the terms of Articles 10, 11, and 12."

i. Article 11.02(a) restricts a trust beneficiary's right to request the trustee to disclose the nature, extent, or identity of "any other bequest or beneficial interest" in the RT, but the provision does not restrict a beneficiary from seeking information relative to their own interest in the trust. Article 11.02(b) goes much further and expresses Norma's intent that the trustee's duties to inform its beneficiaries about the trust were severely restricted, such that no beneficiary is permitted to demand that the trustee disclose the nature of the assets of the trust or the terms of the instrument or receive an accounting of its activities. There is no dispute that Peter is not a qualified beneficiary of the RT — the GST itself is a qualified beneficiary because the RT is its funding mechanism. But even if Peter were a qualified beneficiary of the RT, he would not be entitled to receive the information he demanded in his lawsuit because of the limits on information the trustee is required to give, according to Norma's intent. In short, Norma desired for even the qualified beneficiaries of the RT to receive as little information about the trust and its assets as possible, and Article 11.05 provided that the only provisions of the RT instrument that should be disclosed were the three articles that Perry produced to Peter in discovery.

j. Kansas law allows a settlor to limit beneficiaries' access to trust-related information, if so desired. Exceptions include things like the requirements for creating a trust, the fiduciary duties of the trustee, the court's power to intervene in trust administration, and that the trust have a purpose that is lawful — but the settlor's ability to limit the trustee's duties to inform and report to trust beneficiaries under K.S.A. 2024 Supp. 58a-813 is not one of the exceptions to the general rule that the terms of a trust prevail over the provisions of the KUTC.

k. Peter claims the privacy provisions of the RT instrument violate the fiduciary duties of loyalty, impartiality, and prudence imposed on all trustees. While this proposition may be correct, Norma was permitted to place significant privacy-related restrictions on her trust, and Peter makes no claim that the GST trustee violated any fiduciary duties by abiding by the privacy restrictions. The main goal of the KUTC is to carry out the settlor's intent. The district court properly gave effect to Norma's expressed intent to alter the trustee's duties to inform and report to trust beneficiaries.

l. Peter was not entitled to receive a copy of the RT instrument or an accounting of its assets under any theory set forth in his petition. His status as a qualified beneficiary of the GST did not entitle him to any information about the funding status of the trust beyond what he received from the trustee — which at the time he filed his petition was that the GST was presently unfunded. Moreover, even if Peter was a qualified beneficiary of the RT, he would not have been entitled to the information about the RT instrument and its assets due to the RT's strict privacy-related provisions. The district court properly applied the privacy provisions in the RT instrument to the facts of the case.

m. Peter's petition did not allege a breach of fiduciary duties — it sought a disclosure of the RT instrument and an accounting of its assets. The district court properly limited the scope of Peter's discovery to the scope of the claims in his petition, and in doing so gave effect to the expressed intent of Norma's trusts. Before leaving this issue, the court observed that it would have been appropriate

for the district court to conduct an in-camera inspection of the entire RT instrument rather than reviewing only Articles 10 through 12 before ruling on the GST trustee's summary judgment motion. But Peter has never requested or argued for an in-camera inspection of the entire RT instrument in either district court or on appeal. The RT trustee — the only party with access to the entire RT instrument — had been dismissed from the lawsuit before the parties conducted discovery on the claims in Peter's petition and the district court ruled on the GST trustee's summary judgment motion. The district court properly granted the RT trustee's motion to dismiss because Peter lacked standing individually to sue the RT trustee.

n. Kansas courts apply a two-part analysis to determine whether a no-contest clause should be enforced against a beneficiary. First, the court determines whether the beneficiary's actions violated the express terms of the no-contest clause. Second, the court determines whether the beneficiary had probable cause to take those actions.

o. Article 8 of the GST instrument included forfeiture provisions, in relevant part: "Notwithstanding any other provision of this instrument to the contrary, and to the maximum extent applicable state law permits, if following my death any beneficiary under this instrument files a complaint, joins as a plaintiff, or in any other manner seeks, directly or indirectly, to take any one or more of the actions described in this article, then thereafter for all purposes the provisions of this instrument shall be construed and any property shall be disposed of as though that beneficiary had predeceased me. The actions covered by this article are as follows: (a) Contesting this instrument or any other trust created by me or my husband either during life or at death and whether by way of grant, exercise of power of appointment or otherwise, or any amendment to any of the foregoing."

p. The district court granted summary judgment on the GST trustee's counterclaim from the bench, and like its rulings on other issues, the district court did not file a written memorandum opinion. The district court's forfeiture ruling is premised on the implicit finding that Peter knew he was not entitled to receive the information he was seeking about the trusts at the time he filed his petition for declaratory judgment, so that the petition amounted to an action contesting the GST instrument. But evidence to support this finding is not clearly established in the summary judgment pleadings. The record is unclear when Peter first received a copy of the privacy provisions in the RT instrument. Regardless of the documents Peter may have possessed when he filed his petition — and even if he may have had some knowledge about the RT privacy provisions — the legal action did not contest the GST or the RT but merely sought information about the trusts and a judicial interpretation of the trust instruments. The legal action did not seek to invalidate either trust instrument; nor did it seek to remove the trustee of either trust. As a qualified beneficiary of the GST, Peter had a right to seek information about the RT, to the extent it could be provided, since the RT was the funding source for the GST. Norma passed away about a year before Peter sought a legal remedy. Up to that point, the only information Peter had received about his grandmother's estate was a letter from an attorney that explained the GST was "currently unfunded" and the amount it would be funded in the future was

"unknown." Based on the record provided in the summary judgment pleadings, Peter's petition did not trigger the forfeiture provisions of the GST.

L. *Wilson v. Milonas,* 2025 N.Y. Misc. LEXIS 6362 (Supreme Court of New York, New York County July 22, 2025). Report from a retail DNA company alone cannot support suit for pre-action discovery of trust information.

1. Petitioner Christopher T. Wilson contended that he is the nonmarital son of decedent Spiros Nicholas Milonas, who died in 2022, leaving an estate of about $500 million. Concerning his alleged familial relationship to decedent, petitioner stated that he submitted his DNA to 23andMe, which showed he has 20.77% shared DNA with a half-sister identified as "CM," who petitioner claimed upon information and belief is decedent's daughter, respondent Claire Milonas. This alleged filiation to decedent, petitioner argued, gives him "unquestioned standing as a beneficiary of the Aegean Trust," under either Guernsey law or New York law; renders him a necessary party to any settlement arising therefrom; and gives him an "absolute right to information" concerning the trust and settlement. Petitioner further argued that he "must have access to the terms, provisions, and conditions of the Aegean Trust and the global settlement agreement in order to properly frame his legal claims" for breach of fiduciary duty, an accounting, the claw back of improper distribution of trust assets, and vacatur of the settlement agreement related to the trust.

2. Petitioner brought a special proceeding pursuant to CPLR 3102(c) to obtain pre-action discovery consisting of a trust agreement for the "Aegean Trust"; a settlement agreement related to the trust; to identify the trustees of the trust and the "eight family units" who allegedly received distributions or benefits from the trust under the settlement agreement; and for the preservation of certain evidence. In opposition, decedent's daughters, respondents Sofia Milonas and Claire Milonas, submit the affirmation of respondent Constantina Papageorgiou, who is Court-appointed Guardian of the Property for decedent in an Article 81 guardianship proceeding in this Court. Papageorgiou asserts that she refused to provide petitioner with information concerning decedent within the context of the guardianship proceeding, because she had no idea who he was and it was never proven to her that Petitioner was the biological child of decedent.

3. The Milonas respondents also submit a letter dated March 6, 2025, in which their counsel informed petitioner that the factual assumptions underpinning his petition are "almost entirely incorrect." Counsel explained that decedent was not the settlor of the Aegean Trust; and the beneficiaries of the trust are only decedent's daughters and their issue, and no other issue of decedent. Counsel further explained that the settlement agreement resolved disputes and pending litigation between decedent; his wife, non-party Antonia Milonas; and certain family companies, and did not, as petitioner alleges, distribute trust assets to "eight family units." As proof, counsel provided petitioner with the first page of the settlement agreement. Finally, counsel stated in the March 6th letter that decedent's 2015 will, which was executed about 20 years after petitioner claims to have first met decedent, does not mention petitioner, and was filed with Surrogate's Court for safekeeping in 2021, prior to decedent's death. Further, the Milonas respondents argue that petitioner lacks standing to demand discovery related to the trust, because he has no claim to the trust assets and cannot challenge the trust instrument. Citing the fiduciary duties that a trustee generally has to trust beneficiaries, they maintain that the trustee here would inform petitioner if he were in fact a beneficiary of the trust.

Respondents insist that petitioner is engaged in a speculative fishing expedition and does not present a meritorious cause of action.

4. The court denied the suit for disclosure on the following grounds:

a. To obtain pre-action disclosure, a petitioner must demonstrate it has a sufficient factual basis to assert a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. Pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists.

b. Here, petitioner is not entitled to the pre-action discovery sought, as he has not shown that he has a meritorious cause of action or that the information he seeks is "material and necessary" to an actionable wrong. In the first instance, petitioner has not established through competent or reliable proof that he is decedent's son. He simply presents a document from a retail DNA company, the reliability of which is unclear, and which purports to show his relation to an unknown person identified only as "CM." Additionally, petitioner's assertion that he is or should be a beneficiary of the trust is pure speculation, and his efforts to obtain the trust documents and related settlement agreement are the kind of fishing expedition that the law protects against. Indeed, petitioner concedes that he seeks the discovery, not simply to identify would-be defendants, but to "properly frame his legal claims." Finally, to the extent petitioner believes he is entitled to inherit under decedent's will, which is both on file in Surrogate's Court and in the record here, he is already in possession of facts sufficient to frame his complaint.

VII. REVOCABLE TRUSTS

A. *In re Est. of Sandler,* 2025 NYLJ LEXIS 2525; 2025 LX 326327 (Surrogate's Court of New York, New York County 2025). Trust term requiring notice to trustee of trust amendment does not apply to withdrawal of assets that effectively revoked the trust.

1. Lynne Boyarsky ("Petitioner") moved into the cooperative apartment located at 17 Chittenden Avenue in Manhattan ("Apartment"), the residence of Lydia Sandler ("Grantor"), in 2014. On December 22, 2014, Grantor executed a will in which she left the Apartment to Petitioner and divided her residuary estate as follows: Rochelle Klein ("Rochelle") (2/3), Petitioner (1/6), and Karen Boyarsky ("Karen") (1/6). Grantor then established the Lydia Sandler Grantor Trust (the "Trust") on March 25, 2015, for her lifetime benefit with remainder to Petitioner, whom she appointed as Trustee. The Trust was funded with Grantor's interest in the Apartment. A new stock certificate and proprietary lease was issued to Petitioner, as Trustee, on June 1, 2015.

2. The Trust provides that "[t]he Grantor shall have the right, at any time and from time to time, to withdraw part or parts or all of the Trust Estate, without the consent of any other person." The Trust also provided: "The Grantor hereby declares this trust to be revocable and she hereby reserves the right, at any time or from time to time during her lifetime, by an instrument signed and acknowledged by her, and delivered to the Trustees, to revoke the trust hereby created, in whole or in part, or to alter or amend this Trust Agreement; provided, however: (A) No alteration or amendment to this Trust Agreement shall be effective without the prior written consent of the Apartment Corporation, which cannot be unreasonably withheld or delayed, provided that the foregoing provisions of this Paragraph "A" shall not apply to an alteration or amendment which relates solely to

a dispositive provision of the Trust Agreement; and (B) Written notice shall be given to the Apartment Corporation if this Trust is revoked."

3. Grantor signed a Police Domestic Incident Report, which describes an altercation between Grantor and Petitioner in the Apartment. That same day, a New York County Family Court judge issued the first of several Temporary Orders of Protection, which directed Petitioner to "stay away" from Grantor and the Apartment. Grantor also signed a power of attorney naming Rochelle as her agent at about this time.

4. Grantor executed a new will. The will provided for Rochelle to receive 70 percent of Grantor's estate and for Petitioner and Karen to share the remaining 30 percent, but before signing it, Grantor increased Rochelle's share of the estate to 90 percent and reduced Petitioner's and Karen's shares to 5 percent by making handwritten changes to the will and then initialing them. Thereafter, Grantor executed the instrument that has been propounded by Rochelle, now incorporating the handwritten changes.

5. Grantor executed a series of documents drafted for the purpose of revoking the Trust and transferring ownership of the Apartment back to her. Included among those documents was an instrument titled "Revocation of Trust," signed and acknowledged by Grantor ("Revocation Instrument"). The Revocation Instrument states as follows: "I, LYDIA SANDLER, Grantor, do hereby revoke the Trust and declare that all principal thereof with all rights, titles and interests in said principal revert absolutely to me and to no other." The corporation in which the Apartment shares were held ("Apartment Corporation") issued a new stock certificate and proprietary lease in Grantor's name.

6. Grantor died at the age of 93, survived by three nieces, Petitioner, Rochelle, and Karen, who are sisters. The estate was mired in litigation. Two other contested proceedings were pending, including a proceeding to probate an April 5, 2016 will under which Rochelle is the nominated executor and primary beneficiary.

7. Rochelle claimed on behalf of the estate that the Trust was revoked and the Apartment is an estate asset. Petitioner moved for summary judgment before discovery had been completed, and Rochelle opposed the motion. The court determined that the motion was premature. Thereafter, Rochelle's counsel withdrew from the case. After Rochelle retained new counsel, the court heard arguments on Petitioner's motion for summary judgment and denied summary judgment on the following grounds:

> a. Petitioner had failed to make the required prima facie showing of entitlement to judgment as a matter of law with regard to her claim that the Revocation Instrument is invalid. Grantor reserved the right to revoke the Trust "by an instrument signed and acknowledged by the Grantor, and delivered to the Trustees" and it is undisputed that such a revocation document was signed and acknowledged by Grantor but was not delivered to Petitioner. However, Petitioner did not demonstrate that Grantor intended to condition the validity of the revocation on delivery of the Revocation Instrument to the Trustee.
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> b. Petitioner's argument ignored an ambiguity in the Trust, which allows the Grantor to withdraw parts or all of the Trust assets, when read in conjunction with the revocation language. Significantly, neither this provision nor any other provision in the Trust requires notice to the Trustee if the Grantor withdraws or transfers assets out of the Trust. Thus, Grantor unequivocally reserved for herself the power to withdraw all of the Trust's assets, without giving notice to the

Trustee. This provision undermined Petitioner's contention that, as a matter of law, delivery of the Revocation Instrument to the Trustee was required to revoke the Trust because it shows the possibility that Grantor did not consider notice to the Trustee an important or necessary condition when taking actions that affect the Trust, even when effectively revoking the Trust by removing all of its assets.

c. Further, it is clear from other provisions in the Trust that when Grantor wished to condition or mandate an action, she used language that made her intent clear. The Trust specifically conditions the effectiveness of certain amendments to the Trust on the prior consent of the Apartment Corporation, and provides that notice "shall be given" to the Apartment Corporation if the Trust is revoked.

d. Petitioner cited no authority for her contention that the Revocation Instrument, which makes specific reference to the article of the Trust affording Grantor the power to revoke, must also quote verbatim the entire article as it applies to revocation. Nor did she offer any basis for the court to conclude that the failure to include the date of the revocation in one place on the Revocation Instrument when it is set forth elsewhere renders the instrument invalid. For all these reasons, the court denied the motion to the extent it sought a summary determination that the Trust was not effectively revoked.

e. Petitioner failed to make a prima facie case for summary judgment on her request for a determination that Petitioner, as Trustee, holds the valid stock certificate and proprietary lease for the Apartment, notwithstanding that the Apartment Corporation issued a new stock certificate and proprietary lease in the name of Grantor. The Trust did not provide that the Trustee had to be notified if the Grantor exercised her right to withdraw assets from the Trust and allowed Grantor to make such withdrawals "without the consent of any other person."

f. Petitioner has neither sought specific relief from the Apartment Corporation nor joined it as a party to this proceeding. Moreover, even if that were not the case, on this record, Petitioner offered no authority for the proposition that the Apartment Corporation's decision to accept the Grantor's documents and transfer the Apartment to Grantor based on them was improper as a matter of law, particularly given the evidence supplied by Petitioner in her moving papers that the Apartment Corporation was aware that Grantor had the absolute power to withdraw assets from the Trust without the consent of anyone and without providing notice to the Trustee. Petitioner failed to make a prima facie case that Petitioner should be declared the holder of the valid stock certificate and proprietary lease for the Apartment.

B. *Stewart v. Martin,* 2025 U.S. App. LEXIS 16576; 2025 FED App. 0175P (6th Cir.); 2025 LX 236088; 2025 WL 1864740 (United States Court of Appeals for the Sixth Circuit 2025). Remainder beneficiaries of revocable trust still have constitutional standing to bring claims that may be invalid under state law due to duties owed exclusively to settlor.

1. Lester Warren Martin passed away on March 13, 2020, at age 96. A World War II veteran and a graduate of Harvard Medical School, Dr. Martin was an accomplished physician at the Cincinnati Children's Hospital, one of the world's best youth hospitals. Among Dr. Martin's contributions to medicine was his development of a procedure called the "Lester Martin Pull Through Method," a surgical technique that eliminated the need

for children with ulcerative colitis to use ostomy bags. He also performed Ohio's first successful kidney transplant, which took place in 1965.

2. Dr. Martin was also a successful investor. He read the Investor's Business Daily publication every morning until his death. An "avid" manager of his finances, Dr. Martin accumulated millions of dollars in wealth. To prepare for the distribution of these funds upon his death, he created an estate plan in 1990.

3. The centerpiece of Lester's estate plan was a revocable trust. Lester had five children. The plan was for each child to get an equal share of Lester's trust assets upon his death. But in 2011, one of Lester's daughters, Sarah Stewart, passed away. That meant that Sarah's two children — Daniel Stewart and Rachel Kosoff — stepped into their mother's shoes as trust beneficiaries. They were each supposed to receive half of Sarah's share. Four of Lester's children — David Martin, Betsy Martin Smith, Janet Bertolino, and Susan Weinert — would each inherit a one-fifth share of the assets in Lester's trust. And Daniel Stewart and Rachel Kosoff were to split the one-fifth share that their mother would have received if she had been alive when Lester died.

4. When Lester was 94 years old, Lester gave his only son, David Martin, a power of attorney. Among other things, the power of attorney allowed David to withdraw money from Lester's trust and distribute it to Lester's children and grandchildren. Lester also installed David as the trustee of the revocable trust. David began to distribute money from Lester's trust. During the last year of Lester's life, David distributed a total of $13,930,000. Most of the money was distributed to Lester's four living children — David and his three siblings. David distributed a much smaller portion to Daniel and Rachel, the two children of Lester's deceased daughter Sarah. All told, Daniel and Rachel received a combined $700,000 from David's distributions before Lester's death — just a fraction of what the other beneficiaries received.

5. Daniel and Rachel believed David's distributions were unlawful and sued in federal court. Their lawsuit alleged, among other things, that David's refusal to give them an equal share of distributions from Lester's trust was a breach of trust and a breach of his fiduciary duties as trustee. Although Daniel and Rachel accused David alone of wrongdoing, their complaint named all Lester's four surviving children and the other grandchildren as defendants, so that the court could order those relatives to surrender some of the money they received from David's distributions. The basis for federal jurisdiction was diversity of citizenship.

6. The district court held that David had breached his fiduciary duties to the plaintiffs and opined that David could make distributions from Lester's trust only if Lester had directed him to do so in writing. The court acknowledged that, since David could act both in his own capacity as trustee and in Lester's capacity as settlor (since Lester gave David a power of attorney), David could have issued a written direction to himself to make the distributions. David never did that, believing that Ohio law would not require him to go through a pointless exercise of issuing a written direction to himself to do something. But the court held that Ohio law did require that. Ultimately, in the court's view, David's distributions without specific written authorization amounted to breaches of trust and breaches of David's fiduciary duties to Daniel and Rachel. The court entered summary judgment for the plaintiffs, as to liability only, on their breach of trust and breach of fiduciary duty claims. After a two-day trial, a jury awarded damages David owed Daniel and Rachel in the amount of $2,086,000 — one-fifth of the amount David had distributed

from Lester's trust, less the $700,000 that Daniel and Rachel had already received. The court entered a final judgment that reflected the jury's verdict.

7. A few weeks later, David filed a motion for relief from the court's judgment, asserting that the court's judgment was void because the court lacked the power to decide the case where Ohio law didn't give the plaintiffs a legal right to sue him for breaches of trust, and plaintiffs lacked constitutional standing to sue. The district court granted David's motion. It concluded that Ohio law didn't give the plaintiffs a right to contest David's distribution of money from Lester's trust, and lacked constitutional standing to bring their claims in federal court. The court wiped out the jury's verdict and dismissed the case. Daniel and Rachel appealed, and the court of appeals vacated and remanded on the following grounds:

> a. Daniel and Rachel have Article III standing to bring their claims in federal court. Thus, the district court erred in granting David's motion for relief from judgment. The plaintiffs have established all three elements of constitutional standing. First, they alleged an injury in fact: the loss of $2,086,000. That is a "monetary injury" that readily qualifies as a concrete injury in fact under Article III. Second, this injury was traceable to David's distribution of funds from Lester's trust, which the court said was unlawful. Finally, the plaintiffs' monetary harm is easily redressable by the court's judgment ordering David to pay $2,086,000 to the plaintiffs. In short, this case is a prime example of a genuine controversy that the Constitution authorizes the federal courts to hear.
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> b. It's well established that the trustee of a revocable trust does not owe fiduciary duties to the beneficiaries. In fact, the beneficiaries don't have any legal rights to the trust property, so long as the trust remains revocable. Ohio appears to endorse this view of revocable trusts. The Ohio Uniform Trust Code provides that, when a trust is revocable, the rights of the beneficiaries are subject to the control of the settlor. In this case, that's Lester — and by extension, David, who had a power of attorney to act on Lester's behalf. As for the trustee (David), his duties were "owed exclusively to" Lester — not to Daniel or Rachel, the beneficiaries. On this view, David had no obligation to the beneficiaries of Lester's trust during Lester's lifetime. Ohio law might not give the plaintiffs a cause of action to sue David for breach of fiduciary duties. But the court doesn't need to definitively resolve that issue, since it's irrelevant to the narrow legal question on appeal. Even if the plaintiffs lacked a cause of action to challenge David's distributions, the district court had subject-matter jurisdiction to decide this case.
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> c. David's key mistake is conflating the plaintiffs' right to sue under Ohio law with the requirement of constitutional standing. It is firmly established that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction — the court's statutory or constitutional power to adjudicate the case. Article III standing doesn't turn on the presence or absence of a cause of action. The court has continually observed the distinction between standing and causes of action. Even if a plaintiff lacks a cause of action, he might still have a redressable injury sufficient to satisfy Article III. Whether a plaintiff has a right to legal relief on the merits doesn't affect whether a plaintiff has constitutional standing. And here, Daniel and Rachel have constitutional standing. Even if the court erred in concluding that Daniel and Rachel have a cause of action under Ohio

law (a matter on which the court takes no position), the district court didn't err when it exercised subject-matter jurisdiction over the case.

d. The absence of a valid cause of action does not implicate subject-matter jurisdiction, but with an exception to that rule. When a plaintiff presents a federal claim, a court can dismiss that claim for lack of subject-matter jurisdiction only when it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous. This exception is sometimes called the "substantiality doctrine." And it applies only to dismissals for lack of federal-question jurisdiction, not standing. Under the substantiality doctrine, when a plaintiff brings a claim that appears to arise under federal law — but the federal claim is frivolous — courts say the claim doesn't raise the sort of legitimate federal-law question that can support federal-question jurisdiction. The "wholly insubstantial or frivolous" principle has no application to this case. After all, Daniel and Rachel didn't invoke the district court's federal-question jurisdiction. They didn't bring a federal-law claim. Instead, they brought state-law claims under the district court's diversity jurisdiction. And when a plaintiff satisfies Article III's justiciability requirements (like standing) and satisfies the requirements for diversity jurisdiction, federal subject-matter jurisdiction is proper — regardless of whether the legal theory of relief is frivolous under state law.

e. Some circuit courts have extended the "wholly frivolous" principle to the standing context. These courts have held that a plaintiff may lack standing when he presents a claim that is frivolous on its face. But this is a very limited exception, and courts should be wary before employing it. Courts have an independent obligation to raise jurisdictional issues. If the merits of a claim are jurisdictional, that would force courts to raise defenses that a defendant may never have raised. And this would put courts where they don't belong — speculating as to good defenses that may or may not have been raised (the quintessential merits portion of the lawsuit). Thus, so long as the plaintiff's claimed legal interest isn't patently frivolous, the claim passes this very low bar.

f. Ultimately, whether the plaintiff's legal theory under state law is frivolous is often a different question from whether the plaintiff's claimed injury is frivolous for Article III purposes. Even if Daniel and Rachel's theory of liability under Ohio law had been frivolous, the concrete injury they claim — the loss of money — isn't. That monetary harm is a paradigmatic example of the sort of interest that the law protects. Thus, the district court had jurisdiction over their claims. Because the district court erred in granting David's motion to vacate the judgment for lack of subject-matter jurisdiction, and the district court's order granting relief from judgment is vacated.

g. David's back-up argument was that the plaintiffs were required, but failed, to use expert testimony to prove their damages with the certainty required by Ohio law. David was happy with the district court's dismissal. But now that the dismissal was reversed, he wants to challenge earlier rulings of the district court. He may do so. By the time of the jury trial, the district court had already concluded that David was liable to Daniel and Rachel for breaching his fiduciary duties. The sole question for the jury was the dollar figure that David owed Daniel and Rachel. David argued that Rachel and Daniel didn't prove the value of the money they had

already received with certainty. He argued that doing so would require Rachel and Daniel to account for the returns they had made on the $400,000 that David placed into trusts for their benefit. And he argued that, under Ohio law, Daniel and Rachel needed expert testimony to explain these complex calculations to the jury.

h. David advanced this theory by filing a post-trial motion for judgment as a matter of law. The district court never ruled on the merits of that motion. Instead, the court terminated that motion as moot after it granted relief from judgment. Now that it's clear the plaintiffs do have standing, the district court must rule on this motion. The case is remanded with instructions for the district court to rule on David's motion for judgment as a matter of law.

VIII. PRIVILEGES & EXCEPTIONS

A. *Haviland v. Johnson,* 2025 Conn. Super. LEXIS 150, 2025 WL 384148 (January 30, 2025). Connecticut court refuses to recognize the fiduciary exception to the attorney-client privilege.

1. Wayne Leizear's will left all Leizear's tangible property to a revocable trust established on October 23, 2018. The trust beneficiaries were David Haviland and three other relatives of Leizear. David Johnson became the successor trustee of the trust upon Leizear's death and remained as trustee. Johnson resigned as executor after being confronted by the trust beneficiaries and Haviland was appointed as successor executor.

2. Upon investigation of Johnson's actions as executor, Haviland sued Johnson and two limited liability companies owned by Johnson and his wife, alleging that Johnson, pursuant to a power of attorney and then in his capacity as executor of Leizear's estate, stole millions of dollars in funds, art, antiques, jewelry, and gold and silver coins from Leizear and the estate. He asserted claims for breach of fiduciary duty, fraud, conversion, statutory theft, civil conspiracy, unjust enrichment, elder exploitation, and for constructive trust. Haviland, also a beneficiary of the Leizear estate, brought a separate action against a chiropractor and a friend of Johnson's, Amy O'Donnell-Reuther, and alleged that O'Donnell-Reuther was charging Leizear exorbitant amounts of money for home health care services that were not actually being provided, and that Johnson paid those charges from Leizear's accounts pursuant to the power of attorney.

3. Following Leizear's death, Johnson engaged Leizear's estate planning attorney to assist in the settlement of the estate. Haviland subpoenaed the law firm for production of the entire legal file for the estate, including all communications with Johnson and anyone else concerning the firm's representation of the estate. The firm objected and asserted the attorney-client privilege and work product doctrine. Johnson suffered a traumatic brain injury when he was assaulted and was unavailable to testify. Haviland questioned the extent of Johnson's alleged disability.

4. The court declined to adopt the fiduciary exception to the attorney-client privilege to compel the production of the documents, and granted Johnson's motion for a protective order, on the following grounds:

a. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and

that such advice or advocacy depends upon the lawyer being fully informed by the client.

b. The fiduciary exception to the attorney-client privilege originated in English common law in the context of the trustee-beneficiary relationship. The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees.

c. The executor of an estate is a fiduciary. Although most of the cases addressing the fiduciary exception arise in the context of the relationship between a trustee and trust beneficiaries, not estate administrators and heirs, these roles are analogous and often overlapping so the applicable considerations are virtually the same.

d. In *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), the court adopted the fiduciary exception in the context of trustee-beneficiary relationships. One theory underlying *Riggs* is that the beneficiaries are the "real clients" in whose interest the trustee is employed and who indirectly pay for the legal advice provided to the trustee concerning the administration of the trust. In addition, and often alternatively, courts have focused on the trustee's duty to furnish information to the beneficiaries as a basis for recognizing the fiduciary exception. Most courts recognizing the fiduciary exception draw a line between a trustee's communications with counsel seeking guidance in the administration of the trust and those seeking advice for the personal protection of the trustee. Several of the highest courts in other jurisdictions have rejected the fiduciary exception, citing variously as reasons that: (1) a trustee's duty of full disclosure to beneficiaries extends to all *material facts* affecting the beneficiaries' rights and applying the attorney-client privilege does not limit this duty; and (2) a trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance.

e. Two Connecticut courts have recognized the fiduciary exception. Three Connecticut trial court decisions declined to recognize the fiduciary exception. In the present case, it is a matter of weighing competing interests and adopting a rule of general application. The applicability of the fiduciary exception is not a matter to be determined on a case-by-case basis. If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

f. The "real client" theory is incompatible with Connecticut law. The client in this context, or any other, is the person seeking legal advice. A trustee, or as in the present case an estate executor, who seeks and obtains legal advice is a real client. In any given circumstance, to also consider the beneficiaries as "real clients" presents an attorney undertaking the representation of an executor with potential conflicts of interest because the interests of beneficiaries are not

inherently concurrent with the interests of the executor, nor are the interests necessarily concurrent among the beneficiaries themselves. Further complicating matters, the executor may also be a beneficiary with potential conflicts of interest with other beneficiaries. The "real client" theory, treating estate beneficiaries as clients of an attorney retained by the estate's executor, works only in the simplest of circumstances where all beneficiaries stand in the same position and the executor or trustee is not called upon to exercise discretion. Otherwise, this theory poses a host of ethical dilemmas that counsel against recognition of the fiduciary exception.

g. Weighing the values underlying the attorney-client privilege against the right of beneficiaries to be informed regarding the administration of a trust or an estate, the attorney-client privilege is not required to give way to the beneficiaries' right to information. A trustee's duty to inform is not absolute. The duty is limited to furnishing information about the administration of the trust and the material facts necessary for the beneficiaries to protect their interests. A trustee cannot avoid the duty to inform beneficiaries of material facts simply by communicating them to an attorney. Applying the attorney-client privilege does not limit this duty. Nor is it manifest that keeping beneficiaries "reasonably informed" about the administration of a trust or an estate requires that they have access to communications between a trustee or executor and their attorney.

h. Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications. The benefits of granting beneficiaries and heirs access to communications between an executor and their attorney do not outweigh the potential chilling of essential communications between attorney and client. Courts adopting the fiduciary exception fail to explain why the interest in candid conversations between a fiduciary and their lawyer is diminished as compared to other attorney-client relationships. The privilege itself is limited to legal communication, not facts, and thus its contours are consistent with a fiduciary's duty to inform beneficiaries. Some exceptions to the attorney-client privilege, such as the crime-fraud exception, are premised upon the absence of any value preserved by protecting the communications that are within the scope of the exception. Other exceptions, such as the "at issue" exception apply where the contents of the legal advice is integral to the outcome of the legal claims of the action. Neither of these rationales apply where a beneficiary or successor fiduciary seeks access to privileged communications between a fiduciary and his lawyer merely because the information is relevant or needed to pursue a claim against the fiduciary.

i. There is considerable value in the protection of confidential communications between a fiduciary and their lawyer. An executor's duties extend not only to heirs and beneficiaries, but also to the testator's intentions and even to estate creditors. The interests of these different constituencies may conflict in a variety of ways. Most importantly, there may be divergent interests among the heirs and beneficiaries, and they may be contentious. Beneficiaries may pursue unwarranted distributions. One beneficiary may complain about benefits provided to another beneficiary. Concerns may be raised about the use of trust or estate funds or the adequacy of an accounting. Legal advice may be critical to addressing

these situations. When an executor seeks legal advice to resolve or avoid such problems, that communication would be chilled by the knowledge that its content will be available to the heirs and beneficiaries of the estate. The sometimes-difficult decisions executors must make, which could be beneficially assisted by legal advice, would often be made without legal advice to avoid the risks and difficulties posed by exposing those discussions to scrutiny by others. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.

j. This problem is not solved by limiting access to privileged communications to a successor executor. In the present case and in many cases, the successor executor or trustee is also a beneficiary and the distinction drawn is meaningless. Moreover, even if this distinction was observed, it would not eliminate the chill imposed upon attorney-client communications where a potential successor fiduciary, and possibly a beneficiary, would be looking over the shoulder of the present fiduciary.

k. Finally, even if the fiduciary exception were applied with the condition other courts have placed on it — allowing access to communications concerning the administration of trusts and estates while restricting access to communications concerning a fiduciary's personal interests — the undue imposition on attorney-client communications is not avoided. The uncertainty inherent in drawing that distinction in the regular course of representing the client renders the distinction virtually meaningless. Substantive attorney-client communications concerning difficult conflicts or challenges involving beneficiaries will overlap substantially with potential claims against the fiduciary. Attorneys attempting to honor this distinction run the risk that the disclosure of some communications will waive the privilege as to all communications. Some courts have suggested that fiduciaries hire separate counsel to represent their personal interests to draw clearer lines, which may place an undue burden on the assets of a trust or estate, since there will likely be substantial overlap needed by each attorney. In short, the lines are blurry no matter how diligently an attorney, or a court, might attempt to draw them.

IX. LIMITATIONS & OTHER DEFENSES

A. *Chauncy v. Gorden,* 2025 U.S. Dist. LEXIS 162639 (United States District Court for the Middle District of Florida, Orlando Division 2025). Petition to probate a will in which he had no interest does not defer accrual of tort action for interference with expectancy.

1. This case arose out of Charles Steven Chauncy's frustration that he inherited nothing when Addison McNairy passed away. McNairy was the longtime partner of Chauncy's mother, who left her entire estate to McNairy when she died. McNairy created three wills during his life: one in 1998 that was not discovered until later that left most of his estate to Chauncy's mother; one in 2007 that left most of his estate to Chauncy's mother and her heirs; and one in 2018 that placed his estate in trust and appointed a friend, Defendant Dennis Lee Gorden, as the trustee.

2. When McNairy died, Chauncy filed a petition to probate the 2007 will, while Gorden filed a competing petition to probate the 2018 will. A witness to the 2007 will testified that McNairy did not properly execute it, so the probate court invalidated it and instead admitted the 2018 will to probate in July 2019. Chauncy moved for rehearing, appealed, and moved for relief from judgment. By February 2020, the probate court had denied Chauncy's motions, and Chauncy and Gorden had settled and stipulated to a dismissal of the appeal.

3. Over two years later, Chauncy discovered the 1998 will through Gorden's testimony in another proceeding. Chauncy then sought to reopen the probate proceedings, but the probate court dismissed the petition, finding that Chauncy had no interest in the 1998 will. The appellate court affirmed in December 2023.

4. So in March 2024, Chauncy sued Gorden, alleging tortious interference with an expectancy. Chauncy alleged that he would have inherited McNairy's estate under the 2007 will, but Gorden interfered with this expectancy by exercising undue influence over McNairy and soliciting false testimony from the witness to the 2007 will during the probate proceedings. Gorden moved for summary judgment, and this Court granted it, finding Chauncy's claim time-barred.

5. Chauncy moved the Court to alter or amend its judgment, which the court denied on the following grounds:

> a. Chauncy first argued that the Court improperly determined the date his claim accrued because the delayed discovery, continuing tort, and fraudulent concealment doctrines extended the accrual date of his claim. Gorden counters that Chauncy cannot make these arguments because he did not raise them at summary judgment. On a motion to alter judgment, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. Addressing new arguments would improperly afford a litigant two bites at the apple. Chauncy sought a second bite at the apple by raising new arguments about the delayed discovery, continuing tort, and fraudulent concealment doctrines, which would affect when his claim accrued, that he could have raised at summary judgment but did not, so they will not be considered.
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> b. Chauncy's next argument was that the Court erred by distinguishing between exhaustion and accrual, and Chauncy's claim actually accrued in 2023 when the probate court rejected his 2022 petition to probate the 1998 will.
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> c. This action accrues when all elements have occurred, and the four-year statute of limitations begins to run when the plaintiff discovered or should have discovered all the facts giving rise to the cause of action. The elements of intentional interference with an expectancy are: (1) the existence of an expectancy; (2) intentional interference with the expectancy; (3) causation; and (4) damages. Before a plaintiff can bring a tortious interference claim, he must have exhausted his probate remedies, and they must have provided inadequate relief.
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> d. Chauncy's argument that his 2022 petition to probate the 1998 will should have delayed the accrual of his claim is wrong because the 1998 will does not affect accrual or exhaustion. Unlike the 2007 will, which bequeathed a gift to Chauncy's mother and her heirs, the 1998 will only bequeathed a gift to Chauncy's mother, so it lapsed when she passed away because she predeceased the testator.

Chauncy had no interest in the 1998 will. The only expectancy Chauncy had with which Gorden could interfere was under the 2007 will. So Chauncy's only actionable claim accrued in 2019 when: Chauncy expected to take under the 2007 will; Gorden allegedly unduly influenced McNairy to make a new will in 2018; and Chauncy was damaged when he lost his expectancy because the probate court invalidated the 2007 will and probated the 2018 will. And his claim ripened when Chauncy exhausted his remedies when the 2007 will's probate proceedings ended in February 2020.

e. So Chauncy's claim was time-barred when he filed it more than four years later. The 1998 will is not relevant to the accrual or exhaustion of this claim. The Court did not err in finding Chauncy's claim to be time-barred.

B. *Figgie v. Figgie,* 2025-Ohio-451; 2025 Ohio App. LEXIS 453 (Court of Appeals of Ohio 2025). Court approval of sale of securities starts limitations period on claims of fraud related to the sale.

1. Harry E. Figgie, IV ("Harry IV"), Catherine E. Figgie ("Katie"), and Susan A. Figgie ("Susie") (collectively referred to as "plaintiffs") claimed they were defrauded when shares of Clark-Reliance Corporation ("CRC"), a company created by their grandfather, Harry E. Figgie, Jr. ("Harry Jr."), held in the 1983 Trust settled by their father, Harry E. Figgie, III ("Harry III"), were redeemed by CRC in a securities transaction that occurred more than 20 years ago, in 2001 (the "Transaction"), between CRC and Wilmington Trust, the then-trustee of the 1983 Trust, of which the plaintiffs were beneficiaries. CRC claims that the plaintiffs, as trust beneficiaries, were not parties to the Transaction at issue, CRC was not a fiduciary, had no duty to disclose, and made no misrepresentation of material fact and that plaintiffs' fraud claim is time-barred by the statute of limitations.

2. CRC is a closely held company owned by the Figgie family. Harry Jr. was the chairman of CRC's board of directors, and the CRC shares were owned by Harry Jr., his wife, Nancy, and their three children, Harry III, Mark, and Matthew. In the early 90s, Harry III took over the company. Harry III established a trust in 1983 ("the 1983 Trust"). Harry III and Harry Jr. eventually had a "falling out." Prior to this, Harry III asked Harry Jr. to serve as trust advisor for anything relating to the 1983 Trust's ownership of CRC stock. Harry III died unexpectedly in December 1999. Wilmington Trust became trustee of the 1983 Trust in the summer of 2000. Harry Jr. remained as trust advisor, with the power to make all decisions about the CRC stock.

3. Harry Jr. wanted to divest the 1983 Trust of the CRC stock because of Harry Jr.'s disdain for Harry III and did so by manufacturing a lawsuit involving plaintiffs and Harry III's wife and executor of his estate, Kathy Bliven ("Bliven"), "to determine who would be responsible for paying Harry III's [E]state debts." Plaintiffs contend that the main issue in this lawsuit ("2000 Case") was whether the 1983 Trust had any responsibility to pay Harry III's Estate debts, or if such debts were the responsibility of another trust that Harry III established in 1997 ("1997 Trust"). Harry III's Estate consisted of a last will and testament, the 1983 Trust, and the 1997 Trust. The beneficiaries of the two trusts included plaintiffs and Bliven. KeyBank served as the Trustee of the 1997 Trust. According to plaintiffs, "the goal of the lawsuit was to satisfy Harry Jr.'s expectations. Harry Jr. and CRC would later utilize this lawsuit as the rationale for the supposed need to sell the [1983 Trust's] CRC stock in 2001." Plaintiffs allege that Harry Jr. selected the attorney to represent them, and his selection was not in their best interest. At that time, Harry IV was

18, Katie was 17, and Susie "was institutionalized" because she is "developmentally disabled."

4. Ultimately, Bliven liquidated assets to settle Harry III's Estate. A significant debt of the Estate that Bliven was concerned about was an estate tax liability payable from the 1983 Trust. Thus, Bliven, in her capacity as Executor, advised Wilmington Trust that the CRC stock held by the 1983 Trust would need to be liquidated in order to address the needs of the Estate. Plaintiffs disagreed with Bliven's decision and filed an adversarial case in 2001 ("2001 Case") in probate court. In response to this case, Bliven, as named defendant, filed a counterclaim against plaintiffs seeking an order for the "Sale of Closely Held Interests," which included the CRC stock held by the 1983 Trust.

5. The CRC stock in the 1983 Trust was subject to a 1985 Share Purchase Agreement ("Share Purchase Agreement") that would give CRC and the Figgie family members a right of first refusal to buy any shareholder's CRC stock if a shareholder desired to sell to someone other than CRC or another shareholder. In addition to seeking a court order to sell the CRC stock, Bliven allegedly contacted a third-party broker to ask him to sell the CRC stock and advised him that she was asking for a court order to sell said stock. Because of Bliven's request to sell the CRC stock held by the 1983 Trust, CRC acknowledged the request and confirmed the applicability of the Share Purchase Agreement. Thereafter, Wilmington Trust, as Trustee of the 1983 Trust, agreed to the formula purchase price, as determined by the Share Purchase Agreement, for the CRC shares held in the 1983 Trust. Bliven, as a beneficiary of the 1983 Trust and Executor, likewise agreed to the sale and purchase price through her counsel. Plaintiffs, each represented by counsel, additionally advised the Trustee that they had no objection to the sale of the CRC stock pursuant to the terms in the Share Purchase Agreement. At that time, there were no objections or concerns raised regarding the execution of the Transaction and no challenges to the purchase price.

6. Thereafter, on September 20, 2001, CRC purchased the shares from Wilmington Trust for a total purchase price of $1,909,007.70. The probate court approved the global settlement, and all parties (CRC was not a party to this litigation), including plaintiffs, or their representatives, personally signed the settlement agreement. The court then issued an order dismissing both cases with prejudice on July 10, 2003.

7. Plaintiffs now contend that Harry Jr. facilitated this sale of the CRC shares at below fair market value, and if the stock was redeemed at its fair market value in 2001, it would have been worth around $3,000,000. Plaintiffs allege that the fraudulent nature of the CRC stock purchase became apparent to Mark when he learned that Harry Jr.'s (his father) statements were false. Mark was the only surviving Figgie family member who was on CRC's board when it authorized the stock redemption in 2001. According to Mark, "it wasn't made known to the board at the time of the redemption that I later found out weren't true, the things that I didn't know that I know now, and there were some things that were told to us as a board that weren't true at the time." Mark stated: "My dad had told everyone that the 1983 trust didn't have the cash and the wherewithal to pay the taxes and that they had to buy the stock back because the tax — in order to pay their taxes, and it turns out there was enough money in the trust to do that, and that the cash flow — the Clark-Reliance redemption was actually — well, let me walk you through this. The Clark-Reliance redemption paid them the 1.9 with an initial payment and then a 10-year payout, but what they actually got taxed for by the IRS finally was 2.4, and they got

the tax payment due right away so the Clark stock payment redemption didn't even put in enough cash to pay the Clark stock tax responsibility, and that the Clark stock tax responsibility was paid out of some of the insurance proceeds. So they didn't need to sell the Clark stock. They had enough with the insurance proceeds to pay off the taxes on this, and then they could have kept the stock, and they would have had an ongoing cash flow because as we were getting the distributions for the defective trust to pay off the stock that Matthew and I had been gifted, they would have continued to get an income from Clark-Reliance. So they would have done better to hold onto the stock, not only the future value of the stock, but the income flow from the defective trust."

8. According to the plaintiffs, Mark believed that the misrepresentations were motivated by Harry Jr.'s animus towards plaintiffs and his desire to regain control over CRC: "I think that my father was upset enough about the defective trust and the fact that he was losing control of the stock or the voting control, they were having to pay out income pari passu to the 1983 trust and that they had to convert over to an S Corp, that he not only fired Bottger and Deloitte & Touche, but he then found the opportunity to buy the stock back at a discount over 10 years and get Harry's kids out of the picture and gain control of the voting percentage again, stopped paying out the money to the 1983 trust, and it was a very well created fraud, I think."

9. Plaintiffs claim that they did not learn of this fraudulent scheme until after Thanksgiving 2018 when Harry IV's aunt asked him about the value of CRC stock. This prompted Harry IV to inquire about the 2001 sale of CRC stock with his Uncle Mark. According to Harry IV, Mark told him "he didn't recall what we got for our shares, but that it was an egregiously low valuation, and that he wasn't sure what Nancy got for hers, but she had sold shares right around the same time that we did."

10. Shortly thereafter, on December 20, 2018, Plaintiffs initiated the underlying matter filing a complaint seeking to recover money and damages from the 2001 redemption of the CRC stock. Plaintiffs assert claims for declaratory judgment, fraud, tortious interference with expectancy of inheritance, unjust enrichment, constructive trust, and civil conspiracy. Plaintiffs allege that CRC improperly redeemed its stock from the 1983 Trust for a transaction that was initiated and directed by Harry Jr. Plaintiffs further allege that, at the time of the stock redemption, "Harry Jr. was a member of CRC's board of directors and an officer of the corporation and that he was operating under numerous conflicts of interest by virtue of his conflicting obligations arising from his absolute control over CRC, his position as trust advisor to the Harry III Trust, and his personal animus toward [p]laintiffs." Plaintiffs allege that CRC did not properly value its stock and that Harry Jr. "manipulated and/or relied on manipulated data to artificially deflate the value of the CRC shares for the benefit of CRC and to Plaintiffs' detriment." Plaintiffs further allege that CRC misrepresented and concealed the truth and that the redemption of the shares of CRC were purchased by CRC for a price below fair market value and for the benefit of CRC.

11. CRC moved for summary judgment and the probate court granted the motion and dismissed plaintiffs' first amended complaint. Plaintiffs appealed, and on appeal, the Court of Appeals affirmed on the following grounds:

> a. A fraud action must be brought within four years. The statute does not begin to run, however, until the cause of action accrues. The cause of action does not accrue until the fraud is discovered. The four-year limitations period commences

to run when the complainant has discovered, or should have discovered in the exercise of reasonable diligence, the alleged fraud.

b. In the instant case, there is no dispute that plaintiffs initiated the 2001 Case and were parties in the 2001 counterclaim filed by Bliven, where she sought a court order to sell the shares of CRC stock held by the 1983 Trust. In addition, there is no dispute that plaintiffs' attorney sent a letter to Wilmington Trust in September 2001, stating that plaintiffs had no objection to the redemption of the shares of CRC stock held in the 1983 Trust. Also, there were no challenges to the purchase price. As a result of the sale, the 1983 Trust began receiving distributions in 2001, which continued annually until the year 2010. In addition, plaintiffs had access to all trust statements, documents, and correspondence as early as 2009 and Harry IV was appointed as Susie's guardian in 2006, which granted him the right to full access to documents detailing the assets of the 1983 Trust on her behalf.

c. Although Harry IV inquired from his uncle in late 2018, it does not change the fact that the shares of stock involved in the alleged fraud were the same shares of stock at issue in the 2000 Case and 2001 Case; the plaintiffs were represented by counsel and consented to the redemption; plaintiffs received annual distributions from the redemption for ten years; and plaintiffs had access to all trust documents.

d. Reasonable minds can come to but one conclusion, with that conclusion being adverse to the plaintiffs. Based upon the foregoing instances and information, Plaintiffs had knowledge of the CRC stock redemption that, if using ordinary care and thoughtfulness, would alert a reasonable person to investigate the possibility that fraud may have occurred. Thus, based upon all the foregoing events, Plaintiffs could have discovered, in the exercise of reasonable diligence, any alleged fraud by CRC thereby barring their claim for fraud in their Complaint due to the statute of limitations. There remains no genuine issue of material fact as to when the statute of limitations period commenced to run on plaintiffs' fraud claim. CRC is entitled to judgment as a matter of law.

e. Plaintiffs' fraud claim is also time-barred by the five-year statute of limitations for the sale of securities under R.C. 1707.43(B), which provides: "No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of Chapter 1707 of the Revised Code, shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful, or more than five years from the date of such sale or contract for sale, whichever is the shorter period."

f. In the matter before us, plaintiffs' claims arise from alleged misrepresentations made with respect to the sale and purchase of securities, and the allegations in plaintiffs' complaint are "inextricably interwoven" with the sale of securities. The five-year statute of limitations applies to plaintiffs' claims because their claims arise from alleged misrepresentations made with respect to the sale and purchase of securities. Therefore, the fraud claim is additionally time-barred because the CRC stock was sold in 2001.

g. Having found that summary judgment is proper on the plaintiffs' fraud claim, we likewise find that their civil conspiracy, unjust enrichment, and constructive trust claims fail as a matter of law.

h. An underlying unlawful act must be committed in order to establish an action for civil conspiracy. Because plaintiffs' civil conspiracy claim is based upon their fraud claim, and their fraud claim is time-barred, their civil conspiracy claim necessarily fails. Similarly, because plaintiffs' fraud claim is time-barred, Susie's claim for unjust enrichment also fails.

C. *Hilton v. Modugno,* 2025 Cal. App. Unpub. LEXIS 121; 2025 LX 89267; 2025 WL 64145 (Court of Appeal of California 2025). Information received in connection with disclaimer that mentioned marital agreement commences limitations period on claims that marital agreement was invalid.

1. Conrad N. Hilton ("Conrad") was the founder of Hilton Hotels Corporation ("HHC"). William Barron Hilton ("Barron") was Conrad's son. Barron and Marilyn June Hilton ("Marilyn") married in 1947, when neither had significant assets. Ronald J. Hilton ("Ronald") is the youngest of Barron and Marilyn's eight children.

2. Conrad died in 1979. Conrad designated The Conrad N. Hilton Foundation ("Foundation") as the sole residuary beneficiary of his estate. That bequest, however, was subject to a limitation: Conrad's will gave Barron the option to purchase HHC shares that were deemed "excess business holdings" for a private foundation under the Internal Revenue Code. At the time of his death, Conrad owned approximately 28 percent of HHC stock; under the "excess business holdings" rule, however, the Foundation was limited to holding a 20 percent interest in HHC. Years of litigation ensued between Barron and the Foundation. Eventually, the Court of Appeal held that all of Conrad's HHC shares were subject to Barron's option. Following that decision, in 1989, Barron and the Foundation entered into a settlement agreement ("Settlement").

3. Pursuant to the Settlement, the parties divided Conrad's HHC stock as follows: 30 percent was transferred outright to Barron; 26 percent was transferred outright to the Foundation; and the remaining 44 percent was placed in a trust, from which Barron received a percentage of the distributions during his lifetime.

4. In 1991, Marilyn and Barron signed a postnuptial agreement ("Postnuptial"). When she signed the Postnuptial, Marilyn was in ill health, suffering from multiple sclerosis, wheelchair bound, and dependent on Barron for her daily care and management of finances. Ronald alleges that Marilyn signed the Postnuptial under duress, as Barron had threatened to kick Marilyn out of their home if she did not sign it. The Postnuptial provides that the HHC shares and distributions allocated to Barron by the Settlement are his separate property. Marilyn waived and released all rights to claim financial provision from the estate of Barron after his death. An "Attorney's Certification" signed by Marilyn's counsel and one signed by Barron's counsel attested that each attorney had advised and consulted with his respective client and had fully explained the legal effect of the Postnuptial, and that each client had signed the agreement freely and voluntarily.

5. In 1993, Barron and Marilyn established the Hilton Family Trust ("Family Trust") to hold their substantial community assets. Barron was the sole trustee until Marilyn died in 2004, at which point Wells Fargo was appointed to serve as co-trustee with Barron. Under the terms of the Family Trust, the majority of Marilyn's half of the community property was

allocated to a sub-trust, the Marilyn J. Hilton Marital Trust ("Marital Trust"), for Barron's benefit during his lifetime. The corpus of the Marital Trust would not pass to their eight children until after Barron's death.

6. Marilyn died on March 12, 2004. Following Marilyn's death, Barron offered to disclaim his interest in the Marital Trust so that its assets could be distributed immediately to the eight Hilton children. In exchange, Barron asked his children, including Ronald, to waive any claim they may have against him or Wells Fargo arising out of their administration of the Family Trust and the Marital Trust. Barron also conditioned his disclaimer on his children covering the resulting gift tax and repaying any outstanding loans from Barron and Marilyn.

7. In 2005, in connection with the proposed disclaimer and release, Ronald received "a 64-page package of documents" detailing the Marital Trust's $189 million in assets. The packet also noted that the "classification" of Barron and Marilyn's property "as separate or community" had been "based on tracing of separate property from Schedule A of Postnuptial Agreement." Ronald agreed to the disclaimer plan and signed a waiver of accounting and release ("Release") on March 15, 2006, clearing the way for him to receive his approximately $24 million inheritance early. The Release stated that each "Beneficiary is represented by and has been advised by independent legal counsel and has all knowledge of the Beneficiary's rights and all material facts." It also included an "acknowledgment that no other party, nor any agent or attorney of the other party has made any promise, representation or warranty to induce" the execution of the Release.

8. In 2009, Barron informed his children that he intended to distribute to them the unused funds of the Marital Trust that had been reserved to pay gift taxes on the condition that each child sign a reconfirmation of the previously signed Release. Ronald signed the reconfirmation.

9. Barron died on September 19, 2019. During a phone call sometime "between September 19, 2019 and October 19, 2019," Ronald's sister, Sharron, "told him that Barron had taken HHC stock from Marilyn that should have been community property"; "that Barron had threatened Marilyn and forced her to sign the Prenuptial"; "and that Marilyn would have left Barron and taken her half of all of their property if she had not been medically infirm and dependent on him." According to Sharron, "there were nurses present in the home who could confirm this."

10. In November 2020, Ronald filed two petitions — one in his individual capacity and one in his capacity as the special administrator of Marilyn's estate — based on the theory that the HHC shares and related assets Barron had acquired through exercising his option and through the Settlement were community property and that the Postnuptial designating them as Barron's separate property should be voided. In September 2021, the trial court sustained demurrers, in part with leave to amend and in part without leave to amend, on a variety of grounds. The court also struck certain claims filed on Marilyn's behalf under California's anti-SLAPP statute. The court of appeals affirmed.

11. Ronald filed his first amended petitions in November 2021. In addition to theories previously alleged in the original petitions, Ronald asserted that Barron had commingled separate property with community property, thereby rendering all of it community property. In May 2022, the trial court sustained demurrers to the first amended petitions, finding that Ronald's claims were time-barred. Ronald filed his second amended petitions

in June 2022. In November 2022, the trial court again found that Ronald's petitions were barred by the statutes of limitations. Ronald filed the operative third amended petitions in December 2022, asserting a host of claims for breaches of fiduciary duty, fraud, constructive fraud, conversion, money had and received, undue influence, elder abuse, return of property, imposition of constructive trust, and declaratory relief. Respondents each filed demurrers to Ronald's third amended petitions, based on several grounds including that all claims were barred by the applicable statutes of limitations. For the fourth time, the trial court sustained respondents' demurrers on statute-of-limitations grounds.

12. Ronald appealed. On appeal, the court of appeals affirmed on the following grounds:

a. The longest statute of limitations applicable to Ronald's claims is four years.

b. Ronald's claims all stem from Barron's allegedly wrongful procurement of the Postnuptial, which, in conjunction with the Settlement, deprived Marilyn of her proper share of community property and diminished Ronald's inheritance as a beneficiary of Marilyn's estate. These claims accrued, at the very latest, in 2005, when Ronald received the packet of documents detailing Barron and Marilyn's community property and conspicuously noting that the "classification as separate or community" was based on the Postnuptial. This document placed Ronald on inquiry notice of the Postnuptial and its implications as to what might be in the Marital Trust and what might not be in it.

c. Receipt of the packet of documents in 2005 gave Ronald reason to suspect a factual basis for his claims; it gave him notice or information of circumstances to put a reasonable person on inquiry. It was incumbent on Ronald to, within the applicable limitations period, seek to learn the facts necessary to bring the cause of action.

d. Given his "duty to investigate," at a minimum, Ronald should have asked to see the Postnuptial. If he had done so, he would have discovered its effects on Marilyn's community property rights, its references to the Settlement, and its confirmation that the Settlement proceeds were Barron's separate property. And, given that Ronald alleged in the first and second amended petitions that the Postnuptial was so clearly one-sided, unfair, and unconscionable on its face that anyone in possession of a copy should have known it was voidable, Ronald would have obtained a factual basis for his claim that Marilyn was coerced into signing it.

e. Ronald's receipt of the packet of documents in 2005 thus triggered the running of any applicable statute of limitations. As the statutes of limitations for the claims asserted in the third amended petitions range from two to four years, all were long expired before Ronald filed the original petitions in 2020.

f. Ronald alleged that he made inquiries to one of his sisters and Barron's attorney about the Postnuptial in 2005 and was assured of its legitimacy. These allegations, however, do not further toll the limitations period.

g. Ronald also relied on his "fiduciary relationship" with Barron and Wells Fargo to absolve him of undertaking a reasonable investigation. But delayed accrual due to the fiduciary relationship does not extend beyond the bounds of the discovery rule, which operates to protect the plaintiff who despite diligent investigation is

blamelessly ignorant of the cause of his injuries and should not be barred from asserting a cause of action for wrongful conduct before he could reasonably be expected to discover its existence.

h. Ronald further argued that Modugno is equitably estopped from asserting a statute of limitations defense because Barron concealed his wrongdoing from Ronald, causing him not to sue until he discovered the wrongdoing after Barron's death. Equitable estoppel is inapplicable here. Ronald does not allege that Barron prevented him from obtaining a copy of the Postnuptial or thwarted his attempts to investigate or file timely claims.

i. Family Code section 1101, subdivision (a), "creates a cause of action for breach of fiduciary duty by one spouse against the other for impairment of the claimant spouse's undivided half interest in the community estate." Ronald did not bring this action as the special administrator of her estate until 2020. The action was not "commenced upon" Marilyn's death, because it was not brought on the occasion of, at the time of, immediately following on, or very soon after her death. Nor can Ronald avoid the three-year statute of limitations by claiming that he brought the action upon Barron's death. The purpose of Family Code section 1101 is to avoid pressuring a spouse to engage in litigation during a marriage. Marilyn and Barron's marriage ended when she died in 2004. The court declined to read the statute as permitting one of Marilyn's heirs to wait 15 years after the marriage concluded to bring a claim.

D. *Hopkins v. Callahan*, 2025 U.S. Dist. LEXIS 154013 (United States District Court for the Central District of California). Prior disclosure and partition proceedings commenced limitations on breach of duty and tort claims.

1. Pro se Plaintiff Robert J. Hopkins and pro se Defendant Elsa F. Callahan are siblings. Their mother, Mrs. Hopkins, established the Elsa Hopkins Trust ("Trust") in 1988, whereby both Hopkins and Callahan were beneficiaries and successor co-trustees. In 2002, Mrs. Hopkins amended the trust to add Callahan as a trustee, and in 2003, after Mrs. Hopkins received an Alzheimer's diagnosis, Callahan started acting as trustee.

2. Generally, Hopkins and Callahan were in communication regarding the Trust. On November 29, 2013, Callahan sent Hopkins a cash account register for the Trust ("2013 Trust Register"). Also in 2013, Callahan initiated a Partition Action in Massachusetts that Hopkins participated in regarding a Trust property. In 2019, Callahan initiated an Accounting Action in Massachusetts, that Hopkins also appeared in, seeking approval of her accountings for the Trust.

3. On November 16, 2023, Hopkins brought the present Complaint against Callahan alleging a variety of claims. Remaining are six claims for alleged breaches of Callahan's fiduciary duties as trustee — namely, mismanagement of trust property, embezzlement, failure to keep beneficiaries informed, failure to account, personally benefiting from trust assets through forgery, fraud, or coercion, and giving inappropriate or suspicious gifts — and one claim for intentional infliction of emotional distress ("IIED").

4. Callahan moved for summary judgment, which the court granted on the following grounds:

a. Hopkins discovered or reasonably should have discovered the bases for his fiduciary duty claims more than three years ago and thus, these claims are time-barred.

b. Hopkins reasonably discovered his "primary claim" regarding the allegedly missing 2002–2003 trust records at least four years before filing his Complaint. Hopkins himself attests that from 2013 to 2019 he repeatedly requested access to the 2002–2003 trust records. Thus, he knew or reasonably should have known these records were missing by 2019. The missing records are the cornerstone of Hopkins' claims regarding Trust mismanagement, failure to keep beneficiaries informed, and accounting claims.

c. Second, Hopkins' receipt of the 2013 Trust Register from Callahan provided Hopkins with the factual bases for all his claims. Hopkins confirmed he saw the Trust Register in 2013, and even admits he used the 2013 Trust Register to determine what claims to bring against Callahan in the present case. The 2013 Trust Register gave Hopkins notice of the sale of the Palm Springs property, gifts to James Callahan and Carrie Hudson, monthly deposits to AIG SunAmerica, Met Life payments, and Fidelity account funds. These incidences form the bases for Hopkins' Trust mismanagement, embezzlement, failure to keep beneficiaries informed, accounting, personal benefit, and inappropriate gifts claims.

d. Third, Hopkins discovered the remaining factual bases for his claims more than three years before filing suit. The 2013 Partition Action surely gave Hopkins notice of the sale of the Massachusetts property and Callahan's failure to rent it. Hopkins attests to realizing certain items were missing from that property, such as Mrs. Hopkins' jewelry and paintings, prior to its sale in 2015. Hopkins was aware of the 2002 Trust amendment and the extent of Mrs. Hopkins' Alzheimer's diagnosis by 2013. Hopkins learned of Callahan's allegedly improper Trust payment to her lawyer by 2017. Likewise, Hopkins learned of the alleged stealing of Trust assets for Callahan's niece and alleged coercion into renting Trust property to Callahan's son by 2019 and 2013, respectively. As such, all factual allegations supporting every one of Hopkins' claims occurred more than three years prior to Hopkins' suit.

e. Hopkins' only arguments in opposition to Callahan's statute of limitations defense are that (a) there is no statute of limitations for his claims, and (b) Hopkins first learned of the allegedly missing 2002–2003 trust records during discovery on this case. Both assertions are incorrect.

f. Similarly, Hopkins' IIED claim is time-barred. In California, a claim for IIED has a two-year statute of limitations. The Court construes the bases for this claim as alleged sexual abuse Hopkins faced as a child and Callahan's 2013 Partition and 2019 Accounting Actions that "reawakened" Hopkins' "traumatic memories." All alleged bases for liability occurred outside of the two-year statute of limitations.

E. *In re Boyce Living Trust,* 2025 Md. App. LEXIS 564; 2025 LX 249318; 2025 WL 1888762 (Appellate Court of Maryland 2025). UTC provision limiting contests to the validity of a revocable trust to one year after the settlor's death is a statute of repose.

1. Joretta Boyce and her husband, Walter Boyce, executed the "Boyce Living Trust" ("2008 Trust") on August 2, 2008. The 2008 Trust named Joretta and Walter as trustees

and primary lifetime beneficiaries. Walter designated his and Joretta's daughter, Janet Petway, as his successor trustee of the 2008 Trust, and Joretta named their granddaughter, Lynette Davis, as her successor trustee.

2. Walter passed away on March 11, 2018. On August 4, 2018, Joretta executed the "Amended and Restated Boyce Living Trust" ("2018 Trust"). The 2018 Trust designated Janet's son and appellee, Joseph Addison, as the successor trustee, thereby removing Lynette from the role. Joretta passed away on April 27, 2021.

3. On May 6, 2022, Lynette, Donnell K. Boyce, and Walter Boyce, Jr. (collectively, "Appellants"), all grandchildren of Joretta and Walter, filed a "Verified Petition for Assumption of Jurisdiction Over Trust and Accounting and Complaint for Declaratory Judgment, Conversion, Constructive Trust, Unjust Enrichment, Breach of Fiduciary Duties and For Injunctive Relief" ("Petition") with the Circuit Court for Prince George's County. Five family members separately filed identical objections to the Petition, arguing that Appellants' challenge to the 2018 Trust was untimely. Appellants reasoned that Mr. Addison's alleged fraudulent inducement precluded him and others from arguing that Appellants had filed an untimely petition.

4. Mr. Addison moved to dismiss the Petition. During the November 10, 2022 show cause hearing, Appellants argued that a 2020 administrative order, which was amended by Chief Judge Joseph M. Getty in 2022, extended the tolling of statutes of limitations. Mr. Addison continued to assert that § 14.5-605 is a "statute of repose," and that, therefore, the Petition was untimely. The circuit court agreed with Mr. Addison and explained that a statute of repose differs from a statute of limitations in that the trigger for a statute of repose period is unrelated to when the injury or discovery of the injury occurs. The court dismissed the Petition in its entirety, without separately addressing the Petition's request for assumption of jurisdiction. Appellants timely appealed.

5. On appeal, the court of appeals affirmed in part and remanded in part on the following grounds:

> a. Statutes of limitations and statutes of repose are similar, yet distinct, time-based tools that restrict the availability of recovery. Both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. There is considerable common ground in the policies underlying the two types of statute. But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives.
>
> b. To determine whether § 14.5-605 is a statute of limitations or a statute of repose requires an exercise in statutory construction. § 14.5-605 provides that interested parties to a revocable trust may challenge the validity of said trust: "within the earliest of: (1) 1 year after the death of the settlor; or (2) 6 months after the trustee sends the [interested parties] a copy of the trust instrument and a notice informing the [interested parties] of the existence of the trust, the name and address of the trustee, and the time allowed for commencing a proceeding."
>
> c. Reading the literal text, its meaning is unambiguous: the time to contest a revocable trust is limited to the earlier of either 1 year after the death of the settlor or 6 months after receiving notice of the trust. The plain language analysis must be carried out in relation to the goal to determine whether the General Assembly

intended the restriction period established to operate as a statute of limitations or a statute of repose.

d. A statute of limitations requires plaintiffs "to pursue claims with diligence" and "represents a public policy about the privilege to litigate." A statute of repose serves "to effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time."

e. The nature of a challenge to the validity of a given revocable trust limits the specific class of potential defendants to the administrators of said trust. Section 14.5-605, therefore, provides permanent immunity for those defendants through the implementation of the time bar by requiring parties to file within the defined period. § 14.5-605 provides a grant of immunity to a specific class of potential defendants, namely, trustees and successor trustees.

f. The time limitations in § 14.5-605 balance the creation of plaintiffs' statutory path for challenging a revocable trust's validity with the public interest in trust funds being distributed timely and accurately by means of extinguishing liability after the defined time periods lapse.

g. If the party does not challenge the validity of the trust within the mandated timeframe, the cause of action is extinguished, thereby protecting defendants from future liability. This is consistent with the operation of a statute of repose.

h. Additionally, statutes of limitations and statutes of repose differ in their triggering events. The chief feature of a statute of repose is that it runs from a date that is unrelated to the date of injury, whereas a statute of limitations always runs from the time the wrong is complete and actionable — and injury is always the final element of a wrong. Despite the tragedy of losing a loved one, Appellants did not suffer any legal injury when Joretta passed away. Section 14.5-605 identifies specific events, unrelated to any legal injury, that trigger the statutory time periods: the earliest of either the settlor's death or notice by the trustee to interested parties. Neither the modification of a trust nor the death of the settlor constitutes a legal injury. Therefore, because the trigger events are unrelated to an injury, this factor weighs heavily in favor of the statute being a statute of repose. Section 14.5-605 does not include exceptions to the express time limits anywhere in the text of the statute. Nor does § 14.5-605's legislative history indicate that the General Assembly intended the statute to be subject to equitable tolling. In short, there is no suggestion within either the text of § 14.5-605 or its legislative history that the time limits for contesting the validity of a revocable trust may be tolled in certain situations.

i. The absence of the word "repose" and use of the general term "limitation" does not mean that the Legislature intended to create a statute of limitations; rather, only that the Legislature provided a "limitation" to the time period in which a claim may be brought. Section 14.5-605's text and the full chapter title are not indicative of the statute being one of limitations because the legal term of art, "statute of limitations," is absent.

j. Maryland Rule 10-501(a), which is distinct from § 14.5-605 and not subject to its timing restraints, provides in relevant part: "A fiduciary or other interested person may file a petition requesting a court to assume jurisdiction over a fiduciary

estate." A petition requesting a court to assume jurisdiction must contain certain elements, including the reason for seeking the assumption of jurisdiction by the court and a statement of the relief sought. It is unclear why the circuit court dismissed the Appellants' request for assumption of jurisdiction. In its order following the November 10, 2022 hearing, the court was silent regarding whether it would assume jurisdiction, instead dismissing the Petition in full without any discussion of the Petition's individual counts, including the request for the court to assume jurisdiction and order an accounting. Therefore, while the court properly found that § 14.5-605 was a statute of repose, it did not provide reasoning for its dismissal of the Petition in its entirety, including for dismissal of the request for the court to assume jurisdiction, in either the oral ruling or the subsequent order. The Petition's request for assumption of jurisdiction was a separate count from the challenge to the validity of the 2018 Trust.

F. *In re Est. of Eddleman*, 2025 MT 35 (Supreme Court of Montana). Personal representative cannot unilaterally extend time for creditor claims, but estate is equitably estopped from asserting limitations defense based on its statements through counsel.

1. Warren Dan Eddleman ("Dan") died on August 5, 2022. In his Last Will and Testament ("Will"), executed August 28, 2020, Dan named his friend, Tom Wagoner ("Tom"), as the "Independent Executor" of his Will. The Will essentially devised all of Dan's property to his long-time friend and ranch hand, John Pinkerton ("John"), making him the sole devisee. Dan was survived by his daughter, Madelyn Lue Eddleman ("Madelyn"), ex-wife Sandra Eddleman ("Sandra"), and sister, Jobey Eddleman ("Jobey"). During his lifetime, Dan had established the Madelyn Lue Eddleman Trust ("Trust") for the benefit of his daughter. His sister Jobey and Ron Williamson ("Ron") serve as co-trustees of that Trust. Dan also maintained a majority membership interest in the Eddleman Oar Lock Ranch, LLC (the "Ranch"), with the Trust retaining the remaining minority membership. Pursuant to Dan's Will, the District Court appointed Tom as the Personal Representative ("PR") of the Estate ("Estate") on August 29, 2022.

2. Tom published a Notice to Creditors in *The Billings Times*, a weekly newspaper of general circulation, on September 1, 2022. The Notice stated: "NOTICE IS GIVEN that Tom Wagoner has been appointed Personal Representative of the above-named estate. All persons having claims against the deceased are required to present their claims within four months after the date of the first publication of this notice or the claims will be forever barred." In November of 2022, the Ranch, the Trust, John, Tom, and Ron entered a Memorandum of Understanding ("MOU") in which Tom and Ron agreed to act as co-managers for the Ranch with John having "broad authority over the day-to-day activities" of the Ranch. The MOU also required the signatories to "act in good faith to manage the [Ranch] and administer the Estate of Dan Eddleman" and to "engage in reasonable discussions to resolve any remaining issues."

3. Sandra filed a creditor's claim against the Estate on December 27, 2022, claiming more than $1 million pursuant to her Divorce Agreement with Dan, in addition to warranty deeds for property in Montana and Texas, ranch equipment, and family heirlooms. Sandra's claim stated all amounts "are justly payable . . . and the balance claimed is justly due." Madelyn, though the beneficiary of the Trust, filed a claim in her individual capacity on December 28, 2022, demanding proceeds received by Dan before he died for the sale of 38 of her cattle, as well as $2,100 for a loan and $20,000 for an exchange of funds with

Jobey. Madelyn's claim stated: "the above amount is justly currently due and payable." The Ranch filed a claim on December 29, 2022, claiming more than $1 million were owed by Dan to the Ranch for "loans due" and more than $4 million were owed by Dan to the Ranch's "Surplus Capital Account," in addition to more than $650,000 owed for disproportionate distributions expected in 2023 pursuant to Sandra and Dan's Divorce Agreement. The Ranch's claim noted that "the above amounts are justly currently due and payable." Jobey filed a claim on December 30, 2022, for Dan's funeral expenses, legal fees "to settle the assessment of a court in Texas," "$25,000 for [a] loan made to [Dan] at his request to help pay for expenses," more than $20,000 for an exchange of funds with Madelyn, as well as interest on all loans. Jobey's claim listed the amounts as "justly currently due and payable." The Trust also filed a claim on December 30, 2022, for payments due to a law firm for being "brought into the divorce proceeding" of Sandra and Dan. The Trust's claims were described as: "justly currently due and payable," apart from a contingent claim for any "shortage" arising from making the Ranch's Surplus Capital Account whole. Sandra, Madelyn, the Ranch, Jobey, and the Trust are hereinafter referred to collectively as the "Claimants."

4. On February 23, 2023, Tom, as PR, mailed responses to the Claimants, fully disallowing some claims and allowing others in part. On March 30, 2023, the PR, the Claimants, and John as sole devisee signed a Joint Stipulation for Extension of Time to Respond to Disallowance of Creditor's Claims ("First Extension"), extending the statutory deadline for Claimants to petition or commence a proceeding for allowance of their claims to June 23, 2023. Between March and June of 2023, John, the Claimants, and the PR discussed possible settlement of the claims, but no additional proceedings were initiated. On June 19, 2023, Ron emailed the PR's counsel requesting another extension of the deadline for responding to the PR's disallowance of the claims, to which counsel replied, "No problem. I can prepare the extension." Later that day, counsel confirmed the PR's willingness to consent to the extension during a phone call with Ron. The next day, June 20, counsel circulated for signature a Joint Stipulation for Second Extension of Time to Respond to Disallowance of Creditor's Claims ("Second Extension"), which was intended to extend the deadline for the "Claimants to file petitions for allowance of their respective claims until September 29, 2023."

5. On June 21, Ron emailed counsel, asking about the status of the extension. Counsel responded: "I am waiting on [John's counsel's] signature. . . . To allay any concerns, I am confirming for you in writing that if we don't get the order back before [June] 23rd runs, I will not take the position that the creditor's claims are barred as a result thereof." On the afternoon of June 22, counsel and John's counsel participated in a phone call, the details of which are disputed. After the phone call, John's counsel sent an email to counsel stating: "[w]e are not going to consent to the stipulation." On June 23, the deadline set by the First Extension, counsel notified the Claimants that John would not consent to the Second Extension. Counsel advised Ron that he would re-draft the Second Extension and circulate it without John's signature line. On Monday, June 26, counsel emailed the redrafted Second Extension to the Claimants without a signature line for John. Signatures were returned the same day from Jobey, Sandra, and Madelyn. Ron signed the Second Extension on June 28. Counsel claims to have delivered the Second Extension to the District Court after Tom signed it on Friday, June 30, while the Clerk of Court's timestamp shows the filing as Monday, July 3, 2023, at 10:55 a.m.

6. The District Court entered an order granting the Second Extension, moving the deadline to petition for allowance of claims or commence a proceeding to September 29, 2023. On July 25, 2023, John filed a Motion to Reconsider, stating the court lacked subject-matter jurisdiction over the matter, that the extension had not been timely filed, and that Montana law does not allow the PR to unilaterally consent to such an extension. Prior to September 29, 2023, the new deadline proposed by the Second Extension and initially set by the District Court, Claimants filed their respective petitions for allowance of claims. The District Court set a status hearing for October 23, 2023, ordering the parties to refrain from arguing their positions but, rather "to present the Court with their understanding of the issues yet to be decided." Following the hearing, the District Court granted an order for supervised administration of the Estate. Then, on December 7, 2023, the District Court issued its Order Rescinding Order Granting Joint Stipulation for Second Extension of Time to Respond to Disallowance of Creditor's Claims, and held that all claims and all Petitions to challenge the denial or disallowance of creditors' claims filed after June 23, 2023 are forever barred.

7. The Claimants appealed, and the Montana Supreme Court reversed and remanded on the following grounds:

a. Montana's probate code, based on the Uniform Probate Code, authorizes the PR to "settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate." In doing so, a PR may proceed without a court order but has the option of invoking the "jurisdiction of the court . . . to resolve questions concerning the estate or its administration." In a supervised administration, the PR has all powers of personal representatives under Montana law, except the authority to "make any distribution of the estate without prior order of the court."

b. After being appointed, a PR must give notice to potential creditors of the estate and can accomplish this by publishing said notice in a local newspaper of general circulation for three successive weeks. The notice must give the PR's address and announce that claims presented after four months from the date of the first published notice will be "forever barred." Four months represents a special statute of limitations for creditors given actual notice by publication. Montana law also governs the manner in which claims are presented, stating: "The claimant shall mail to the personal representative return receipt requested a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is considered presented on the first to occur of receipt of the written statement of claim by the personal representative or the filing of the claim with the court. If a claim is not yet due, the date when it will become due must be stated. If the claim is contingent or unliquidated, the nature of the uncertainty must be stated. If the claim is secured, the security must be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made."

c. If a PR disallows all or part of a claim, creditors then have 60 days after receiving notice of disallowance, "if the notice warns the claimant of the impending bar,"

to petition for allowance of their claim(s), or to commence a proceeding against the PR. If a claim is not presently due or is contingent or unliquidated, a PR "may consent to an extension of the 60-day period." A PR "with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate."

d. Tom, as PR, mutually agreed with the Claimants and John, the sole devisee, to the First Extension of the 60-day statutory period for petitioning for allowance of the claims, as authorized. As that extended deadline approached, Tom, through the Estate's counsel, agreed to a Second Extension of the time period. That consent was initially communicated by Breitenbach in an email to Ron, stating, "No problem. I can prepare the extension," confirmed by him in a telephone call, and, again, in writing when the drafted Second Extension was circulated to all Claimants and John by the PR's counsel. Additionally, two days before the deadline, Breitenbach assured Claimants that he would "not take the position that the creditor's claims are barred" if an order granting the Second Extension was not issued by the District Court before the First Extension's deadline. Thus, despite John's refusal to sign the Second Extension, there was no doubt about the PR's conveyed position in agreement with extending the timeframe in which Claimants, most of whom were not represented by counsel, had to respond.

e. However, the PR lacked authority, without the consent of sole devisee, John, to extend the time in which the Claimants were required to petition for allowance of their claims or commence a proceeding. A PR may "consent to an extension of the 60-day period" in three instances: 1) when the claims are "not presently due"; 2) when the claims are "contingent"; or 3) when the claims are "unliquidated." As the claims here were presented, they do not satisfy any of these exceptions. The plain descriptors of these claims — currently or justly due — puts them outside the exception for claims "not presently due." The claims made by the Ranch, Madelyn, Sandra, and Jobey are not contingent, and have never been challenged as "unliquidated."

f. It is true that the Trust's claim against the Estate includes payments to a Texas law firm, as well as a "contingent claim" for any shortage in the instance the "fair market value of the [Ranch] is not made whole via the [Ranch's] claims on the Estate." However, it also notes that "[a]ll the above amounts are justly currently due and payable." A "contingent claim" is one "that has not yet accrued and is dependent on some future event that may never happen." An alleged right to repayment for specific loans and distributions to Dan from the Ranch when he was living would have already occurred and accrued. Because the claims fail to meet statutory exceptions for when a PR may extend the period in which creditors must respond to the disallowance of claims, we conclude Tom, as the PR for Dan's Estate, lacked authority to unilaterally consent to the Second Extension.

g. The passing of the deadline provided by the First Extension would have resulted in expiration of the claim processing statute of limitations for Claimants to challenge the disallowance of their respective claims. Waiver of that limitation requires the consent of all successors. John's consent was necessary under the statute to effectuate the Second Extension. The claims would have been barred

at the close of the time period agreed upon by all interested parties and authorized by the District Court under the First Extension.

h. The Estate, however, is equitably estopped from raising a claim processing time-bar defense for Claimants' claims. A PR can be estopped from asserting a claim processing time limitation against a claim when the claimant's failure to bring the claim resulted from a PR's representations that no claim needed to be filed. Equitable estoppel is a principle of equity used to promote justice, honesty, fair dealing, and to prevent injustice or a party from taking advantage of his own wrong while asserting his strict legal right. A party asserting equitable estoppel must establish the following six elements by clear and convincing evidence: 1) the existence of conduct, acts, language or silence constituting a representation, or concealment of a material fact; 2) the fact must be known to the party to be estopped at the time of the conduct or the circumstances be such that knowledge of the fact is necessarily imputed to that party; 3) the truth concerning the fact must be unknown to the party claiming estoppel at the time it was acted upon; 4) the conduct must be done with the intent, or at least the expectation, that it will be acted upon by the other party or under circumstances both natural and probable that it will be acted upon; 5) the conduct must be relied upon by the other party and, thus relying, the party must be led to act upon it; and 6) the other party must, in fact, act upon it in such a manner as to change the party's position for the worse.

i. All of the elements of equitable estoppel are satisfied. The Estate had abundant actual notice of the claims, including their complexity and the substantial amount associated with each claim, and had participated in discussions with the Claimants seeking a resolution. Counsel, on behalf of the PR, made representations about a Second Extension to the Claimants, which he, as an attorney tasked with reviewing the claims, would have reasonably known were likely to be relied upon by the Claimants. The reassurances were clearly made with the expectation that the Claimants would sign the Second Extension with the expectation that they did not need to file petitions for allowance or commence a proceeding against his client by the deadline under the First Extension, evidenced by counsel's stated intent to allay the Claimants' concerns about the timing of the filings. And indeed, Claimants relied on counsel's statements when deciding not to file a petition for allowance or commence any additional proceedings. The Claimants' failure to file a petition or commence a proceeding changed their position for the worse, as the District Court determined their claims were forever barred under application of the claim processing statutes. In narrow circumstances such as these, the doctrine is appropriately applied to avoid the injustice that would otherwise result from such justifiable reliance leading to failure to file estate claims.

G. *In re Thomas R. Tomei Trust,* 2025 N.J. Super. Unpub. LEXIS 294; 2025 WL 629187 (Superior Court of New Jersey, Appellate Division 2025). Claims against trustee barred by laches.

1. On July 19, 1976, Vincent Tomei established the irrevocable Thomas R. Tomei Special Trust (the "Special Trust"), with Vincent as settlor and individual trustee, and his son, plaintiff Thomas, as beneficiary. Vincent managed the trust, though William E. Bierlin, Jr., was named as an independent trustee, and Herbert I. Berkowitz, then a young intern working for Vincent, as successor independent trustee. The trust specified that the

trustees would "hold," "manage," and "invest" trust property for plaintiff's benefit. It included a limitation on liability, stating: "No trustee shall incur any personal liability of any character whatsoever by reason of any matter or thing of whatsoever nature which may occur in connection with the administration of this trust, save only liability arising from gross negligence, willful default or fraud." The trust was governing by Pennsylvania law. On the same day, July 19, 1976, Vincent established a second trust for plaintiff's benefit, the irrevocable Thomas R. Tomei Special Trust # 2 (the "Special Trust # 2"). The Special Trust # 2 was almost identical to the Special Trust and Vincent was again the trustee. On August 18, 1983, plaintiff and Vincent established a third trust, the irrevocable Thomas R. Tomei Trust (the "1983 Trust"). Once again, plaintiff was the beneficiary and Vincent was the trustee, and the trust specified that Vincent, as trustee, would "hold," "manage," and "invest" certain trust property for plaintiff's benefit. The trust also included a limitation on liability, stating: "No trustee shall incur any personal liability of any character whatsoever by reason of any matter or thing of whatsoever nature which may occur in connection with the administration of the trust or any fund created hereunder, save only liability arising from gross negligence, willful default or fraud."

2. All three trusts include identical language providing that the trustee is authorized to employ accountants, agents, attorneys, employees, investment counselors, and other representatives, to act without independent investigation upon their recommendations, and to determine and pay their compensation.

3. Plaintiff began working for H&H in 1972, prior to the creation of the trusts, and Vincent served on H&H's Board of Directors since 1976, when the first two trusts were established. H&H's principal place of business is in Delaware County, Pennsylvania. Plaintiff became president of H&H around 1984 and was responsible for its daily operations, while Vincent, an accountant by trade, managed the company's financial affairs. Since 1984, Tomei family members or trusts whose beneficiaries are Tomei family members owned H&H in varying share percentages and plaintiff, Vincent, and Marie, reportedly the corporate secretary, were all signatories on H&H's business accounts. The precise percentages of ownership interests and shares held by each family member have been the subject of other litigation, albeit tangentially.

4. Beginning around 1990, H&H became very profitable, earned income of several million dollars per year, and typically distributed almost all of its annual income to shareholders for tax purposes, totaling in excess of $82 million since 1989. With plaintiff's consent, his H&H distributions were paid to Vincent as trustee of plaintiff's three trusts. In turn, Vincent made transfers from H&H to plaintiff's trust accounts.

5. Around 1994, plaintiff bought out his family members' interests in H&H, except for his mother Marie Tomei, and, as a result, his trusts gradually obtained an increasing number of H&H shares. Using the proceeds from plaintiff's buy-out, Vincent established trusts for several family members, including trusts for plaintiff's children, Thomas Tomei II and Lynn Tomei, as well as trusts for his other son, Mark Tomei, and Mark's children, Matthew and Michael Tomei. Thereafter, on unspecified dates, Vincent made countless transfers and gifts from plaintiff's trusts to these family members.

6. As of 2006, plaintiff's 1983 Trust contained 94.69% of H&H shares. The vast majority of funds held on behalf of the trusts were held in accounts at Oppenheimer & Co., Inc. ("Oppenheimer") or Charles Schwab & Co. ("Schwab"). During Vincent's management of plaintiff's trusts, it is undisputed that their value increased significantly.

7. Beginning around 2012, plaintiff and Vincent had disagreements about the management and operation of H&H. In 2012, plaintiff observed a fax printout in Vincent's office showing millions of dollars in the trust accounts of other family members, causing him to suspect that his H&H distributions had been misappropriated. As a result, plaintiff directed that his H&H distributions be paid to him directly, rather than to Vincent as trustee.

8. Vincent, who claimed to be acting as H&H's primary voting shareholder by virtue of Marie's shares, terminated plaintiff's employment with H&H over plaintiff's objection. Thereafter, Vincent and H&H, later joined by Marie as an intervenor, filed a complaint against plaintiff in the Court of Common Pleas, Delaware County, Pennsylvania ("Delaware County court"), alleging, among other things, that plaintiff had breached his fiduciary duties to the company. Plaintiff filed a counterclaim for breach of fiduciary duty in the operation of H&H. The lawsuit commenced years of litigation and a receiver was appointed to operate H&H in the interim.

9. In 2017, following a bench trial, the Delaware County court found that plaintiff's termination at the June 3, 2013, shareholder meeting was void and invalidated his termination. The court found that Vincent's and Marie's claims were barred on equitable grounds because they were rooted in Vincent's own immoral or illegal acts. Specifically, the court found that Vincent forged and fabricated H&H records by creating multiple sets of H&H share books, manufacturing meeting minutes, and unilaterally submitting articles of amendment to the Pennsylvania Department of State without authorization to do so.

10. The Delaware County court found that the two trusts created in 1976 expired in 2016 and 2017, respectively. Multiple versions of the trusts were produced during the litigation. One version of the Special Trust provided that the duration of the trust would be 41 years, at which time plaintiff could withdraw the principal and undistributed income. This version of the trust did not specifically identify plaintiff's children. Another version of the trust provided that the duration of the trust would be 20 years and made reference to plaintiff's two children who were not yet born in 1976. A third version of the trust included a 40-year duration and also made reference to plaintiff's yet-unborn children. The Delaware County court apparently concluded that the 40-year and 41-year versions were effective.

11. Regarding the 1983 Trust, plaintiff's version provided that the duration of the trust would be 20 years, concluding on August 18, 2003, at which time the principal and undistributed income would be paid to plaintiff. It also provided that the situs of the trust was New Jersey and that it should be interpreted and construed under the laws of New Jersey. In contrast, Vincent's amended version provided that the duration of the 1983 Trust would be 30 years, concluding on August 18, 2013, that the situs of the trust was Pennsylvania, and that it should be interpreted and construed under the laws of Pennsylvania. The Delaware County court held that the version of the 1983 Trust with a 20-year term and a situs in New Jersey was effective. The Pennsylvania appellate court affirmed the Delaware County court's decision, and the Pennsylvania Supreme Court denied further review.

12. Meanwhile, plaintiff filed a verified complaint against Vincent on June 12, 2013, in the New Jersey Superior Court, Chancery Division, to confirm the termination of the 1983 Trust, to compel an accounting, to impose resulting and constructive trusts, and for injunctive relief. By order entered on June 18, 2013, the New Jersey Superior Court judge directed Vincent to turn over to plaintiff the assets in the 1983 Trust, namely, the stock in

H&H, and to provide an accounting. Consistent with plaintiff's position, the judge found that the 1983 Trust had terminated on August 18, 2003, and imposed a resulting trust on any assets accrued after that date. Vincent was removed as trustee of the Special Trust and Special Trust # 2, and Charles P. Bowes was appointed successor trustee of both.

13. Vincent appealed, alleging error in the judge's finding that the 1983 Trust terminated in 2003, instead of 2013. On August 28, 2014, the superior court reversed and remanded for a plenary hearing to determine the termination date for the 1983 Trust. The judge entered an order reflecting the parties' agreement that the 1983 Trust terminated on August 18, 2003, and that New Jersey law would apply. Notwithstanding the consent order, the trust assets were not immediately distributed.

14. Thereafter, on July 29, 2015, plaintiff filed an amended verified complaint against Vincent and Marie. The complaint contained 19 counts, most of which were directed at Vincent and predicated on the allegation that Vincent engaged in fraudulent conduct as the trustee of plaintiff's trusts and committed illegal acts without plaintiff's knowledge or consent.

15. The trial court entered a judgment of diminished legal capacity as to Vincent, appointing Mark as his limited guardian. Two doctors certified that Vincent was "unfit and unable to govern himself and manage his affairs" because of dementia. One doctor opined that Vincent did not have the capacity to be deposed or testify at a trial. Vincent agreed that a guardian was necessary. Marie died on March 21, 2017.

16. The parties retained forensic accounting experts, who reviewed the company's history and the trusts' activities and prepared reports. Vincent and Marie's expert concluded that since 1991, H&H distributed $82,340,290. Of that, $74,311,763 was paid for plaintiff's benefit either to his trusts or to plaintiff and his wife directly, and $7,895,111 was paid to various other Tomei shareholders. She issued a supplemental report concluding that a net of $4,401,800 was transferred out of plaintiff's various trust accounts, including $2,285,267 to plaintiff himself, $1,926,133 to his children, and $173,347 to his parents. In addition, $17,053 was paid from plaintiff's trusts to Mark's family. Plaintiff's expert concluded that H&H distributed $82,420,064 since 1989, $76,730,297 should have been paid for plaintiff's benefit, and there was a "shortfall" of $2,418,534 owed to plaintiff. Plaintiff's expert later issued a supplemental report concluding that plaintiff's trusts were actually owed $5,421,433, and various accounts for Vincent, Marie, Lynn, Thomas II, Mark, Matthew, and Michael included numerous unexplained deposits, withdrawals, and transfers.

17. Vincent moved for summary judgment, seeking dismissal of plaintiff's amended complaint. The Estate of Marie joined Vincent's motion. Vincent referred to a 2014 text message from plaintiff to Lynn in which plaintiff wrote, "I put almost every dollar into your trust." In her deposition, Lynn confirmed receiving the text message from plaintiff. Vincent certified that plaintiff received annual reports and K-1 forms from the trusts showing Vincent's actions. Additionally, the information was included on plaintiff's personal tax returns, which listed the income received from his trusts. Further, as president of H&H, plaintiff was charged with knowledge of the company's annual distributions. As such, plaintiff saw the tax returns and the K-1 forms for H&H, showing distributions paid from H&H to his trusts. Vincent relied on a 1983 power of attorney ("POA") giving him broad authority to manage plaintiff's affairs. Vincent also relied on a 2001 release agreement ("2001 Release") confirming that plaintiff actively participated in

the management of the trusts, approved of all activities, and made independent investment decisions.

18. Regarding the 2001 Release, on June 6, 2001, in order to "become more actively involved in the investment strategy of the trusts," plaintiff signed an "Approval, Release, and Indemnity Agreement" absolving Vincent of any liability in connection with his investments. Critically, the 2001 Release provided that plaintiff was "fully familiar" with the trusts' activities and that he "approve[d] in all respects" the "investments" made. Plaintiff did not dispute signing the 2001 Release.

19. Plaintiff denied that he materially participated in the management of his trusts. He confirmed in a deposition that as president of H&H, he saw "the amounts that came out of H&H" which were paid to Vincent as trustee for deposit into plaintiff's trusts. Further, he testified at a deposition that he sometimes served as bookkeeper of H&H and was always aware of the payments made to Vincent as trustee. In yet another deposition, plaintiff acknowledged that he had "some say" in how trust assets were invested. He testified that he "regularly" asked for and received statements showing the balances in the 1983 Trust held at Oppenheimer. He also admitted that he sometimes went online to access "all" the trust accounts at Oppenheimer.

20. Vincent acknowledged that multiple versions of certain trust documents existed because he had recreated documents following a flood at his home.

21. The trial judge granted defendants' summary judgment motion based on laches because plaintiff failed to use due diligence in evaluating Vincent's conduct, it was unfair to bring this belated action. The judge found defendants were prejudiced by the fact that certain documents were lost or destroyed, including by virtue of the flood at Vincent's home. The judge also found prejudice caused by Vincent's inability to testify about conversations that occurred 40 years earlier following the entry of the judgment of diminished legal capacity and the appointment of a guardian. Further, the judge relied on the equitable doctrines of "acquiescence and consent," finding that as father and son, plaintiff had the ability to study Vincent's management of his finances.

22. After prevailing in his summary judgment motion, Vincent filed separate applications for counsel fees in the amount of $188,948 and $1,872,135. The judge denied the applications and concluded that the law firm's work did not benefit the trust itself but rather Vincent alone.

23. On appeal, the superior court affirmed in part, reversed in part, and remanded on the following grounds:

> a. The doctrine of laches bars the bulk of plaintiff's claims. There was clear prejudice arising from plaintiff's delay in pursuing the claims implicated by Vincent's management of the trusts going back as far as 1976. The undisputed facts show that plaintiff should have known of the transfers from his trusts and failed to act in a timely manner, resulting in prejudice to defendants' ability to defend the case occasioned by Vincent's incapacity, Marie's death, and lost trust records.
>
> b. Specifically, over the years, plaintiff had sufficient access to the trust records and admitted occasionally going online to access "all" of his trust accounts at Oppenheimer as well as receiving statements from Oppenheimer showing trust

balances. In addition, the plain language of the 2001 Release, which plaintiff admitted signing, indicated his full awareness and approval of the trust affairs before 2001, and his intention to "become more actively involved" in the trust affairs thereafter. Further, the text message from plaintiff to his daughter confirmed his awareness and approval of transfers to her trusts. Based on these facts, reasonable diligence dictates that plaintiff should have known of the transfers he now disputes in this matter.

c. Plaintiff confirmed that he saw "the amounts that came out of H&H" which were paid to Vincent as trustee for deposit into his various trusts, including the Special Trust # 2. Further, the assets of the Special Trust # 2 were held, at least in part, at Oppenheimer, where plaintiff admitted checking the online information for "all" his accounts. Plaintiff's failure to timely seek the relief sought and resulting prejudice to defendants justify dismissal under the doctrine of laches.

d. Plaintiff argues the judge erred in granting summary judgment when Vincent's versions of the trust documents were clearly forged, but this is immaterial to the judge's finding of laches. Equally unavailing is plaintiff's contention that the judge erred in relying on the exculpatory language contained in the purportedly forged trust instruments because the judge did not expressly rely on the exculpatory language in granting summary judgment but on the doctrine of laches as applied to the parties' conduct throughout the trusts' existence.

e. The record clearly reflects that plaintiff should have known of the transfers from H&H and failed to timely act. Plaintiff was undisputedly aware of H&H's distributions dating back to the 1980s, as he served as its president and signatory, and even admitted to serving as its bookkeeper at times. He knew that Vincent routinely transferred funds from H&H, and saw the annual K-1 forms showing distributions from H&H. Once again, his delay resulted in prejudice to defendants' ability to defend the case.

f. Plaintiff raises material factual disputes regarding whether he consented and acquiesced to Vincent's conduct in connection with the management of his trusts and the H&H distributions. Plaintiff asserted he and Vincent never discussed the trust agreements, and that he never discussed transfers to Lynn with Vincent or Marie. Plaintiff also disputed assertions that he allowed transfers between his trusts as part of a cash management system for H&H or that his receipt of records or tax returns from H&H affirmatively proved that he acquiesced in the management of his trusts or the transfers from H&H. Had consent and acquiescence been the only bases for the judge's grant of summary judgment, the court would agree with plaintiff that reversal was warranted. However, notwithstanding these disputed material facts, the claims were properly dismissed based on laches because even if plaintiff did not actually know of the conduct, he should have known.

g. Here, the judge failed to acknowledge the dispute of fact concerning the validity and authenticity of the power of attorney that plaintiff did not recall signing and alleged was a forgery. Instead, the judge presumed the validity of the document as an additional basis to dismiss the claims. Nonetheless, the error is of no moment because dismissal of counts two and four through sixteen based on the doctrine of laches was legally justified without considering the POA.

h. Count one sought enforcement of the June 18, 2013 order directing Vincent to convey the assets of the 1983 Trust and to provide an accounting of the 1983 Trust. Separately, count one sought an accounting of the Special Trust and Special Trust # 2. Because plaintiff promptly raised the claim in his amended 2015 complaint, laches is no bar to the relief sought. On the other hand, the June 18, 2013 order did not address count one's request for an accounting of the Special Trust and Special Trust # 2. On remand, the judge should consider whether laches applies to plaintiff's request for an accounting of the Special Trust and Special Trust # 2.

i. Count three sought an order confirming the termination of the Special Trust as of 1996, imposing a resulting trust on its assets, and surcharging Vincent for any losses since that time. The judge failed to specifically analyze count three's claims and instead broadly dismissed them for laches. Regardless of the version of the Special Trust applied, the trust has terminated because the longest version contained a 41-year term, which expired in 2017, four years after plaintiff initially filed this action. Because the Special Trust did not terminate until after the action was filed and plaintiff is the undisputed beneficiary of the trust and entitled to the trust corpus upon its termination, we conclude the doctrine of laches does not apply to count three and the judge should have considered plaintiff's demand for a resulting trust to effectuate the termination of the trust.

j. Count eighteen sought an order providing that Vincent was not entitled to any commission as trustee, and count nineteen sought an award of counsel fees for plaintiff.

k. Count seventeen alleged fraud in connection with Vincent's actions as trustee and in relation to H&H distributions. Here, there are disputes regarding fraud Vincent may have committed by altering trust documents and making improper transfers of funds. Critically, the Delaware County court's finding that Vincent forged and fabricated H&H records provides further indicia of possible fraud in this separate but related proceeding. Given the disputed facts as to whether Vincent committed fraud, on remand, the judge should consider whether the claims in count seventeen may be subject to the laches bar.

l. There was no abuse of discretion in the judge's denial of counsel fees. Vincent did not participate in the litigation as an advocate for plaintiff, the beneficiary of the trust. On the contrary, Vincent participated to protect his own interests and to defend allegations for breach of fiduciary duty against him individually. His victory on summary judgment was one of personal gain, and did not yield any financial benefit for others. Thus, in denying Vincent's request for counsel fees, the judge properly concluded that this case does not fall within the fund-in-court exception.

m. The judge properly rejected Vincent's argument that the language of the trusts permitted a counsel fee award. Here, the limiting provisions in the trust documents appearing under the heading "Administrative Powers of Trustees" undermine Vincent's argument. Indeed, a trustee's role depends "primarily upon the terms of the trust." Here, the trusts' language provides that the trustee is authorized to employ attorneys in the administration of the trusts, not defending against allegations of misconduct against him individually. Vincent argues for the first time on appeal that the judge erred in failing to apply Pennsylvania law, which

permits fees and costs incurred by a trustee to be chargeable to the trust. Because Vincent did not raise this issue before the trial judge and it is not jurisdictional in nature or implicates the public interest, the court declined to consider the argument. Vincent's application still fails as unreasonable because it included numerous charges associated with an entirely separate matter.

H. *Liberty One Funding Trust v. Achenbach*, 2025 U.S. Dist. LEXIS 27840; 2025 LX 29230; 2025 WL 504488 (United States District Court for the Northern District of Georgia 2025). Because insurable interest claims arise from Georgia's public policy against life wagers, there is no statute of limitations for insurable interest claims in Georgia, and trustee notices did not clearly trigger a shortened statute of limitations on related trust claims.

1. This case arises from a life insurance financing program allegedly operated by Plaintiffs Liberty One Funding Trust and Liberty Two Funding Trust ("Liberty") and Wells Fargo Bank, N.A. and Wells Fargo Delaware Trust Company, N.A. ("Wells Fargo"). Defendants are the "heirs" of individuals who participated in the program. The quotations below are from the allegations by the Defendants.

2. Defendants contend Liberty and Wells Fargo operated a program to originate and procure hundreds of what they call "stranger-oriented life insurance policies" on senior citizens throughout the country. This program "ostensibly provided a means by which senior citizens could obtain life insurance through long-term, non-recourse premium financing." Liberty and Wells Fargo promoted the program "as straightforward life insurance premium financing, where the premiums would be borrowed; the principal and interest on a 'loan' would be paid with the policy proceeds; and whatever policy proceeds were left over would be paid to the families of the senior citizen insureds." All this "was a ruse." "In reality," the program "existed as a means for Liberty, with the aid and assistance of its agent Wells Fargo," to procure life insurance policies on strangers "where Liberty was guaranteed more than 90% of each policy's death benefit prior to each policy's creation."

3. To successfully operate the scheme, Liberty and Wells Fargo targeted senior citizens and misrepresented the nature of the program and the accompanying loan agreements. Specifically, Liberty and Wells Fargo "sought out seniors" of "advanced age" who did not even need life insurance and induced them to join the program "with the promise of financial compensation." Liberty and Wells Fargo told these seniors that "in exchange for allowing large life insurance policies to be procured on their lives at no cost to them, the seniors would receive financial compensation of 'between 5% to 15% of a policy's face amount,' which would come in the form of an 'upfront advance' or a 'periodic advance' and/or a portion of the policy's death benefit (paid to beneficiaries that are designated by the insureds) when they died." Liberty also informed the insureds that, when they passed away, their life insurance policy proceeds would be used to repay policy premium advances and periodic payments Liberty made to the insureds along with interest, "with any remaining proceeds of the policy being retained by" the insureds.

4. If a senior agreed to participate in the program, Liberty "would obtain a HIPAA release from the senior . . . and collect their medical records so that Liberty could prepare a life expectancy or mortality study," allowing Liberty to "predict when the senior . . . would die." The main risk to Liberty in these transactions "was that an insured would not die and that Liberty would need to continue to pay premiums to keep the policies in force until the inevitable happened." To offset this risk, Liberty bought "massive" annuities on

the lives of each insured, with each annuity "producing monthly payments to Liberty that were tens of thousands of dollars in excess of the ongoing cost to fund the premiums on each respective policy."

5. If Liberty decided a senior was a suitable candidate for the program, Liberty would provide him or her "non-negotiable boilerplate documents," which "created multiple entities in Georgia," including an irrevocable trust in the name of the insured. Insureds "had no ability to negotiate or edit the terms of the trust agreements, . . . and no ability to select the trustee." Rather, "in every case, Wells Fargo was the trustee." The trust agreements identified the insureds' family members as beneficiaries.

6. The purpose of each irrevocable trust was to own a member interest in an LLC created in the respective senior's name. "In turn, the boilerplate Liberty trust agreements . . . directed the trustee, Wells Fargo, to become the 'Manager' of" each respective LLC. Each LLC then applied for a life insurance policy on the senior as proposed owners and beneficiaries. But, because Liberty controlled who was designated trustee and manager of each LLC, Liberty also controlled "the entirety of each transaction and . . . each" life insurance policy. So, while Wells Fargo was technically the trustee over trusts that in name benefitted the insureds and their families, its "true master . . . was Liberty," as Liberty both "dictated" Wells Fargo's "roles in connection" with the newly created entities, and "paid Wells Fargo for its services." Once Liberty established these businesses and named Wells Fargo trustee and manager of each respective trust and LLC, Liberty had Wells Fargo "enter into assignments purportedly by and between" the trusts and LLCs through which the LLCs "assigned all of their rights, title, and interest" in the policies and death benefits to Liberty.

7. Along with all the documents the seniors had to sign to create the trusts and LLCs, Liberty and Wells Fargo also had each insured sign a "complex, boilerplate" financing agreement, "each of which was non-negotiable and contained an arbitration provision." These agreements provided that Liberty would give the LLCs financing in the form of "[a]dvances" on the life insurance policies "for the purpose of funding" premiums, monthly payments, and (at Wells Fargo's discretion) "expenses of the LLC." The agreements contained terms and formulas related to these payments that in reality "were illusory and allowed Liberty and Wells Fargo to secretly charge" the insureds and LLCs "undisclosed amounts that lined the pockets of Liberty with millions of dollars . . . without letting the" insureds "understand what was happening." In fact, it was these "illusory" terms that allowed Liberty and Wells Fargo to purchase the secret annuities and charge the insureds for those annuities "plus other exorbitant and undisclosed fees." In other words, Liberty and Wells Fargo used the financing agreements to secretly charge the insureds for the costs of the annuities, all while Liberty was pocketing the profits instead of using the annuities to pay the premium costs and periodic payments to the insureds as promised. Then, "when each Insured passed away, Liberty and Wells Fargo would . . . reduce the life insurance death benefit paid to each Insured's family by deducting the cost of such annuities," even though "Liberty had been keeping the excess annuity payments all along."

8. Defendants "are the individual heirs and/or representatives of the estates of deceased" insureds who entered financing agreements and other transactional documents with Liberty and Wells Fargo as part of the life insurance financing program. With respect to each insured: (1) the insured set up a Georgia LLC in his or her name; (2) the insured and

LLC entered into financing agreements with Liberty and Wells Fargo; (3) Liberty and Wells Fargo procured and financed a life insurance policy on each insured's life; and (4) Liberty secretly purchased an annuity on each insured, intentionally concealed the details of the annuity from the insured and his or her family, and fraudulently charged each insured for the costs of the annuity while pocketing the profits. Upon the death of each insured, the insurer for each life insurance policy paid the death benefits to the LLC formed in the insured's name. Wells Fargo then distributed the proceeds to Liberty.

9. Defendants initiated arbitration against Liberty and Wells Fargo in October 2023, claiming, among other things, that the program constitutes an illegal life-wagering scheme. In response, Liberty and Wells Fargo filed separate lawsuits in the Georgia State-Wide Business Court and moved to stay arbitration. Defendants removed both cases to federal district court and they were consolidated. Defendants answered each complaint and filed counterclaims: (1) a declaration that they do not have to arbitrate their claims and instead may litigate them; (2) a declaration that if they must arbitrate, the arbitration is governed by the Federal Arbitration Act ("FAA") rather than the Georgia Arbitration Code ("GAC"); (3) to void the subject life insurance policies ab initio as illegal life wagers; (4) to void the subject financing agreements ab initio as life wagers; (5) to recover for breach of the financing agreements because Plaintiffs "receiv[ed] and retain[ed] death benefits far in excess of what they were contractually entitled to receive"; and (6) to recover damages on the grounds Liberty and Wells Fargo violated the federal RICO Act. They raise an additional claim for breach of trust against Wells Fargo.

10. Liberty and Wells Fargo moved to dismiss Defendants' counterclaims, which the federal district court granted in part and denied in part on the following grounds:

a. Defendants lack contractual standing to bring claims that Liberty and Wells Fargo breached the financing agreements or that the agreements are invalid. Defendants are not parties to the financing agreements. Those agreements are between Liberty, the insureds, and their respective LLCs. Nor are Defendants beneficiaries to those agreements. Indeed, the agreements expressly preclude assignment and disclaim any third-party beneficiaries. So, Defendants could only bring claims for breach of those agreements on behalf of the insureds' estates. Under the pertinent law where each insured lived, only judicially recognized personal representatives are authorized to prosecute and settle claims in favor of or against an estate. Aside from one conclusory statement that Defendants are the "heirs and/or representatives" of the insureds' estates, Defendants do not plausibly allege they are the legal representatives or administrators of any of those estates. Nor do they claim to have any other legal authority to bring claims on behalf of the estates.

b. Wells Fargo did not argue Defendants lack standing to challenge the insurance policies as non-signatories or that their status as non-signatories to the financing agreements otherwise prevents their breach of trust and RICO claims. The Court therefore declined to dismiss those claims simply because Defendants were not parties to the financing agreements.

c. The contracts at issue here that contain arbitration clauses are the financing agreements. As already explained, none of the Defendants are signatories or beneficiaries to those agreements. And the arbitration clauses apply only to disputes "between the parties." Absent any actual agreement between Liberty

and Defendants to arbitrate, Liberty cannot use the language of the financing agreements to compel arbitration of Defendants' counterclaims. Liberty cannot enforce the arbitration clauses over their counterclaims simply because they bring their claims as the insureds' "heirs." As just explained, the financing agreements expressly disclaim any third-party beneficiaries, so Defendants had no interest in those agreements, even as the heirs of the insureds. Indeed, that's the exact reason they cannot pursue their claims arising from those agreements. So, the arbitration clauses cannot bind them as heirs. Defendants initiated arbitration under the belief it was mandatory. Upon Liberty's filing suit and asserting that the financing agreements "each contain a clause providing that disputes may be resolved by arbitration or in court," Defendants asserted their counterclaims and evidenced an intent to litigate. The Court declined to find at this stage that Defendants are bound by the arbitration clauses in the financing agreements, as they were not parties to those agreements.

d. Defendants Jay Grimm Jr., Robert Krakovitz, Leon Malnik, and Phyllis Sifen are alleged beneficiaries of those policies, and they are entitled to challenge them as illegal and void. Each insured related to those Defendants created a Georgia LLC in their respective name that later obtained life insurance on them (all directed by Liberty and Wells Fargo). So, as beneficiaries, they can challenge the validity of those policies. If discovery establishes these Defendants were not the beneficiaries of any pertinent life insurance policies, their claims likely will not survive summary judgment. But at this stage, those claims move forward.

e. Because insurable interest claims arise from Georgia's public policy against life wagers, there is no time bar at all. Defendants do not seek to hold Plaintiffs liable for breach of the insurance policies. Rather, they argue those policies were void at the time they were made because they violate Georgia's public policy against life wagers. There is no statute of limitations for insurable interest claims in Georgia. The Court thus declines to dismiss the insurable interest claim on timeliness grounds.

f. Wells Fargo says Defendants' breach of trust claim against it is time-barred because Defendants raised it more than two years after they "receive[d] a written report that adequately disclose[d] the existence of the claim." According to Wells Fargo, it sent each of Defendants' insured relatives an annual report in the form of a benefits letters "that adequately disclosed the financial status of their policies, including the amounts of their projected net benefit payouts." Defendants say the benefits letters do not constitute reports for purposes of the statute of limitations and that the Court instead should apply Georgia's six-year statute of limitations, which runs from the time the beneficiary "discovered, or reasonably should have discovered, the subject of such claim."

g. Georgia's Trust Code provides for a two-year statute of limitations on breach of trust claims "if a beneficiary has received a written report that adequately discloses the existence of a claim against the trustee for a breach of trust." If a beneficiary does not receive such a report, he or she can bring a claim "within six years after the beneficiary discovered, or reasonably should have discovered, the subject of such claim." An adequate "report" must provide "detailed information" that includes "the assets, liabilities, receipts, and disbursements of the trust, the

acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest."

h. Wells Fargo says nothing about what the benefits letters it sent the insureds supposedly said aside from "the financial status of their policies" and "the amounts of their projected net benefit payouts." It does not attach any of the letters. Instead, it cites a provision of the financing agreements requiring Wells Fargo to "provide to the LLC" an annual "statement setting forth what the Total Amount Due would have been if the Death Date had occurred on the date of such anniversary." But even assuming Wells Fargo actually sent these letters — and that their receipt by the LLCs is sufficient to impart knowledge about them upon the respective trusts' beneficiaries — it does not appear those letters contained the kind of information typically required by an adequate report under the Trust Code. Taking Wells Fargo's word at what the benefits letters said, they are nowhere near as detailed as the reports in *Cook*. And importantly, Wells Fargo does not argue they provided the insureds or Defendants details about the annuities they allegedly purchased on the insureds' lives — the heart of Defendants' claim for breach of trust. Maybe discovery will show otherwise, but Wells Fargo's proffer does not suggest the letters were adequate under the Trust Code.

i. In any event, the Court would not consider the benefits letters even if Wells Fargo had provided them. At the motion-to-dismiss stage, the Court looks only to Defendants' counterclaims and accepts their allegations as true. Defendants allege Wells Fargo hid from them (and the insureds) the details of the annuities it purchased on the insureds' lives, the amounts they generated, and that the trust beneficiaries were effectively paying the costs of the annuities. Looking only at Defendants' allegations — rather than the extrinsic documents Wells Fargo relies upon but does not provide — the Court cannot say Defendants received a report sufficient to trigger the Trust Code's two-year statute of limitations. For now, the Court concludes the six-year limitations period applies.

j. Wells Fargo says Defendants' claim for breach of trust is untimely even under the six-year limitations period. According to Wells Fargo, Defendants knew or should have known about their claim at the time the insureds signed the financing agreements (the latest being in 2005), as those agreements informed the insureds "about the formulas that would be applied in the calculation of the net payout benefits after their death." Wells Fargo emphasizes those agreements also required the insureds to "waive[] the 'potential conflict of interest' with regard to Wells Fargo's alleged role as Trustee while also supposedly acting 'for the benefit of Liberty and its princip[als].'" Defendants say the waivers "are only one part of the breach of trust claim," and that they "were not only in contravention of Georgia law, but incomplete," leaving out "the true nature of [Wells Fargo's] conflicts of interest." According to Defendants, the waiver is inoperable because Wells Fargo "provided only a partial, and thus materially misleading, list of the roles it was serving for Liberty," and it did not "reveal the details of the annuities, even though it was the trustee" of a trust that held those annuities for Liberty.

k. The statute of limitations on a breach of trust claim "may be tolled by a trustee's fraudulent conduct." It's unclear how Defendants would have known about their

claim at the time the insureds signed the financing agreements — even though it may have provided them formulas for the net payout benefits — when Defendants' claim is that those formulas and the net payout number did not include or describe hidden costs related to the annuities or other fees. In any event, contrary to Wells Fargo's characterization, Defendants' allegations about Wells Fargo's intentional concealment are not "vague and unsupported." As already explained, Defendants' allegations on this front were detailed and described several things Wells Fargo purportedly hid from them and the insureds. Defendants, in fact, concede documents Liberty and Wells Fargo provided to the insureds prior to their signing the financing agreements disclosed they would have to pay for "costs of the Program, such as the purchase of the [annuities]." Defendants contend, however, that Liberty and Wells Fargo concealed the full and true details about these annuities, including their costs and their generation of "massive amounts of excess profits." It's these details Defendants say Wells Fargo should have disclosed to fulfill its duty to act on behalf of the beneficiaries.

l. Defendants also argued Wells Fargo's attempt to disclaim liability for its "potential" conflicts of interest does not absolve it because, at the time the insureds signed the trust agreements, Wells Fargo knew it had an "actual," not a mere "potential," conflict of interest. Defendants convincingly argue this means Wells Fargo had a duty to disclose its role as trustee for the trust that held the annuities for Liberty. Given Wells Fargo's heightened duty to disclose — and Defendants' lessened burden to investigate — Defendants have sufficiently pled this broad waiver does not bar them from challenging Wells Fargo's alleged breach of trust.

m. Because the Court concluded Defendants pled sufficient facts suggesting Wells Fargo deliberately concealed its alleged breaches of trust — such that Defendants did not reasonably discover (and could not have reasonably discovered) this claim until their counsel learned about it in other litigation — Defendants' claims are not time-barred at this point. Should discovery show Plaintiffs knew or should have known about their breach of trust claims at a time that brings those claims outside the limitations period, Defendants can move for summary judgment on that ground.

n. While it's not clear from their allegations when Defendants' lawyer learned this information, the Court could not say it is evident from those allegations that Defendants discovered or should have discovered the alleged fraud more than four years ago. It does not matter, as Liberty claims, that Defendants allege Plaintiffs reaped the ill-gotten profits when they paid the death benefits. What matters is when Defendants learned they improperly reaped those profits. Accordingly, the Court declined — at this stage — to dismiss Defendants' RICO claims on limitations grounds.

I. *Poe v. Taylor,* 2025 W. Va. App. LEXIS 322 (Intermediate Court of Appeals of West Virginia 2025). Tort and equitable claims related to bequests in a will are not subject to the six-month statute of limitations on probate of a will.

1. Dorothy Louise Poe ("Ms. Poe") died on September 3, 2021, without a known will. The County Commission of Kanawha County ("County Commission") entered an order opening Ms. Poe's intestate estate and appointing one of her heirs at law, James W.

Taylor ("Mr. Taylor"), as the administrator. The Fiduciary Supervisor filed The First and Final Settlement Report and Report of Claims for the Estate of Dorothy Louise Poe with the County Commission. Mr. Taylor then distributed Ms. Poe's $1,304,622.38 intestate estate equally between her eight heirs, who were the children of her siblings.

2. In April 2023, Valerie Jane Poe ("Petitioner"), whose late husband was Ms. Poe's husband's brother, discovered a document among her husband's files purporting to be the Last Will and Testament of Dorothy Louise Poe ("the Will"). The Will was dated November 14, 2008. Under the terms of the Will, Ms. Poe devised a one-seventh share of her estate to each of her siblings and her husband's siblings. For a devisee who predeceased Ms. Poe, his or her share was to be divided per stirpes between his or her surviving children. Under these terms, seven of Ms. Poe's heirs would receive smaller shares of her estate than they received through intestate succession: Mr. Taylor, Eugenia Colleen Toussant, Colletta Kay Carr, Steven Nelson Darrah, Sheri Ann Blile, Nolon R. Taylor, and Susan R. Penland. Petitioner submitted the Will to the Fiduciary Supervisor of the County Commission on June 27, 2023. On August 30, 2023, the County Commission admitted the Will to probate.

3. Petitioner filed the underlying complaint on December 14, 2023, against Ms. Poe's seven intestate heirs entitled to smaller shares of her estate under the Will than they had previously received via intestate succession. Petitioner sought to recover through a claim of unjust enrichment the difference between the amount each defendant received via intestate succession and the amount he or she was entitled to under the Will, so that Petitioner could redistribute Ms. Poe's estate according to the Will's terms. Mr. Taylor filed a motion to dismiss Petitioner's complaint.

4. The circuit court granted Mr. Taylor's motion to dismiss, finding Petitioner's complaint untimely under the six-month statute of limitations set forth in West Virginia Code § 41-5-11 for an action to impeach or establish a will. Petitioner appealed.

5. The court of appeals reversed and remanded on the following grounds:

a. The six-month statute of limitations set forth in West Virginia Code § 41-5-11 only applies to actions filed either to impeach or establish a will, and her complaint was neither. The sole purpose of the proceedings permitted under this section is the determination of the validity of a challenged instrument purporting to be a will. The purpose of an action to establish the validity of a will is for the will to be accepted to probate.

b. In contrast, tort and equitable claims related to bequests in a will are not subject to the six-month statute of limitations. In her complaint below, Petitioner did not seek to establish the validity of the Will, which was already admitted to probate. Indeed, Mr. Taylor does not contest the Will's validity. Instead, Petitioner sought the equitable recovery of assets previously distributed via intestate succession. Therefore, the circuit court erred in finding that the six-month statute of limitations set forth in West Virginia Code § 41-5-11 barred Petitioner's complaint.

J. *Stevens v. Lyne,* 2025 U.S. Dist. LEXIS 171356 (United States District Court for the Northern District of Illinois, Eastern Division 2025). Repetitive claims barred by res judicata.

1. The following facts are alleged in Plaintiff's pleading in this case. On April 4, 2012, Dr. Everett Lyne and Dorothy Evans Lyne, the parties' parents, executed their wills and

conveyed a Gull Lake, Michigan property ("the Property") into a revocable trust ("2012 Trust"), for which Dorothy was the Trustee. The 2012 Trust provided that the Property would be kept and shared by the family or sold with equal division of the proceeds between the siblings.

2. Defendant Evans Daniel Lyne ("Daniel") was named as Dorothy's agent pursuant to a Power of Attorney ("POA") and Successor Trustee of the 2012 Trust, and as Dorothy's Alzheimer's disease progressed, he began managing her finances and took a series of actions related to the Property for his own benefit. Daniel conveyed the Property from the 2012 Trust to the Everett Dennis Lyne Revocable Trust in October 2016, and then, acting under POA, to Dorothy individually in April 2020. In July 2020, Daniel conveyed the Property to Dorothy and himself with a right of survivorship and mortgaged the Property. In October 2020, Daniel conveyed his interest in the Property back to Dorothy individually and then from Dorothy to the Dorothy Lyne 2020 Family Trust ("2020 Trust"), which he had created in April 2020, through defective warranty deeds.

3. The 2020 Trust dilutes the interest of any beneficiary who cannot contribute approximately $30,000 per year. It also permits the Trustee to compel payment of required expenses for the Property and provides for further dilution if payment is not made. The 2020 Trust names Daniel as the Trustee, and his attorney as Trust Protector. As Trustee, Daniel has refused to lease the Property; demanded that each of the siblings contribute $30,000 in May 2021 and $35,000 in April 2024 with the threat of dilution; and failed to provide a proper accounting of the assets and liabilities of Dorothy and the 2020 Trust. Daniel has also used the Property for his own benefit and barred Plaintiff from using the Property except in the winter months.

4. Plaintiff filed a number of actions in the United States District Court for the Northern District of Illinois, the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois ("DuPage County Court"), and the Michigan Probate Court between 2022 and 2024 related to the 2020 Trust and/or the Property.

5. On November 11, 2022, Plaintiff filed a federal suit alleging that Daniel and his counsel breached various duties in connection with the 2020 Trust. In December 2022, Plaintiff voluntarily dismissed the case.

6. On September 21, 2023, Plaintiff filed a petition in the DuPage County Court requesting the appointment of a guardian for Dorothy, an accounting of the 2020 Trust, and an inventory of Dorothy's estate. After Dorothy passed away on January 28, 2024, the case was dismissed with prejudice.

7. On May 20, 2024, Plaintiff filed a Petition for Instruction Regarding Trust and Removal of Trustee in the Barry County, Michigan Probate Court. On September 25, 2024, the Michigan court granted Daniel's motion for summary judgment and dismissed the case with prejudice.

8. About a week after filing the 2024 Michigan Case, Plaintiff filed another suit in DuPage County Court against Evans Daniel Lyne, as trustee and beneficiary, and Deirdre Lyne Churchill, as beneficiary (collectively "Defendants").

9. On August 21, 2024, the court denied Plaintiff's petition, and on October 10, 2024, the court denied Defendants' motion for sanctions and closed the case.

10. On November 1, 2024, Plaintiff filed a petition in the Probate Division of the DuPage County Court to remove Daniel as Executor/Trustee and appoint an independent executor and trustee to administer trust and estate property. She also filed, on the same day, a petition to admit Dorothy's will to probate, issue letters of office, and issue a citation compelling Daniel to account for all estate income and expenses and the disposition of Dorothy's property. This case remains pending.

11. On November 6, 2024, Plaintiff filed this action in the Chancery Division of DuPage County Court seeking a declaratory judgment that the 2020 Trust is invalid. Daniel removed the case to the federal district court. The Court thereafter denied Plaintiff's motion to remand under the probate exception.

12. Defendants argued that this case should be dismissed because it is barred by res judicata and Illinois' single refiling rule and because Plaintiff fails to plead an actual controversy as required in a declaratory judgment action. The federal district court granted the motion to dismiss the case on the following grounds:

a. Beginning with res judicata, dismissal is only appropriate when it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law. Res judicata applies if there is (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies. Plaintiff conceded that the 2024 DuPage County Injunction Case involved a final adjudication on the merits and the same parties as the present case.

b. Illinois uses the transactional test to determine whether there is identity between the causes of action at issue. Under that test, separate claims will be considered the same cause of action for purposes of res judicata if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. The claims presented in this case and the 2024 DuPage County Injunction Case arise from the same group of operative facts. This action seeks to invalidate the 2020 Trust based on Daniel's creation and maladministration of the 2020 Trust, which was in contravention of Dorothy's intent as expressed in the 2012 Trust and to Plaintiff's detriment. The 2024 DuPage County Injunction Case sought to maintain the status quo while the Michigan court considered invalidating the 2020 Trust on the exact same basis. What's more, in the 2024 DuPage County Injunction Case, Plaintiff relied on the existence of the 2012 Trust and Daniel's alleged misconduct in creating and administering the 2020 Trust as support for her likelihood of success on the merits, and incorporated both the 2020 Trust and her complaint from the 2024 Michigan Case into her petition. In other words, the petition in the 2024 DuPage County Injunction Case included all the facts necessary to assert the claim she brings here.

c. Plaintiff emphasized that she did not seek to enjoin any conduct with respect to the 2020 Trust in the 2024 DuPage County Injunction Case. Yet the res judicata inquiry focuses not on the type of relief sought but rather on the factual circumstances from which the claims arise. Here, viewed pragmatically, both actions derive from the same series of interconnected events, beginning with moving the Property from the 2012 Trust to the 2020 Trust and continuing through Daniel's alleged misconduct in administering the 2020 Trust and he and Deirdre's

liquidation of Dorothy's estate property, all of which was allegedly against Dorothy's wishes and Plaintiff's interests.

d. Therefore, res judicata bars the present suit.

K. *Tharrett v. Everett,* 2025 Kan. LEXIS 277 (Supreme Court of Kansas 2025). Due process violations do not in and of themselves void a judgment; trust beneficiary cannot accept distribution and then take an inconsistent position and challenge the amount distributed on appeal.

1. Roxine Poznich died testate in 2020 with a revocable living trust. The trust beneficiaries were her five children. There was a bitter dispute between two of those children concerning the trust. Poznich's daughter, Sarah Tharrett, was named as the successor trustee. But Poznich's son, David Everett, sued in May 2021 to remove Sarah as trustee. David's lawsuit was dismissed.

2. In October 2021, Sarah sent a final trust report, including an accounting and a proposed distribution of remaining assets. Once again, David was dissatisfied. All beneficiaries except David executed releases acknowledging and approving the documents. David, proceeding pro se, raised several objections that prevented closing the trust.

3. Consequently, in June 2022, Sarah petitioned seeking authorization to distribute the trust estate as provided in the trust report. Sarah also sought costs against David because his actions leading up to the declaratory suit prevented winding up the trust. David filed several pro se pleadings in response in which he accused Sarah of filing the action for an improper purpose due to his failure to execute the release. The parties engaged in extended motions practice. Ultimately, the district court closed the trust and released Sarah from trustee duties. It further ordered Sarah's attorney to distribute the remaining funds from his trust account to the beneficiaries. Finally, the court awarded Sarah $4,000 in attorney fees from David's share of the trust distribution due to "extraordinary services in defense of the estate" by Sarah's attorney regarding David's motions.

4. David, again proceeding pro se, filed his notice of appeal, but he accepted his distribution check shortly thereafter. Sarah subsequently filed a notice of acquiescence with the district court and supplemented the record on appeal. The Court of Appeals then dismissed the appeal for lack of subject-matter jurisdiction on acquiescence grounds. The Court of Appeals denied Sarah's request for appellate costs and attorney fees based on its earlier finding that it had no subject-matter jurisdiction to review the merits of the appeal. David petitioned for review, and Sarah cross-petitioned solely on the attorney fees issue.

5. On appeal, the Kansas Supreme Court affirmed in part and reversed in part on the following grounds:

a. Acquiescence occurs when a party voluntarily assumes the burdens or accepts the benefits of the judgment it contests on appeal. Subject to certain exceptions, as a general rule, a litigant who has accepted the benefits of the judgment of the trial court will be deemed to have acquiesced in such judgment and may not thereafter adopt an inconsistent position and appeal from such judgment.

b. David argues that a party cannot acquiesce to a void judgment, and the district court's judgment was void because the district court denied him due process by entering final orders without affording him a meaningful opportunity to be heard

and without a full copy of the trust instrument. That a party cannot acquiesce to a void judgment may not be an iron-clad rule. Nonetheless, the court assumed without deciding, for the purposes of this case, that a party can never acquiesce to a void judgment. Even assuming David's allegations about the final orders are true, due process violations do not in and of themselves void a judgment. To void a judgment, a due process violation must so completely extinguish a party's opportunity to be heard that it effectively eliminates a court's personal jurisdiction over the party. The mere inability of a party to fully flesh out an argument is not a due process violation that can void a judgment. The subset of due process violations that may void a judgment are narrow — and are only present when a party is so excluded from consideration of the merits that the court effectively has no personal jurisdiction over that party. And that is demonstrably not the case here. David was personally served in June 2022. He proceeded to file an answer, a motion to dismiss, an amended motion to dismiss, an amended answer and counterclaim, a transcript request, a motion to disqualify opposing counsel, a reply brief to Sarah's consolidated response to his amended motion to dismiss and his counterclaim, a second amended motion to dismiss, and a memorandum in support of his motion to disqualify. He appeared in person at a status conference about two months after he was served. Finally, he appeared in person again at the October 2022 hearing where the district court denied and dismissed all his motions and ordered the trust closed. His void judgment argument has no merit here.

c. Acquiescence can be raised at any time, even sua sponte by an appellate court, because it implicates subject-matter jurisdiction. Therefore, the Court of Appeals properly considered the issue.

d. Third, David argued that any acquiescence was an act of self-protection because Sarah's attorney had already "helped himself" to $2,262 worth of attorney fees without district court authorization. David does not understand that the attorney for the trust was due attorney fees from all residuary beneficiaries in addition to what was awarded by the district court against David alone. The district court awarded $4,000 in fees exclusively from David's share, but that was not all the attorney fees to which the trust's counsel was entitled. The gift of a share of the residuary estate is, and is intended by the testator to be, indefinite in amount, and to be whatever is left after paying funeral expenses, attorneys' fees, executors' compensation, administrative expenses, debts of the decedent, and taxes. Thus, the Court of Appeals was correct in holding that there is no basis in the record for David's self-protection argument.

e. David's posture — that his right to more money is rooted in the trust and not in the district court judgment — is a creative but ultimately fruitless bit of rhetorical wordplay. Sarah initiated the declaratory judgment action to get a final district court ruling on what was owed to whom under the trust. And David accepted his distribution from the trust that occurred because of the district court's judgment.

f. When a party to an appeal has paid any portion of a judgment rendered against such party, including the costs, such party will not be deemed to have acquiesced in the judgment so long as the issues on appeal cannot affect the payments made and the payment thereof is not involved in the issues on appeal. Likewise, any

party to an appeal who accepts such payment shall not be deemed to have acquiesced in the judgment so long as the issues on appeal do not affect the obligation for the payment of or the right to receive such portion of the judgment.

g. In situations where one party's "portion" directly impacts the portions awarded to other parties — where a district court's final order apportions a fixed total "pot" among and between contending litigants — the judgments are inseparable. Acquiescing in the portion one has received necessarily implies acquiescing in the portions received by other parties. When, as here, a trust beneficiary accepts the distribution awarded to him or her, he or she cannot then take an inconsistent position and challenge the amount distributed on appeal. The benefits received are not separable from any additional distributions to which the beneficiary believes he or she is entitled. David has thus acquiesced to the judgment, and his appeal is dismissed for lack of jurisdiction.

h. There is not a blanket rule that a lack of jurisdiction over the merits of an appeal automatically means that a court has no jurisdiction to award attorney fees. The Court of Appeals should have considered Sarah's request. A frivolous appeal presents no justifiable question and is easily recognized as having little chance of success. Sarah's motion correctly notes that David's supplemental brief argues a litany of meritless and irrelevant points. But David did present colorable arguments regarding void judgments (which were not addressed below) and the separability of his acceptance of his distribution money from his appeal, as illustrated above. Thus, even though David has not prevailed, his appeal was not frivolous. There is sufficient evidence in the record to establish an equitable award to Sarah of her attorney fees for counsel's efforts in representing the trust.

L. *Tyler v. Winters (In re Sage),* 2025 Mich. App. LEXIS 5979 (Court of Appeals of Michigan 2025). Failure to provide the dates of all amendments to the trust prevents running short of statute of limitations on trust contest.

1. In 2012, Elsie N. Sage ("Elsie") created the Elsie N. Sage Revocable Trust ("the Trust"). Elsie had five daughters: Lola Tyler, Janice Mascho, Jacquelyn Barwin, Cynthia Winters, and Joyce Sage. After establishing the Trust, Elsie revoked and restated the Trust three times. Elsie first revoked and restated the Trust on September 6, 2018 ("the 2018 Restatement"). In the 2018 Restatement, Elsie named herself and Cynthia as trustees. The 2018 Restatement named Elsie's five daughters as beneficiaries of the trust assets upon her death. Each daughter was to receive 20% of the residual trust property, with Joyce's share to be held in a supplemental needs trust because she was a mentally incapacitated adult. On July 2, 2019, Elsie restated the Trust again ("the 2019 Restatement"). The 2019 Restatement removed Elsie as a trustee, but maintained the 20% gift of the residual trust assets to each daughter.

2. On August 19, 2021, Elsie revoked and restated the Trust for a third and final time ("the 2021 Restatement"). The document stated, inter alia, "Settlor now wishes to amend the Agreement to revise various provisions, and for the sake of clarity has decided to completely restate the terms of the Trust." The 2021 Restatement named Elsie's five daughters and then, "not for a lack of love or affection," expressly disinherited Lola and her descendants. The 2021 Restatement named Hastings Fire Department ("Hastings FD") and the remaining four daughters as beneficiaries of the trust property. Under the

2021 Restatement, Hastings FD was to receive 20% of trust assets and the four remaining daughters would each receive 25% of the remaining trust property.

3. After executing the 2021 Restatement, Elsie amended the Trust twice before passing away on October 24, 2022. Elsie first amended the 2021 Restatement on September 18, 2022 ("the First Amendment"). Under the First Amendment, Hastings FD was to receive 20% of trust assets; seven other fire departments, a library, a school band program, a park, and a museum each were to receive 5% of trust assets; and the supplemental needs trust of Joyce was to receive 25% of trust assets.

4. Five days later, on September 23, 2022, Elsie amended the 2021 Restatement a second and final time ("the Second Amendment"). Under the Second Amendment, Hastings FD was to receive 20% of trust assets; five other fire departments and a school band program each were to receive 5% of trust assets; the supplemental needs trust of Joyce was to receive 25% of trust assets; Janice and Jacquelyn each were to receive 10% of trust assets; Lola was to receive 4% of trust assets; and Cynthia was to receive 1% of trust assets.

5. Elsie died on October 24, 2022.

6. On December 20, 2022, Cynthia notified each of Lola Tyler, Janice Mascho, and Jacquelyn Barwin ("appellants") of the existence of Elsie's Trust and their interests therein in a "Trust Notice" and accompanying letter drafted by Cynthia's legal counsel. Nowhere in these notices did Cynthia or her attorneys indicate the trust had been amended on September 23, 2022.

7. On July 26, 2023, Cynthia sent appellants a proposed distribution plan, which showed trust assets totaling more than $3.2 million.

8. On September 25, 2023, appellants filed a petition to set aside trust instruments and to surcharge and remove Cynthia as trustee. The petition contained one count contesting the validity of the Trust because of undue influence and one count requesting the surcharge and removal of Cynthia as trustee for a breach of fiduciary duty.

9. Hastings FD moved for partial summary disposition, arguing that the claim was time-barred by the six-month limitations period, and that the claim was barred by the equitable doctrine of laches because of the inequity caused by appellants' undue delay in litigating the issue.

10. Appellants argued the Statutory Notice was noncompliant because it (1) did not state the date of the Second Amendment; (2) did not include material provisions from the 2018 Restatement; and (3) did not list a provision in the 2021 Restatement that affected Lola's rights as a beneficiary. Appellants also argued laches did not apply because appellants filed their petition within the statutory limitations period and there was no prejudice to the beneficiaries of the Trust.

11. The probate court granted the motion and dismissed the claim as time-barred. On appeal, the court of appeals reversed and remanded on the following grounds:

> a. The Michigan Trust Code ("MTC") provides in relevant part: "A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following: (a) Two years after the settlor's death; and (b) Six months after the trustee sent the person a

notice informing the person of all of the following: (i) The trust's existence; (ii) The date of the trust instrument; (iii) The date of any amendments known to the trustee; (iv) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any; (v) The settlor's name; (vi) The trustee's name and address; and (vii) The time allowed for commencing a proceeding."

b. Under this statute, a challenge to the validity of the trust must be brought within two years after the settlor's death or six months after the provision of a notice that complies with the requirements listed, whichever is earlier. It is undisputed that appellants did not bring their challenge to the Trust within the six months after the Statutory Notice was provided, but did bring their challenge within two years of Elsie's death.

c. To apply the six-month limitations period, the Statutory Notice must include, among other requirements, "[t]he date of any amendments known to the trustee." In this case, the date of the Second Amendment was September 23, 2022. That date was not provided in the Trust Notices or the accompanying letters. There is no dispute that the date of the Second Amendment was known to Cynthia.

d. The provision of a five-week window between the execution of the First Amendment and Elsie's death from which appellants could "infer" a possible date the amendment was executed, did not provide the "date" of the amendment's execution. Consequently, the Statutory Notice did not comply with the requirements.

e. When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. The statute states the six-month limitations period is applicable if "the trustee sent the person a notice informing the person of all of" the requirements listed in the statute. The plain language of this statute requires provision of each of the listed requirements, including the date of amendments known to the trustee, for application of the six-month limitations period.

f. An exception to this general rule of statutory interpretation exists when the Legislature includes a substantial compliance provision in a statute. In this case, Hastings FD has identified no substantial compliance provision that would apply. Moreover, specific statutes within EPIC have their own substantial compliance provisions for discrete topics. The express inclusion of substantial compliance provisions in other areas of EPIC combined with the absence of such a provision support that the Legislature intended that the notice statute be enforced as written. Accordingly, we conclude the Statutory Notice was required to strictly comply for application of the six-month limitations period.

g. Because the Statutory Notice did not comply with the date requirement, the limitations period applicable was two years. Appellants filed their petition within that two-year period. Consequently, Hastings FD was not entitled to summary disposition on the basis that Count I of appellants' petition was time-barred.

h. Laches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to

assert. However, for laches to apply, inexcusable delay in bringing suit must have resulted in prejudice. Laches may bar a claim even though the limitations period has not run. Hastings FD has not provided an alternative basis for this Court to affirm the probate court's grant of partial summary disposition because Hastings FD has failed to argue in the probate court or this Court that it was prejudiced by appellants' delay in asserting their rights. Hastings FD argues only that the delay in filing the petition forced the Trust to incur the cost of belated and "Trust-depleting" litigation. This is not prejudice resulting from inexcusable delay. Rather, the filing of appellants' petition, regardless of its timing, would result in the cost of litigation. Hastings FD has not argued an excusable delay in filing the petition caused a change in conditions for it or the other beneficiaries of the Trust. Accordingly, laches is not an appropriate ground to alternatively affirm the probate court's order.

X. TAX-RELATED CLAIMS

A. *Bernard v. Reg. of Wills for Anne Arundel Cnty.*, 2025 Md. Tax LEXIS 7 (Maryland Tax Court 2025). Will provision waiving recovery of state death taxes from recipient of property does not override the statutory default for non-probate assets like POD accounts.

1. Terrance J. Bernard (the "Decedent") died testate on April 3, 2024. His Will was admitted to probate in the Orphans' Court for Anne Arundel County. Item 2 of the Will provides: "All estate, inheritance, succession, transfer and legacy taxes payable by reason of my death under the laws of the United States or of any state district or territory thereof with respect to any property included in my gross estate subject to such taxes, together with interest charges on such taxes, shall be paid from the residue of my Estate, before distribution to any legatee, charitable or otherwise, and I hereby waive on behalf of my Estate any right to recover from any person, including any beneficiary or beneficiaries of insurance of my life, all or any part of the taxes, or interest on such taxes, so paid."

2. The Decedent owned two bank accounts designated as payable-on-death ("POD") to individuals who are not exempt from Maryland inheritance tax under TG § 7-203. These accounts did not pass through probate but transferred directly to the beneficiaries upon the Decedent's death. The Register of Wills for Anne Arundel County (the "Respondent") assessed inheritance tax on these accounts against the Estate, relying on the directive in Item 2 of the Will. Petitioner, Olah Bernard, as Personal Representative of the Estate, appealed, arguing that TG § 7-216(b) mandates payment by the recipients since the property passed without distribution.

3. The tax court reversed on the following grounds:

a. Maryland imposes an inheritance tax on the transfer of property from a decedent to nonexempt beneficiaries at a rate of 10%. This tax applies to both probate and non-probate assets, including POD accounts, as they are included in the gross estate for inheritance tax purposes. Under TG § 7-216(a), inheritance tax on property passing through distribution (i.e., probate) is generally paid by the distributor before distribution. However, for property passing without distribution, such as POD accounts, § 7-216(b) provides: "The inheritance tax on property that passes from a decedent shall be paid by the recipient if . . . the property passes from the decedent to the recipient without distribution."

b. The issue here is whether Decedent's Will overrides this statutory allocation. A testator may clearly and unambiguously direct the payment of inheritance taxes from the residuary estate, ignoring statutory apportionment rules if that is the testator's intent. A clear directive to pay taxes from the residue as a cost of administration overrides exemptions or default payment rules.

c. The Court of Appeals in *Pfeufer v. Cyphers*, 397 Md. 643 (2007), held that a testator may clearly and unambiguously direct the payment of inheritance taxes from the residuary estate, ignoring statutory apportionment rules if that is the testator's intent. However, *Pfeufer* involved apportionment of inheritance tax among named residuary legatees — all of whom were beneficiaries under the will and received their interests through probate distribution. The court's holding was limited to the context of probate assets, where the will directly governs the distribution and can bind the legatees to its terms, including tax directives.

d. The POD accounts here are non-probate assets that pass outside the Will by operation of law, directly to recipients who are not legatees named in the Will. These beneficiaries are not bound by the Will's provisions in the same manner as probate distributees. The issue is not intra-probate apportionment among will beneficiaries, but whether a will can unilaterally shift the tax burden from non-probate recipients to the probate residue, effectively apportioning between probate and non-probate interests. Maryland law treats inheritance tax as a tax on the recipient's privilege to receive, not on the estate itself, and TG § 7-216(b) explicitly assigns payment responsibility to the recipient for non-distributed property.

e. While Item 2 of the Will refers to taxes on "any property included in my gross estate" and waives recovery from "any person, including any beneficiary or beneficiaries of insurance of my life," this language, though broad, does not unambiguously override the statutory default for non-probate assets like POD accounts, which are governed strictly by TG § 7-216(b). Absent explicit statutory authority or case law extending *Pfeufer* to non-probate scenarios — and none exists — the Will cannot bind third-party recipients who receive property independently of probate. To extend *Pfeufer* as the Respondent urges would undermine the legislative intent behind TG § 7-216(b), which protects the estate from bearing taxes on assets it does not control or distribute. It could also lead to absurd results, such as depleting the residuary estate for the benefit of non-legatees without their consent or involvement in the probate process. Maryland courts have not applied *Pfeufer*'s intent principle to override payment rules for non-probate assets, and doing so here would require clearer evidence of legislative or judicial endorsement. Accordingly, TG § 7-216(b) governs, and the inheritance tax on the POD accounts must be paid by the recipients, not the Estate.

B. *In re Townson,* 231 N.Y.S.3d 786 (Surrogate's Court of New York, Monroe County 2025). Provision apportioning estate taxes on all taxable estate assets against the residue is not sufficient to apportion estate taxes to QTIP trusts.

1. Petitioners Lisa C. Townson ("Lisa") and Winslow W. Townson ("Winslow") are the biological children of Schuyler C. Townson ("Schuyler"). They are remainder beneficiaries

of two Qualified Terminable Property ("QTIP") trusts established pursuant to their father's Will.

2. The Respondents are James S. Reed as the executor of the estate of his mother Ann Townson, Schuyler's wife. Schuyler died in 1994, survived by his wife Ann and by his children Lisa and Winslow. Ann was not the mother of Lisa and Winslow. JPMorgan Chase is also a respondent, as co-trustee of the QTIP trusts.

3. Schuyler's Will provided that the two trusts were to be established for the benefit of his wife Ann, and for the benefit of his children Lisa and Winslow, and partially for the benefit of Ann's four biological children. Of the two QTIP trusts, both established after Schuyler's death by an election on the estate's Federal Estate tax return, one was a "GST-Exempt" QTIP trust and was funded with $1,000,000.00. The remainder beneficiaries of that trust are Lisa and Winslow, in equal shares. The second trust, a "non-GST" QTIP trust, was funded with $8,782,465.11. The remainder beneficiaries of the non-GST QTIP trust are Lisa Townson (one-third), Winslow Townson (one-third), and Ann's four biological children (collectively one-third).

4. Schuyler's Will named his wife Ann and Chase Lincoln Bank N.A. (predecessor to JP Morgan Bank) as co-trustees of both QTIP trusts. From 1994 to September 2023, she collected all income from the trusts. In 2022, counsel drafted Ann an updated Will, which she executed on September 2, 2023. She included in the Will a clause apportioning the taxes to be paid upon her death as between her estate and the QTIP trusts. It reads as follows: "I direct that my Executor pay out my residuary estate, without apportionment, all estate inheritance and like taxes imposed by the government of the United States, or any state or territory thereof, or by any foreign government or political subdivision thereof, in respect to all property required to be included in my gross estate for estate or like tax purposes by any such governments, whether the property passes under this Will or otherwise, without contribution by any recipient of any such property."

5. Ann died in September 2023. She was survived by son James S. Reed (the executor of her estate) and his siblings, all Ann's biological children from a prior marriage. James, as executor of the estate, retained the drafting attorney to represent the estate. In December 2023, counsel sent a memorandum directing the trustee of the QTIP trusts to pay more than $4 million in federal and state taxes then due, notwithstanding the language in the Will regarding tax apportionment. This will construction proceeding followed. The children of Schuyler sought to have Ann's biological children, the beneficiaries of her residuary estate, pay the entire tax burden incurred by the estate and the trusts.

6. The court ordered that taxes be apportioned to the QTIP trusts on the following grounds:

> a. Apportionment of an estate's state and federal tax burden as between the residuary estate and marital deduction trusts is the favored outcome and the preferred policy choice. New York Estate, Powers and Trusts Law ("EPTL") § 2-1.8 (d-1) (1) (A) provides that the estate is "entitled" to apportion the state tax burden between the residuary estate and the marital deduction trusts ("QTIP" trusts), but not "if the decedent specifically directs otherwise by will."
>
> b. Similarly, the Internal Revenue Code ("IRC") § 2207A (a) (1) provides that the "decedent's estate shall be entitled to recover" from the QTIP trusts taxes

attributable to the assets in the trusts but "may otherwise direct" if the decedent in his Will "specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property."

c. The House of Representatives Report accompanying the amendment of IRC § 2207A in 1997 states that "The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by a specific reference to QTIP, the QTIP trust, section 2044, or section 2207A)" and that ". . . a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery."

d. "Specifically" has been held to mean an express reference to the QTIP trusts or to the provisions of the Code and/or the EPTL referenced above.

e. The basis for requiring express mention of a QTIP trust is the presumption that most testators do not intend to apply a general tax exoneration clause to QTIP property. EPTL 2-1.8 is an attempt to protect the testator's presumed intent and prevent inadvertent alterations of tax apportionment clauses.

f. The language in Decedent's Will regarding tax apportionment is not "specific" enough to comply with the statutory requirement of a specific direction found in EPTL § 2-1.8 (d-1) (1) (A), and a specific "indication of intent" under Internal Revenue Code § 2207A (a) (1). Where a waiver of apportionment against a QTIP trust is sought, there must be strict compliance with the direction to "specifically direct otherwise." The failure in a will or trust to specifically refer to the QTIP trusts (and/or the Code and/or EPTL sections) leaves the fiduciary of the estate the authority and the right — the entitlement, to use the statutory language — to seek contribution from the trusts for the payment of taxes. The language in decedent Ann Townson's Will is one of the formbook examples of tax exoneration clauses that evolved before there were QTIPs. The post-ERTA draftsman, on the other hand, is advised to use totally different language to apportion QTIP taxes.

g. Where the will or trust lacks the language (perhaps not explicitly but certainly as implicitly as can be) required by the statutes, the intent of the testator is not the primary issue. The determinative factor is whether the tax exoneration clause references the QTIP trusts and/or the statutory language by which the QTIP trusts were created.

h. To the extent that intent is an issue at all, courts have considered whether directing that the residuary estate pay the entire tax would result in an obvious inequity. Here, if the trusts were exonerated from paying any of the tax, Ann's biological children, the beneficiaries of the residual estate, would have to pay an increased amount of tax, thus negatively impacting the natural objects of her bounty, something she was not likely to do.

i. However, as of 2022, when Ann wrote her will, 26 USCA 2207A had been amended so that it reads exactly as 26 USCA 2207B (tax apportionment is waived when the document "specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property"). Of course, it is an axiom of estate and trust practice that will construction prioritizes the testator's intent and that the "primary objective in construing a will, of course, is to ascertain the

decedent's intent so that the will's purpose may be effectuated. Here, however, federal law created the tax-planning entities known as QTIP trusts, and federal law has dictated the circumstances under which tax apportionment can be exercised or waived, a scheme New York adopted. When the federal and New York statutes require words of specific indication of intent and (in the case of the Code) a reference to the subchapter, "magic words" referencing the QTIP trusts and/or the Code provisions are exactly what is required.

C. *Garcia v. Douglas Cnty. (In re Est. of Bort),* 2025 Neb. App. LEXIS 578 (Nebraska Court of Appeals 2025). Family friend stood *in loco parentis* and subject to lower state inheritance tax rate.

1. George Bort, 74 years old, died testate on January 15, 2021. A copy of his 2013 will was filed in the county court on January 28, 2021. Bort's will named David Garcia as personal representative and as the sole beneficiary of his estate.

2. In July 2024, Garcia filed a "Motion to Determine in Loco Parentis and Class 1 Designation on Final Inheritance Tax Determination." Garcia alleged that Bort was a single man with no children. He and Bort met in approximately December 1997 when Garcia's mother purchased a residence next door to Bort. He and Bort developed a father/son relationship and maintained that relationship for 23 years until Bort's death in January 2021. Garcia requested that the county court enter an order determining that Bort stood in loco parentis to Garcia and, therefore, Garcia should be considered a "Class 1 Designation on the Final Inheritance Tax Determination."

3. Garcia, 33 years old, testified that he graduated from high school in 2009, subsequently obtained his bachelor's and master's degrees, and was a mental health practitioner. Garcia first met Bort in 1997 when Garcia, along with his mother and younger brother, moved into the house next door to Bort in Omaha, Nebraska; Garcia was 7 years old at the time. Garcia's sister was later born while the family was living next door to Bort. Bort was single and had no children. From 1997 to 2000, Garcia would see Bort outside and they "would say hi from afar."

4. From 2000 to 2005, Garcia was 10 to 15 years old. He and Bort "started getting a lot closer," they "were talking frequently outside of [Bort's] house" and "gained a lot of trust." It was "very common" for Garcia's mother to take food to Bort or Bort would have dinner at Garcia's house. Bort would take Garcia's family out to eat as well; "We would go pretty frequently as a family and then, sometimes, just him and I, which was nice." Garcia mowed Bort's lawn, helped him with landscaping and snow removal, and "[j]ust anything, really, he needed help with." Bort "was always working on his car" and taught Garcia about mechanics and how to drive. (Bort also helped teach Garcia's brother how to drive.) Garcia said, "We talked about everything," had "man-to-man conversations about . . . the birds and the bees," he "[t]aught me about finances and . . . his experiences in the military," and he "just showed me a lot of love and gave me a lot of wisdom." Bort "was the one that kept motivating me to do well" in school, and he "wanted to know if I was doing well, checking in on grades." When Garcia and his brother got home from school, his mother would be at work. Bort "was always outside," would say hello, ask how they were doing, "give us a dollar, pretty frequently," and "just check in on us" before he would go back inside of his house; "it was a very common routine where I felt like he was just making sure we got home okay."

5. From 2006 to 2010, Garcia was 16 to 20 years old. By that point, Garcia was interacting with Bort "every other day," "[i]f it wasn't at his house or in our house, it was a phone call," and Garcia felt like Bort "was family" and "a father figure." (Garcia did not know his own father.) Garcia's family "all" checked on Bort. In 2006, there was a domestic violence incident involving Garcia's mother and her partner, and Garcia's mother "was scared" and "went over to [Bort's]"; "we trusted [him]." After that, Bort's vigilance "increased quite a bit" and "he was a . . . protector," and "[a]ll of us felt safer because he was there." Bort "started calling me son" and "one day, you know, he said, 'You can call me Pops.'" Garcia "already felt like that was kind of [their] relationship anyway, so to call someone Pops was — was powerful," and from then on, he called Bort "Pops."

6. On cross-examination, Garcia was asked if Bort exercised any authority over him. Garcia responded, "I respected him" and "I felt like I had to listen." And when asked if Bort had any rules that Garcia had to abide by, he responded, "just kind of treating people well and being smart." If Garcia got in trouble with his mother, she would talk to Bort, "kind of let him know a little bit, not a lot," and then "[Bort] would then kind of like give me his two cents in a way that only he could." Garcia said, "[I]f I felt [Bort] was disappointed, that was — to me, that was a lot," "[t]hat was discipline in itself." And when Garcia got into a fender bender in high school, Bort told him it would be a while before he let him drive his (Bort's) Cadillac; "I took it as . . . discipline, cause I really enjoyed driving around with him."

7. When Garcia went to college in Lincoln, Nebraska, he would go home every weekend or every two weekends. He was "a bit worried" about the wellbeing of his mother and siblings, but "[w]e had [Bort] next door, so that gave me a . . . sense of comfort." Bort called Garcia "[a]t least once a week," "[s]ometimes more." In October 2010, Bort sent a hand-written letter to Garcia at his dormitory. Bort began the letter "Son," and closed the letter with "Your Dad"; the letter and envelope were received into evidence. In another undated letter received into evidence, Bort began with "David (Son)," and closed the letter with "George." Garcia said Bort included $20 or $40 in the letters.

8. When asked if Bort ever attended any of his graduation events, Garcia responded, "No, not the actual events, but we always had parties at the house celebrating graduations, birthdays[,] [and] [Bort] was present at all of those." Bort gave Garcia money "[e]very now and then," and gave him gifts "[e]very holiday, every Christmas, graduations, things like that."

9. From 2011 to 2015, Garcia was 21 to 24 years old. Garcia was asked if there was ever a time when he had a conversation with Bort regarding Bort's will and durable powers of attorney for financial and healthcare matters. Garcia responded that "around" 2013 or 2014, Bort "just kind of randomly in our conversation, he kind of said, by the way, you know, when and if something happens to me, like, I want you to be the one to take care of all this stuff." Garcia later learned that Bort had appointed him in his durable power of attorney for financial matters and healthcare. Copies of the durable power of attorney documents were received into evidence; both documents were signed and notarized on December 26, 2013, and appointed "my friend DAVID GARCIA" to serve as attorney-in-fact. Garcia never needed to exercise his authority under the durable powers of attorney.

10. Garcia's counsel asked the county court to take judicial notice of Bort's will that was filed with the court on January 28, 2021. Douglas County had "[n]o objection" and the court took judicial notice "of the court file," including Bort's will.

11. Garcia was asked if Bort ever told him why he was giving him all of his property. Garcia responded, "He told me because we were family," and "he was very adamant about the government not getting his stuff."

12. From 2016 until Bort's death in 2021, Garcia was not living in his family's home next door to Bort. However, he continued his relationship with Bort. When asked if he made any observations about Bort's health and wellbeing in "2018, 2019," Garcia responded, "Yeah, . . . his health was declining." As a result, Garcia went to Bort's home more often. Bort had appointments at the veterans hospital two to three times each month, and Garcia drove Bort to those appointments; depending on how long the appointment was going to take, Garcia would either wait for Bort outside or in the waiting room, or he would drop him off and come back to pick him up after the appointment. Bort "always offer[ed] to pay for the rides," but Garcia "always declined." In 2020, Bort was hospitalized at the veterans hospital in Omaha for "maybe three weeks or so," and then he was transferred to the veterans hospital in Grand Island, Nebraska, "because of his condition." Garcia and his mother visited Bort twice in Grand Island. Bort called Garcia from Grand Island and Garcia recorded the call because "I kind of had a feeling or I don't know if you can call it a premonition, but . . . I just wanted to keep his voice with me forever" and "I wasn't sure how long he had."

13. A transcript of the phone call was received into evidence. The first page of the exhibit states that the phone call took place on December 7, 2020. During that phone call, Bort referred to Garcia as "son," said "I really miss you guys a lot," and "I got to tell you[,] [y]ou're my family now." Bort also told Garcia where to find some silver dollars in his home [*9] "in case something does happen to me," and told Garcia, "I want you to take it before the government gets involved"; Bort thought the coins could be "worth a lot" and wanted them to go to Garcia and his family. At the end of the call, Garcia and Bort exchanged "I love you[s]."

14. Garcia did not recall any other conversation he had with Bort after the recorded call before Bort passed away at the hospital in Grand Island. According to Garcia, Bort's "[o]nly request" with respect to his funeral and burial "was that he wanted to be buried next to our family, cause he — he was a part of our family." Bort was buried next to Garcia's uncle.

15. Garcia's mother testified that, in the beginning, "I was a little bit scared or careful with my kids not getting near [Bort]" because "he was a single person, older than all of us" and she never saw "other people visiting him or family members or parties or anything" and he was "always, like, smoking and drinking." However, "over time he became a different person," "he started coming out more" "and started talking to us whenever he [saw] us." Later, during a domestic incident with her partner, she went to Bort and asked him for help; "He opened the door, [*10] and he — he said, 'You stay here until the police get[] here.'" Garcia's mother said that Bort "helped [her] a lot" with Garcia. "Any time that I felt like I wasn't doing my job because I was not that male figure that [Garcia] needed," she would talk to Bort and then he would talk to Garcia.

16. Garcia's mother testified that, over time, Bort joined the family at their house for meals. "[Q]uite a few years ago he gave me these two little pictures" of himself and said to "put it on [our] wall" with our family photos because he "wanted to be with my family." Bort's photo is "still" on the wall in her home. She said that Bort asked to be buried with

her family "because he considered us his family." When Bort was sick, she asked him if there was anyone she could call, and he said, "No, you are my only family."

17. The county court held that Bort acted and stood in loco parentis to Garcia for purposes of § 77-2004 and therefore Garcia should be designated as a "Class I" beneficiary. Douglas County appealed.

18. The court of appeals affirmed on the following grounds:

a. Douglas County's brief contains no designated assignments of error section and does not comply with appellate court rules. Douglas County's brief does contain headings in the argument section which allege error by the county court, but argument headings are insufficient. The Nebraska Supreme Court has consistently rejected headings in the argument section as a sufficient substitute for assignments of error contained in the proper place and properly designated.

b. Section 77-2004 states, in relevant part: "In the case of a father, mother, grandfather, grandmother, brother, sister, son, daughter, child or children legally adopted as such in conformity with the laws of the state where adopted, any lineal descendant, any lineal descendant legally adopted as such in conformity with the laws of the state where adopted, any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent, or the spouse or surviving spouse of any such persons, the rate of tax shall be: (a) For decedents dying prior to January 1, 2023, one percent of the clear market value of the property received by each person in excess of forty thousand dollars; and (2) Any interest in property, including any interest acquired in the manner set forth in section 77-2002, which may be valued at a sum less than or equal to the applicable exempt amount under subsection (1) of this section shall not be subject to tax."

c. Inheritance tax rates are higher for other types of beneficiaries. Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.

d. The following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relationship of a parent under § 77-2004: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

e. Ordinarily, on appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record, and the factual findings necessary to determine whether the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong. However, because of Douglas County's pleading deficiencies, review of this appeal is limited to plain error. Plain error is error plainly evident from the record and of such a nature that

to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

f. There is not error plainly evident from the record that is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

D. *Mitchell v. Register of Wills for Howard Cnty.*, 2025 Md. Tax LEXIS 3; 2025 LX 91696; 2025 WL 877597 (Maryland Tax Court 2025). Tax apportionment clause required estate to pay state inheritance taxes on non-probate accounts.

1. In 2023, decedent, Elizabeth May Anderson, a cousin of the Petitioner, died. Petitioner instantly received by transfer two investment accounts. These accounts listed the Petitioner as transfer-on-death. Petitioner received no other property from the decedent. At first, the Register of Wills assessed the Estate (using the incorrect tax rate). The second and final third assessments were assessed to the Petitioner as opposed to the Estate. Petitioner timely paid the third assessment to avoid penalties and/or interest. The Petitioner then filed a refund request with the Respondent, which was denied. Petitioner then timely appealed to this Court.

2. The Maryland Tax Court ordered the payment of state inheritance taxes from the Estate on the following grounds:

a. Under Md. Code Ann., Tax—Gen. § 7-216 (2023), inheritance tax must be paid by the distributor of the property, unless the decedent specified a source to pay the tax, such as the Estate. Further, the recipient of the inheritance shall pay the tax if the distributor fails to pay the tax, or the property passes to the inheritor without distribution.

b. The expressed intent of the will is gathered from its four corners. The words in the will are to be given their plain meaning and importance. When recognized legal terms are used, the testator is presumed to have used such terms with the knowledge of their technical meaning, and with the purpose of employing that meaning in the disposition of his property.

c. The will provided as follows: "I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate herein disposed of, or any part hereof, or on any bequest or devise contained in this my Last Will (which term wherever used herein shall include any Codicil hereto), or on any insurance upon my life or on any property held jointly by me with another or on any transfer made by me during my lifetime or on any other property or interests in property included in my estate for such tax purpose be paid out of my residuary estate and shall not be charged to or against any recipient, beneficiary, transferee or owner of any such property or interests in property included in my estate for such tax purposes."

d. The will states that the inheritance tax on any property included in the Estate should be paid from the residuary of the Estate. This appears to include property passed outside of the Estate, which can be assessed inheritance tax. The intent therefore is expressed, not inferred. The Estate includes the total property of an individual prior to distribution. As such, any property, even property distributed outside of the probate process, would be covered under the above tax clause.

While Petitioner's inheritance was not probated as it was inherited at the moment of death independent of the estate distribution, the inheritance was mentioned within the will. Therefore, the decedent did acknowledge that there was property outside the Estate that was to be disbursed.

e. Petitioner has a right to request a refund. Petitioner would be entitled to the refund interest. First, the tax was wrongfully collected. Second, the error is attributed to the Register of Wills, a unit of State government, and not the Petitioner. Therefore, the request for interest is granted.

XI. DIRECTED TRUSTS, PROTECTORS, & SPECIAL FIDUCIARIES

A. *Stacy Revocable Trust v. Gillespie (In re Est. of Stacy),* 2025 Iowa App. LEXIS 238; 20 N.W.3d 847; 2025 LX 57205 (March 5, 2025). In case of first impression, court holds that trust protector provisions do not give rise to shifting burden of proof on claims that trust amendments were product of undue influence by protector.

1. Margie and Richard Stacy married in 1948 and raised four children: Kathy Jondle, James ("Jim") Stacy, Diane Bass, and Peggy Gillespie. Margie and Richard owned a 160-acre farm in Webster County.

2. In 2012, Richard's health began to decline. Around the same time, the couple started making changes to their estate plans. Wills executed by Margie in 2010, 2012, and 2013 reflect an intent for Margie's assets to pass in equal shares to her three daughters or their families. During these years, Margie and Richard kept their daughters informed about their estate plan and invited them to participate in meetings with their family attorney.

3. Richard passed away in 2014. Peggy blamed her older sister for moving Richard to the care facility where he died. Peggy became heavily involved in Margie's affairs. She began reviewing all of Margie's financial statements and attending meetings with Margie's banker, who remembered Peggy doing most of the talking. Peggy also went to meetings with her mother's lawyer. None of Margie's other children were present at these meetings.

4. In the wake of Richard's death, the banker encouraged Margie to transfer her assets to a revocable trust after Margie told her about disagreements among her children. On December 3, 2014, Margie settled the Margie L. Stacy Revocable Trust (the "Trust"). She transferred to the trust all her personal belongings, her home in Clive, and the Webster County farm. These assets were to be held for Margie's benefit for life and then distributed in equal shares to her children upon her death. Margie appointed herself trustee, named a bank as her successor, and reserved the power to amend or revoke the Trust.

5. A dispute arose over funds Kathy received from Richard before his death and a car loan that Margie co-signed with Kathy. In 2016, Peggy connected Margie with a new attorney to update her estate plan to equalize Kathy's debts. Shortly after their first meeting, Margie executed a pour-over will and a durable power of attorney authorizing Peggy to manage her financial affairs. Margie later revoked the power of attorney because the kids were fighting over money. A month later, Margie sent a letter to counsel requesting that Peggy be re-enlisted as her agent. In another letter, Margie requested that counsel prepare a trust amendment reducing Kathy's distribution by $50,000. Peggy typed both letters for her mother's signature.

6. In 2019, Jim's health began to fail, and Peggy helped him move out of his apartment. Margie distanced herself from Peggy again. Kathy contacted a third attorney to help Margie revoke Peggy's power of attorney. Margie named Kathy as her agent for financial matters, and Kathy and Diane as co-agents for healthcare decisions. Kathy, Diane, and Margie then met with the banker to talk about further restricting Peggy's access to Margie's finances. When Peggy found out, the family friction turned to flame. Three days after she was removed as Margie's agent, Peggy took Margie back to the bank to execute another financial power of attorney restoring Peggy's authority. She also blocked Kathy's number on Margie's phone and promised to call the police if Kathy tried to contact Margie. Peggy then arranged for her mother to meet with a fourth attorney to amend the Trust.

7. On June 13, 2019, Margie signed the Amended and Restated Margie L. Stacy Revocable Trust ("Restated Trust"). Under the Restated Trust, Kathy and her children would split the proceeds from the sale of Margie's home in Clive. The rest of the trust assets — including the Webster County farm — would pass to Peggy and Diane. The Restated Trust established Peggy as the "trust protector," with the authority to revoke the trust or amend its terms. And it provided: "While the Settlor is alive, [the] Trust Protector's approval and signature is required to amend or revoke this Trust. The Settlor and Trust Protector must act together to change or terminate this Trust."

8. Two weeks after executing the Restated Trust, Margie gave counsel a handwritten note to be given to Kathy after Margie's death. The note stated: "Kathy, I'm writing this letter to explain your inheritance. You have borrowed so much money and taken things promising to make monthly payments that you don't deserve any farm land. You've never paid back any of the money. You also put on Facebook that I'm not your mother. So, if I'm not your mother, you don't get the same as Diane and Peggy. You have hurt me for the last time. Margie"

9. In August 2020, Margie moved in with Peggy. She was in "frail health," and her doctor had advised her to not live alone. After moving in with Peggy, Margie decided to sell her Clive house to Kathy's son. Counsel advised Margie that selling the house would leave nothing in the trust for Kathy. According to counsel, Margie explained that she understood the consequences and wanted to proceed. The sale closed in January 2021.

10. About one month later, Margie decided that she wanted to give the Webster County farm to Peggy only. According to counsel, Margie said that Diane's health was deteriorating, and she was worried that a sizeable inheritance would disqualify Diane from government benefits. On February 11, 2021, Margie amended the trust by reducing Diane's share to a $20,000 lump sum and leaving all the farmland to Peggy ("2021 Amendment"). Peggy signed and approved this amendment as the trust protector. The same day, Margie signed a deed in her capacity as trustee conveying the farm to Peggy ("Farmland Transfer").

11. Margie died on April 4, 2021. Her 2019 pour-over will was admitted to probate without present administration. Kathy contested the validity of the 2019 pour-over will, the Restated Trust, the 2021 Trust Amendment, and the Farmland Transfer on undue influence grounds. Kathy also asserted a claim against Peggy for intentional interference with a bequest and sought punitive damages.

12. At trial, Kathy requested a burden-shifting instruction for the undue influence claims related to Margie's trusts and the Farmland Transfer. Under her proposed instruction, if

the jury found Peggy and Margie were in a confidential relationship at the time Margie signed the Restated Trust, the 2021 Trust Amendment, or the Farmland Transfer, then the burden is on Peggy Gillespie to prove that there was no undue influence. The district court granted Kathy's request for the burden-shifting instruction on the Farmland Transfer but denied it for the trust claims. For the trust claims, the jury was instructed: "The law presumes a person is free from undue influence when making a trust or an amendment to an existing trust. To overcome this presumption, the Plaintiff must prove by a preponderance of the evidence" that the Restated Trust and 2021 Trust Amendment resulted from undue influence. But for the Farmland Transfer, the jury was instructed that if Kathy proved Peggy was in a confidential relationship with Margie at the time of the transfer, the burden shifted to Peggy "to prove by clear, satisfactory, and convincing evidence" that Peggy "acted in good faith throughout the transaction" and that Margie "acted voluntarily with freedom, intelligence, and a full knowledge of all the facts."

13. The jury returned a verdict finding Peggy had unduly influenced Margie with respect to the 2021 Amendment and Farmland Transfer. It found against Kathy on each of her other claims. Both parties appealed the jury's verdicts. Kathy claimed the district court erred by denying her requested burden-shifting instruction for her challenge to the Restated Trust. On cross-appeal, Peggy contended that the evidence was insufficient to support a finding of undue influence with respect to the 2021 Amendment and Farmland Transfer. The Iowa Court of Appeals affirmed on the following grounds:

> a. Undue influence is influence that destroys the free agency of a grantor and substitutes the will of another person for the grantor's own. When undue influence meddles with a grantor's decision about how to dispose of property during life or after death, interested parties can bring a claim to invalidate that decision.
>
> b. Contestants seeking to set aside a will based on undue influence carry the burden of proving the essential elements of the action by a preponderance of the evidence. Persons seeking to set aside inter vivos transfers carry a higher burden of proving their cause of action by clear, satisfactory, and convincing evidence. Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefitted parties to prove — by clear, satisfactory, and convincing evidence — their freedom from undue influence. No such presumption of undue influence exists in the case of a will contest, even where the testator and beneficiary stand in a confidential relationship. But a suspicion of overreaching may arise where the dominant party has participated in the actual preparation or execution of the will.
>
> c. To rebut the presumption of undue influence on an inter vivos transfer arising from a confidential relationship, the grantee needs to prove by clear, satisfactory, and convincing evidence that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.
>
> d. The doctrine that undue influence is to be presumed as between parties inter vivos, dealing with each other when fiduciary relations exist between them, has no application to testamentary gifts. The theory as to contracts and gifts inter vivos is that a person having need of property, or at least a desire to retain it during life, is not likely to part with it without a measurably adequate equivalent. But the primary presumption on which this whole doctrine rests is entirely lacking in

testamentary dispositions. The natural inference that the owner is adverse to parting with his property in the case of gifts and contracts inter vivos is reversed in the disposition of property by will. The design of the testator, as manifested therein, is to give away a part or all he has or may thereafter acquire. He does not undertake to part with its use or enjoyment, for the will speaks only from the time of his death, and therefore its use and enjoyment by him is not interrupted.

e. Another reason for treating testamentary dispositions differently is that a testamentary beneficiary is not necessarily a party to the execution of the will and may have no knowledge thereof until years after it has been made. By contrast, the grantee of an inter vivos transfer is more likely to have firsthand knowledge regarding the transaction, putting the grantee in a better position to present the facts to court or jury.

f. The Restatement (Third) of Property treats both categories of donative transfers the same. This case requires the court to squarely address the applicable burden for an undue influence claim involving a confidential relationship and a revocable trust with a trust protector provision. Whether the burden-shifting rule applies in revocable trust contests appears to be a question of first impression.

g. While Margie's assets were titled in the name of the trust, she was the sole trustee and beneficiary of the trust during her lifetime and retained control over its assets. Neither Peggy nor the other beneficiaries of the Restated Trust had any right to the property until Margie's death. The Restated Trust expressly provided that despite the powers granted to Peggy as trust protector, she "shall not amend this agreement to limit or alter the Settlor's right to trust assets." Margie also retained the ability to amend or revoke the trust during her lifetime, even though Peggy's "approval and signature" as trust protector was required. The trust protector restrictions on amendments and modifications to the trust complicate the analysis. But the key consideration is Margie's retention of a beneficial interest in the trust assets during her lifetime. While Margie's ability to amend or revoke the trust was limited by the trust protector provision, the Restated Trust was predominantly testamentary. For these reasons, the district court did not err in rejecting Kathy's burden-shifting instruction for the Restated Trust claim.

h. Viewing the evidence in the light most favorable to Kathy, a reasonable juror could conclude that Peggy asserted control over her mother's affairs in the years following her father's death. She attended all of Margie's meetings with her banker and attorneys. Peggy secured roles as Margie's trust protector and agent under financial and medical powers of attorney. She successfully reversed two attempts by Margie to revoke her authority. She communicated with Margie's attorneys regarding requested changes to Margie's estate plan. And she worked to isolate Margie from contact with Kathy. By the time she executed the 2021 Trust Amendment and Farmland Transfer, Margie was in a "frail state" and living in Peggy's home. Her decision to gift Peggy the farmland left her trust devoid of major assets and substantially disinherited her other surviving children. That outcome was antithetical to the design of Margie's wills and trusts predating 2019, and it benefited only Peggy. Kathy offered substantial evidence to show that Margie was susceptible to undue influence, that Peggy had the opportunity and disposition to unduly influence Margie, and that the 2021 Amendment and

Farmland Transfer were the clear result of that influence. The district court correctly denied Peggy's motion for a directed verdict.

XII. DISTRIBUTIONS & DISBURSEMENTS

A. *Holte v. Rigby*, 2025 ND 77; 20 N.W.3d 122; 2025 N.D. LEXIS 78; 2025 LX 20615 (Supreme Court of North Dakota 2025). Trustee cannot attach equitable lien to beneficiary's life interest to recover funds stolen by beneficiary's deceased parent.

1. In 2008, Kermit and Ardella Holte ("grantors") executed the Kermit and Ardella Holte Family Mineral Trust Agreement and conveyed mineral interests to the trust by quitclaim deed. The trust designates the grantors and their three sons — Sheldon Holte, Steven Holte, and Nathan Holte — as beneficiaries: "The net income of the Trust, and payments received by the trust, after payment of any expenses incurred in the administration of the Trust, shall be divided into the following parts and distributed in regular monthly payments as follows: 1. All bonus payments, delay rentals, and shut-in payments shall be distributed at least annually to Kermit Holte and Ardella Holte, and to the survivor of them. 2. All royalties and other income shall be distributed at least monthly as follows: A. One-fourth (1/4) to Ardella Holte and Kermit Holte, and to the survivor of them. B. One-fourth (1/4) each to Sheldon Holte, Steven Holte, and Nathan Holte."

2. Upon the death of the survivor of Ardella Holte and Kermit Holte, and upon the death of any other beneficiary, his or her trust share shall go to his or her issue per stirpes as beneficiaries, or if none, such share shall be added ratably to the other beneficiaries of this trust. The trust agreement designated Kermit and Nathan as the original co-trustees.

3. Kermit died in May 2012, and, pursuant to the trust agreement, Kermit's interest went to Ardella. Ardella and Sheldon declined to serve as co-trustee after Kermit's death. Nathan served as sole trustee until 2018, when Steven was appointed co-trustee due to Nathan's failing health and the brothers' worry that Nathan could suddenly pass. Nathan continued to manage the financial aspects of the trust, however; Steven did not take an active role in administration of the trust until Nathan's death in April 2021. Upon Nathan's death in April 2021, Sheldon was appointed successor co-trustee.

4. No one detected any issue with Nathan's administration of the trust until Steven reviewed the accounts after Nathan's death. Steven learned that, from 2014 until his death in 2021, Nathan had directed half of Ardella's one-fourth share to his ex-wife, Dawn, who, pursuant to their 2011 divorce judgment, was entitled to half of Nathan's share of trust income. In addition to Nathan's misappropriation of trust income, Steven also discovered that Nathan had stolen money from Ardella's non-trust bank accounts.

5. All accounts at issue in this case were held with the same bank in Williston. Each beneficiary had their own account into which Nathan, as an agent and authorized signer on each account, deposited distributions. Nathan and Steven, as co-trustees, signed a Certification of Trust, Delegation of Power, and Indemnity Agreement, which allowed each of them to independently manage accounts associated with the trust without the other's prior authorization. Ardella also held personal checking and savings accounts that were separate from her trust account.

6. Steven and Sheldon, as co-trustees, retained an accounting firm to investigate. The investigation revealed that Nathan had stolen $442,182.12 from Ardella's share of the trust income by directing half of Ardella's share to his ex-wife Dawn. Although Ardella had

received only an eighth share of trust income, she had paid taxes as if she had received her full quarter share, because Nathan had directed the tax preparer to prepare equal K-1 tax forms for all beneficiaries. The investigators estimated that Ardella had paid between $35,000 to $76,500 in excess taxes. The investigation also revealed that Nathan had stolen $375,100 from Ardella's non-trust accounts. Nathan held a durable power of attorney for Ardella and used this authority to withdraw money out of Ardella's accounts.

7. Nathan died in April 2021, and Tiah Rigby, Nathan's only child, was appointed personal representative of Nathan's estate. Rigby became the life beneficiary of the quarter share in trust income upon Nathan's death.

8. The Holtes sued Rigby, individually and as representative of Nathan's estate, alleging that Nathan had committed conversion, civil theft, fraud, deceit, exploitation of a vulnerable adult, breach of contract, negligent misrepresentation, negligence, and constructive fraud. In their amended complaint, they added a claim for constructive trust and offset, alleging that Nathan's estate and Rigby were enriched through Nathan's fraudulent actions and that Rigby's share of trust income should be offset until all money that Nathan stole, plus interest, is recouped. Rigby filed a counterclaim against the co-trustees, alleging that she was entitled to her full quarter share of trust income and that the co-trustees had violated both their fiduciary duties as well as the trust agreement by withholding it.

9. The district court held that the co-trustees may offset Rigby's distribution until all misappropriated trust money, plus interest, is recouped, but that the co-trustees may not offset Rigby's distribution to recoup the non-trust money that Nathan stole.

10. Rigby appealed. On appeal, the North Dakota Supreme Court reversed and remanded on the following grounds:

a. The issue is whether, under the trust agreement and North Dakota law, co-trustees have authority to recoup from Rigby's distribution the trust income that Nathan misappropriated.

b. Although the trust agreement provides co-trustees with broad authority and discretion to administer the trust, withholding Rigby's distribution is inconsistent with grantors' clear intent that Rigby, as life beneficiary of a quarter share of trust income, receive a monthly distribution.

c. The Holtes cite no authority for their contention that a trustee may withhold a current life beneficiary's distribution of trust income to recoup money misappropriated by the former life beneficiary. The Holtes' construction of the trust agreement fails to address co-trustees' duties under the trust agreement and the grantors' clear intent to create successive life interests in the shares of trust income. The co-trustees have a duty under the trust agreement to distribute, at least monthly, trust income to the life beneficiaries.

d. The trust agreement expressly creates successive life interests in quarter shares of the trust's income. Nathan's life interest in a quarter share of trust income terminated upon his death, at which point Rigby's life interest in that share vested. The trust agreement provides express direction that co-trustees "shall" distribute trust income to the life beneficiaries on a monthly basis.

e. The authorities the Holtes cite pertain to offsetting a trustee-beneficiary's misappropriation of trust property against that same trustee-beneficiary's beneficial interest. In this case, however, the breaching trustee's beneficial life interest terminated upon his death, and the co-trustees are offsetting to recoup his misappropriations against the current life beneficiary's distribution.

f. The Holtes cite no authority for the contention that Nathan's misappropriations created a liability that attached to his beneficial interest, and because Rigby is the current life beneficiary of that interest, her distribution is subject to offset. There is limited on-point authority on this issue, but what exists suggests that where a life beneficiary is indebted to the trust or the settlor and dies, remainder interests under the trust cannot be taken to satisfy his obligation. Nathan's beneficial life interest terminated upon his death, and because Rigby is not personally liable for Nathan's misappropriations, it is improper to offset against her distribution.

g. The Holtes' equitable lien theory fails, because an "equitable lien attaches to an asset as security," and the quarter share of trust income at issue is not Nathan's asset. Nathan had a life interest in a quarter share of trust income, which terminated upon his death. Rigby currently has a life interest in the quarter share, and because she had no role in Nathan's theft of Ardella's non-trust money, it is improper to attach an equitable lien to her beneficial life interest. As the district court concluded, it is undisputed through testimony at trial that Rigby was not involved, and has no personal liability for the actions of Nathan during his lifetime, and any monies misappropriated by Nathan from Ardella's personal banking accounts while he was general durable power of attorney must be reclaimed from Nathan's estate.

B. *In re Harvey Stewart 2008 Irrevocable Tr.,* 2025 N.J. Super. Unpub. LEXIS 1075 (Superior Court of New Jersey 2025). Dissolution of related underlying entities do not change characterization of receipt from preserved entity as income under Principal and Income Act.

1. Plaintiff James D. Stewart and defendant Martha A. Chamberlain are co-trustees of the A. Harvey Stewart 2008 Irrevocable Trust. The trust's settlor was A. Harvey Stewart, who died on January 29, 2023. Harvey was James's father and Martha's husband. James, as well as his two siblings, Hilary and Zachary, who appeared unrepresented, are all Martha's stepchildren; that is, they are the issue of Harvey's marriage to his first wife.

2. The trust instrument provides that during Martha's lifetime the co-trustees were to pay her "all the net income in quarter-annual or more frequent installments." The co-trustees were also authorized to use their discretion in determining whether to distribute to Martha "from time to time such amounts of principal (even to the point of completely exhausting the same)" for Martha's "health, support, and maintenance in her accustomed manner of living." The trust instrument further instructs that after Martha's death the corpus of the trust is to be transferred to Harvey's estate. Thus, a natural tension was created when Harvey made Martha (the trust beneficiary entitled to the income and, at times, other "such amounts of principal") a co-trustee along with James, her stepson, who might have a personal interest in the retention of as much of the trust's corpus as possible at the time of Martha's death, because those funds might ultimately benefit his siblings, the estate's beneficiaries.

3. James commenced suit when recently a $51,425 check was sent to Martha made payable to the trust; Martha deposited the check into the trust account and then transferred the entirety of those funds to her personal account. James asserted that he "believed" this $51,425 was principal and not income and that Martha acted wrongfully in at least two respects: she acted without his input, and she paid to herself trust funds that constitute principal, not income. James sought Martha's removal as co-trustee, her return of $51,425 to the trust, and an accounting. Martha claimed that she acted in good faith and did nothing that her husband hadn't done in the past with similar types of payments into the trust. She also asserted that the nature of the payment — whether labeled income, principal, or a combination of both — is not necessarily clear and that she wasn't required to act in concert with James even though he is a co-trustee because James had been asked to resign as a co-trustee by Harvey during Harvey's lifetime, because James was in fact disinherited by Harvey, and because James has been otherwise uninvolved with the trust.

4. Martha moved for summary judgment, which the court granted in part on the following grounds:

a. The trust holds an 8.5% interest in New Shrewsbury Investment Ltd. ("New Shrewsbury"), that New Shrewsbury is a holding company that owns a 50% interest in TF Associates, and that TF Associates owned 100% of Tinton Falls Associates, LLC, which owned property in Toms River that it sold in March 2024 for $2,600,000. From the proceeds of that sale, Tinton Falls Associates paid off a loan to TF Associates, which also received the remaining net proceeds from the sale as Tinton Falls Associates' only member. TF Associates then distributed some of the proceeds to its partners, one of whom is New Shrewsbury, which thereafter paid a portion of what it received to the trust, since the trust holds an 8.5% interest in New Shrewsbury.

b. The Uniform Principal and Income Act of 2001 (the "Act") governs how the funds in question should be characterized. The Act declares that "a trustee shall allocate to income money received from an entity," unless it can be characterized as, or fall within, one of the following categories: (1) property other than money; (2) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity; (3) money received in total or partial liquidation of the entity; and (4) capital gain dividends from regulated investment companies or real estate investment trusts.

c. In attempting to argue that the second or third may pose factual questions about whether the funds might be characterized as principal, James questions the scope of the word "entity." To be sure, as James points out, there were multiple entities involved in generating the eventual payment to the trust of the questioned $51,425. But the "entity" to which subsections (2) and (3) of N.J.S.A. 3B:19B-10(c) refers is the entity in which the trust holds an interest. Despite James's attempt to cloud the issue in responding to the summary judgment motion, N.J.S.A. 3B:19B-10(a) clearly defines "entity" for these purposes as any type of organization "in which a trustee has an interest."

d. The trust holds an interest in New Shrewsbury only; the trust did not then and does not now hold an interest in TF Associates or Tinton Falls Associates. So, while the sale of the Toms River property may have resulted in a total or partial

liquidation of Tinton Falls Associates, and that Tinton Falls Associates' liquidation or dissolution may be of the type falling within N.J.S.A. 3B:19B-10(c)(2), that circumstance has no impact on the statute's application to the payment the trust received from New Shrewsbury because New Shrewsbury has not been wholly or partially liquidated or dissolved. And for that matter, neither has TF Associates. There is no dispute that New Shrewsbury held an interest in TF Associates, which held an interest in Tinton Falls Associates, which owned property that was sold. Only New Shrewsbury is the "entity" of concern in the application of the Act. The money received by the trust was not a distribution or a series of related distributions in exchange for part or all of the trust's interest in New Shrewsbury. No part of the 8.5% interest the trust held in New Shrewsbury was exchanged by the trust for the money in question; the trust still holds that 8.5% interest. And the money received was not "in total or partial liquidation of" New Shrewsbury; that entity has remained unchanged. So, the Act does not require the allocation of the payment to principal. The money received by the trust came from income New Shrewsbury received from TF Associates, which received money from Tinton Falls Associates, which sold property it alone owned.

e. James argues that because, in his view, these three entities (New Shrewsbury, TF Associates, and Tinton Falls Associates) are "related," there is a question of fact about whether the $51,425 is income or principal. That mistaken generality, which is untethered to the precise facts and the clear meaning of the applicable statute, cannot stand in the way of summary judgment.

f. The $10,285 payment by New Shrewsbury over which Martha took dominion was also properly allocated as income. In his opposition, James acknowledges that the money ultimately came to New Shrewsbury from the sale of property by Monroe Lake, LLC. As noted above, New Shrewsbury owns an interest in TF Associates, which held a 29% membership in Lake Monroe. The same analysis of the trust's receipt of this fund calls for its characterization as income. As a matter of law, there is no merit to James's claim that New Shrewsbury's payment to the trust of $51,425 and $10,285 constituted principal. Those payments were income.

g. That conclusion, however, doesn't end the matter. First, the trust declares Martha's entitlement to "net income" not "income." In opposition, there are assertions that some part of the questioned payments should have remained in the trust for the payment of any tax liability, and, from this, that Martha's removal of what might have been more than net income was a violation of her fiduciary duty as a trustee. While the trust instrument contains a definition section, it does not define "net income," nor has it been shown how other provisions in the instrument should guide the court in understanding what might have been intended by the phrase "net income." Absent a clear understanding about what the trust intended about the difference — if any — between income and net income, the court cannot determine whether Martha overstepped her bounds when she exerted dominion over the entirety of the two sums in question or whether there is some amount that she should disgorge for the benefit of the trust.

h. Because of that uncertainty, the court also cannot resolve the second part of Martha's motion, in which she seeks a dismissal of those parts of James's

complaint that demand an accounting and her removal as a co-trustee. The court does agree that, as a matter of law, Martha need not provide James with an accounting insofar as he would seek to have her provide information that is readily available to him. But if Martha's alleged breach of a fiduciary duty — limited to whether she improperly exerted dominion over the difference, if there is a difference, between trust income and net income — warrants her removal as a co-trustee, then the court may deem it advisable to require some sort of accounting. Both the claim for an accounting and the claim for her removal turn not on the bare and unsupported allegation that Martha kept James in the dark — since he had every right to relevant bank statements and transactions related to the trust as did she — but, again, on whether Martha overstepped her bounds by taking dominion over more than the "net income," whatever that might mean, of the recent $54,125 and $10,285 payments.

C. *In re Irrevocable Life Ins. Trust of Ruth M. Grant Dated February 16, 2004,* 2025 Pa. Super. Unpub. LEXIS 1390; 2025 LX 29394 (Superior Court of Pennsylvania 2025). Trustees could not transfer life insurance policies to new trust that benefitted some, but not all, of the beneficiaries of original trust.

1. On October 2, 1992, Louis A. Grant ("Father") and Ruth M. Grant ("Mother") jointly settled a life insurance trust ("the Father-and-Mother Trust). They named all four of their children ("Son and three Daughters") as equal beneficiaries of the Father-and-Mother Trust. Mr. Eiler, who was Father and Mother's long-time CPA, served as a "Special Trustee" of the trust. Under the trust agreement, Father and Mother forfeited all control and disposition of the trust assets. The trust was irrevocable. Also, the agreement directed that the Trustees would collect any life insurance proceeds payable on Father's or Mother's death and divide those proceeds equally among the four children. Finally, Article V of the trust document dictated that: "The Special Trustee may purchase insurance on the life of the Settlors which may be acquired as separate policies (covering the life of the Settlors). If insurance is purchased by the Special Trustee, the Special Trustee shall be vested with all right title, claim benefit and interest in and to such coverages, and is authorized and empowered to exercise and enjoy, for the purposes of this Trust as absolute owner of such insurance coverages, all the options, benefits, rights, and privileges pertaining to such insurance coverage."

2. In addition, the powers of the Special Trustee included ownership, management, and allocation of any life insurance policies that the Special Trustee might buy. The agreement allowed the Special Trustee to "assign all or part of such insurance coverages with the administration of this Trust," "designate or change from time to time the beneficiary with respect to such insurance coverages," and "exercise any options available to him under any policies then in his possession, including the right to surrender the same for cash."

3. The trust purchased a life insurance policy on Father and Mother and named itself as beneficiary. This first policy is not in dispute. On January 6, 1995, Father died, and Mother became sole owner of the family businesses. Seven years later, in 2002, Mother decided to bequeath the family businesses to Louis A. Grant, Jr. ("Son") and to increase the life insurance payouts to her Daughters in an attempt to equalize the values going to her children. Mother also wished to acquire the new life insurance policies as soon as possible to save money on the premiums. Her attorney told her that he would prepare a new trust

for the life insurance policies. However, Mother's attorney did not promptly create a new trust for the new policies.

4. Instead, in September 2003, the Father-and-Mother Trust bought a second policy on Mother's life worth $3,000,000 and a third policy on Mother's life worth $5,000,000. Thus, the combined death benefit of the second and third policies was $8,000,000. Like the first policy, the Father-and-Mother Trust named itself the beneficiary of the new policies. But the Trustees had the intention of eventually transferring them to a new trust that only benefited the three daughters.

5. Three months later, on February 16, 2004, Mother's attorney prepared documents for a new trust, which Mother settled. She named only the three Daughters as equal beneficiaries of this Mother-Only Trust. She wanted the new trust to assume ownership of the second and third policies from the Father-and-Mother Trust for the exclusive benefit of Daughters.

6. Mr. Eiler, who was also a Trustee of the Mother-Only Trust, signed the forms to change the beneficiary and ownership of the second and third policies from the Father-and-Mother Trust to the Mother-Only Trust. Mr. Eiler did not speak with Son about the second and third policies or obtain a court order permitting the transfer of the policies. Mother then began funding the Mother-Only Trust, so it could pay the policies' premiums.

7. In June 2006, the Mother-Only Trust surrendered the second and third policies for their cash values. Using the funds from the surrendered policies, the Mother-Only Trust purchased a fourth policy on Mother's life with a death benefit of $8,000,000 and named itself as beneficiary. The following year, Mother sold her businesses for approximately $50,000,000, and Son received more than $19,000,000 in excess of his interest in the businesses.

8. In 2020, Mother's attorney resigned as Special Trustee for both trusts. Attorney Leroy L. Metz, II assumed those roles. Two years later, Mother died. The fourth policy paid the $8,000,000 death benefit to the Mother-Only Trust.

9. Attorney Metz filed a First and Final Account of the Father-and-Mother Trust. Due to the filing, Son learned that the Father-and-Mother Trust had purchased the second and third policies, that Mr. Eiler had transferred those policies from the Father-and-Mother Trust to the Mother-Only Trust, and that the Mother-Only Trust surrendered them and used the funds to purchase the fourth policy. Son filed an objection to the First and Final Account of the Father-and-Mother Trust. He alleged that the Trustees improperly transferred the second and third policies in violation of the Father-and-Mother Trust Agreement.

10. Following a non-jury trial, the orphans' court ruled in favor of Son. As remedy, the orphans' court imposed a constructive trust on the Mother-Only Trust for $2,002,410.96, representing Son's one-quarter beneficial share of the fourth policy's net proceeds of the transferred policies. Attorney Metz and Mr. Eiler timely appealed.

11. On appeal, the Superior Court affirmed on the following grounds:

> a. Mr. Eiler and Attorney Metz overlook the fact that Father and Mother jointly settled the Father-and-Mother Trust in 1992 to benefit all four of their children equally. In doing so, Father and Mother agreed to relinquish control over any assets placed in the Father-and-Mother Trust. Therefore, after Father died, the

Special Trustees' fiduciary duties were not to Mother, but to her four children, in equal measure. As a result, Mother had no legal authority to revise Father's and her 1992 estate plan in 2002 (however well-intentioned the new estate plan may have been). Based on the plain language of the Father-and-Mother Trust Agreement, Mother forfeited all power to alter the irrevocability of the Father-and-Mother Trust or to direct the disposition of any property it acquired. Her subjective desires for the second and third policies, being in conflict with the plain language of the Father-and-Mother Trust Agreement regarding the purpose of that trust's property, are irrelevant.

b. Hence, when the Trustees purchased the second and third policies, they purchased them for the purposes of the Father-and-Mother Trust as absolute owner of such insurance coverages. That language clearly expresses the joint wishes of Father and Mother in 1992. At that time, they desired to limit the Trustees to owning life insurance policies for the Father-and-Mother Trust, not for a future trust that Mother might create on her own.

c. As a matter of law, the Trustees did not purchase the second and third policies for transfer to a yet-to-exist trust, because the Father-and-Mother Trust Agreement did not allow them to purchase life insurance for any trust other than the Father-and-Mother Trust. The Trustees' attempts to effectuate Mother's desire to use the Father-and-Mother Trust as a holding tank, until Mother's attorney found time to create the Mother-Only Trust, has no bearing on the analysis.

d. Mother's attorney and Mr. Eiler misinterpreted (or simply ignored) the plain language of the trust, which explicitly limited the Special Trustee's power to "this Trust." Mr. Eiler and Attorney Metz seek to rewrite Article V to implement Mother's unilateral estate plan, in violation of Father's and Mother's joint estate plan dating back to 1992. When the words of a trust document are clear and unambiguous, they are the only evidence of the settlor's intent and the trustees' duties.

e. By relinquishing the ownership and transferring the beneficiary of the second and third policies to the Mother-Only Trust, Mr. Eiler breached his fiduciary duty to Son under the Father-and-Mother Trust Agreement. He deprived Son of one-fourth of the proceeds from second and third policies, which (but for the improper transfer and surrender of those policies) would have gone to Son under the terms of the Father-and-Mother Trust.

f. The Supreme Court of Pennsylvania has long held that the Orphans' Court, in matters within their jurisdiction, proceeds on the same principles as a court of chancery. Hence, an orphans' court has a broad grant of judicial authority including all legal and equitable powers required for or incidental to the exercise of its jurisdiction. The orphans' court therefore has broad remedial powers to protect the victims of disloyal fiduciaries.

g. When an orphans' court finds a breach of trust, the remedies available include voiding an act of a trustee, imposing a lien or a constructive trust on trust property, or recovering trust property. The orphans' court had authority to trace the second and third policies from the Father-and-Mother Trust to the Mother-Only Trust,

through the purchase of the fourth life insurance policy, and ultimately to reach and recover the death benefit of $8,000,000 paid on the fourth policy. The record establishes that the $8,000,000 paid on the fourth policy are the proceeds derived from the misappropriated second and third policies. Thus, the orphans' court may recover those proceeds.

h. The Trustees, on behalf of the Mother-Only Trust, used the cash values of the second and third policies to purchase the fourth policy. Furthermore, the payout on the fourth policy was equal to the anticipated payouts on the second and third policies. The second and third policies were worth a combined total of $8,000,000, which is what the fourth policy paid upon Mother's death. Hence, the orphans' court logically followed the money from the second and third policies to the fourth policy and its identical death benefit payout.

i. The remedy of the orphans' court is eminently reasonable and equitable. It prevents unjust enrichment of Daughters from the improperly transferred second and third policies.

D. *In re Trust of the R.J. Wenck Trust Under the Last Will/Testament of Wenck,* 2025 Iowa App. LEXIS 73; 19 N.W.3d 881; 2025 LX 33412 (Court of Appeals of Iowa 2025). Trustee did not breach duties by distributing trust principal to pay retainer for criminal defense attorney for beneficiary.

1. This was the third appeal relating to the R.J. Wenck Trust since 2022. Lanny Wenck died in 2017. His last will and testament divided the residue of his estate equally between four children. While three of the children received their shares of the estate residue directly, the share left to the fourth child, R.J. Wenck, was to be held in trust for R.J.'s benefit during his lifetime. The remainder beneficiaries of the trust are the other three children. The terms of the trust require the trustee to pay R.J. all net income of the trust annually. It also provides that the trustee, in the trustee's sole and absolute discretion, may pay to or apply for the benefit of R.J. such portions of the principal of the trust as the trustee deems advisable to provide for the education, health, support, and maintenance of R.J. after taking into account any other resources available to him for these purposes.

2. In an effort to protect the trust from creditors, the trust contains this spendthrift clause: "No title in the Trust created in this instrument or in any property at any time becoming a part of this Trust, or in any income from this Trust, shall vest in any beneficiary, and neither the principal nor the income of such Trust shall be liable to be reached in any manner by the creditors of any beneficiary and no beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of his or her interest in such Trust, or the income produced thereby, prior to its actual distribution by the Trustees to the beneficiary."

3. In 2023, R.J. became concerned that he would be arrested and criminally charged, prompting R.J. to visit the trustee and tell him that he might need money from the trust for a criminal defense attorney. R.J.'s concerns were realized when he was arrested a few months later and charged with eighteen criminal offenses, eleven of which are class "C" felonies. He then requested funds from the trust principal for a retainer for a criminal defense attorney. The trustee believed R.J. would have difficulty obtaining a public defender given his status as the lifetime beneficiary of the trust and determined that R.J.'s father would have wanted to provide R.J. with some money for the defense attorney's

retainer. So, the trustee agreed to invade the principal to provide the criminal defense attorney with $30,000 for a retainer upon the district court's approval. The court ultimately approved the $30,000 payment to the criminal defense attorney but ordered that R.J. must reimburse the trust by requiring future annual income from the trust that would otherwise go to R.J. be used to restock the principal instead.

4. The remainder beneficiaries appealed, arguing that the trustee failed to consider all other resources available to R.J. as required by the terms of the trust when he approved the payment. They also argued that, because there was evidence that a friend of R.J.'s had already provided $5,000 to the criminal defense attorney to cover part of the retainer and the criminal defense attorney intended to return the $5,000 to the friend after receiving the $30,000 from the trust, the payment of the $30,000 effectively would pay off a debt of R.J.'s to the friend and violate the trust's spendthrift clause.

5. On appeal, the court of appeals affirmed on the following grounds:

a. It is clear from the trust language that the trustee was required to take "into account any other resources available to" R.J. before invading the principal for R.J.'s benefit. Contrary to the remainder beneficiaries' contentions otherwise, the trustee did just that. He understood that R.J. had no income or savings to pay for the retainer. He had already talked with R.J. about whether he would be able to borrow against his home to secure the funds. It is apparent the trustee assessed the situation, determined that R.J. would not be able to come up with the $30,000 from other resources, and concluded that R.J.'s father would have wanted to provide some financial support to R.J. for a defense attorney. That process did not run afoul of the trust language, and the trustee did not abuse his discretion when he gave his approval.

b. As to the remainder beneficiaries' contention that the $30,000 retainer would violate the spendthrift clause of the trust because the defense attorney intended to return $5,000 to R.J.'s friend who had already provided some money for a retainer, the court is not swayed by their argument. The defense attorney requested a $30,000 retainer to represent R.J., and that is what the trustee sought court approval to provide. What the attorney independently did with other monies in response to receiving the $30,000 retainer is immaterial and not a violation of the spendthrift clause.

c. The $30,000 is to be repaid into the trust principal from the annual trust net income R.J. would otherwise receive. So should the remainder beneficiaries want these monies paid back as expeditiously as possible, they should avoid causing unnecessary expenses to the trust so that the annual net income can be maximized and utilized to repay the $30,000 back into the principal.

E. *Mason v. Hard,* 2025 U.S. Dist. LEXIS 193949 (United States District Court for the Southern District of Ohio 2025). Beneficiary may sue trustees for allegedly denying request for distribution of all trust assets for improper motives, but trustees owe the remaindermen consideration in deciding whether to make a principal distribution and cannot completely ignore a remainderman's interest.

1. On December 28, 1976, Edward A. Hobart and Rachel C. Hobart (together, the "Grantors") established The Edward A. Hobart and Rachel C. Hobart Irrevocable Trust ("Trust"). The Grantors created the Trust to safeguard the Hobart family's control of their

business venture, the Hobart Brothers Company. That company was sold in 1996, and the Trust has since operated as a "vessel" for the sale proceeds and diversified financial investments.

2. The Grantors appointed five trustees to manage the Trust: Peter C. Hobart, William B. Howell, Robert B. Bravo, Ralph G. Ehlers, and William H. Hobart, Jr. (collectively, the "Original Trustees"). The Trust Agreement directed the Original Trustees to split the Trust assets into five separate (but collectively administered) sub-trusts, each for the benefit of a particular individual's lineal descendants. Although the Original Trustees were not required to physically divide Trust assets and could regard all sub-trusts as a single fund for investment purposes, the Trust Agreement limits income and principal distributions to the beneficiaries of each such separate trust from the trust respectively created for their benefit. The Trust Agreement instructs the trustees to distribute each sub-trust's net income to its respective lineal descendants on a per stirpes basis via installment payments. Trustees have more discretion over principal distributions: "After such time as there shall be no Trustee serving who belongs to a generation which is older than the generation assignment of every beneficiary of the separate trusts created hereunder, the Trustees shall be authorized to distribute to any one or more of the respective lineal descendants for whom each such separate trust is held and who shall not have a then-living ancestor who is a beneficiary of such trust, such part or all of the principal of their respective trust as a majority of the Trustees shall determine, without restriction as to purposes."

3. Principal distributions must not, however, exceed a beneficiary's "per stirpes share" of the sub-trust, and all distributions are treated as advancements of any amounts distributable upon the sub-trust's termination. Trustees must also manage and administer the Trust and sub-trusts by majority vote. The sub-trusts vest (i.e., terminate) according to Ohio's rule against perpetuities. Upon such vesting, trustees are to distribute any remaining assets to the then-living persons for whom such respective sub-trust is held, per stirpes. If there are no living beneficiaries, trustees must equally allocate that sub-trust's remaining assets to the other sub-trusts.

4. One sub-trust was for William H. Hobart, Jr.'s lineal descendants ("Hobart Sub-Trust"). William H. Hobart, Jr. is Lydia Mason's ("Plaintiff") father, and she and her five siblings — including Defendants Rachel C. Hobart ("Rachel") and William H. Hobart III ("Harrison") — are income beneficiaries of the Hobart Sub-Trust.

5. In February 2022, Plaintiff requested distribution of her "share" of the Hobart Sub-Trust principal. Plaintiff sought to advance a principal distribution because, after her son's death, she no longer had any lineal descendants to whom her share of the principal could be distributed in the future, meaning that if the Hobart Sub-Trust terminates after her death, her portion will go to her then-living siblings or their surviving lineal descendants. Plaintiff submitted her distribution request to the Hobart Sub-Trust trustees. At that time, those trustees included Plaintiff's sister Rachel and three of her cousins — Defendants David H. Howell ("Howell"), Lawrence E. Hard ("Hard"), and Peter John Hobart ("Peter") — along with Defendant Karen M. Moore ("Moore"), a non-Hobart family member who, apart from her role as a trustee, served as legal counsel for the other four trustees (the "Voting Trustees").

6. The Voting Trustees considered Plaintiff's request. As part of that process, Moore provided legal advice about the Voting Trustees' obligations and the scope of their

discretion to approve principal distributions. Rachel also invited Harrison to "act in her stead" in considering (but not voting on) Plaintiff's distribution request. Ultimately, the majority of the Voting Trustees — including Rachel and Moore — voted to deny Plaintiff's request.

7. Plaintiff sued the Voting Trustees, asserting various claims such as breach of fiduciary duty, mismanagement of trust assets, and improper allocation of principal and income. In November 2023, Plaintiff filed an Amended Complaint to add new allegations arising out of events that occurred after she filed her initial Complaint. Because Defendant Portia Clark ("Clark") replaced Hard as a trustee in August 2023, Plaintiff added her as a party to this case. Plaintiff also added allegations stemming from an incident on September 11, 2023, when Plaintiff received a text message from her mother's phone: "Dear Lydia, I will return to Troy on September 18 with my caregiver from Nantucket. Some of your siblings will meet me there to help prepare for my move to The Academy in Colorado. Given the lawsuit you have filed, our lawyers have advised all of us to minimize communication with you. I am asking you to vacate 250 Ridge before September 17. I plan to close the house after my move to reduce my expenses. Love, Mom."

8. Plaintiff asserted that the text message was not actually from her mother — rather, Moore (with support from unnamed others) wrote and sent the text message to interfere with Plaintiff's relationship with her mother as retaliation for this lawsuit. Thereafter, Plaintiff was "thrown out of the family home" and "denied any practical access to her own mother." After Moore's deposition in August 2024, Plaintiff alleged that her brother Harrison, not Moore, maliciously wrote and sent the text message with help from Rachel. Plaintiff brought eleven claims against Defendants and moved for judgment on the pleadings to dismiss nine of these claims: declaratory judgments as to the rights and terms of the Trust; breach of fiduciary duty claim; aiding and abetting a breach of fiduciary duty; spoliation; and injunction.

9. The federal district court granted in part, and denied in part, the motion on the following grounds:

> a. Plaintiff asked the Court to hold Moore liable based on her legal advice to the other trustees, and her position as both a trustee and as counsel for the other trustees. In Ohio, absent an express agreement to the contrary, an attorney who performs legal services for a trustee has no duty or obligation in contract, tort, or otherwise to any third party to whom the trustee owes fiduciary obligations. This statute was designed to shield an attorney from liability to a third party for fiduciary duty breaches. Plaintiff has not shown the existence of any contrary express agreements. Consequently, Plaintiff is precluded from asserting a breach of fiduciary duty claim against Moore arising out of the legal services she rendered to the other trustees, and Moore is entitled to judgment in her favor on this part of Plaintiff's claim.
>
> b. Defendants do not challenge the existence of a fiduciary relationship between Moore as trustee and Plaintiff as beneficiary, nor could they. Defendants also do not argue that no breach occurred. Defendants posit that Plaintiff cannot show an injury proximately resulting from Moore's alleged breach, and maintain that the Voting Trustees unanimously denied Plaintiff's distribution request, so even if Moore had recused herself, the result would have been the same — a majority of trustees voted to deny Plaintiff's request. If an event would have occurred

regardless of a defendant's actions, those actions are not the proximate cause of a plaintiff's injury. Defendants are correct, as a matter of math, that Moore's recusal would have left four Voting Trustees to vote on Plaintiff's distribution request, which is one more than the three votes required to establish the majority necessary for Trust administration actions. All four voted against the request. Moore's failure to abstain from the vote, then, would not have changed the result — Plaintiff's request would have been summarily denied anyway. But Moore's failure to recuse is not the only breach that Plaintiff asserts. Defendants' causation theory ignores Plaintiff's allegation that Moore held a conflicted, self-serving understanding of the Trust Agreement and prevented the other Voting Trustees from obtaining outside legal advice from independent counsel for her own gain. Plaintiff has plausibly alleged that Moore improperly swayed the other Voting Trustees — it is conceivable that, without this influence, the vote may have come out differently. Although Moore's failure to recuse, standing alone, may not be the proximate cause of Plaintiff's injury (i.e., the denial of her distribution request), her influence may have been the beginning of a "natural and continuous sequence" that produced the denial. Plaintiff has adequately alleged proximate cause at this point in the case.

c. Rachel is Plaintiff's sister. Rachel's position as both a Hobart Sub-Trust trustee and a beneficiary is not inherently improper. One of several beneficiaries of a trust can be one of several trustees of the trust. Indeed, by designating Hobart family members as four of the five trustees, it seems that the Grantors may have (at least implicitly) approved some inevitable conflicts of interest. This does not mean, though, that Rachel's conduct as a trustee is immune from scrutiny. Even a grant of absolute discretion will be controlled by the court if the trustee acts in bad faith, dishonestly, or with an improper motive. Although Rachel's failure to abstain from the vote did not, on its own, result in the ultimate decision to deny Plaintiff's distribution request, Plaintiff alleges that Rachel, as a Voting Trustee, participated in the consideration of that request. It is plausible that Rachel sufficiently influenced the other Voting Trustees so as to proximately cause them to deny Plaintiff's request. Thus, Rachel is not yet entitled to judgment in her favor on this part of Plaintiff's breach of fiduciary duty claim.

d. The Trust Agreement in this case is silent about a trustee's ability to delegate management acts or duties, so the Court looks to other sources to determine whether Rachel breached her fiduciary duties to Plaintiff by delegating her trustee authority (but not the ultimate vote on Plaintiff's request) to Harrison. In general, a trustee must personally perform her fiduciary duties. Although trustees cannot delegate the entire administration of the trust, they can delegate the performance of certain acts. A trustee may delegate duties and powers that a prudent trustee having comparable skills could properly delegate under the circumstances. The trustee must "exercise reasonable care, skill, and caution" in selecting an agent, establishing the scope and terms of the delegation, and reviewing the agent's actions. A trustee who delegates her duties to an agent using reasonable care is not liable to a trust's beneficiaries for the agent's actions. However, the agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. Plaintiff does not identify the acts or responsibilities that Rachel allocated to Harrison, explain how Rachel "involved" Harrison in the distribution

request or the extent of his participation, or set forth the content or effect of Harrison's "erroneous and self-serving" advice. And Plaintiff recognizes that Harrison did not cast Rachel's vote for her. Because Plaintiff has not even remotely alleged the extent of Rachel's delegation to Harrison, Plaintiff fails to sufficiently plead that Rachel breached her fiduciary duties based on the same.

e. Rachel supported Harrison's drafting of the September 2023 text message. Rachel intended the text message to harm Plaintiff by interfering with her relationship with her mother and "other relatives." Although Plaintiff cites no law or other sources supporting the proposition that a trustee breaches fiduciary duties by retaliating against a beneficiary for exercising their rights under a trust, it seems sensible to allow beneficiaries to hold trustees accountable for intentionally threatening beneficiaries or discouraging them from filing lawsuits as a violation of their duty of loyalty. Defendants have not demonstrated that, as a matter of law, a fiduciary duty claim against Rachel stemming from her retaliatory conduct would not be cognizable.

f. Looking to Harrison, Plaintiff argues that he breached his own fiduciary duties and further aided and abetted Rachel's breaches of her fiduciary duties. Ohio law does not recognize a civil cause of action for aiding and abetting. So, the aiding and abetting portion of Plaintiff's claim against Harrison is dismissed. Plaintiff has not sufficiently pleaded that Harrison owed or breached any fiduciary duties. A fiduciary relationship does not emerge out of a simple familial connection. Harrison serves as a permanent member of the Hobart Advisory Council, an outside board of advisors to the trustees on matters concerning trust administration. He is not (and has never been) a Hobart Sub-Trust trustee owing duties to beneficiaries like Plaintiff. Plaintiff does not identify the trust-related tasks that Rachel allocated to Harrison, nor does she explain the level of his participation or the terms and timing of his delegation. This is particularly detrimental to Plaintiff's allegations surrounding the September 2023 text message, which Harrison drafted and sent more than a year after Plaintiff made her distribution request. Plaintiff does not assert that Rachel directed Harrison to draft the message or that Harrison was acting as Rachel's agent when he did so, such that he could be liable for breach of fiduciary duty based on retaliation. These vague and conclusory allegations do not suffice to identify the extent of any duty Harrison owed to Plaintiff.

g. Plaintiff contended that Clark, Howell, Hard, and Peter failed to protect her from Rachel and Harrison's "self-serving and malicious" actions and improperly relied on Moore's legal advice rather than exercising their own judgment or obtaining independent counsel. Plaintiff does not allege that any of these other Defendants were aware of Rachel's "self-serving and malicious" motives. True, trustees have a duty to use reasonable care to prevent a co-trustee from committing a breach of trust. But Plaintiff does not contend that these Defendants knew any more than the mere fact of Rachel's dual status as a trustee and beneficiary. Liability does not attach to a trustee merely because they are also a beneficiary. Without alleging something more, such as these Defendants' awareness of any bad faith, dishonesty, or improper motive on Rachel's part, Plaintiff's claim arising from these Defendants' alleged failure to protect her and failure to prohibit Rachel from considering her distribution request cannot proceed. The same is true for Plaintiff's attempt to hold these Defendants liable for their failure to protect her

from Harrison. Plaintiff makes much of the September 2023 text message, but Plaintiff's distribution request occurred months earlier, and Plaintiff does not allege any details about whether these Defendants even knew about the text message. Plaintiff also fails to adequately allege how Harrison influenced these Defendants at any point in the relevant period. Plaintiff has not sufficiently shown how Clark, Howell, Hard, and Peter's reliance on Moore's advice amounted to a breach of their fiduciary duties. Plaintiff does not allege, for example, how a trustee's failure to obtain secondary counsel breaches a fiduciary duty.

h. Plaintiff moved for a declaration and injunction prohibiting Moore and Rachel from participating in the trustees' future consideration of her next distribution request. Essentially, Plaintiff wants the Court to prevent Rachel and Moore from considering any of her future distribution requests. Any such declaration would necessarily be effectuated by and subsumed within the injunction. That part of this claim is dismissed.

i. Because the Court has concluded, however, that Plaintiff's breach of fiduciary duty claims against Rachel and Moore may proceed (at least in part), judgment for Defendants on what remains of this claim (e.g., Plaintiff's request for the appointment of new trustees) would be premature at this juncture.

j. Plaintiff asked the Court to declare that (1) remaindermen "do not have rights that would preclude the Trustees from making distributions of principal"; and (2) these remaindermen's rights "are contingent on the Trust continuing to exist until its latest termination date." Plaintiff requested a declaration that the trustees "are legally authorized to distribute all of the Trust's assets to the current income beneficiaries thereunder pursuant to Article III.B. of the Trust."

k. Part of Plaintiff's declaratory relief claim seeks the Court's input as to whether remaindermen's rights "are contingent on the Trust continuing to exist until its latest termination date." Plaintiff does not adequately explain, and the Court cannot discern, how a declaration to this effect would settle or clarify a controversy. This matter surrounds Plaintiff's request for "her share" of the Hobart Sub-Trust's principal. On its face, this request does not implicate the Trust's termination, and whether remaindermen's rights are connected to the termination or are contingent on the fulfillment of other specific conditions does not appear to be at issue. As such, the Court declines to exercise jurisdiction over this part of the claim. A declaration as to the other part of Plaintiff's claim regarding the effect of remaindermen's rights on distribution requests would settle the controversy and legal relations between the parties, though, so the Court will exercise jurisdiction to that extent. Looking to the merits, Defendants agree that remaindermen interests do not "automatically preclude" the trustees from making principal distributions to unidentified lineal descendants. But Plaintiff wants the Court to go a step further and determine whether the existence of remaindermen "in any way impedes" distribution requests.

l. If Plaintiff seeks a declaration that the trustees owe the remaindermen no consideration at all in deciding whether to make a principal distribution under the Trust Agreement, the Court cannot make such a declaration, as it would be contrary to law for a trustee to completely ignore a remainderman's interest. A remainderman is a type of successive beneficiary. If a trust has two or more

beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

m. In this case, the Trust Agreement permits distribution of "such part or all of the principal of [the] respective trust as a majority of the Trustees shall determine, without restriction as to purposes." But they must exercise that discretion with remaindermen in mind, and the Court sees nothing in the Trust Agreement that conveys a contrary Grantor intent. Defendants are entitled to judgment in their favor on this.

n. Plaintiff questions the trustees' authority to effectively terminate the Trust. Assuming the Court did issue such a declaration, though, it would not settle the controversy between the parties or usefully clarify any legal relations. As mentioned above, this action concerns Plaintiff's request for "her share" of the Hobart Sub-Trust's principal, which the Voting Trustees denied. Plaintiff did not ask the Voting Trustees to distribute all of the Hobart Sub-Trust's assets to the current income beneficiaries, and nothing indicates that she will do so in the future. Therefore, even if, as Plaintiff alleges, Moore advised the Voting Trustees that they were prohibited from liquidating the entire Trust, their authority to do so is not, as Plaintiff maintains, "at the heart of this dispute." The Court is not inclined to offer an advisory opinion on this issue and declines to exercise jurisdiction over this claim.

o. Plaintiff urges the Court to declare that trustees can distribute Plaintiff's "full share" of the Hobart Sub-Trust to her. But Defendants do not dispute that the Trust Agreement allows trustees to distribute Plaintiff's one-sixth portion of the principal to her. So, there is no "earnest and vital controversy" between the parties on this point to support jurisdiction.

p. Finally, Plaintiff accuses Harrison of destroying evidence. According to Plaintiff, Harrison destroyed documentation that he drafted while this action has been pending and also advised others to destroy communications that they received from him. The Supreme Court of Ohio has recognized a free-standing cause of action for spoliation of evidence. The elements of a spoliation claim are: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. Plaintiff's allegations contain just enough factual content for the Court to draw the reasonable inference that Harrison is liable for the misconduct alleged. Plaintiff alleges that Harrison destroyed "documentation" and "written communications relating to core issues" that he drafted while this case was pending; that Harrison knew about this litigation involving Plaintiff; and that Harrison willfully destroyed evidence to disrupt Plaintiff's case and "frustrat[e] discovery in this action." At this stage, the Court finds that the allegations put Harrison on notice of the grounds for all five spoliation elements.

XIII. DEBTS & CLAIMS

A. *Glass v. Delong,* 2025 Pa. Super. Unpub. LEXIS 2323 (Superior Court of Pennsylvania 2025). Decedent breached oral contract to name domestic partner as beneficiary on retirement accounts, and mutual promises are adequate consideration for the contract.

1. On November 20, 2021, Jeffrey A. George died intestate at the age of 60, survived by his longtime romantic partner, Elizabeth. His death was unexpected, as he was relatively young and in very good health, as he was an avid runner and cyclist. Decedent — previously divorced — was unmarried at the time of his death and had no known children or issue. Although unmarried, Decedent and Elizabeth enjoyed a monogamous common domestic life together, commingling assets and other financial obligations. Elizabeth is an adult resident of the Commonwealth of Pennsylvania, presently residing in a home she shared with Decedent, located in Mertztown, Berks County, Pennsylvania (the "Home"). Elizabeth and Decedent acquired the Home together in 2006 as joint tenants with the right of survivorship. In 2010, they entered into a mortgage secured by the Home, issued through RBS Citizens, N.A. ("Citizens").

2. Upon Decedent's passing, and with the assistance of a longtime friend of Decedent, William Heydt ("Mr. Heydt"), Elizabeth performed an investigation into Decedent's assets. At the time of his passing, Decedent owned several investment and retirement accounts custodied/managed by various wealth managers. Decedent placed the preponderance of his retirement and investment assets in five accounts custodied by Cetera Investment Services, LLC ("Cetera"), consisting of: (a) an Individual Retirement Account ("IRA"); (b) a Roth IRA; (c) another Roth IRA; (d) an individual investment account; and (e) a second individual investment account (collectively, the "Cetera Accounts"). Additionally, Decedent possessed: (a) a Roth IRA custodied by Franklin Templeton Investments ("Franklin Templeton") (the "Franklin Templeton Account"); and (b) a UGI Savings Plan managed by Fidelity Investments ("the Fidelity Account") (together with the Cetera Accounts and the Franklin Templeton Account, the "Retirement Accounts").

3. On December 23, 2021, Michele E. DeLong ("Ms. DeLong") initiated probate by Letters of Administration and a Short Certificate appointing her administratrix of the Estate. At or around that time, while investigating Decedent's retirement assets and investments, Elizabeth and Mr. Heydt learned that Decedent failed to execute designations naming a beneficiary on the Retirement Accounts. Because Decedent failed to complete/execute the appropriate designations, the Estate, by and through Ms. DeLong, identified the Retirement Accounts as probate assets of the Estate subject to intestate distribution in accordance with the Pennsylvania Probate, Estates, and Fiduciaries ("PEF") Code. By law of intestacy, Ms. DeLong, as Decedent's sole surviving sibling, is the sole beneficiary.

4. Elizabeth sued, claiming Cetera had wrongfully withheld payment of the Cetera Accounts. Cetera filed a Petition for Interpleader, seeking to pay the disputed funds into court and to join the Estate as a party. The Estate and Cetera entered into Stipulation that, among other things: (1) liquidated the disputed Cetera Accounts into a money market account, without distribution pending further order of court as to proper ownership; (2) removed Cetera as a named party to the Civil Matter; and (3) joined the Estate as an interpleaded claimant.

5. In the absence of a properly completed designation of beneficiary form, Fidelity delivered funds from the UGI Savings Plan, ($480,549.17) to the Estate by check dated February 24, 2022, subject to a Confirmation as Beneficiary and Release from Later

Claims. Proceeds from the Franklin Templeton Account (the most recent value totaling $99,114.70 as of an Asset Summary Statement for period January 1, 2001 to September 30, 2021) remain undistributed and subject to a determination as to proper ownership.

6. Elizabeth petitioned seeking title to the Retirement Accounts, together with a declaration that she is entitled to reimbursement of 50% of the amounts paid on the Mortgage from the date of Decedent's death to the present, and 50% of the ongoing payment obligations to Citizens Bank until such time as the Mortgage is satisfied.

7. In her Petition, Elizabeth claimed title to the disputed Retirement Accounts pursuant to an oral agreement between Elizabeth and Decedent whereby each agreed to transfer her/his respective policies of insurance, retirement accounts, and other investment assets to the other upon death (the "Agreement"). Under this Agreement, Elizabeth named Decedent as beneficiary on all insurances/retirement accounts, executing the proper designations of beneficiary and TOD forms, with specific reference at times to Decedent being her "domestic partner." Elizabeth was, therefore, surprised to learn upon Decedent's passing that he failed to prepare and execute the necessary forms to effectuate his mutual designations.

8. Important to this dispute, Decedent had very recently prior to his death transferred much of his accumulated wealth into new Cetera-managed accounts. Emails from that time between Decedent and his investment representative at Cetera, Gina Katrinak ("Ms. Katrinak"), are consistent with his intent to name Elizabeth as his beneficiary on his Cetera Accounts. In at least one instance, Decedent "parked" a substantial amount of money in a temporary account for a period of approximately one week, designating Elizabeth as his beneficiary on the temporary account, but when those assets were transferred to its final account destination, Decedent's designation did not carry over. A Retirement Analysis prepared by Fidelity approximately five years prior to Decedent's death addressed their mutual retirement goals, with consideration of, among other things, collective assets and sources of income, including their respective Social Security payments and defined employer benefits.

9. At some point after Elizabeth and Decedent purchased the Home in 2006, but prior to Spring 2021, Decedent informed Mr. Heydt that Decedent and Elizabeth entered into a bilateral agreement to name one another beneficiaries of their respective retirement and investment accounts. Mr. Heydt faithfully recounted Decedent's words (in sum and substance): "[y]eah, … '[t]hats our agreement' … '[s]he's named on all of [my retirement accounts]; and I'm named on all of hers.'" In a separate conversation occurring in the Spring of 2021 — approximately 18 months prior to his death, and several weeks after depositing more than $600,000.00 in proceeds from a rollover of his 401(k) to Cetera (Account No. XXXX5393) — Decedent again informed Mr. Heydt that Elizabeth was his "beneficiary on everything." Mr. Heydt remembered the conversation clearly, with attention to the specific circumstances giving rise to the discussion, explaining Decedent was late to meet Mr. Heydt for a bike ride because he had just dropped off documents with his financial planner (Cetera) earlier that day.

10. Mr. Heydt asked Decedent about leaving some of his assets to Ms. DeLong, to which Decedent replied: "no, Ms. DeLong and her husband are fine. They have plenty of money." When Mr. Heydt asked Decedent why he did not simply marry Elizabeth, Decedent explained that he was not in any rush, explaining: "I'm taken care of, you know, that's why I have her on my [retirement] accounts and she puts me on hers." Ms.

Katrinak, who managed Decedent's Cetera accounts, explained that it was her understanding they were "basically married" except for a "marriage certificate and an IRS tax credit."

11. In August 2021, Decedent delivered his second tranche to Cetera via check and executed the required forms to facilitate the deposit, including an application where he identified Elizabeth as his domestic partner and designated her as his 100% beneficiary. On August 12, 2021 (after delivering his second check), Decedent exchanged emails with Ms. Katrinak at her Cetera email account address in which Decedent asked Ms. Katrinak if she needed anything further from him to accomplish their plans for the additional rollover, to which she responded "nothing else needed!"

12. From that point onward, there was no further discussions regarding the documents submitted on August 6, 2021, nor were there any communications regarding the beneficiary designation.

13. Cetera's initial application for an IRA account type specifically includes a section for identifying a beneficiary. In the instance of an individual or other investment account, however, an account holder must designate a beneficiary by separate form. She also indicated that any change in designation following an initial account application must be accomplished by submitting a prescribed beneficiary designation form. Ms. Katrinak expressed that, upon learning of Decedent's death, she was surprised to learn that Elizabeth was not the identified beneficiary on Decedent's Cetera Accounts. Instead, the initial Cetera application purported to name "Jeffrey George Estate" as 100% beneficiary. Had Decedent inadvertently left the designation blank in his initial application, it would have resulted in the Estate being named beneficiary by default.

14. In email communications with Decedent from November and December 2020, Decedent expressed his desire to change the beneficiary after his initial cash deposit, but did not specifically nominate a beneficiary. Ms. Katrinak admitted that administrative mistakes can happen when processing forms such as beneficiary designations. Decedent's designation identifying Elizabeth as his "domestic partner" and 100% beneficiary was not provided to Cetera notwithstanding that Ms. Katrinak, as Decedent's Cetera agent, gave him the form to initiate the funding. In any event, Ms. Katrinak stated that, had the information Decedent populated on the application been on Cetera's prescribed form, she would have had a duty to supply it to Cetera and it would have been sufficient to prompt Cetera to make sure its records identified Elizabeth as Decedent's beneficiary. Cetera's agent had this information on Decedent's most recent beneficiary designation identifying Elizabeth, but Cetera's home office, because it's not the right form, didn't get this information.

15. Ms. DeLong knew little about Decedent's financial affairs during his life. Decedent never discussed these things with his sister and was a private man.

16. The court found that Decedent's designation naming the Estate as beneficiary happened by default resulting from an omission, and Decedent submitted a completed designation of beneficiary in or around December 2020 designating Elizabeth as beneficiary on the Cetera Accounts. Decedent made the designation on a document that an agent of Cetera provided to him and it would, therefore, be reasonable for any individual to believe that it served to make a designation or confirm an existing one. The court concluded that Elizabeth entered into the valid and enforceable bilateral Agreement

with Decedent, supported by substantial consideration in the form of mutual obligations, requiring that the parties execute all documentation required to identify one another beneficiaries on their respective retirement accounts. As a direct result of Decedent's breach, Elizabeth suffered money damages in amounts equal to the proceeds of each of the foregoing Retirement Accounts.

17. Ms. DeLong and the Estate appealed, and the superior court affirmed on the following grounds:

a. Chapter 27 of the PEF Code concerns contractual arrangements relating to succession. The court has only applied and interpreted Section 2701 in unpublished decisions, all of which involve provisions within wills or contracts to revoke or not to make wills. There is no authority where Section 2701 was applied to an oral agreement to name beneficiaries for retirement or investment accounts. Rather, Section 6409 of the PEF Code, concerning nontestamentary transfer of property, applies to the agreement between Elizabeth and Decedent.

b. This case involves claims against a decedent's estate based on an oral contract, and the existence and terms of an oral contract must be established by clear, precise and indubitable evidence. Pennsylvania courts have held that claims based on an oral contract against a decedent's estate must meet a high evidentiary standard, and the evidence in support of finding an enforceable agreement must be "clear, precise and indubitable." Because the claim concerns an oral contract against the Decedent's estate, the heightened standard of review applies. However, because the trial court applied the heightened standard, Appellants' second issue merits no relief.

c. The evidence is more than sufficient to establish the existence of an oral contract. The contractual terms, simple as they are, are well defined: Elizabeth would designate Decedent as her beneficiary on all non-probate retirement assets, and Decedent would do the same. These mutual promises plainly constitute adequate consideration. Further, the parties could only fulfill their obligations by executing the appropriate documents required by their respective financial custodians during their lives. Here, the instant agreement concerned actions that Decedent and Elizabeth would undertake during their lives and does not involve any promises either to make or not to revoke a will. As part of the agreement, Elizabeth and Decedent bargained for and agreed upon consideration, that in exchange for Elizabeth naming Decedent as her primary beneficiary on her accounts, Decedent would likewise name Elizabeth as his primary beneficiary. It is also clear that the mutual promises of naming one another as beneficiaries was bargained for as the exchange for the promise.

B. *In re Est. of Franklin,* 2025 N.J. Super. Unpub. LEXIS 1887 (Superior Court of New Jersey, Appellate Division 2025). Beneficiaries or successors of an estate cannot avoid satisfying child support liens simply by agreeing to transfer their share of estate proceeds to others.

1. Geraldine Franklin died intestate in 2015, leaving three surviving adult children: Louise Richardson (née Soden) ("Soden"), Anthony DeFazio, and Kelly Ann Bell. The court appointed Joel A. Davies, Esq., of the Law Offices of Taff, Davies and Kalwinsky, to represent the estate as administrator.

2. After several years of litigation, all three successors agreed to settle the estate matter and memorialized their agreement in writing. The written agreement, styled as a Settlement Agreement and Stipulation for Dismissal, provided in pertinent part: "Anthony DeFazio and Kelly Ann Bell agree between themselves that Kelly Ann Bell will honor the promises made to Geraldine Franklin and provide the additional money promised to Anthony DeFazio and will repay the loans made by Anthony DeFazio to Kelly Ann Bell in the past ten years by transferring 100% of her share of the Estate to Anthony DeFazio. This agreement does not affect Soden … wherein Anthony DeFazio agrees not to pursue any legal action against Kelly Ann Bell for ALL loans that have been provided to her and that her debt to Anthony DeFazio shall be deemed paid in full and any remainder amount of money owed which is not covered by Kelly Ann Bell's entire share of the estate shall be forgiven as if they were paid in full."

3. The Agreement also provided for a $10,000 payment to Samantha Orlen, Bell's daughter. All three siblings signed the Agreement and submitted it along with a "Stipulated Order" to the court for approval.

4. The court modified the accompanying stipulated order by adding the following language: "Kelly Ann Bell must satisfy her outstanding child support obligation before the administrator can honor the agreement. … Prior to final distribution, Ms. Bell shall provide the personal identifying information of the lien recipients to the Administrator, so he can verify and satisfy the lien on her inheritance."

5. In a separate attached statement of reasons, the court stated: "A successor's ability to make an agreement to alter their shares of an estate … is subject to the satisfaction of any outstanding child support lien … a child support obligation cannot be evaded by an agreement between successors of an intestate estate to alter the interests to which they are entitled when a child support judgment is in place."

6. On appeal, the appellate division affirmed on the following grounds:

> a. Plaintiff challenged the court's authority to modify the stipulated order, requiring Bell to satisfy her outstanding child support obligation prior to distribution of the estate.
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> b. The Judgment for Child Support Lien Act ("Act") provides: "The lien shall have priority over all other levies and garnishments against the net proceeds of any settlement negotiated prior or subsequent to an inheritance unless otherwise provided by the Superior Court, Chancery Division, Family Part. … The lien shall stay the distribution of the net proceeds to the prevailing party or beneficiary until the child support judgment is satisfied. … As used in this act, "net proceeds" means any amount of money, in excess of $2,000, payable to the prevailing party or beneficiary after attorney fees, witness fees, court costs, and other costs related to the lawsuit, inheritance or settlement are deducted from the award, proceeds or estate."
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> c. The Act unquestionably grants priority to child support liens over "all other levies" and stays the distribution of net proceeds to the prevailing party or beneficiary until the lien is satisfied. There is no support for plaintiff's proposition the court erred in its exercise of discretion to modify the Agreement or its interpretation and application of the law.

d. It is irrelevant that plaintiff and Bell agreed to redistribute their intestate shares of the estate. The court appropriately relied on the explicit language of the Act and the applicable case law to conclude that the child support lien against successor Bell must be satisfied, despite the beneficiaries' contrary agreement. There is no legal basis for plaintiff's argument that beneficiaries or successors of an estate can avoid satisfying child support liens simply by agreeing to transfer their share of estate proceeds to others.

e. Moreover, adopting plaintiff's interpretation of N.J.S.A. 3B:23-9 would generally undermine the rights of children to child support, which runs counter to fundamental principles of long-standing jurisprudence. As the court stated, "the right to child support belongs to the child and may not be waived by a custodial parent" and "even two parents cannot waive or terminate their duty to support a child by settlement agreement." It is therefore well-settled that a child's right to financial support from the child's parents is a paramount interest that outweighs an estate beneficiary's right to alter distribution.

f. Here, where a child support judgment has been entered, there is no support for the proposition that a duly entered judgment and lien may be avoided, even by agreement.

g. The term "net proceeds" is not ambiguous. The term "net proceeds" does not demarcate the timing of a distribution, as plaintiff contends. Rather, the statute's use of the term "net proceeds" has been interpreted to mean that "the automatic lien … is against only that portion of a party's settlement, after deduction of litigation costs, which exceeds $2,000. The lien simply does not apply to the first $2,000."

C. ***Walker v. Ga. Dep't of Human Servs.*, 2025 Ga. App. LEXIS 460 (Court of Appeals of Georgia, Fifth Division 2025).** Ante litem notice requirements before filing a tort claim against state are not tolled during period prior to appointment of estate administrator.

1. This case involves the tragic death of a 33-day-old infant in foster care. The foster mother, an employee of the Georgia Department of Human Services ("DHS"), allegedly rolled over on the baby and smothered her when they were asleep in the same bed. The infant's natural parents, Jennifer and Antonio Walker, and Jennifer as the administrator of the infant's Estate ("Plaintiffs"), sued DHS to recover damages for wrongful death, the infant's pre-death pain and suffering, and funeral expenses. The trial court dismissed the case based on sovereign immunity due to Plaintiffs' failure to comply with the ante litem notice requirement of the Georgia Tort Claims Act ("GTCA"). Plaintiffs filed a timely notice of appeal.

2. The infant was born on September 18, 2021, and the next day, she was removed from her parents' custody and placed in foster care. Sadly, on the morning of October 21, 2021, the infant died, and DHS notified her natural parents of the death later that day. A medical examiner conducted an autopsy and determined that the infant's death was an accident. The medical examiner also determined that the cause of death was asphyxia due to obstruction of the infant's airway while "co-sleeping." On December 20, 2021, a death certificate was issued for the infant, which is when the natural parents learned the results of the autopsy.

3. The Lamar County Probate Court issued Letters of Administration to Jennifer Walker as the administrator of the infant's Estate. Four days later, a law firm retained to represent Jennifer in her capacity as the administrator of the Estate sent a notice of the Estate's claim for damages for wrongful death, the infant's pre-death pain and suffering, and funeral expenses to the Risk Management Division of the Georgia Department of Administrative Services ("DOAS") and a copy to DHS, both by statutory overnight delivery. Seven months later, within the GTCA's two-year statute of limitation — Plaintiffs filed a complaint against DHS alleging causes of action for negligence and wrongful death. Plaintiffs amended their complaint on December 8, 2023, and February 21, 2024. On April 2, 2024, DHS filed a motion to dismiss Plaintiffs' second amended complaint.

4. The trial court entered an order granting DHS's motion to dismiss based on sovereign immunity due to Plaintiffs' failure to comply with the GTCA's 12-month ante litem notice requirement. As relevant here, the court found that the infant died and that the Walkers were notified of the death on October 21, 2021, but that Jennifer did not send DOAS and DHS a notice of the Estate's claim until 16 months later, on February 21, 2023. The court rejected the argument that Jennifer could not give notice of the Estate's claim until after the probate court appointed her as the Estate's administrator, pointing to the provision of the Revised Probate Code that says that an administrator's powers "commence upon qualification" but "relate back to give . . . effect" to pre-qualification acts "that are beneficial to the estate."

5. Plaintiffs appealed and the court of appeals affirmed the dismissal on the following grounds:

> a. The GTCA waives the State's sovereign immunity against tort claims but only if the requirements of the GTCA are met. First, the GTCA establishes a two-year statute of limitation for bringing tort claims against the State or any of its departments. All provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code, shall apply to causes of action brought pursuant to the GTCA. Second, the GTCA establishes a 12-month ante litem notice requirement: "No person . . . having a tort claim against the state under the GTCA shall bring any action against the state upon such claim without first giving notice of the claim as follows: Notice of a claim shall be given in writing within 12 months of the date the loss was discovered or should have been discovered."
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> b. The GTCA defines the word "person" broadly to mean any "natural person, corporation, firm, partnership, association, or other such entity." To be effective, the ante litem notice must be sent "by certified mail or statutory overnight delivery, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services," and a copy must be "delivered personally to or mailed by first-class mail to the state government entity" being sued. Compliance with the 12-month ante litem notice requirement is mandatory and jurisdictional. No action against the state under the GTCA shall be commenced, and the courts shall have no jurisdiction thereof, unless and until a written notice of claim has been timely presented to the state as provided in this subsection. Unlike the tolling of the limitations period to bring tort claims under the GTCA, there is no reference to the possibility of "tolling" — or otherwise extending — the 12-month ante litem notice period.

c. Contrary to Plaintiffs' claim, the Estate was not "created" on February 17, 2023, when the probate court appointed Jennifer Walker as administrator for the infant's Estate, nor was the Estate "established" by the probate court's order. To the contrary, the infant's Estate came into existence the moment she died on the morning of October 21, 2021. Under Georgia law, a decedent's estate comes into existence automatically when the decedent dies. A decedent's estate exists independently of, and prior to, the appointment of an administrator.

d. As relevant here, OCGA § 9-3-92 says: "The time between the death of a person and the commencement of representation upon his estate . . . shall not be counted against his estate in calculating any limitation applicable to the bringing of an action, provided that such time shall not exceed five years. At the expiration of the five years, the limitation shall commence, even if the cause of action accrued after the person's death."

e. According to Plaintiffs, the GTCA's 12-month ante litem notice requirement fits the description of "any limitation applicable to the bringing of an action," and OCGA § 9-3-92 therefore requires that the time from the infant's death on October 21, 2021, to Jennifer Walker's appointment as administrator of the infant's Estate on February 17, 2023, "not be counted against [the Estate] in calculating" whether the Estate timely sent its ante litem notice. However, as the trial court correctly recognized, the ante litem notice requirement is not a statute of limitation, and therefore the Code's statutory tolling provisions do not apply to the GTCA's 12-month ante litem notice period. The Georgia Supreme Court reiterated this holding in 2025. Moreover, unlike the GTCA's two-year statute of limitation for bringing tort claims against the State, the 12-month ante litem notice requirement does not mention the "provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code," much less say that those tolling provisions apply to the GTCA's ante litem notice period.

XIV. SITUS, FORUM SELECTION, JURISDICTION, & VENUE

A. *Craighead v. Nessel,* 2025 U.S. Dist. LEXIS 47368; 2025 LX 197990; 2025 WL 815932 (United States District Court for the Eastern District of Michigan 2025). IRS has primary authority to interpret the Internal Revenue Code, but that does not mean state probate courts lack jurisdiction over the internal affairs of nonprofit corporations. The state's enforcement of charitable trusts initiated an action by the attorney general on behalf of the people in order to sanction the federal plaintiff for some wrongful act is a state-initiated civil enforcement proceeding subject to *Younger* abstention.

1. Prior to this federal suit, the Attorney General and Assistant Attorney General of Michigan (jointly "the AG") investigated Plaintiff Safe Place Transition Center Inc. ("Safe Place") for its alleged failure to meet the state's reporting requirements for charitable trusts.

2. Plaintiff Mark Craighead ("Craighead") is Safe Place's president, treasurer, secretary, and registered agent. After Craighead proved unwilling to answer the AG's questions in its investigation, the AG filed a petition in Wayne County Probate Court alleging that: (1) Craighead and Safe Place failed to provide information and documents required by law; (2) Craighead used Safe Place as a straw man to purchase and hold real estate for a friend; (3) Safe Place has failed to maintain its tax-exempt status; and (4) its officers and directors

have breached their fiduciary duties of care and loyalty. The AG requested that the probate court exercise limited supervision of Safe Place; appoint a special fiduciary; and order an accounting, registration, and the filing of annual statements. The AG also asked that the probate court disregard the corporate entity and hold Craighead personally liable if Safe Place failed to properly account.

3. Rather than raising his federal claims in opposition to the state's petition in state court, Craighead sought removal to federal court and raised his federal claims there, but the court remanded the case for lack of subject-matter jurisdiction. When Craighead's attempt to remove the case failed, he filed a parallel federal complaint. In it, he alleged constitutional claims. Craighead describes himself as the president and director of Safe Place Transition Center — a "nonprofit organization that provides housing assistance to formerly incarcerated individuals and veterans in the Detroit area." He alleges that defendants launched an unlawful campaign of harassment and intimidation against him with: (1) warrantless surveillance; (2) unlawful contact with Safe Place tenants to "dig up potentially damaging information about him and his organization"; (3) the misuse of authority to falsely accuse him of mismanaging Safe Place; and (4) filing "a fraudulent petition on behalf of the Michigan Department of the Attorney General" against him and Safe Place in the Wayne County Probate Court to deprive him of his civil rights and property interests. Craighead also claims that defendants committed civil RICO violations and conspired to interfere with his civil rights in violation. And he brings a Fourth Amendment claim, a First Amendment retaliation claim, a substantive due process claim, and an equal protection claim. Craighead requests compensatory and punitive damages and injunctive relief.

4. The Magistrate Judge found that this is a typical case warranting federal abstention under *Younger v. Harris*. The federal district court accepted the magistrate's report and stayed the case on the following grounds:

> a. All three *Younger* conditions are met, and no exceptions apply. Craighead filed this action while there was a state-initiated proceeding pending in state probate court, the state of Michigan has an important interest in the supervision of charitable trusts, and Craighead has adequate opportunities to raise his federal claims in the state proceedings.
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> b. Exceptions to *Younger* exist only in the very limited circumstances when a plaintiff shows they are subject to repeated harassing state prosecutions, flagrant constitutional violations, or demonstrate extraordinary need for immediate equitable relief, but none of those situations are presented here.
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> c. Finally, while federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary, it may not do so in a common-law action for damages. Instead, the court must stay the damages claim pending the outcome of the state court proceedings. Craighead's complaint includes a request for injunctive relief and damages, and so should be stayed rather than dismissed entirely.
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> d. The argument that federal courts have a compelling interest in ensuring that such organizations are not subjected to unconstitutional state interference ignores the premise behind *Younger* abstention: federal courts should not interfere with certain legitimate activities of the states, even if federal interests are implicated.

e. The argument that the probate court lacks jurisdiction over the internal affairs of a 501(c)(3) entity, and that the IRS has total control over 501(c)(3) entities, is incorrect — the IRS has primary authority to interpret the Internal Revenue Code, but that does not mean state probate courts lack jurisdiction over the internal affairs of nonprofit corporations.

f. Plaintiffs incorrectly argue that Michigan's Supervision of Trustees for Charitable Purposes Act governs charitable trusts, not nonprofit corporations (like Safe Place) organized under 501(c)(3). Any corporation, or other legal entity holding property for any charitable purpose, qualifies as a "trustee" of a charitable trust under Michigan law. Relatedly, Plaintiffs' claim that Michigan probate courts do not have jurisdiction over corporate governance issues is incorrect. The probate court has exclusive jurisdiction over the internal affairs of corporations created to administer trusts. Thus, Plaintiffs have not shown that the probate court lacks jurisdiction over Safe Place's affairs as a charitable trust. Regardless, for purposes of determining whether *Younger* abstention applies, the point is tangential. Plaintiffs have offered no basis why they would be unable to make those state-law arguments in state court.

g. State courts have concurrent jurisdiction to consider civil claims arising under RICO. And Plaintiffs still do not cite any authority for the proposition that the state probate court lacks the authority to consider, or provide remedies for, Plaintiffs' constitutional arguments. Plaintiffs have thus not met their burden to explain why they would not be able to raise their federal arguments in state court, which is presumed to have concurrent jurisdiction over those claims.

h. After applying *Younger* and deciding to abstain, a district court may not exercise its discretion to decide whether to dismiss the case; instead, the district court must stay the damages claim pending the outcome of the state court proceedings.

i. Plaintiff's claim that *Younger* abstention applies only in three "exceptional circumstances" — ongoing state criminal prosecutions, certain civil enforcement proceedings akin to criminal prosecutions, and civil proceedings necessary for state courts to perform judicial functions — ignore that middle category, which is most commonly applied to suits initiated by the state in its sovereign capacity. The state's enforcement of charitable trusts initiated in an action by the attorney general on behalf of the people in order to sanction the federal plaintiff for some wrongful act is a state-initiated civil enforcement proceedings subject to *Younger* abstention.

j. The Magistrate Judge carefully considered, and rejected, each exception to the *Younger* abstention doctrine. Plaintiffs argue that the irreparable harm exception also applies because Plaintiff may eventually be held personally liable and the Safe Place nonprofit may be dissolved. To justify federal intervention over a state enforcing its statutes in state court, a party must show special circumstances of irreparable harm beyond the normal incidental harms that arise from court proceedings. Plaintiffs have failed to show why a finding of Craighead's personal liability or the mere application of state statute would establish irreparable harm justifying federal intervention, or why the Magistrate Judge's finding on this point was wrong.

k. Plaintiffs' final objection, somewhat confusingly, argues that the Magistrate Judge erred by recommending a "complete" stay because a court "should stay rather than dismiss accompanying claims for damages." That is exactly what the Magistrate Judge recommended, so the objection is accordingly overruled.

B. *Dave v. 2012 Bobby Shah Irrevocable Trust*, 2025 U.S. Dist. LEXIS 766; 2025 LX 153789; 2025 WL 26706 (United States District Court for the District of Arizona 2025). Action for money damages is in personam and not subject to dismissal for lack of jurisdiction.

1. This case arises from an alleged scheme by Bobby Shah ("Shah"), co-trustee of the Trust, to move the Trust and shield assets from Dave. Dave and Shah were married but are now in divorce proceedings. In 2012, while they were still together, Shah formed the Trust with its situs in Arizona for the benefit of his spouse and their children. Shah initially named Dave the trustee of the Trust. Shah named Arjav Shah ("Arjav") the Trust Protector.

2. A decade after its formation, Arjav and Shah allegedly took steps to move the Trust situs and ensure a South Dakota court would assume supervision of the Trust. First, Shah removed Dave as a trustee and appointed Arjav in her stead. Pursuant to his authority as Trust Protector, Arjav appointed Shah as the sole successor trustee of the Trust. Arjav later appointed Michael Wright, a South Dakota resident, as co-trustee of the Trust.

3. In November 2022, Shah created a South Dakota company called Overwatch LLC ("Overwatch") and made the Trust the owner. Shah named himself manager of Overwatch. Overwatch is the Trust's primary asset. In the same month, he transferred membership interests of two Arizona companies — which Dave alleges were marital property — to the Trust without Dave's consent. Since at least 2022, the Trust's records have been kept in South Dakota; tax returns on its behalf are prepared, reviewed, and signed in South Dakota; and annual reports for Overwatch LLC have been prepared and filed in South Dakota. By making these changes, Arjav and Shah were able to move the situs of the Trust to South Dakota.

4. Shah and Wright filed a petition "for court supervision and sealing of court file" ("Petition") in a South Dakota state court on February 6, 2024. The Petition included an inventory of the Trust assets, a copy of the governing Trust instrument, and a statement of interested parties. A copy of the Petition and its attachments were served on Dave. Dave received notice of the hearing scheduled for the Petition. The South Dakota court held the hearing and entered an order confirming the court's supervision. Neither Dave nor any attorney on behalf of Dave appeared at the hearing or filed any objection to the Petition. A notice of entry of the order was mailed to Dave, and Shah filed the judgment with the Mohave County Superior Court.

5. Two days after the South Dakota state court issued its order, Dave filed the present suit. Dave brings three counts against the Trust: (1) aiding and abetting Shah's breach of fiduciary duty; (2) intentional fraudulent transfer; and (3) constructive fraudulent transfer. The second and third claims are brought under the Uniform Fraudulent Transfer Act ("UFTA"). The Trust moved to dismiss for lack of subject-matter jurisdiction.

6. While the Trust's motion to dismiss was pending, Shah filed a petition in the South Dakota court to determine beneficiaries and interested persons of the Trust and to obtain approval of the Trust's inventory and accounting ("Second Petition"). A copy of the Second Petition was mailed to Dave. Dave received several notices of the hearing

scheduled for the Second Petition. The court held the hearing in June. Neither Dave nor any attorney on behalf of Dave appeared at the hearing or filed any objection to the Second Petition. The court entered an order after the hearing, concluding that Dave was neither a beneficiary nor an interested party to the Trust and that no transfer to the Trust was fraudulent. The Trust notified the court of the South Dakota court's decision. Shortly thereafter, Dave filed a "Motion for Partial Summary Judgment re: Non-Preclusive Effect of South Dakota State Court Orders," asking this Court to rule that Dave is not bound by the South Dakota court order and that the decision has no preclusive effect on this case.

7. The court refused to dismiss the suit for lack of jurisdiction on the following grounds:

a. The Trust levies a factual attack on subject-matter jurisdiction. In support of a factual subject-matter attack pursuant to Rule 12(b)(1), the moving party may submit affidavits or any other evidence properly before the court. And the Court may properly consider that evidence without converting the motion to dismiss into a motion for summary judgment.

b. Though federal courts are courts of limited jurisdiction, where jurisdiction exists, federal courts have a virtually unflagging obligation to exercise it. Generally, state and federal courts should not interfere with or restrain each other's proceedings. But where a court has custody of specific property, that court has prior exclusive jurisdiction over all in rem or quasi in rem proceedings against that property. The question of whether the prior exclusive jurisdiction doctrine applies turns on what, precisely, is at issue in the state and federal court proceedings. If both courts exercise either in rem or quasi in rem jurisdiction, then the courts may be simultaneously exercising jurisdiction over the same property, in which case the prior exclusive jurisdiction doctrine applies and the district court is precluded from exercising jurisdiction over the res.

c. An action is in rem where it determines interests in specific property as against the whole world. An action is quasi in rem where the parties' interests in the property serve as the basis of the jurisdiction for the parallel proceedings. On the other hand, where the relief sought is a money judgment only, the action is in personam. In personam actions enforce a personal liability or establish a debt or a right to share in property, and thus obtain an adjudication that might be had without disturbing control of the state court.

d. Actions to "administer trusts" are in rem. The nature of the suit in South Dakota, which deals with all aspects of administration of the Trust, is in rem. Characterization of an action as in rem or in personam requires the Court to examine all aspects of the cause of action: the form of the action, as well as the parties involved and the remedies sought. Here, Dave seeks both compensatory damages and equitable relief from the Trust. Though the transferee is an appropriate defendant in a fraudulent transfer action, it is apparent from the Complaint that it is Shah, not the Trust, who performed the fraudulent transfers. That Dave is pursuing an action against the Trust suggests that she wants to retrieve specific assets from it. And, as the Complaint's request for relief reads, Dave seeks an order rescinding the fraudulent transfer of marital community assets to the Trust as alleged herein and avoiding such transactions. Ordering the Trust to return specific assets to Dave would (1) require the Court to exercise

control over property that is not within its territory and (2) disrupt the South Dakota court's control of the Trust.

e. Money, unlike an identifiable piece of property, is fungible. The Complaint requests money damages as an alternative or in addition to return of specific property. A final judgment finding that the Trust is liable to Dave for the value of the assets she lost establishes the Trust's personal liability and is thus in personam. Because Dave could obtain complete relief with money damages, this is an in personam action.

f. Dave's motion for partial summary judgment asks the Court to declare that the South Dakota state court order has no preclusive effect. The motion is premature. The Trust merely notified the Court of the South Dakota decision; it has not raised the defense. The Court will not decide the preclusive effect of the judgment until the issue is ripe for adjudication.

C. *Donald v. Bank of Am., N.A.,* 2025 U.S. Dist. LEXIS 149858 (United States District Court for the Eastern District of Pennsylvania 2025). The probate exception to federal diversity jurisdiction precludes federal court jurisdiction over claims for unpaid trustee commissions and excessive legal fees.

1. This is a pro se civil action arising out of Defendant Bank of America's purported mismanagement of two New York trusts. Plaintiff Williamson Pell Donald contends that the bank breached its fiduciary duty by (1) failing to facilitate his timely judicial appointment as successor trustee of one of the trusts, and (2) incurring excessive legal fees in administering the trusts.

2. For sixty years, Bank of America has served as corporate trustee of two New York trusts: a 1962 testamentary trust created under the Will of Vida K. Pell (Plaintiff's grandmother) and a 1964 inter-vivos trust, also created by Vida Pell. Plaintiff is a one-sixth discretionary income beneficiary of the trusts, both of which have been under the supervision of the Surrogate's Court of Westchester County (the "Surrogate's Court") for nearly six decades.

3. Following the death of Vida Pell in 1967, her Will was admitted to probate, with Williamson Pell Jr. (Plaintiff's uncle), Norman H. Donald, III (Plaintiff's brother), and Bank of America (then the United States Trust Company) serving as co-trustees of the testamentary trust. After Williamson Pell Jr. died in 1972, successor letters of trusteeship were issued to Plaintiff's cousin, Angie Pell. Norman Donald III served as co-trustee with Angie Pell until Donald III's death in July 2018.

4. On February 19, 2025, the Surrogate's Court appointed Plaintiff as successor trustee of the testamentary trust, approved Bank of America's resignation as corporate trustee of both trusts, and appointed First State Trust Company as successor corporate trustee of both trusts. On June 5, 2025, Bank of America petitioned the Surrogate's Court for the judicial settlement of the bank's intermediate accounts. These accounting proceedings remain pending.

5. Plaintiff contended that Bank of America, as corporate trustee, breached its duty to timely secure his judicial appointment as successor trustee of the testamentary trust following Norman Donald III's death in July 2018. He pointed to language in the trust providing: "Should Norman H. Donald, III, fail to qualify or cease to act as such Executor

and Trustee, I nominate and appoint my grandson, Williamson P. Donald, as such Executor and Trustee." Plaintiff also asserted that Bank of America incurred excessive legal fees in connection with its administration of the trusts, thereby reducing his one-sixth discretionary income interest. Plaintiff seeks "not less than $100,000 trustees' fees plus interest" based on his delayed appointment, a $300,000 reimbursement to the trusts based on the bank's excessive payments to legal counsel, and $10 million in punitive damages.

6. Defendant moved to dismiss for lack of subject-matter jurisdiction, which the federal district court granted on the following grounds:

a. Plaintiff's claims fall outside the scope of federal-question jurisdiction. Plaintiff's claims sound entirely in state tort law — specifically, common law breach of fiduciary duty.

b. It appears that Plaintiff is attempting to invoke federal-question jurisdiction by alluding to Title 12 of the FDIC regulations, which "set[s] forth the standards that apply to the fiduciary activities of national banks." The Third Circuit has held that 12 U.S.C. § 92a — the primary statute authorizing 12 C.F.R. § 9 - does not create a private right of action. Accordingly, there is no basis for federal-question jurisdiction.

c. The probate exception precludes the exercise of federal diversity jurisdiction. Plaintiff did not invoke diversity jurisdiction in his Complaint, but the court took judicial notice that the requirements of the federal diversity statute are nominally satisfied: Mr. Donald is domiciled in Pennsylvania, Defendant Bank of America is a citizen of North Carolina, and the amount in controversy exceeds $75,000. Nevertheless, the probate exception prohibits my exercise of jurisdiction because the judgment Plaintiff seeks would require this Court to assume control over property under the active supervision of the Surrogate's Court.

d. Under the probate exception, federal courts lack jurisdiction over the probate or annulment of a will and the administration of a decedent's estate and may not "dispose of property that is in the custody of a state probate court. The probate exception precludes federal courts from endeavoring to (1) probate or annul a will, (2) administer a decedent's estate, or (3) assume in rem jurisdiction over property that is in the custody of the probate court.

e. The trusts at issue are within the custody of the Surrogate's Court. The New York Constitution vests the state's surrogate's courts with jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, and administration of estates, and authorizes the courts to exercise such equity jurisdiction as may be provided by law. Pursuant to the jurisdiction conferred upon it by the New York Constitution and by statute, the Surrogate's Court of Westchester County has supervised the trusts at issue here for nearly six decades. In 1967, the Surrogate's Court admitted Vida Pell's Will to probate and issued Letters of Trusteeship to the trustees named in the Will. Five years later, the court issued Successor Letters of Trusteeship to Angie Pell with respect to the testamentary trust. The following year, the court judicially settled and approved the trustees' first intermediate account for the testamentary trust. In the early 2000s, the court judicially settled and approved the trustees' second

intermediate account for both trusts, and approved the settlement of a dispute regarding a beneficiary's rights under both trusts. In 2025, the court approved Bank of America's resignation as trustee of both trusts, appointed First State Trust Company as successor trustee, and appointed Plaintiff as successor trustee of the testamentary trust. On June 5, 2025, Bank of America petitioned the court for the judicial settlement of the bank's intermediate accounts. These proceedings remain pending. The Surrogate's Court of Westchester County has exercised supervisory control over the trusts for nearly sixty years — and continues to do so. This level of sustained activity is sufficient to place the trusts within the custody of the state probate court.

f. Plaintiff's claim for trustee commissions due to Bank of America's purported failure to timely appoint him as successor trustee is barred by the probate exception. Plaintiff's claim for unpaid trustee commissions falls squarely within the probate exception, as any potential judgment would require this Court to assume in rem jurisdiction over trust property under the active supervision of the Surrogate's Court.

g. Plaintiff's claim for excessive legal fees is precluded by the probate exception because of the parallel accounting proceedings pending in the Surrogate's Court. On the surface, Plaintiff's claim for excessive legal fees would not appear to require this Court to assume in rem jurisdiction over property that is in the custody of the probate court. Unlike Plaintiff's claim for unpaid trustee commissions, where any monetary relief would come directly out of the trust, here, a judgment would be reimbursed to the trust. The Surrogate's Court is currently overseeing accounting proceedings concerning, among other things, the reasonableness of counsel fees incurred by Bank of America in its role as corporate trustee — a process that affords Plaintiff the opportunity to be heard. Plaintiff has the right to file an objection to Bank of America's payments of legal fees and other administrative expenses. Moreover, even in the absence of objections, the Surrogate's Court may inquire into the propriety of a fiduciary's accounting sua sponte.

(1) Bank of America's payments to McGuireWoods are central to both the present action and to the accounting proceedings pending in the Surrogate's Court. Any relief granted by this Court on this issue would thus necessarily interfere with the Surrogate's Court's rulings on the same issue, with the result that the probate exception precludes federal jurisdiction.

D. *Goldstein v. Bank of Am., N.A. (In re Goldstein),* 2025 Nev. LEXIS 48 (Supreme Court of Nevada 2025). Personal jurisdiction over out-of-state bank was required despite the statutory grant of in rem jurisdiction over trust because statute cannot obviate the due process requirements of the U.S. Constitution.

1. Richard Goldstein, a Douglas County, Nevada, resident, is the sole lifetime beneficiary of the Richard H. Goldstein Irrevocable Trust ("RHG Trust" or "trust"), a discretionary trust created under the Samuel R. Goldstein Trust ("SRG Trust") in Missouri. Samuel Goldstein, Richard's father, created the trust. When Samuel passed away in 2000, he left a sizeable estate. Samuel left roughly one-half of his assets to his daughter, Carol Jones,

free of trust, and appointed her trustee of the SRG Trust. Jones and her children are also the contingent remainder beneficiaries of the RHG Trust. Aside from Richard, none of the beneficiaries are domiciled in Nevada.

2. The situs of RHG Trust administration is in Missouri, where the corporate trustee, Bank of America ("BOA"), has administered the trust from its St. Louis office since Samuel's death in 2000. The trust gives BOA "sole and absolute discretion" in administering the trust. Likewise, the trust provides that if the situs of the trust is moved upon the "absolute discretion" of BOA, the trust "shall be administered and governed by the laws of such chosen jurisdiction." The trust also contains a no-contest clause that will result in a forfeiture of Richard's interest if he files any action that alleges "fraud, undue influence, interference with inheritance rights or another or similar allegation connected with or arising out of preparation, revision, execution or implementation of any one or more of Grantor's Estate Planning Documents."

3. Richard has received trust-related communications from BOA at his attorneys' offices in Missouri (from 2000 to 2020) and California (from 2021 to present). Although BOA operates at least 61 financial centers and ATMs in Nevada, all meetings attended by Richard related to the trust occurred in Missouri and California. Richard does not use BOA's consumer banking services in Nevada. As a federally chartered bank, BOA does not have a state of incorporation, but its main office is in North Carolina.

4. Richard previously filed an action in Missouri seeking a declaration that the no-contest clause would not be violated if he filed a proposed petition asserting various claims against Carol Jones and BOA, among others. The Missouri circuit court held that Richard's proposed petition would trigger the no-contest clause, and he appealed to the Missouri Court of Appeals, which affirmed.

5. In May 2021, Richard contacted a BOA senior trust officer in Las Vegas, requesting that BOA transfer the trust administration situs from Missouri to Nevada. During a phone call between Richard's counsel and the trust officer, the trust officer requested that Richard provide a copy of the SRG Trust because she did not have one. Richard's counsel sought updates from the trust officer several times over the next few months, but she did not respond. In October 2021, a senior trust officer from BOA's St. Louis office that administers the trust sought the remainder beneficiaries' input on Richard's request to transfer the trust situs.

6. In January 2022, BOA, in a letter signed by the Las Vegas trust officer, denied Richard's request, stating that based on its consultation with the St. Louis team, there were no "legal advantages" to be gained by the trust or its beneficiaries by changing the situs from Missouri to Nevada. The letter instructed Richard to "direct any future inquiries with respect to the Trust to BOA's St. Louis team."

7. Richard petitioned asking the district court to "assume jurisdiction" over the trust and issue a construction of the trust that would permit him to file his proposed petition to change the trust situs without triggering the no-contest clause. BOA and remainder beneficiaries Wendy Magid, Cindy Bennett, David Jones, and Laura Reichman filed motions to dismiss. As relevant here, BOA and the remainder beneficiaries argued that they were necessary and indispensable parties, thus requiring that due-process-based personal-jurisdiction protections be met before the court could act on the petition. In response, Richard argued that personal jurisdiction was not required because NRS

164.010 provides in rem jurisdiction over the trust. And even if personal jurisdiction were required, Richard argued, BOA consented to personal jurisdiction by registering an agent for service of process under NRS 14.020 as a condition of doing business in Nevada and, alternatively, specific jurisdiction existed based on BOA's minimum contacts with Nevada.

8. The district court granted BOA's motion to dismiss. Richard appealed and the Nevada Supreme Court affirmed on the following grounds:

a. Though Richard's petition does not assert any claims of personal liability against BOA, BOA, as trustee of the RHG Trust, was a necessary party to Richard's petition, which asked the district court to interpret the no-contest clause. As a result, Richard had to show Nevada has personal jurisdiction over BOA for the court to resolve Richard's petition.

b. Trustees have the legal interest in the trust property, and, therefore, they are necessary parties in suits respecting such property. In effect, the trustee represents the trust in litigation as the real party in interest. Moreover, BOA has a fundamental duty to administer the trust in accordance with the settlor's intent, and Richard ultimately seeks to challenge BOA's discretion in declining to transfer the trust situs to Nevada, which in turn would determine whether Missouri or Nevada law governs the trust. Therefore, although the case does not directly involve trust property, the district court properly determined that BOA was a necessary party with an interest at stake in a potential judgment construing the trust's no-contest clause because such a judgment could alter the scope of permissible litigation that Richard may file in challenging administration of the trust and change the trust situs contrary to BOA's discretion as trustee.

c. BOA was indispensable because in its absence Richard's requested relief cannot be shaped to avoid prejudicing or altering BOA's rights and obligations with respect to its absolute discretion in changing the trust situs and the enforcement of the no-contest clause. As for an adequate remedy for Richard should the action be dismissed, he may file his petition in Missouri where courts have properly exercised personal jurisdiction over the trustee and all beneficiaries.

d. Personal jurisdiction over BOA was required despite the statutory grant of in rem jurisdiction under NRS 164.010, as the statute, even by its own terms, does not — and indeed cannot — obviate the due process requirements of the U.S. Constitution. Fourteenth Amendment rights cannot depend on the classification of an action as in rem or in personam since that is a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.

e. The district court acknowledged that in rem jurisdiction was established under NRS 164.010(1), which provides that "upon [a] petition of a settlor or beneficiary of the trust, the district court of the county in which any trustee resides or conducts business at the time of the filing of the petition . . . shall assume jurisdiction of the trust as a proceeding in rem unless another court has properly assumed continuing jurisdiction in rem."

f. While NRS 164.010(5)(b) provides a statutory basis for exercising personal jurisdiction over a nonresident trustee under certain circumstances, where the

beneficiary seeks relief against the trustee personally and personal jurisdiction is challenged, due process requires that the nonresident trustee have sufficient minimum contacts with Nevada for the court to bind the trustee to a Nevada judgment. The district court may only exercise specific personal jurisdiction over a nonresident trustee under NRS 164.010(5)(b) if the statute's requirements are satisfied and the plaintiff meets her burden under the Due Process Clause's minimum contacts analysis.

g. That NRS 164.010(5)(b) expressly allows the trustee to make a special appearance to challenge personal jurisdiction reflects the Legislature's recognition that due process requirements must be satisfied — even where the in rem requirements of NRS 164.010(1)-(2) are met.

h. Moreover, unlike traditional in rem proceedings, Richard seeks a declaratory judgment as to the no-contest clause such that the trust property itself "[was] not the subject matter of [the] litigation, nor [was] . . . the underlying cause of action related to the property." The presence of trust property, documents, and beneficiaries in Nevada may satisfy due process requirements under certain circumstances. But those circumstances do not exist here, where Richard is the trust's only obvious Nevada connection, the record contains no evidence of any trust property located in Nevada, and the trust has been administered in Missouri for more than 20 years. We recognize that Richard does not seek relief against the trustee personally, unlike the beneficiary in *Burgauer*; however, Richard seeks a construction of the trust that would allow him to circumvent the no-contest clause and challenge BOA's absolute discretion as to the situs of administration. Thus, the district court did not err in concluding that its consideration of Richard's petition required application of the minimum contacts analysis, to ensure that subjecting the nonresident trustee bank to Nevada jurisdiction would not offend due process.

i. NRS 14.020 requires a corporation to appoint an agent for service of process as a precondition for doing business in Nevada. However, NRS 77.440, contained in Nevada's Model Registered Agents Act, declares that "[t]he appointment or maintenance in this State of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this State." Therefore, NRS 14.020 does not automatically subject BOA to personal jurisdiction. NRS 14.020 does not condition the privilege to do business in Nevada on consenting to general personal jurisdiction.

j. BOA is a federally chartered national bank that maintains more than 60 financial centers and ATMs throughout Nevada, including the Las Vegas office where Mayo works. BOA's presence in Nevada shows that it deliberately reached out beyond its home and availed itself of the Nevada market in offering its banking services, thereby subjecting itself to state regulation. However, BOA's Nevada-based financial centers and ATMs have no relationship to Richard's petition or the RHG Trust, which has been administered in Missouri since its inception. While it is true that the trust officer's letter is a Nevada contact that relates to Richard's petition, the letter is not evidence of BOA's purposeful availment related to the litigation because Richard's counsel initiated the contact by calling her and sending several follow-up letters. BOA's Missouri team analyzed Richard's request, and the letter

instructed Richard to "direct any future inquiries with respect to the Trust to BOA's St. Louis team." Richard met with BOA officers in person in Missouri and California to discuss trust management issues, and BOA mailed trust-related correspondence to Richard's counsel in Missouri and California. Thus, the district court did not err in concluding that Richard's petition did not arise out of or relate to BOA's purposeful availment of Nevada where Richard was aggrieved by decisions made by BOA's St. Louis team and Richard initiated BOA's only litigation-related contacts with Nevada. The mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. A corporation's continuous activity of some sorts within a state is not enough to support suits unrelated to that activity.

E. *Golub v. Werren,* 2025 Ohio 2950 (Supreme Court of Ohio 2025). A judge's exercise of the court's legitimate authority is a matter of the judge's discretion, not the court's jurisdiction, so determining the lawfulness of that use of discretion is not a matter for the extraordinary writ of prohibition.

1. Louis Shurman named William and Tiffany Sharrard as fiduciaries and primary beneficiaries in his will. Shurman died in December 2021, following the deaths of his mother, Irene Shurman, and his siblings, Gerald Shurman and Darlene Shurman, all three of whom had died intestate. William agreed to serve as fiduciary, and the Sharrards hired counsel to represent them and the four Shurman estates in four cases before the probate court.

2. After a couple of years, the Sharrards decided to change counsel. Counsel collected $43,560 from the estates before the bill or accounts of the estates were submitted to the probate court for its approval.

3. Counsel sued the Sharrards, the estates' new lawyer, and her law firm in the probate court, alleging breach of contract and tortious interference. After the probate court dismissed the tort case for want of subject-matter jurisdiction, counsel refiled it in the general division. The general division dismissed the case for want of subject-matter jurisdiction, reasoning that the probate court has exclusive jurisdiction over matters relating to the administration of an estate and the distribution of its assets. Counsel appealed to the Fifth District. While that appeal was pending, the probate court set a deadline for the final accounts to be filed in the estate cases. New attorney requested a status conference, which was held in April 2024. Counsel was no longer the attorney of record in the cases, and he received no notice of the status conference. After the status conference, the probate court issued citations for counsel and William Sharrard to appear at a hearing, asserting that they could be held in contempt of court if they failed to appear.

4. Four days before the hearing, counsel filed a petition requesting a writ of prohibition and a preliminary injunction. He named the probate judge, the Sharrards, and the new estate attorney as respondents. He asserted that the probate court lacked subject-matter jurisdiction to hold the hearing in the estate cases because it had previously dismissed the tort case for want of subject-matter jurisdiction. And noting that he had refiled the tort case in the general division and that the appeal in that case was pending before the Fifth District, he asserted that the probate court lacked jurisdiction to proceed in the estate cases.

5. The citation hearing went forward in the probate court before the Fifth District ruled on the prohibition petition. Counsel alleged that at the hearing, Judge Dixie Park first asked Golub to wait outside the courtroom for about five minutes while the judge spoke with the new estate attorney. Once she admitted Golub into the courtroom, Judge Park asked him whether he had accepted fees from the estates without her approval. Counsel admitted that he had done so. On May 15, two days after the hearing, Judge Park issued an order directing counsel to return the fees to the estates within seven days and directing Sharrard to file final accounts of the estates by May 23. Though at the hearing, counsel had agreed to return the fees, he later appealed the order to the Fifth District.

6. Meanwhile, Judge Park filed a motion in the Fifth District to dismiss counsel's prohibition petition. In the motion, Judge Park explained that the probate court had jurisdiction to hold the citation hearing and order the return of attorney fees to the estates. Upon counsel's request, the Fifth District converted this motion into one seeking summary judgment because it referred to evidence outside the pleadings. In his response to Judge Park's motion, counsel again asserted that the probate court's previous dismissal of the tort case and the pendency of his appeal from the general division's dismissal of the refiled tort case had divested the probate court of subject-matter jurisdiction over the estate cases. He added that Judge Park's failure to explain the reason for the citation hearing before holding the hearing was a due-process violation.

7. The Fifth District granted Judge Park's motion, dismissing counsel's petition for a writ of prohibition. Counsel appealed and the Ohio Supreme Court affirmed on the following grounds:

a. Counsel filed an 865-page supplement with his merit brief. Included in this supplement are multiple documents filed in an unrelated case in which the new estate attorney appeared as counsel. Because these documents are not in the record certified by the Fifth District, they were improperly included in counsel's supplement. Plus, since they concern a nonjudicial party, they are irrelevant to the writ and are sua sponte stricken.

b. About a week after his reply brief was filed, counsel filed a motion for leave to amend it. Appellee, Judge Curt Werren, who was ultimately assigned the estate cases following Judge Park's retirement, did not file a response to this motion. Counsel's only amendment in the new version of his reply brief is to change "may" to "may not" in a single sentence. Though his motion is not necessary as the typo was evident from context without amendment, the motion is granted.

c. Counsel filed a motion "to suggest mootness and reverse," challenging the merit brief filed by Judge John S. Campbell, who temporarily succeeded Judge Park before he was succeeded by Judge Werren. Counsel asserted that Judge Campbell changed the probate court's position on each proposition of law counsel had asserted in this court and that the judge had "expressly adopted" some positions that counsel made in his briefing before this court. After succeeding Judge Campbell, Judge Werren filed a response in opposition to the motion. The argument that counsel presents in this motion does not support his assertion that the probate court has changed its positions. Golub asserts that the probate court's order scheduling a citation hearing indicates that its earlier order directing counsel to appear or risk being held in contempt was procedurally deficient. But the order

directing Golub to appear was issued to compel him to explain his acceptance of attorney fees without the probate court's approval.

d. Counsel argued in the motion that by approving attorney fees charged by the new attorney before the estates had been resolved, the probate court contradicted its prior order directing him to return fees he had accepted without the court's approval. But, whereas the new attorney requested the court's approval of the fees, he just took them.

e. Counsel filed a motion to strike the merit brief filed by Judge Campbell as well as Judge Werren's response to counsel's motion "to suggest mootness and reverse." Counsel asserted that the brief and the response were filed in the name of former Judge Park after her retirement. Judge Werren filed a response in opposition to this motion, pointing out that although the judge assigned to the estate cases had changed, "the court's authority, which is at issue, has not." Judge Werren also points out that the civil procedures rules allow automatic substitution of a former public officer's successor as a party in a suit whenever the officeholder was named in his or her official capacity. The court has the authority to substitute the current officeholder for the former public officer initially named in a suit in his or her official capacity. A party's failure to name in a filing the current holder of a judicial office has no effect on the arguments made in the filing, because the arguments are made on behalf of the court that was sued. In a prohibition case, the issue is the extent of a court's authority and a judge's exercise of that authority in his or her official capacity as a judge.

f. Nearly five months after the close of briefing — counsel asked us to take judicial notice of the alleged existence of audio recordings of two probate court hearings. He asserts that Judge Park previously refused to produce one of these recordings and found that the other one did not exist. He further states that in July 2025, he sent the probate court a public-records request for the recordings, that a probate court employee informed him that the recordings exist, and that the employee has not yet been able to produce them. The items counsel asks the court to take judicial notice of, to the extent that they are relevant, relate to disputed facts in the case. The only facts subject to judicial notice are those that are not subject to reasonable dispute.

g. The writ of prohibition is an extraordinary remedy by which a superior court prevents an inferior court from acting beyond its jurisdiction. To establish a basis for a writ of prohibition, counsel would have to prove by clear and convincing evidence that (1) the probate judge exercised judicial power, (2) the exercise of that power was unauthorized by law, and (3) denying the writ would result in injury for which there is no adequate remedy in the ordinary course of law.

h. There is no dispute that the probate court exercised judicial power when it held hearings in the estate cases, including the citation hearing. Nor is there any dispute that the probate court exercised judicial power when it ordered Golub to return to the estates the fees he had accepted without the court's approval.

i. Counsel claimed that once the probate court ruled that it lacked jurisdiction over the tort case, the court lacked authority in the estate cases to issue the May 15 order directing him to return the attorney fees he had accepted from the estates.

The probate court clearly has statutory subject-matter jurisdiction over matters directly concerning estates in probate. Such matters include issues involving the payment of counsel. Therefore, although whether counsel is owed damages for breach of contract and/or tortious interference was an issue to be resolved in the tort case, whether he must wait until after final accounts have been filed in the estate cases to accept the $43,560 in fees he charged the estates is an issue within the subject-matter jurisdiction of the probate court.

j. The probate court ordered counsel to return the $43,560 in fees he had received from the estates. The Fifth District was right to determine that the probate court had the authority to do so. The probate court has never indicated that counsel will be barred from receiving any compensation he earned from the estates. It has merely instructed him to wait until the proper time to accept attorney fees.

k. Counsel also asserted that the probate court violated Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution by barring him from the courtroom for a few minutes at the beginning of the citation hearing. In addition, counsel raised in passing (but does not support with evidence) various other complaints about Judge Park's conduct before, during, and after the hearing. He accuses her of failing to certify audio recordings of the citation hearing, withholding video recordings of the hearing, forcing him to attend the hearing without notice of the accusation against him, participating in ex parte communications with the new attorney, failing to provide advance notice of the purpose of the hearing, and filing an inaccurate transcript in an affidavit-of-disqualification proceeding he filed against her. These complaints all challenge Judge Park's exercise of her discretion in managing cases properly before the probate court. A judge's exercise of the court's legitimate authority is a matter of the judge's discretion, not the court's jurisdiction, so determining the lawfulness of that use of discretion is not a matter for the extraordinary writ of prohibition.

l. Counsel had an adequate remedy in the ordinary course of law for these alleged nonjurisdictional errors by way of appeal in the Fifth District. An appeal is a remedy in the ordinary course of law that precludes a writ of prohibition. Counsel has, in fact, already raised these issues in his appeal to the Fifth District from the probate court's judgment in the estate cases. So, because Judge Park acted within the scope of the probate court's subject-matter jurisdiction and because an adequate remedy at law was available in the appeal that Golub has filed, the Fifth District's dismissal of the prohibition action as to the probate court is affirmed.

m. Counsel also named the Sharrards and the new attorney as respondents in his prohibition petition. A writ of prohibition can halt only judicial or quasi-judicial action. Counsel has not alleged that these parties are judicial actors. Therefore, the Fifth District was right to conclude that because these parties could not exercise judicial or quasi-judicial power, no writ of prohibition can be issued against them.

F. *Haynie v. Karolczyk,* 2025 U.S. Dist. LEXIS 166161; 2025 U.S. Dist. LEXIS 164423 (United States District Court for the District of South Carolina 2025). Claims under "Unified Trust Law" or FINRA do not give rise to federal-question jurisdiction.

1. Frank M. Haynie, proceeding pro se, brought a civil action alleging breach of fiduciary duty in relation to the purported mismanagement of his late mother's estate. Plaintiff is a retired SEC-registered investment advisor and municipal bond hedge fund manager. In 1997, he took over the management of his mother's estate, which was valued at approximately $610,000 after taxes. Plaintiff claims that over the next 10 years, he increased the estate to about $1.6 million. In late 2007, Plaintiff's mother decided to transfer the management of her assets to Merrill Lynch. Plaintiff claims that when he relinquished control of the account in 2007, along with a substantial amount of cash, his mother had approximately $400,000 in municipal bonds and $200,000 in bank CDs. The account was earning close to $50,000 a year.

2. In 2013, a trust was apparently created naming Plaintiff's sister, Defendant Gayle Karolczyk, as the trustee with full investment authority over their mother's estate, which was then valued at $722,758. Defendant Karolczyk delegated management to her Merrill Lynch advisor, who charged for professional management. When Plaintiff's mother died in 2024, her account was liquidated and $775,000 was distributed to the beneficiaries, including Plaintiff.

3. Plaintiff challenged the management of his mother's estate, arguing that the market quadrupled in the 11 years since the defendants managed it, such that the beneficiaries could reasonably expect the estate to be near $3,000,000. Although Plaintiff has little information regarding the specific "workings of the account" while under Defendants' management, he notes that they "took $725,000 to less than $800,000 in 10 years while charging substantial management fees and no market disasters to contend with." Other than the bonds Plaintiff bought years earlier, the assets apparently remained in a Merrill Lynch money market account for years. Plaintiff therefore argued that "[t]he core issue" here is a "breach of fiduciary duty," which Defendants owed to Plaintiff as a beneficiary of his mother's estate. He contended that his sister owed "an even higher duty to [him] via Unified Trust Law."

4. In addition to these claims, the Complaint alleged a "Civil Conspiracy to defraud Plaintiff whereby the Trust account paid management fees that were actually used for management of Defendant Karolczyk's substantial personal accounts." Plaintiff suggested that while the "amount in controversy" here exceeds $2 million, Defendants' "actions are so egregious that some sort of punitive or exemplary damages are [also] expected."

5. The magistrate recommended dismissal of the complaint for lack of jurisdiction on the following grounds:

> a. The court possesses the inherent authority to review a pro se complaint to ensure that the plaintiff has standing, that federal jurisdiction exists, and that the case is not frivolous, even where the plaintiff has paid the filing fee. Pro se complaints are held to a less stringent standard than those drafted by attorneys. A federal court is therefore charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. Nonetheless, the requirement of liberal construction does not mean that the court must ignore a clear failure to allege facts that set forth a cognizable claim in a federal district court.

b. Federal courts are courts of limited jurisdiction, meaning they possess only that power authorized by Article III of the United States Constitution and affirmatively granted by federal statute. Accordingly, a federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists and to dismiss the action if no such ground appear. There is no presumption that a federal court has jurisdiction over a case, and a plaintiff must allege facts essential to show jurisdiction in his or her pleadings. Without original jurisdiction, however, a federal court generally cannot exercise supplemental jurisdiction over state law claims.

c. Here, Plaintiff invokes "diversity of citizenship" as the basis for jurisdiction. The diversity statute requires that the plaintiff demonstrate complete diversity of parties and an amount in controversy in excess of $75,000. Complete diversity of parties means that no party on one side may be a citizen of the same state as any party on the other side. In the instant case, the Complaint indicates that Plaintiff, Defendant Karolczyk, Defendant Clark, and Defendant Crosett are all citizens of South Carolina. Consequently, diversity of citizenship does not exist, and the Court cannot exercise diversity jurisdiction over this case.

d. Because Plaintiff cannot invoke diversity jurisdiction, the Court now turns, in an abundance of caution, to federal-question jurisdiction. The plaintiff must allege a cause of action arising under the Constitution, laws, or treaties of the United States. In other words, federal jurisdiction requires more than a simple allegation that jurisdiction exists or citation to a federal statute, and a mere allegation that a federal statute has been violated is not sufficient to invoke federal jurisdiction.

e. Plaintiff appears to allege strictly state law causes of action. It is settled that a claim of "breach of fiduciary duty" is a state-law-based claim, not a federal claim. To the extent Plaintiff suggests that his sister, Defendant Karolcyzk, owed him some sort of fiduciary duty pursuant to "Unified Trust Law," Plaintiff is likely referring to the Uniform Trust Code ("UTC"), which was drafted by the National Conference of Commissioners on Uniform State Laws "to provide uniform guidance on issues of trust law, particularly in jurisdictions in which the law of trusts was sparse." Notably, the UTC is simply "a model for codifying the law on trusts, not an actual law on which a claim can be based." To that end, "[t]he South Carolina Trust Code, located in Article 7 of the South Carolina Probate Code, was revised effective January 1, 2006, to comport with the Uniform Trust Code." Any claims Plaintiff brings pursuant to the UTC therefore fall under South Carolina law and do not provide a federal cause of action here.

f. Finally, Plaintiff surmises that Defendants engaged in a "civil conspiracy" to "defraud" him. Notwithstanding the speculative nature of these allegations, the Complaint does not clarify whether Plaintiff raises this conspiracy claim as a constitutional violation or a violation under state common law. However, an actionable civil conspiracy under § 1983 must be committed by persons "acting under color of state law." Because none of the Defendants are state actors, Plaintiff cannot bring a cognizable civil conspiracy claim under § 1983 and must instead raise such allegations pursuant to state common law. In short, Plaintiff's civil conspiracy claim does not provide a basis for federal-question jurisdiction.

g. In fact, the only reference to any sort of federal authority in the Complaint appears where Plaintiff notes that he attempted to obtain documents regarding

Defendants' management of his mother's assets through a "FINRA action" in 2024. The Financial Industry Regulatory Authority ("FINRA") is a registered, self-regulatory organization authorized under the Securities Exchange Act of 1934 that has "the authority to exercise comprehensive oversight over all securities firms that do business with the public." However, FINRA regulations do not give rise to a private right of action.

h. Based on the above, the undersigned simply cannot identify a cognizable federal claim or controversy from the pleadings. Indeed, even if Defendants mismanaged Plaintiff's mother's assets as alleged in the Complaint, Plaintiff's frustrations sound in state law only, and without original jurisdiction, the Court cannot exercise supplemental jurisdiction over such claims.

i. The district court adopted the magistrate's recommendations and dismissed the action.

G. *In re Paul A. Flinn Revocable Living Tr.,* 2025 Haw. App. LEXIS 296; 2025 LX 176108 (Intermediate Court of Appeals of Hawai'i 2025). Petition to remove trustee dismissed on judicial comity where out-of-state court already exercised jurisdiction over the trust administration.

1. The subject trust ("Trust") was executed by Margaret S. M. Flinn's ("Margaret") father, Paul A. Flinn ("Decedent"). After Decedent's July 2, 2020 death, his four living children, Donald, Juliana, Anthony, and Margaret became successor co-trustees. The Trust provides that the decisions and actions of a majority of the successor co-trustees shall be binding on the Trust. In July 2020, the Co-Trustees retained California counsel to administer the Trust.

2. The Trust held title to a residential property in Kula, and it provided Margaret the right to continue to reside in a cottage located on the property. The Co-Trustees tried to include Margaret in the "decision-making process" to maintain and market the main house on the Kula property, among other things, but Margaret was unresponsive and uncooperative with these efforts.

3. The Co-Trustees filed an "Ex Parte Application for Order Suspending the Powers of Co-Trustee Margaret Flinn" and a "Petition to Suspend Powers of Co-Trustee; Petition to Remove Co-Trustee; Petition to Construe Trust Provisions; Petition for Instructions" ("Petition to Suspend Margaret") in the Superior Court of the State of California in the County of San Luis Obispo ("California Court"). In the Ex Parte Application for Temporary Suspension, which was set for hearing on July 19, 2021, the Co-Trustees sought the temporary suspension of Margaret's powers based on her alleged failure to cooperate and her breach of fiduciary duty to administer the trust estate, pending a hearing on the Petition to Suspend Margaret, which was set for November 30, 2021. A July 13, 2021 proof of service by the California counsel reflects service of both filings via mail and email on Margaret and her then-counsel. A July 14, 2021 attestation by the California counsel stated that Margaret and her then-counsel were also notified by telephone.

4. On July 19, 2021, the California Court granted the Ex Parte Application for Temporary Suspension, suspending Margaret's powers as a co-trustee ("Order Granting Temporary Suspension"). The Order Granting Temporary Suspension stated: "All notices for this ex parte proceeding as required by law have been given[.]"

5. As to the November 30, 2021 hearing on the Petition to Suspend Margaret, the record contains a November 23, 2021 stipulation and order to continue the November 30, 2021 hearing to May 24, 2022, at Margaret's request. Margaret signed the November 23, 2021 stipulation and order, by which she agreed to file her objection to the Petition to Suspend Margaret "no later than January 14, 2022[.]" Margaret, self-represented, timely filed her January 13, 2022 "Response/Objection" for the May 24, 2022 hearing on the Petition to Suspend Margaret.

6. While the May 24, 2022 hearing on the Petition to Suspend Margaret was pending in California, Margaret filed a December 20, 2021 "Emergency Ex Parte Petition of Co-Trustee & Beneficiary Margaret S. M. Flinn to Remove Co-Trustee Donald Flinn & Order Accounting and Restitution for Waste and Neglect of Fiduciary Duties and for Protective Order" ("Petition to Remove Donald") with the Probate Court. Relevant here, Margaret declared that: "On July 12, 2021, Donald FLINN applied to the probate court of San Luis Obispo County, California, for an order suspending [Margaret] as co-trustee, which was obtained ex parte, with no notice to [Margaret], and no opportunity to be heard in opposition."

7. On January 18, 2022, the Co-Trustees filed an opposition to Margaret's Petition to Remove Donald, and a "Petition to Dismiss [Petition to Remove Donald] and Vacate Order to Maintain Status Quo and to Set Evidentiary Hearing" (Petition to Dismiss). Margaret filed an opposition, and court-ordered supplemental briefs were also filed.

8. On April 8, 2022, the Probate Court granted the Co-Trustees' Petition to Dismiss, dismissing Margaret's Petition to Remove Donald with prejudice; ruling that "judicial comity" warranted the Probate Court to refrain from exercising jurisdiction over the Trust; concluding that Margaret made material misrepresentations and/or omissions in the Petition to Remove Donald regarding her allegedly not being on notice of the California proceeding and not having an opportunity to be heard; and finding that the California proceeding had been active for months, in which Margaret had participated and already had her powers as co-trustee suspended.

9. The Co-Trustees moved for attorney's fees and costs ("Fees Motion"). Margaret filed her opposition to the Fees Motion and argued that the Co-Trustees failed to demonstrate that her filings were frivolous or made in bad faith; and on the same day, the Probate Court issued the Fees Order granting the Fees Motion in the full amount requested.

10. Margaret appealed and the court of appeals affirmed the dismissal of the claims but reversed the fee award on the following grounds:

> a. The Probate Court's findings that it lacked jurisdiction and jurisdiction "lies with California," where the California probate court proceeding "has been going on for many months," were supported by the record and not erroneous.
>
> b. The "material misrepresentations and omission" finding is in the Dismissal Order, but no similar finding appears in the Fees Order. The record of the California proceedings reflects substantial evidence to support the Probate Court's "misrepresentations" finding. Margaret's Petition to Remove Donald, which claimed that the California Order Granting Temporary Suspension was "obtained ex parte, with no notice" to Margaret, was contradicted by the record reflecting that Margaret and her then-counsel had notice of the Ex Parte Application for Temporary Suspension by mail, email, and telephonically; and the California Order

Granting Temporary Suspension's specific determination that proper notice had been given.

c. Margaret is correct that the award of attorneys' fees to the Co-Trustees was unsupported by factual findings. To award attorney's fees for a frivolous claim, the court must make a specific finding in writing that all or a portion of the claims made by the party are frivolous and are not reasonably supported by the facts and law in the civil action.

d. Here, the Fees Order does not cite to authority explaining the award, and does not contain specific written findings that the Petition to Remove Donald, or any claims made within it, were frivolous.

H. *Marcinak v. Steber,* 2025 U.S. Dist. LEXIS 148243 (United States District Court for the Southern District of Alabama 2025). Colorado River abstention appropriate pending resolution by probate courts and due to vexatious and reactive nature of claims.

1. Plaintiff Judith S. Marcinak ("Marcinak") and Defendant William E. Steber, III ("Steber") are the adult children of Anne Steber ("Decedent"), who died on February 2, 2022. This litigation is the latest round in an ongoing dispute between the siblings over their mother's assets, including those assets comprising her probate estate, and those passing outside of probate. In count one of Marcinak's original complaint, she asserted that Steber breached his fiduciary duty as executor of their mother's estate, and in count two, she sought a declaratory judgment with respect to Steber's role as executor of their mother's estate and as the attorney-in-fact for their mother's power of attorney. Marcinak also asserted that Steber may have misappropriated monies and misused his powers and as a result, caused a devaluation in their mother's overall estate, including both probate and non-probate assets.

2. Upon review of Marcinak's original complaint, the Court entered an order placing Plaintiff on notice that she had failed to provide a summons for Defendant Steber and that her complaint contained several deficiencies. The Court advised that when considering diversity jurisdiction, if Marcinak was seeking to sue Steber in his capacity as the executor of their mother's estate, the legal representative of an estate of the decedent is deemed a citizen only of the same state as the decedent, and that Marcinak had not alleged the citizenship of their mother, the decedent, Anne Steber.

3. The Court also noted that to the extent Marcinak contends that Steber was breaching his duty as executor of their mother's estate, which is being probated, that claim may be barred by the probate exception. The Court also noted that the probation exception may not apply if Marcinak was seeing to sue Steber in "his individual capacity" for actions taken as the executor of their mother's estate and was seeking recovery from Steber as opposed to the estate. With respect to Marcinak's request for a declaratory judgment that Steber may have misappropriated monies and misused his powers while serving as the attorney-in-fact under their mother's power of attorney and as executor of the estate, and that this in turn led to the devaluation of both the probate and non-probate assets of the estate, the Court noted that the claim might fall outside the probate exception assuming there existed diversity of citizenship between Marcinak and Steber and that the value of the misappropriated monies and/or non-probate assets exceed the jurisdictional limits.

4. The Court also observed that while Marcinak named fictitious defendants, fictitious party pleading is not permitted in federal court except when the plaintiff's description is

so specific as to be, at the very worst, surplusage. Accordingly, Marcinak was directed to file an amended complaint that corrected the noted deficiencies and to file a summons. She was cautioned that if she failed to timely comply with the Court's Order, said failure might be construed as a failure to prosecute and might result in dismissal without prejudice.

5. Marcinak timely filed an amended complaint that essentially contained the same claims as those in her original complaint and again included fictitious parties. Steber moved to dismiss, which the magistrate recommended granting on the following grounds:

> a. Following the filing of Marcinak's original complaint on May 14, 2024, the Court issued an order on July 23, 2024, addressing various pleading deficiencies in Marcinak's complaint and the fact that Marcinak had not provided the Court with a summons for Defendant Steber, let alone served him notwithstanding that the ninety-day deadline for service of process was due to expire on August 12, 2024. The Court explained that if Marcinak desired to pursue this action, she had to file an amended complaint to correct the various deficiencies and a summons, on or before August 12, 2024. Two days past the August 12th deadline, Marcinak filed her amended complaint along with a proposed summons. The Clerk issued the summons that same day and notified counsel that the summons was ready to be printed and served. Six weeks later, after no proof of service or request for an extension of time had been filed, the Court issued an order directing Marcinak to show cause on or before October 11, 2024, why this action should not be dismissed for failure to perfect service on Steber within the ninety-day deadline for service provided by Fed. R. Civ. P. 4(m). In Marcinak's response, her counsel alleged that he and his staff encountered problems downloading the summons and sought assistance from the Court's support staff, that after engaging a process server to serve the summons, he discovered that the first attempt at service was defective because the complaint was not served with the summons, and that service was perfected on October 6, 2024, by serving the summons with the amended complaint on Steber. Marcinak's counsel further alleged that on October 11, 2024, he again encountered problems filing Marcinak's response to the Court's show cause order and proof of service and as a result, he emailed a copy of the response and proof of service to the Clerk's office before successfully filing it on October 14, 2024.
>
> b. There is no question that Marcinak failed to perfect service within the ninety-day period mandated by Rule 4(m). Interestingly, while Marcinak's response does not reflect any attempts to timely serve the summons and complaint within the required ninety-day period, the undersigned finds it plausible that Marcinak's counsel was operating under the impression, albeit erroneous, that the August 12, 2024 deadline for serving the complaint was restarted upon the filing of the amended complaint. The record before the Court is devoid of any steps undertaken by Marcinak's counsel to perfect service by the August 12 deadline, and Marcinak's counsel offers no explanation for the delay. Marcinak's counsel has not established good cause for failing to timely serve Steber. His contention that the fact that the Court accepted Marcinak's amended complaint and summons, and did not strike Marcinak's response to the Court's show cause order constitutes "acceptance" and "ratification" is nonsensical at best. He also has not pointed out any issues relating to the statute of limitations and based on the

record, it is not clear whether any of Marcinak's claims would be negatively affected by the statute of limitations. Notwithstanding, the record reflects that Marcinak's counsel made an effort to timely file Marcinak's amended complaint and summons pursuant to the Court's directives in the order dated July 23, 2024. And while it took two attempts, Marcinak's counsel finally succeeded in perfecting service on Steber following the issuance of the Court's show cause order. There is no assertion that Defendant was prejudiced by the delay or that Marcinak's counsel ignored the Court's orders regarding service. Accordingly, the Court should exercise its discretion and retroactively extend the deadline for Marcinak to serve her complaint on Steber to October 6, 2024, when the summons and amended complaint were properly served by the process server.

c. In her amended complaint, Marcinak represents that she is only suing Steber in his individual capacity and is not seeking recovery from probate assets. The general rule in determining whether a claim falls under the probate exception is whether a particular claim and the relief it seeks to interfere with is in the possession of a state probate court. In this case, Marcinak seeks to challenge actions taken by Defendant Steber both in his capacity as executor of their mother's estate as well as in his capacity as the attorney-in-fact under her power of attorney. Marcinak makes clear however that she is not seeking to recover any property held by the estate but is instead asserting claims against Steber personally and is seeking to recover from him as opposed to the estate. In view of Marcinak's declaration, this case does not fall within the probation exception because Marcinak is not seeking to probate a will, administer an estate, or dispose of property that is in the custody of a state probate court. Accordingly, Steber's assertion that this action is barred by the probate exception is not well taken.

d. As grounds for the res judicata defense, Steber relies on previous litigation between him and Marcinak involving their mother's investment account held by Kestra Investment Services, LLC ("the Kestra investment account" or "Kestra litigation"). While Marcinak's amended complaint challenges actions taken by Steber as the attorney-in-fact under their mother's power of attorney, it does not specifically mention the Kestra investment account. Thus, it is not clear if, in this action, Marcinak is challenging any action taken by Steber with respect to the Kestra investment account. The Court's preliminary review of the state court pleadings Steber submitted in support of his res judicata argument reflect that at the time of Steber's mother's death, she owned a Kestra investment account that held approximately $165,000, and that Steber and Marcinak were equal 50% beneficiaries of the account. In 2022, Steber filed a complaint in the Circuit Court of Baldwin County alleging that due to the types of investments held in the account, the account could not be divided equally between he and Marcinak and that he and Marcinak were unable to reach an agreement regarding distribution of the account. Marcinak filed an answer and counterclaim against Steber seeking, inter alia, "all accounting records in his possession" for the investment account, "production of certified copies of all financial records" for the investment account "since its inception," and Steber's "certification and validation" of Anne's power of attorney that named Steber as her attorney-in-fact. Subsequent thereto, Marcinak requested the dismissal of her counterclaim. The circuit court granted Marcinak's request and dismissed her counterclaim with prejudice. It is not clear

that Steber's actions in regard to the Kestra account are included as a part of Marcinak's amended complaint in this action. Thus, at this juncture, Steber's res judicata argument should be rejected. If it is later determined that Marcinak's amended complaint does in fact encompass Steber's actions related to the Kestra account, Steber's res judicata argument can be developed in a motion for summary judgment.

e. In federal court, all fraud claims must be pled with particularity. Upon review of each of Marcinak's fraud causes of action in count three, each fails to satisfy the pleading requirements. To prove deceit, Marcinak must show, inter alia, that Steber made a willful, fraudulent, or reckless misrepresentation with the intent to deceive. To prove misrepresentation, Marcinak must show, inter alia, Steber made a false misrepresentation, either intentionally, recklessly, or innocently. Although the crux of both causes of action is a misrepresentation, Marcinak's amended complaint does not identify a single misrepresentation by Steber during the six-year period of time covered by count three. Having failed to plead a specific misrepresentation or to plead the misrepresentation with any degree of particularity, Marcinak's claims for deceit and misrepresentation are due to be dismissed.

f. Turning to Marcinak's claim for suppression of a material fact, Alabama law requires a plaintiff to plead and prove reliance. Here, while Marcinak claims that Steber failed to make a financial accounting and engaged in self-dealing, she does not allege any specific material that Steber suppressed, let alone how said suppression induced her to act or to refrain from acting and caused her actual damage.

g. Steber also alleges that Marcinak's amended complaint should be stayed or dismissed based on principles of abstention, comity, judicial economy, and the avoidance of piecemeal and vexatious litigation. In support of his argument, Steber points to two related state court proceedings. First, following their mother's death in February 2022, Steber filed to have his mother's will admitted to probate in Probate Court of Baldwin County, Alabama. On April 26, 2022, the will was admitted to probate, Steber was named as executor by the probate court, and letters testamentary were issued. A second action was filed on October 26, 2022 by Marcinak's daughter in the Circuit Court of Baldwin County seeking to contest the will of Steber and Marcinak's mother. Steber alleged that Marcinak, through her attorney and her daughter, filed a meritless will contest in an effort to intentionally interfere with Steber's inheritance and to intentionally inflict emotional distress on Steber. A default judgment was entered against Marcinak on Steber's third-party complaint. Later, on April 23, 2024, the court entered summary judgment in favor of Steber and against Marcinak's daughter in the daughter's attempt to contest the will of Steber and Marcinak's mother. The will contest was dismissed with prejudice, although the circuit court retained jurisdiction for a determination of damages on Steber's counterclaim and third-party complaint against Marcinak and her daughter. The estate administration was remanded to the Probate Court of Baldwin County.

h. In considering whether to stay or dismiss a case under the Colorado River doctrine, the Court conducts a two-step analysis. At the first step — the

threshold — the court must satisfy itself that the federal and state litigation are parallel, which means the federal and state proceedings involve substantially the same parties and substantially the same issues. The cases need not be exactly alike, so long as they are "substantially similar." Assuming the threshold inquiry is satisfied, the court considers whether application of any factor or combination of factors supports the conclusion that the case is an exceptional one where wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation warrants a stay or dismissal of the federal litigation in favor of the state litigation, despite the usual duty to exercise jurisdiction.

i. The state probate and circuit cases are parallel to the instant federal action under Colorado River. The probate action and the instant action involve Steber and his sister Marcinak, both of whom are beneficiaries under their mother's estate, and in this case, Marcinak seeks to sue Steber, in his personal capacity, for actions taken as the executor of their mother's estate and as the attorney-in-fact under their mother's power of attorney. Additionally, the state litigation regarding the will contest involves Steber, Marcinak, and Marcinak's daughter and calls into question actions by Steber in connection with the execution of his mother's will. The bottom line is that the state actions and the instant action focus on Steber's actions with respect to Steber and Marcinak's mother's will and the administration of her estate. It is clear that this action and the state actions involve essentially the same parties and will necessarily involve the resolution of substantially similar issues. Accordingly, the undersigned finds that this case and the state cases are parallel proceedings for the purposes of the Colorado River analysis.

j. As best the Court can determine, the probate court has assumed jurisdiction of the estate assets, some of which may include property held by the estate. On the other hand, in this case, Marcinak makes clear that she is not seeking any probate assets but is instead seeking to recover against Steber and his personal assets. Thus, this factor, if applicable, would appear to weigh against abstention.

k. Although Steber resides in Alabama and, since the filing of this action, Marcinak has relocated to Kentucky, there is, relatively speaking, no greater burden on either of them to appear in the Baldwin County state courts than it is to appear in federal court in Mobile. Given that neither side has argued, let alone made a showing, that one forum is more inconvenient than the other forum, this factor is neutral.

l. Here, the probate case was filed in April 2022, and although it is not yet concluded, it is winding down. Similarly, in the related will contest initiated by Marcinak's daughter, that case is likewise winding down. The Circuit Court of Baldwin County entered a default judgment against Marcinak on Steber's third-party claim and entered judgment in favor of Steber on his counterclaim against Marcinak's daughter who was seeking to contest the will of Marcinak and Steber's mother. Marcinak did not initiate this action until May 2024, well after the adverse rulings in the state court actions, and discovery in this case has not yet commenced. In light of the foregoing, this factor weighs strongly in favor of abstention.

m. The fourth factor considers the potential for piecemeal litigation. This factor favors abstention. If the state cases and this case proceed in parallel fashion, it is likely that discovery in these cases would overlap to a great degree and likely be duplicative. More importantly, the parallel litigation of the state cases and this case create the risk of conflicting rulings on the same evidence.

n. The fifth factor is whether state or federal law will be applied. This factor tilts slightly toward abstention given that state probate issues are at the heart of the controversy.

o. The sixth factor, "the adequacy of the state court to protect the parties' rights," is neutral. There is nothing before the Court suggesting that either this Court or the state courts are not adequate to protect the rights of the parties.

p. Upon analysis, the Colorado River and progeny factors weigh in favor of abstention and that a stay of this federal suit is appropriate pending resolution by the Baldwin County Circuit and Probate Courts of the cases pending before those courts.

q. Marcinak's initiation of this federal court litigation was vexatious and reactive, coming after the involuntary dismissal with prejudice of her counterclaim she filed in the Kestra investment account litigation and after the entry of a default judgment against her in the will contest litigation. Marcinak offers no explanation for defaulting in the will contest litigation or choosing not to prosecute her counterclaim in the Kestra investment account litigation (resulting in a dismissal with prejudice of her claims against Steber). Marcinak's claims against Steber for financial accounting records and for diminution of value of their mother's probate assets could easily been handled by the state courts, but after adverse ruling against her, Marcinak filed suit in this court. Given that this litigation is properly categorized as vexatious and reactive, that too supports abstention by this Court.

I. *Porter v. Arsenault,* 2025 U.S. Dist. LEXIS 12797; 2025 LX 105161; 2025 WL 297385 (United States District Court for the District of Massachusetts 2025). Citizenship of revocable trust is citizenship of trustees for federal court diversity jurisdiction purposes.

1. Plaintiff argues that the citizenship of all parties, including the Trust, must be considered for purposes of subject-matter jurisdiction. The court found diversity of citizenship as between Defendants Kevin and Diana Arsenault, who are citizens of Florida, and Plaintiff Eric Porter, who is a citizen of Massachusetts. The court did not address the citizenship of the Trust but directed that that issue would be considered after Defendants filed their response to the Amended Motion for Reconsideration. Defendants filed an Opposition addressing the citizenship of the Trust.

2. Defendants argued that the citizenship of the Trust is irrelevant to the diversity jurisdiction analysis because the Trust was added as a party through an Amended Complaint after this case was removed to federal court. That conclusion would be true if there were no amendment of the complaint. But if a complaint is amended to add or substitute parties, those new parties' citizenship must be considered. If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject-matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court. Where Plaintiff amended his complaint as of right, the court must now consider the Trust's citizenship and remand the case if necessary.

3. A traditional trust takes the citizenship of its trustees, while a business entity called a trust takes on the citizenship of its members. The primary distinction is that a traditional trust exists as a fiduciary relationship and not as a distinct legal entity. Courts look to state law to determine the juridical status of a trust. The court looks to Florida law because the Trust at issue here was created under and is governed by Florida law. Federal courts applying Florida law have considered whether a trustee possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. This includes considering a trust agreement's grant of powers to the trustee. Florida law specifically incorporates the common law of trusts, which states that a traditional trust is not a legal entity capable of legal action on its own behalf.

4. Here, the Trust Agreement enumerates broad powers granted to the Trustee, in addition to all of the powers conferred upon trustees by the Florida Trust Code. Those powers include retaining, exchanging, selling or leasing, investing or reinvesting, and making distributions from the assets of the trust, subject to the purposes of the Trust Agreement. These are the customary powers to hold, manage, and dispose of assets for the benefit of others. Moreover, the Trust Agreement identifies Kevin and Diana Arsenault as the Settlors transferring properties to themselves as Co-Trustees of the Trust, with provisions for distributions to certain beneficiaries following the Arsenaults' deaths. All this "facilitates a donative transfer" for purposes of estate planning, rather than a "bargained-for exchange."

5. Because the Trust is a traditional trust, it takes the citizenship of its trustees for purposes of diversity jurisdiction. The Trust Agreement specifies that Kevin and Diana Arsenault are the Trust's only trustees. As the court has already determined the Arsenaults are citizens of Florida, the Trust therefore is also a citizen of Florida.

6. Accordingly, the court has subject-matter jurisdiction and Plaintiff's Amended Motion for Reconsideration is denied.

J. *Potter v. Baxter,* 337 Ore. App. 606; 565 P.3d 64; 2025 Ore. App. LEXIS 186; 2025 LX 48381 (Court of Appeals of Oregon 2025). Sending trust funds and communicating with beneficiaries in the forum state is insufficient to establish minimum contacts for personal jurisdiction.

1. Jacqueline Potter and William (Liam) Potter filed a complaint in Oregon alleging breach of trust against trustee, a resident of Texas. The complaint alleged that their mother, Elizabeth Potter, a resident of California, created a trust in California in 2013, naming herself as the trustee. That trust designated the children as the beneficiaries and appointed trustee, a friend of Elizabeth, as the successor trustee. According to the complaint, at the time that the trust was created, the assets of the trust included all of Elizabeth's "tangible and intangible personal property," which was located in California, as well as securities in a Charles Schwab & Co., Inc. account.

2. Under the terms of the trust, upon Elizabeth's death, trustee was to divide the assets of the trust into two separate trusts (one for each child's benefit), provide each of the children with the income that was generated by their respective trust, and distribute half of the assets of each child's trust when they reached the age of 35, and the remainder when they reached the age of 40. The trust stated that it was to be governed by the laws of California, "regardless of the domicile of any trustee or beneficiary."

3. Elizabeth died in April 2014, and trustee began administering the trust. At that time, the Charles Schwab & Co., Inc. account had a balance of nearly $5 million. Trustee

assumed the trusteeship with the knowledge that the children were residents of Oregon. Following her mother's death, Jacqueline moved her mother's personal property from her mother's home in California to a storage unit in Oregon. Although Jacqueline initially paid the cost of moving and storing the personal property, trustee used funds from the trust to reimburse her. Trustee also began paying the monthly storage unit fees using money from the trust. Between 2015 and 2019, Jacqueline and trustee talked on the phone every three to six months. The amount of contact increased in 2019 because the children were hoping to use trust funds to purchase a home for Liam. Over the years, Jacqueline requested accountings, but trustee never provided one.

4. Trustee's alleged lack of transparency is ultimately what prompted the children to file this action claiming breach of trust against trustee. In their first amended complaint, the children alleged that trustee breached the trust by failing to provide accountings, distribute income, and invest and manage trust assets as a prudent investor would. The children sought relief including removal of trustee, an accounting, and surcharge.

5. Trustee moved to dismiss the case for lack of personal jurisdiction. Before the trial court ruled on trustee's motion to dismiss for lack of jurisdiction, the children issued a subpoena to Charles Schwab for the trust's financial account statements. The statements showed that there was only $114.79 remaining in the account. After learning of the remaining balance, the children filed supplemental briefing opposing trustee's motion to dismiss, asserting that, the legal context of this case has shifted dramatically from trust administration to one of conversion, fraud, and misrepresentation. However, the children did not (at that time) file or move to file an amended complaint to add those claims to the action.

6. After a hearing, the court ruled that it had personal jurisdiction over trustee and denied trustee's motion to dismiss. The trustee appealed, and the court of appeals, over a dissenting opinion, reversed and remanded on the following grounds:

> a. ORCP 4C supplies Oregon courts with jurisdiction over a party in any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the respondent. ORCP 4C applies only to claims for personal injury or injury to property. Here, the children's first amended complaint does not allege damages for personal injury or injury to property. Instead, it seeks damages for economic loss of their inheritance caused by trustee's alleged breach of trust. Because the children have not alleged the type of injury that ORCP 4C requires, the trial court erred in determining that jurisdiction was proper under that provision.
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> b. ORCP 4D provides, in relevant part, that Oregon courts have personal jurisdiction over a party: "In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the respondent, provided in addition that at the time of the injury solicitation or service activities were carried on within this state by or on behalf of the respondent. This section requires either a claim for injury to person or property. Because the children have not pleaded either type of injury, ORCP 4 D is also inapplicable to the facts of this case.
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> c. ORCP 4E states in relevant part that Oregon courts have jurisdiction over a party in an action that arises out of "a promise, made anywhere to the [petitioner] or to

some third party for the [petitioner's] benefit, by the [respondent] to perform services within this state" or "to deliver within this state things of value." The children correctly contended that, because the record here also contains evidence that trustee assumed the trusteeship with knowledge that the children were residents of Oregon, the trial court could similarly infer that trustee made an implied promise to make trust distributions (i.e., deliver things of value) to the children in Oregon so as to bring this case facially within the scope of ORCP 4 E(3).

d. Although the trial court made no express factual finding as to whether trustee began administering the trust with knowledge that the children were Oregon residents, that factual finding is consistent with its ultimate conclusion that it had jurisdiction and is supported by evidence in the record. There is no evidence that trustee "explicitly promised" that he would deliver trust distributions within Oregon, but such a commitment may be fairly inferred from trustee's knowledge that the children]resided in Oregon at the time that he assumed his duties as trustee. Because this record allows the court to infer that trustee made an implicit promise to Elizabeth to deliver "things of value" within Oregon, that is sufficient to bring this case facially within the scope of ORCP 4 E(3).

e. The exercise of jurisdiction over a nonresident is proper under the Due Process Clause of the Fourteenth Amendment to the United States Constitution if the respondent has "minimum contacts" with the forum state and the assertion of jurisdiction comports with notions of "fair play and substantial justice."

f. The alleged tortious conduct that the children rely on does not fall within the scope of the claims articulated in their first amended complaint. Although the children ultimately filed a second amended complaint that asserted claims including intentional interference with prospective inheritance, conversion, and fraud, the operative complaint at the time that the trial court ruled on the motion to dismiss only contained claims for breach of trust based on trustee's alleged failure to provide accountings, distribute income, and manage trust assets as a prudent investor would. Because specific personal jurisdiction is claim-specific, the particular claims at issue guide our inquiry into whether the respondent has minimum contacts with the State of Oregon. Where, as here, the claims at issue are for breach of trust, the contacts that are relevant for purposes of establishing minimum contacts include those that relate to the formation of the trust and the subsequent alleged breach.

g. None of the facts related to the formation of the trust establish any contact between trustee and the State of Oregon. The trust was created in the State of California by a resident of that state, and the terms of the trust stated that it was to be governed by the laws of California, "regardless of the domicile of any trustee or beneficiary." At the time that the trust was created, trustee was, and has remained, a resident of Texas. Although the record reflects that trustee accepted the trusteeship with knowledge that the children lived in Oregon, a respondent's knowledge that an Oregon resident is involved in a transaction is not, standing alone, sufficient to establish the contact necessary to impose jurisdiction.

h. The facts related to the alleged breach also do not establish that trustee has the requisite minimum contacts with Oregon. The record shows that trustee

administered the trust exclusively from Texas and, thus, that is where the alleged breaches of trust occurred. Although trustee sent money from the trust to Oregon and had phone calls with the children about the trust, those acts are insufficient to establish the kind of purposeful direction that is necessary to satisfy the minimum contacts requirement. To the extent that the children contend that the phone calls delayed their recognition of trustee's breaches of trust, case law requires detailed allegations of the particular guarantees that caused the harmed individual's reasonable reliance. Here all of the beneficiaries are residents of Oregon; however, that fact alone does not compel a different outcome.

i. The claims against trustee for breach of trust relate to his alleged handling of the trust's financial assets, rather than the physical assets located in Oregon. Consequently, the presence of physical assets in this state does not establish the necessary connection between trustee's conduct and Oregon to support the exercise of jurisdiction over trustee.

j. This case does not present a typical commercial transaction in which an out-of-state enterprise has purposefully targeted an Oregon market or resident, and there is no evidence that trustee purposefully sought out the trusteeship. Rather, the record shows only that he agreed with his friend, Elizabeth, to take over the administration of a preexisting California trust that happened to have two Oregon beneficiaries. In sum, the facts as they pertain to the claims alleged in the children's first amended complaint support the conclusion that trustee did not purposefully direct his activities toward Oregon residents. Consequently, trustee's contacts are insufficient to establish personal jurisdiction.

7. One dissenting justice would hold that the trustee had "substantial and not isolated" contacts with Oregon by accepting the responsibility for administering a trust in which all of the beneficiaries lived in Oregon, maintaining constant contact with decedent's children, and arranging for trust property to be moved to and administered in Oregon, and the trustee should have understood that moving property to Oregon, administering that property in Oregon, and stringing beneficiaries along by sending rent payments to Oregon placed him on "fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign."

K. *Tingley v. First Fin. Bank*, 252 N.E.3d 428; 2025 Ind. LEXIS 127; 2025 LX 85557; 2025 WL 602588 (Supreme Court of Indiana 2025). Court has subject-matter jurisdiction due to in-state trustee, despite trust holding out-of-state real estate, being governed by out-of-state law, and included mostly out-of-state beneficiaries.

1. In 2002, nine joint owners of six parcels of real property located in Clark County, Illinois, created a trust, Trust No. 428. They named themselves as trust beneficiaries and named the First National Bank of Marshall, Illinois, as trustee. Sometime later, First Financial Bank, which is based in Terre Haute, Indiana, acquired First National Bank of Marshall and assumed responsibility for its trust accounts, including Trust No. 428. Although First Financial is headquartered in Terre Haute, it continued administering the trust in Illinois.

2. Under the trust's terms, the trustee holds both legal and equitable title over the property while the beneficiaries retain certain "power[s] of direction," like managing the trust's property and receiving any rent or sale proceeds. To exercise these powers, the trust gave primary authority to one of the nine owners, who is also a trust beneficiary,

Elvia Murphy. The trust named Elvia's son, John Murphy, as successor upon her death or incapacity. Elvia lived in Illinois when the trust was created. Of the remaining eight original beneficiaries, five also lived in Illinois at that time, and one each lived in Arizona, Colorado, and Indiana.

3. The trust agreement has two key provisions. The first is that "[i]f any property remains in this trust twenty years from this date [March 22, 2002], it shall be sold at public sale by the Trustee on reasonable notice, and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement." The second says that the trustee has no duty to manage, control, or otherwise be responsible for trust property "except on written direction" of a beneficiary with the power of direction.

4. At the twenty-year mark, in 2022, John had taken over the trust's direction from Elvia. By this time, four of the original beneficiaries had been succeeded by seven new beneficiaries, adding up to twelve total beneficiaries. Given the twenty-year sale provision, the trustee reached out to John, then living in Illinois, informing him that "[i]n order to keep this trust active, an Extension Agreement must be signed by all beneficial owners of the trust." John, with the agreement of four of the other eleven beneficiaries, directed the trustee to extend the trust for another twenty years. Emily Tingley, a successor beneficiary living in Indiana, disagreed with John's decision to extend the trust.

5. In 2023, Tingley sued the trustee in Vigo County, Indiana, where it is headquartered. She asked the trial court to direct the trustee to "carry out the terms of the Trust," referencing the twenty-year sale provision, and sought a court order requiring the trustee to sell all trust property. In response, the trustee sought to dismiss the case, arguing that "Indiana has no subject-matter jurisdiction over this case as the Trust at issue is administered in Illinois." It also argued that "no county in Indiana has venue" under the Indiana Trust Code. At the same time, the trustee filed its own suit in Illinois about the conflicting trust provisions and sought a declaration that, among other things, it be allowed to extend the trust's duration, as John directed. After briefing by the parties, the Indiana court granted the trustee's motion and dismissed the action below for lack of subject-matter jurisdiction.

6. Tingley appealed, and the court of appeals reversed. The trustee then sought transfer, which the Indiana Supreme Court granted, to resolve the conflict within the court of appeals over whether an Indiana trial court has subject-matter jurisdiction over a dispute involving a multistate trust. The Indiana Supreme Court reversed and remanded on the following grounds:

> a. Subject-matter jurisdiction turns on one question: does a court have the constitutional or statutory power to hear the case. The legislature has endowed Indiana courts with subject-matter jurisdiction over all civil trust suits. Yet with multistate trusts, some courts have found that jurisdiction turns on non-jurisdictional factors like choice-of-law questions, venue rules, and the specifics of a particular trust. See, e.g., Alford Trust, 897 N.E.2d at 951.
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> b. A court's jurisdiction has two dimensions, personal and subject matter. Personal jurisdiction asks whether the court possesses power to impose judgment on a particular defendant. Subject-matter jurisdiction asks whether the action or claim falls within the general scope of authority conferred upon the court

by the constitution or by statute. The trustee concedes personal jurisdiction. But it challenges subject-matter jurisdiction.

c. Superior courts, like the court below, have broad power — original and concurrent jurisdiction in all civil cases. One such civil case is a declaratory judgment action. The legislature has empowered courts of record within their respective jurisdictions with power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The Vigo Superior Court, where Tingley brought this action, is a court of record. The trial court has subject-matter jurisdiction over Tingley's action against the trustee. She seeks a declaration that the trustee may not renew the trust and an injunction compelling it to sell trust property consistent with the trust agreement. Tingley's civil action seeks a declaration of her rights under the trust agreement and thus falls squarely within the broad civil jurisdiction of superior courts generally, and the Vigo Superior Court specifically.

d. Despite these statutes, the trustee relies on the trust code's venue provision to claim that the trial court lacks jurisdiction because venue supposedly exists nowhere in Indiana. The trustee misreads the trust code and misunderstands venue. The cited trust-code provision addresses not jurisdiction but preferred venue within Indiana: "Unless the terms of the trust provide otherwise, venue in a proceeding brought by a party" — to, for example, enforce the terms of a trust agreement — "shall be exclusively in the county in which the principal place of administration of the trust is located." This statute specifies only "where" not "whether": where an Indiana court with jurisdiction may hear a trust case, not whether the court has jurisdiction at all.

e. Consistent with this trust-code provision, trial rules likewise say that venue statutes do not remove or alter a court's subject-matter jurisdiction. No statute or rule fixing the place of trial shall be deemed a requirement of jurisdiction. Thus, a venue error is not a jurisdictional matter that deprives the court of the right to entertain the subject matter. Illustrating this point is that the remedy for a venue error is to transfer the case. The remedy for an error of subject-matter jurisdiction, in contrast, is not transfer but dismissal.

f. There is a distinction between jurisdiction — the power to adjudicate a dispute —and prudential matters for which a trial court with jurisdiction may nevertheless dismiss a case. In doing so, *Alford Trust*, which conflates jurisdiction with unrelated prudential concerns like where trust property is located, where the trust is administered, where venue lies, and what law applies, is overruled. Trial courts may decline to hear a case (though jurisdiction is secure) under doctrines of comity or forum non conveniens. These doctrines are not before us, though, because the trustee has yet to raise them.

g. Attorneys and judges alike frequently confuse jurisdiction with other concerns. Such confusion occurred here. The trustee cast the prudential issues inherent in overseeing multistate trusts, choice-of-law questions, and venue concerns as problems of jurisdiction. For instance, the trustee claimed that the "legal effects" of this case "are properly heard and decided by the appropriate court in Illinois that has primary subject-matter jurisdiction" over the trust because the trust is administered in Illinois. This claim confuses choice-of-law issues with jurisdiction.

h. That said, the distinction between choice of law and jurisdiction can be blurred when a trust spans several states. Indeed, questions may arise with regard to the validity, administration, interpretation, or construction of a trust having significant contacts or relationships with more than one state. Yet these issues do not concern subject-matter jurisdiction.

i. Generally, a court has jurisdiction to adjudicate a trust by reason of its relationship to the trust, the trust parties, or the trust property, which is sufficient to make its decree reasonable and recognized as valid in other states. This initial question of the forum court's jurisdiction to adjudicate the case should be distinguished from other types of adjudicatory jurisdiction such as, for example, the choice-of-law jurisdiction of a court to apply its own local law rather than the local law of another state in resolving the substantive issue. There may be the further question of whether the court having jurisdiction will choose to exercise its discretionary power to act in the matter. Thus, when litigation involves a multistate trust, courts should keep first things first: ensure subject-matter jurisdiction before turning to prudential issues.

j. Our courts have not always followed this sequence. In *Alford Trust*, an Indiana-based mother created a trust and chose her Virginia-based son as trustee. When the trustee refused to account for trust assets, trust beneficiaries in Indiana sought help from a court in Indiana. On appeal, a divided panel found the Indiana court lacked subject-matter jurisdiction because trustees "continuously and exclusively" managed the trust in Virginia. The *Alford Trust* majority confused subject-matter jurisdiction with prudential concerns. *Alford Trust* held that since Virginia law governed the trust, Indiana courts could not hear the case. But Indiana courts often apply other states' laws, and whether another state's law applies has nothing to do with an Indiana court's power to hear a case.

k. Next, *Alford Trust* determined that a trust being administered "continuously and exclusively" in another state prevented Indiana courts from exercising jurisdiction. Not so. Disputes over trust administration fall within our superior courts' general civil jurisdiction, as set out by the legislature.

l. Finally, *Alford Trust* also misreads the Indiana Trust Code. The Indiana Trust Code says that, except for proceedings filed by the attorney general, venue lies "exclusively in the county in which the principal place of administration of the trust is located." Although this statute refers to venue, *Alford Trust* treated it as a rule about jurisdiction. A venue provision, though, does not confer jurisdiction; it prescribes, rather, the location at which trial proceedings are to occur from among the courts empowered to exercise jurisdiction. Venue, in other words, presupposes jurisdiction and neither creates nor withholds it. *Alford Trust* is disapproved because it blurs venue and other prudential concerns, on one hand, with jurisdiction, on the other.

m. Though the Vigo Superior Court has subject-matter jurisdiction over the disputed trust here, prudential concerns may still subject this case to dismissal in the court's discretion. Doctrines of comity and forum non conveniens, for instance, permit a trial court with jurisdiction nonetheless to decline to exercise its power.

n. Comity is the principle that a court has discretion to dismiss a case as a matter of courtesy and convenience when there are pending proceedings in an out-of-state court. The general rule is that if an action concerning the same parties and the same subject matter has been commenced in another jurisdiction capable of granting prompt and complete justice, comity should require staying or dismissing of a subsequent action filed in a different jurisdiction. Trial rules also permit discretionary dismissals under the doctrine of forum non conveniens if a court determines another jurisdiction would better handle the case. For now, though, neither doctrine is before us because the trustee's dismissal motion implicated only subject-matter jurisdiction, which lies here. On remand, if the trustee persists in its view that this case does not belong in Indiana, it can seek dismissal under one or more discretionary doctrines like comity or forum non conveniens. Neither doctrine affects the court's jurisdiction. And neither doctrine compels dismissal of a case over which the court has jurisdiction.

XV. ABUSIVE LITIGATION

A. *Mosling v. Melnik (In re Karl Melnik Revocable Living Trust),* 2025 Mich. App. LEXIS 6377; 2025 LX 350581; 2025 WL 2317239 (2025). Sanctions upheld for filing frivolous contest to trust amendment.

1. Karl Melnik, the grantor of the Karl Melnik Revocable Living Trust (the "trust"), was in a long-term romantic relationship with petitioner Deborah Mosling for over two decades, from 1996 to 2018, but they were never married. Petitioner Justin Melnik is Deborah's son. In 2015, Melnik amended the trust to add petitioners as beneficiaries to the trust. The relationship between Melnik and Deborah ended in 2018 when Deborah was arrested for elder abuse and removed from Melnik's home in Wisconsin. Melnik then moved to Michigan to live with respondent. In 2019, Melnik amended the trust, removing petitioners as beneficiaries, trustees, or successor trustees of the trust (the "amendment"). Following that amendment, Deborah sued Melnik in Wisconsin, claiming that she was entitled under Wisconsin law to an equitable share of the assets acquired by Melnik during their relationship. Deborah did not challenge Melnik's capacity to amend the trust or his ability to understand the nature and extent of his property and direct the disposition of it when he died. Melnik defended the suit for over two years, asserting that Deborah had been abusive and affirming his intent not to include Deborah or Justin in his estate plan. In 2022, after Melnik died, Deborah voluntarily dismissed her suit in Wisconsin.

2. In 2023, petitioners filed a verified petition with the probate court, contesting the validity of the amendment on the grounds that Melnik had lacked sufficient mental capacity to amend the trust in 2019, alleging severe Alzheimer's dementia or some other mentally debilitating illness. After eight months of discovery, petitioners filed a motion to voluntarily dismiss their suit, stating that the petitioners' belief that Melnik lacked testamentary capacity had been based on the medical records in their possession at the time the verified petition was filed, but that discovery did not confirm this belief. Petitioners additionally stated that their retained expert witness was unable to conclude with a reasonable degree of certainty that Melnik had lacked testamentary capacity when he amended the trust in 2019, and they requested an order dismissing the case.

3. Respondent moved for sanctions, asserting that petitioners knew that there was no evidence that Melnik had lacked testamentary capacity when he amended the trust, and

that they possessed this knowledge when they signed the verified petition. Additionally, respondent asserted that petitioners and their counsel had failed to adequately investigate their claims prior to bringing suit, brought claims that were not well-grounded in fact or law, and brought the suit with the purpose of harassing and injuring respondent. Respondent's motion was accompanied by an email from petitioners' counsel rejecting a settlement counteroffer from respondent. That email contained the following paragraph: "My client's hope was that a release of potential litigation in Wisconsin would motivate a settlement in this matter. This does not seem to be the case. So my clients are going to dismiss this matter and move forward with filing a lawsuit in Wisconsin unless your client would like to settle this case for an amount closer to my initial offer to avoid protracted litigation in Wisconsin."

4. Petitioners argued that the limited medical records they had in their possession at the time they filed the petition supported their good-faith belief that Melnik lacked the capacity to amend the trust in 2019. These records indicated that Melnik had a history of strokes and suffered from major depressive disorder, a mild cognitive disorder, and a major neurocognitive disorder due to vascular dementia without behavioral disturbance. Petitioners indicated in their response that they only possessed a small portion of Melnik's medical records at the time the petition was filed, and that the records were only from 2018.

5. At a hearing, petitioners' counsel stated that, although Melnik's medical records did contain diagnoses of some mental disorders, their expert was unable to discern how those issues would have affected Melnik and his capacity to amend the trust. Petitioner's counsel further stated that when he initiated the case, petitioners only provided him with a small portion of Melnik's records from Wisconsin medical providers, and further that the petitioners had failed to disclose that those medical records had been provided in the Wisconsin lawsuit under a protective order, meaning that they should not have been used in future litigation.

6. Regarding the email discussing future Wisconsin litigation, petitioners' counsel stated that he did not intend the email to be threatening or to threaten additional litigation; rather, he believed, based on Deborah's representation that she had been given advice by a Wisconsin attorney, that Deborah had a potentially valid claim that was "some sort of common law marriage thing or just some similar law that they have there." Therefore, according to petitioner's counsel, he merely intended to indicate in the email that petitioners would want more money in return for a settlement that involved the full release of claims in Michigan and Wisconsin.

7. During the Wisconsin litigation, the issue of Melnik's capacity was never raised. Melnik was deposed twice, and his deposition testimony clearly showed that he understood his finances and property ownership and desired that petitioners not receive any share of his estate. In the Wisconsin litigation, Deborah had testified under oath that in 2018 Melnik did have the capacity to endorse checks made out to her and her family. Petitioners had also admitted in their depositions in this case that they had never formed the belief that Melnik lacked the capacity to amend the trust while Melnik was alive — they only did so after reviewing the medical records.

8. The probate court granted petitioners' motion to dismiss and granted respondent's motion for sanctions as to petitioners. The court noted that the medical records from June 2018, which petitioners relied upon for the majority of the medical diagnoses that they

had asserted affected Melnik's testamentary capacity, did indicate that Melnik had suffered from "dementia-like symptoms and confusion in 2018," but that petitioners had provided no medical records covering the time period when Melnik amended the trust. Further, the court noted that in their depositions, petitioners could provide no specific examples of times when they were concerned about Melnik's cognitive capacity or ability to manage his own affairs. The court held that petitioners knew or should have known that there was no basis to assert that Melnik lacked capacity to make testamentary decisions. The probate court also found that the Michigan litigation was initiated for an improper purpose. The court ordered sanctions, specifically noting that it was sanctioning petitioners themselves, not their counsel.

9. Petitioners appealed the probate court's order granting in part respondent's motion for sanctions and imposing a sanction of $105,136 on petitioners, jointly and severally, and the court of appeals affirmed on the following grounds:

a. Petitioners never raised the issue of Melnik's testamentary capacity in 2019 until after his death in 2022, despite Deborah filing suit against Melnik in Wisconsin and litigating that suit for over two years, during which time Melnik was deposed twice. Petitioners, in their depositions, could not provide any examples of Melnik being confused or unable to understand his financial affairs; in fact, Deborah testified that Melnik was still capable of making his own decisions after being diagnosed with dementia in 2018, and Justin testified that there was never a point in his relationship with Melnik when Justin believed that Melnik was not capable of making his own financial decisions.

b. Melnik was never diagnosed with Alzheimer's disease and there is no evidence that any medical provider ever questioned his capacity to make decisions regarding his finances, property, or any other aspect of his life. Petitioners relied on a handful of medical records from 2018 to assert that there was at least a question regarding Melnik's capacity to amend the trust in 2019, but their own testimony indicates that they did not personally have any concerns regarding Melnik's ability to manage his affairs while he was alive. The mere fact that Melnik had at some point in his life been diagnosed with a condition that could have affected his testamentary capacity was insufficient to support a claim for lack of capacity, but in this case, it was not only insufficient, but it was contradicted by petitioners' own testimony about their own experiences with Melnik. The probate court did not clearly err by holding that petitioners knew or should have known that their verified petition was not well-grounded in fact.

c. The email from petitioners' counsel referring to possible future litigation in Wisconsin was sent nearly seven months after the verified petition was filed, and in itself provides little insight into petitioners' motives at the time of signing or filing the verified petition. Moreover, it appears from this record that Justin was not a party to the Wisconsin litigation, and it is unknown whether he would be a party to any future litigation in that state. However, the probate court also noted the timing of the various lawsuits and the fact that petitioners, or at least Deborah, appeared to have a habit of voluntarily dismissing one suit only to begin another. Although a closer call, it is not clear that a mistake was made with respect to Deborah's purpose in filing the petition. With regard to Justin, on this record, it is more arguable that the probate court erred by finding that he had signed or filed

the verified petition for an improper purpose. However, any error by the trial court is harmless in light of the probate court's other findings.

B. *Pilkington v. Liggett (In re Est. of Lenk),* 2025 Nev. App. Unpub. LEXIS 504; 2025 LX 414250 (Court of Appeals of Nevada 2025). Vexatious litigant restrictions and sanctions affirmed on appeal for repetitive and harassing claims.

1. These matters arose from a dispute over the distribution of the estate of Edward L. Lenk. Respondents/Real Parties in Interest Hunter Liggett, Jill Rene Stynda, Janet E. Lenk Cohen, Carin Lenk Sloane, and Kristin Noel Lenk (the "Lenk heirs") are Lenk's nieces and nephews and are the statutory heirs to his estate. Prior to Lenk's death, Robert created the Lenk Family Trust, which left Lenk's substantial estate to Robert and Denise Pilkington ("Pilkingtons"), effectively disinheriting the Lenk heirs. Following Lenk's death, the Lenk heirs filed a petition seeking to declare the Lenk Family Trust invalid and alleging Robert engaged in various acts of misconduct regarding the estate (the "trust matter").

2. While the trust matter was ongoing, the parties located assets that were not held in the trust and subsequently opened an estate matter that governed disbursement of all non-trust assets. Thereafter, the Lenk heirs and Pilkingtons entered into a settlement agreement where the Pilkingtons stipulated that the trust was invalid and further agreed to pay additional funds in return for the Lenk heirs waiving any claims they may have against the Pilkingtons. The district court subsequently entered an order in both the trust and estate matters, adopting the settlement agreement. As a result, the trust was dissolved and all assets previously held in the trust were transferred to the estate matter for disbursement.

3. Despite the settlement agreement, the Pilkingtons continued to assert claims to the estate funds in both the trust and estate matters, and they also instituted a civil complaint against Nye County Public Administrator Ginger Simpson, the Lenk heirs, Wells Fargo, and the district court judge overseeing both the trust and estate matters (the "civil complaint"). For a period of time, the Lenk heirs and the Pilkingtons were involved in three different district court proceedings concerning Lenk's estate and the actions taken in the trust matter.

4. Following additional motion practice, in which the Pilkingtons continued to assert previously denied arguments, the district court overseeing the estate matter entered an order finally distributing the estate between the Lenk heirs. The Lenk heirs subsequently filed a motion for attorney fees and costs, seeking a sum of $429,649.45, and sought an order declaring the Pilkingtons vexatious. Robert appeared at a hearing and argued the motion for attorney fees was untimely, there was no judgment authorizing a fee award, and he was not vexatious because his bank accounts remained frozen and he acted reasonably in seeking to unfreeze them.

5. The district court entered an order declaring the Pilkingtons vexatious litigants and awarding the Lenk heirs $490,079.32 in legal fees and $29,141.32 in costs. The district court ordered that: (1) the Pilkingtons were enjoined from filing pro se complaints in the Fifth Judicial District Court unless they first submit the complaint to an existing district court judge's chambers for review to determine if the complaint contains cognizable claims; (2) if the complaint contains cognizable claims, the reviewing judge will provide a written finding that the new action has merit or may impact a constitutional right; and (3)

if the Pilkingtons do not comply with this procedure, they will be responsible for any fees or costs associated with the defense and/or dismissal of said suit.

6. The Pilkingtons appealed and the court of appeals affirmed on the following grounds:

a. A writ of mandamus is the proper means for challenging a district court vexatious litigant order. Mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. The petitioners bear the burden of demonstrating that extraordinary relief is warranted. This court reviews an order declaring individuals to be vexatious litigants and setting restrictions on their ability to access the courts for an abuse of discretion.

b. Because vexatious litigant orders limit a litigant's right to access the courts, the court must perform a four-factor analysis in declaring individuals to be vexatious litigants. This analysis requires that: (1) the litigants be "provided reasonable notice of and an opportunity to oppose" the request; (2) the district court "create an adequate record for review," including an explanation of the reasons it issued the order; (3) the district court find the filings were frivolous or harassing and not simply based on "a showing of litigiousness"; and (4) the order be "narrowly drawn to address the specific problem encountered."

c. The district court properly made a record to support the vexatious litigant order. Here, the district court noted the Pilkingtons' constant, repetitive filings across multiple courts and found that the Pilkingtons are uninterested in complying with any ruling they disagree with and instead continually multiply the litigation by filing new motions, petitions, or complaints. The district court further found that, rather than ending the litigation, the Pilkingtons used the settlement agreement as a "springboard" for litigation against not only the Lenk heirs but the district court and the probate commissioner. The district court further found that the primary goal of these filings was to run up litigation costs and harass the Lenk heirs. These findings are supported by substantial evidence in the record.

d. The Pilkingtons repeatedly asserted the claim that their bank accounts remained frozen despite three different district courts rejecting this argument. Notably, when the Pilkingtons' appeals challenging these decisions were dismissed as untimely, the Pilkingtons simply took their claims to another district court in an attempt to obtain a different result. The Pilkingtons' pursuit of their bank account claims is but one example of how they refused to accept any adverse rulings and instead litigated their claims across three different judicial actions and multiple appeals. Moreover, the record reflects that, in discussing these ongoing proceedings, Robert stated that he believed such litigation would be "fun" and that he looked forward to the continued motion practice.

e. Moreover, to the extent the Pilkingtons claim they cannot be vexatious because none of their individual filings was ever declared vexatious, there is no Nevada law establishing such a requirement for a court to declare individuals vexatious litigants.

f. The district court found the Pilkingtons' filings were part of a "course of deception and obfuscation" to conceal their attempts to abscond with Lenk's assets. Further, the district court found the Pilkingtons used the settlement agreement as "a springboard for further malicious and vindictive litigation" and

regardless of the legal reasoning, the court found the Pilkingtons continued to challenge every adverse order to inflict financial pain through attorney fees. Once again, these findings are supported by substantial evidence in the record.

g. The Pilkingtons further reason that, so long as they reasonably believed their bank accounts remained frozen, or that the Lenk heirs violated the settlement agreement, their associated filings cannot be frivolous or vexatious. However, the district court determined that the Pilkingtons were not litigating based on a reasonable, if incorrect, belief regarding the status of the bank accounts but instead found the Pilkingtons' true intent was "to create maximal monetary damage." Further, while the Pilkingtons assert their intention was only to unfreeze the allegedly frozen accounts, substantial evidence supports the district court's determination that the Pilkingtons were actually using these filings to harass the Lenk heirs in retaliation for being deprived of Lenk's estate. This includes that the Pilkingtons asserted their already dismissed claims regarding the bank accounts in three different courts, initiated litigation against the district judge overseeing the trust matter, continued to litigate the settlement agreement despite the court enforcing it, and Robert's own statements indicating the litigation was "fun" for him.

h. The vexatious litigant ruling is narrowly tailored. The type of restrictions available to a district court does not depend on the number of defendants a vexatious litigant has named. The Pilkingtons have named multiple defendants in their frivolous filings, including naming the district court judge overseeing the trust and estate matter in a civil complaint.

i. The district court found the Lenk heirs were entitled to attorney fees under state law that permits attorney fees as a sanction award. Thus, because the Lenk heirs were awarded attorney fees as a sanction, the ordinary 21-day time limit for seeking attorney fees did not apply, and the Pilkingtons' timing argument does not provide a basis for relief. On appeal, the Pilkingtons have failed to identify any specific billing entries for attorney fees that were purportedly incurred in another case. Instead, they generally assert, without explanation, that at least some of the fees must have been incurred in other litigation. Given the Pilkingtons' failure to identify anything in the record to support their argument, no relief is warranted on this claim.

XVI. FIDUCIARY APPOINTMENT, REMOVAL, & SUCCESSION

A. *Baskin v. Walkup,* 2025 S.C. App. LEXIS 4; 2025 LX 173350 (Court of Appeals of South Carolina 2025). Trustee removed for focusing on long-term growth of trust rather than needs of current beneficiary.

1. Jane Baskin's father, Eldridge Baskin, died in September 1990. Baskin, his only child, was bequeathed a house and its contents in Columbia. At the time, Baskin was approximately forty-three years old and had cerebral palsy. The remainder of the estate was placed in a trust to be held, administered, and distributed as hereinafter provided for the sole benefit of Baskin to provide for the well-being of Baskin so long as she shall live. The will further indicated: "the provisions thereof are to be construed in the light of this purpose and while this shall not have the effect of limiting in any way the power, authority,

or discretion of the trustee hereunder, it shall at all times be borne in mind by the trustee when considering the matter of any encroachment upon the principal of the trust."

2. William B. Walkup was named as the trustee. The trust was funded with liquid assets valued at more than $130,000 and a rental home valued at more than $40,000. The will directed the trustee to invest the trust assets, apply the net income for Baskin's benefit, and distribute principal for Baskin's medical care, comfortable maintenance, and welfare. Upon Baskin's death, the trust assets would pass to the settlor's then-intestate heirs at law.

3. Baskin sued to remove Walkup as trustee and for an accounting. Both parties moved for summary judgment. The probate court denied both motions and appointed a guardian ad litem (GAL). The matter proceeded to trial on January 4, 2021.

4. Baskin lived in the family home from 1959 until June 2015, when against her wishes, she moved to an apartment complex owned by Walkup because the complex was closer to his office and he believed expenses were too high at the house. The apartment was not accessible, which Baskin required for her wheelchair. Baskin testified she told Walkup she wanted to go back to the house rather than pay rent at the apartment; instead, Walkup attempted to move her to a nursing home. Baskin refused to move to the nursing home and began renovating her house.

5. According to Baskin's testimony, out of her monthly income of $860 per month, she paid for her food, utilities at the house, insurance, cable, dog expenses, and clothing. Baskin testified Walkup discussed the trust with her one time, in 2008, after she retained a lawyer who requested an accounting. When Baskin asked Walkup about one accounting, he told her she did not need to know more. In 2017, Baskin retained another lawyer who requested another accounting. By letters dated August 10 and August 24, 2017, Walkup reminded Baskin the house belonged to her and, although the trust had been paying the insurance and electric bills on the house, it would discontinue paying them beginning in October. Baskin testified she had been paying the utility expenses since then, and her friend, Michele Moseley, had been paying the insurance. On May 14, 2018, Baskin and Moseley sent a letter to Walkup telling him not to directly contact Baskin and to correspond through her attorney. By letter to Walkup, Baskin demanded, inter alia, $6,500 per month from the trust.

6. Baskin testified she had known Moseley for thirty-seven years, and named her as a general and health care power of attorney in 2017. Moseley was also acting as one of Baskin's caretakers. Baskin maintained she needed a caregiver for ten hours a day rather than the forty hours per week the trust was paying for, and Baskin wanted to be able to pay Moseley for her caregiving time, which Walkup refused to do. Baskin testified she could pay her own bills and had a checking account and credit card. Moseley began providing care to Baskin in 2017. Moseley testified Baskin was capable of handling her money; paid her bills each month; and could live within a monthly budget. Moseley also testified she was not paid for her assistance because Walkup refused to pay her. Moseley testified she became Baskin's power of attorney at Weatherly's request and she primarily exercised power only to sign checks for Baskin. Moseley claimed she did not create the breakdown of Baskin's relationship with Walkup, which was "already sour." In addition, Moseley testified she could not work with Walkup as trustee because he did not "like" her.

7. Walkup testified he was eighty years old and had known Baskin since she was eleven months old. He agreed to be the trustee because he believed he could help. According to Walkup, he moved Baskin to his apartment complex because she began falling, and there, his daughter could and did assist Baskin. Walkup testified Baskin should be in a nursing home because she needed 24/7 care. He also testified Baskin required $14,400 per month to live in the house, which would deplete the trust within three years. In comparison, Walkup maintained the nursing home would cost $6,600 per month or more depending on the level of care Baskin required. Walkup believed Baskin resented that her father did not leave the estate directly to her and testified his relationship with Baskin deteriorated much more when Moseley became involved. Walkup testified regarding the vast increase in corpus of the trust during the period of his trusteeship, which grew from approximately $135,000 to more than $500,000.

8. The parties entered a temporary settlement agreement, which they filed with the probate court. Walkup remained the trustee solely for investment and tax reporting purposes; Alex Weatherly was appointed as a special trustee for Baskin's care; and Walkup was to provide a monthly payment to Weatherly on behalf of Baskin. Baskin was to move to the house by February 1, 2021.

9. Baskin filed a motion for temporary attorney's fees. Walkup filed a memorandum in opposition to the court's request for a proposed order granting Baskin attorney's fees. The court indicated its intent to award attorney's fees. According to Baskin, Walkup, "for the first time at the status conference," maintained the settlement agreement had expired; thus, the court considered the matter an emergency and set a hearing for that afternoon. The court rejected Walkup's contention that the temporary order expired and granted Baskin's request to increase the monthly payments. The court also set the remainder of the trial for December 2021.

10. On November 19, 2021, Walkup filed a motion for recusal, arguing the probate judge's bias was indicated by her willingness to rule against Walkup regarding attorney's fees before fully hearing from him. Walkup filed an emergency motion dated December 30, 2021, seeking investigation by the GAL based on anonymous telephone calls he received regarding Baskin's care. The court reappointed the GAL. Baskin filed an amended petition for temporary attorney's fees. The court denied the motion for recusal. Walkup filed a civil action in Lexington County as the trustee against Weatherly and Moseley. Baskin filed a Motion for Order and Rule to Show Cause (Contempt) or in the Alternative, Motion to Enforce Settlement and for Sanctions.

11. When the trial continued, Walkup introduced the affidavits and deposition transcripts of numerous witnesses in lieu of testimony. The GAL testified she first visited Baskin in October 2020 at the apartment, which she found was not accessible. At the time, Baskin was receiving paid care for twenty-four hours per week. In addition, Moseley provided care for twelve hours per week. The GAL expressed concern at that time regarding Baskin's inability to afford food, incontinence supplies, medications, and other expenses, such as a custom-fitted wheelchair. The GAL recommended funds from the trust be released to provide for the renovations to the house. She also recommended a professional fiduciary service be hired as the trustee. The GAL opined Baskin should be provided a monthly budget, which she was capable of managing. In May and June of 2022, the GAL again visited Baskin, this time at the house. The GAL testified Baskin was happy at the house; the rooms were "very nice [with] wide-open space for her to walk

through and utilize her wheelchair"; the shower was an appropriate roll-in shower; the kitchen was well-stocked; and the area was very clean. In addition, the GAL found no financial concerns.

12. The GAL opined Baskin needed consistent medical supervision and recommended, inter alia, 24/7 care by licensed caregivers; a licensed healthcare provider under a doctor's supervision; a background check on the live-in caregiver/tenant; and a certified geriatric care manager that was not in a caregiver role. In response to a question whether there was evidence Baskin was being unduly influenced by Moseley, the GAL testified Baskin was willing to go along with others' actions in order to stay in her house, but the GAL did not observe anyone exerting influence on Baskin to do something she did not want to do. When asked if the fact that Moseley was the beneficiary of the house upon Baskin's death changed her answer, the GAL testified, "No."

13. The court removed Walkup as trustee based on, inter alia, (1) best serving Baskin; (2) a substantial change in circumstances in the relationship between Walkup and Baskin, which had "deteriorated to a toxic level of litigation"; and (3) requested by Baskin, best serving the trust, and not inconsistent with a material purpose of the trust. The court noted a suitable trustee was immediately available because Weatherly had been serving, and Baskin was competent with Weatherly's and Moseley's assistance, to find a suitable replacement. The court also found Walkup in contempt and in breach of the temporary settlement agreement and ordered Walkup to pay Baskin's attorney's fees of $3,500 for having to bring a motion for sanctions. Finally, the court awarded Baskin attorney's fees of $129,625.80. The court denied Walkup's motion for attorney's fees. Walkup appealed.

14. On appeal, the court of appeals affirmed on the following grounds:

a. A trustee may be removed by the court if, because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

b. The will required the trust be used for the sole benefit of Jane E. Baskin so long as she shall live. Thus, the primary purpose of the will and the creation of the trust was to benefit Baskin. Although Walkup's financial expertise was apparent in the manner in which he invested and grew the trust corpus, the record was replete with evidence that long-term growth rather than Baskin's well-being was Walkup's primary concern. Grounds for removal of Walkup as trustee were Baskin's best interests and a substantial change of circumstances in the relationship between Walkup and Baskin. Furthermore, there was a suitable successor trustee, Weatherly, until Baskin was able to replace the trustee with his assistance.

c. There is no evidence in the record suggesting that Judge McCulloch was biased and her factual findings were supported by the record. Walkup based his motion for recusal on the email request to Baskin's counsel in July 2021 to prepare an order granting temporary attorney's fees and on Judge McCulloch's comments during the status conference/emergency hearing. As to the email, Baskin moved

for temporary attorney's fees in February 2021. Rather than responding to the motion, Walkup moved to recuse Judge McCulloch. Regarding the emergency hearing, Walkup asserted he based his motion for recusal on Judge McCulloch's statement that she was going to award Baskin attorney's fees, which Walkup argued was premature because he had not presented his case. Although Judge McCulloch stated at the hearing that she was going to award Baskin attorney's fees, in the order, no attorney's fees were granted as a result of the emergency hearing and Judge McCulloch stated the issue of attorney's fees "is still an issue to be decided." There is no evidence of bias.

d. Walkup argues the probate court erred in finding him in contempt because the temporary settlement agreement did not forbid him from filing an action in Lexington County. The court found the agreement temporarily stayed the action and Walkup violated the stay by commencing the action and by misrepresenting in it that he was the trustee of the trust. There is clear and convincing evidence to affirm the finding of contempt. Walkup's filing of an action in another jurisdiction raising the same issues was willful disobedience of the order incorporating the settlement agreement.

B. *Doe v. N.H. Div. of State Police,* 2025 N.H. LEXIS 4; 2025 LX 290689 (Supreme Court of New Hampshire 2025). State trooper's deceptive responses to investigation into potential abuse of trustee powers justify termination of employment with state police.

1. While employed as a trooper by defendant New Hampshire Division of State Police ("Division"), the plaintiff, John Doe, cared for his elderly aunt and was the successor trustee of his aunt's trust. In April 2015, the plaintiff and his aunt sought to change the trust from a revocable trust to an irrevocable trust. They consulted with an attorney who proposed that the aunt resign as trustee and name the plaintiff as the new trustee of the trust. The aunt signed a "Resignation of Trustee form," the plaintiff signed an "Acceptance of Trustee form," and the plaintiff became the trustee of the aunt's trust. Soon thereafter, however, the branch manager of the bank where the trust was located contacted the aunt and expressed concern that the plaintiff was "withdrawing large amounts of funds" from the trust. According to the plaintiff, his aunt responded by closing the account at the bank and transferring the assets to a different bank where she made herself the trustee of the trust.

2. The branch manager at the bank where the trust was originally located also contacted defendant New Hampshire Attorney General's Office ("AGO") regarding the plaintiff's depletion of the trust's funds, and the AGO opened an investigation. The AGO interviewed the plaintiff and asked him several times whether he was the trustee of his aunt's trust. The plaintiff responded that he was not. At the conclusion of the investigation, the AGO "cleared the plaintiff of any criminal wrongdoing." However, the AGO contacted the New Hampshire Division of State Police ("Division"), based upon its belief that the plaintiff lied during the investigation and recommended that the Division submit the plaintiff's name for placement on the Exculpatory Evidence Schedule ("EES").

3. The Division conducted an internal investigation into the plaintiff's "alleged untruthfulness" during the AGO's investigation. Prior to being interviewed, the plaintiff asked the branch manager at the second bank whether his aunt was the trust's current trustee. The branch manager responded that the aunt was the trustee and the plaintiff was the successor trustee.

4. During an interview, the plaintiff represented to the Division that he was not the trustee of his aunt's trust and that his aunt remained the trustee. The investigating officer confronted the plaintiff with the "Resignation of Trustee" and "Acceptance of Trustee" forms that the plaintiff and his aunt had signed and the plaintiff's email communications with the attorney. The plaintiff responded that he did not recall signing the document or sending the email communications. The investigating officer determined that the plaintiff "intended all along to take over as trustee and that he planned [his aunt's] resignation and his acceptance of the role of trustee" and recommended disciplinary action. The Division concluded that the plaintiff's responses during the interview were "deceptive and obstructive to the investigation," and it terminated the plaintiff's employment "for lack of integrity in violation of the professional conduct standards." The Division also notified the plaintiff that his name would be added to the EES.

5. The plaintiff appealed the termination of his employment to the New Hampshire Personnel Appeals Board ("PAB"). The PAB upheld the Division's termination of the plaintiff's employment. The plaintiff unsuccessfully moved for rehearing and filed an appeal that dismissed as untimely.

6. Plaintiff filed a complaint in the superior court requesting declaratory judgment that "his name is not appropriate for inclusion on the EES" and a permanent injunction to remove his name from the EES. The defendants moved to dismiss the complaint, and the court granted their motion. The plaintiff unsuccessfully moved for reconsideration and then appealed.

7. On appeal, the New Hampshire Supreme Court affirmed on the following grounds:

a. The question therefore is whether the plaintiff is entitled to a hearing in the superior court regarding his placement on the EES in addition to the PAB employment termination appeal in which he participated.

b. The plaintiff participated in the Division's investigation that resulted in its finding of misconduct, and the Division informed him that it intended to submit his name for inclusion on the EES when it reached the decision to terminate his employment. The plaintiff then appealed his employment termination to the PAB, which, although it did not separately address the plaintiff's placement on the EES, upheld the Division's finding of misconduct that led to the plaintiff's termination. The PAB denied the plaintiff's motion for rehearing, and the plaintiff failed to timely appeal the PAB's decision to this court.

c. Furthermore, the Division notified the plaintiff that it intended to submit his name for inclusion on the EES when it terminated his employment prior to the plaintiff's PAB appeal. The plaintiff was provided an opportunity to challenge the conduct that led both to his termination and his placement on the EES during his appeal to the PAB. Because the employment termination and the EES designation were predicated on the same underlying conduct of the plaintiff, it is not the case that the plaintiff should be provided an additional hearing in the superior court to relitigate the EES placement. There are no differences in hearings conducted before the PAB and the superior court sufficient to warrant a separate hearing, and a different outcome would not result.

d. Plaintiff had a full and fair opportunity to present the arguments to the PAB about whether he lied, and indeed provided his own testimony about the

underlying facts. The sustained finding sufficiently establishes the plaintiff's misconduct for the purposes of determining whether it is potentially exculpatory.

e. Although the trial court's decision preceded the New Hampshire Supreme Court's articulation of the standard for determining whether information in an officer's personnel file constitutes potentially exculpatory evidence, its reasoning is consistent with that standard. Potentially exculpatory evidence is evidence, including impeachment evidence, that is reasonably capable of being material to guilt or to punishment. Considerations made to determine the admissibility of evidence, such as the age of the conduct and its materiality to an officer's general credibility, should factor into the determination of whether information in an officer's personnel file warrants his or her inclusion on the EES.

f. The sustained instances of untruthfulness during official investigations bear on the plaintiff's general credibility, potentially triggering a prosecutor's obligation to disclose the evidence to a criminal defendant in a case where the plaintiff's credibility is at issue. Therefore, the trial court concluded that the plaintiff's personnel information contains potentially exculpatory evidence such that his placement on the EES is appropriate.

g. The plaintiff's responses during the investigations conducted by the AGO and the Division were deceptive, and evidence of this misconduct is reasonably capable of being material to guilt or to punishment. Therefore, the trial court correctly determined that the plaintiff failed to demonstrate that the information in his personnel file does not contain potentially exculpatory evidence such that his name should be removed from the EES.

C. *Hardaway v. King (In re Estate of Earnest Ovell King),* 2025 Mich. App. LEXIS 4918; 2025 LX 132740; 2025 WL 1742287 (Court of Appeals of Michigan 2025). Trustee removed for failure to carry out terms of trust and settlement agreement.

1. Earnest O. King had eight children, including Eugenia Hardaway and Emeline King. Upon Earnest's death, his estate was to pour over into his Living Revocable Trust. Hardaway was the successor trustee of Earnest's Trust. King lived with Earnest as his caretaker for approximately four years, starting in 2019. Earnest passed away on June 29, 2023. On June 30, 2023, King left Earnest's home to run errands. While King was away from the home, Hardaway changed all of the locks, including the locks on the mailbox. On October 4, 2023, King changed the locks and did not provide Hardaway with a copy of the key.

2. Earnest's home is the primary asset in the Trust. King filed a petition requesting supervision of the Trust, removal of Hardaway as trustee, a compelled accounting, a surcharge of Hardaway, and to enjoin Hardaway from dissipating Trust assets. King alleged Hardaway should be removed as trustee for committing a breach of trust, refusing to respond to beneficiaries, and failing to properly administer the Trust. She asserted a special fiduciary should be appointed to preserve and properly administer the Trust. Hardaway responded and claimed she had not engaged in any conduct that was a breach of her fiduciary duties. A mediation was held and the case was settled. Among other terms, King was to vacate the home so it could be sold.

3. King later moved to enforce the settlement agreement, compel the sale of the home, remove Hardaway as trustee, appoint an independent fiduciary, compel an accounting,

and for fees and sanctions. She alleged that Hardaway had repeatedly stated she would not sell the home and had not listed it for sale. At the hearing regarding this motion, King's attorney acknowledged Hardaway had listed the home for sale, but contended that Hardaway refused to go through with a sale. The probate court granted King's motion to enforce the settlement agreement and appointed Thomas Fraser as the special fiduciary.

4. Hardaway appealed and the court of appeals affirmed on the following grounds:

a. The Trust states that "[a]fter the death or disability of [Earnest and his wife], a majority of beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this agreement may remove any incumbent Trustee." Notwithstanding this provision, a probate court has the power to remove a trustee under statutory grounds.

b. The probate court found that the parties' behavior was "outrageous" and the home was sellable. The court's findings were supported by the record. Although the court did not expressly identify any of the statutory grounds for removal, examining the record, it is apparent that the removal was because of persistent failure of the trustee to administer the trust effectively, and because that removal of the trustee best serves the purposes of the trust.

c. It is undisputed that the home is the primary asset in the Trust. It is further undisputed that Hardaway locked King out of the home one day after Earnest's passing, and King locked Hardaway out of the home several months later. The settlement agreement was entered on December 15, 2023. Relevantly, it stated that King would provide Hardaway with a key to the home, Hardaway would prepare the home for sale, Hardaway would provide a timeline for listing the home for sale, and King would be paid $80,000 from the proceeds of the sale. It is undisputed that the home was not listed for sale until May 28, 2024. Over five months had elapsed between the entry of the settlement agreement and the listing of the home, which was nearly one year after Earnest's death. Hardaway had a duty to expeditiously administer the trust but persistently failed to do so.

D. *In re Est. of Gilmore,* 2025 Haw. App. LEXIS 278; 2025 LX 127657; 2025 WL 1590740 (Intermediate Court of Appeals of Hawai'i 2025). Personal representative removed where estate assets distributed 17 years earlier and there was no equitable reason to reopen estate.

1. In 1968, twins Samantha and Amanda were born to Elizabeth Shapiro Gilmore ("Decedent") and her first husband in Boston, Massachusetts. Decedent divorced her first husband in 1978, and married Donald D. Gilmore in 1985. In 1997, Decedent was diagnosed with terminal cancer and decided to move to Maui. On November 20, 2005, Decedent died intestate in Kīhei, Maui. According to Samantha, between Decedent's death and early December 2005, she and Amanda discussed their joint desire to obtain and maintain Decedent's photographs, portraits, paintings, graphic designs, and other personal property, and decided to proceed with obtaining D. Gilmore's interest in the Decedent's personal property in exchange for their interest in Decedent's individual retirement account.

2. According to Amanda, she, Donald, and Samantha gathered in Decedent and Donald's home and divided up Decedent's personal belongings amicably and by agreement. With Donald Gilmore's permission, Amanda and Samantha divided certain personal property belonging to their mother, namely her paintings and her photographs. By agreement,

Samantha took the paintings and Amanda took the photographs. Both Amanda and Samantha submitted statements from Donald indicating he agreed with their decision to split Decedent's artwork and photographs.

3. For the next fourteen years, Samantha possessed the paintings and Amanda possessed the photographs. In 2019, Donald assigned Amanda all rights, title, and interest in Decedent's photographs and negatives, including copyright(s) to those images. About a year later, Donald assigned his portion of any copyright to Decedent's works (including "archive of creations and artwork, photographs, negatives, contact sheets, documents and writings of all sorts, including her journals") to Amanda.

4. In 2020, Samantha petitioned the probate court for adjudication of intestacy and to appoint her personal representative of Decedent's estate, which the court granted. Ultimately, the probate court found that Decedent's personal belongings, including the paintings and photographs, were distributed in 2005 and, thus, were not part of Decedent's estate. The probate court terminated Samantha as personal representative and dismissed the probate action.

5. Samantha appealed and the court of appeals affirmed on the following grounds:

a. Though it appears Hawai'i has not determined whether a terminated personal representative can appeal an order removing them as personal representative of an estate, other jurisdictions allow a terminated personal representative to appeal a probate or trial court's order terminating them as personal representative. The court agrees with those jurisdictions. To hold otherwise would render the order terminating Samantha as personal representative unreviewable.

b. In terminating Samantha as personal representative, the probate court determined equity does not support a redivision of the Decedent's property. A formal testacy proceeding may be commenced at any time after five years from the decedent's death if, in the discretion of the court it would be equitable to do so, for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

c. Decedent's personal belongings were distributed in 2005 and were no longer part of the estate. The court did not abuse its discretion in determining that equity did not require redivision of Decedent's belongings seventeen years later.

d. Samantha argues the probate court collaterally attacked its August 10, 2020 order granting her petition for adjudication of intestacy and appointing her personal representative. Appellate courts in Hawai'i have typically only applied the collateral attack doctrine in situations in which a second lawsuit has been initiated challenging a judgment or order obtained from a prior final proceeding. Here, there was no second lawsuit and, thus, no collateral attack.

E. *In re Est. of Pachis,* 2025 N.Y. Misc. LEXIS 6640 (Surrogate's Court of New York, Bronx County 2025). Executors removed for non-cooperation that left a multi-millionaire buried in Potter's Field for years.

1. The decedent died on July 07, 2020, at the age of 94. She was never married and never had any children natural or adopted. Her only distributee is a half-sister. The propounded instrument dated June 2, 2014 (the "instrument"), notes that it was being stored in a safety deposit box, delineates decedent's family history, contains detailed funeral instructions, and provides for the disposition of decedent's estate, including numerous charitable bequests. In spite of her detailed instructions under the instrument, decedent was interred in Potter's Field on Hart Island on June 23, 2021, and remains there to date.

2. On January 22, 2021, with a copy of the instrument and a waiver and consent from Leonard Sammarco ("Sammarco"), a nominated co-executor, the other nominated co-executor and drafting attorney, Reginald Asiedu, Esq. ("Asiedu"), filed a petition to search decedent's residence, and obtained an order from the court allowing for that search. According to Asiedu's affirmation he spent months attempting to get the cooperation of the police department to unseal the apartment to no avail and ultimately he referred the matter to the Bronx County Public Administrator (the "PA"). Asiedu states he did not seek an order for a safety deposit box opening from the court.

3. After the decedent's death, the instrument was not produced until three years later. Sammarco, through his attorney Luc Ulmet ("Ulmet"), filed a petition seeking an order allowing him to search the safe deposit box listed in the instrument, and obtained an order from the court permitting that search. Sammarco filed an inventory, detailing decedent's assets and their locations. Thereafter, Sammarco filed decedent's original instrument with the court and filed his own probate petition.

4. All beneficiaries under the propounded instrument, including several charities, were given notice of the application and the New York State Attorney General (the "AG") submitted a notice of appearance. Asiedu filed objections to Sammarco's probate petition and filed his cross-petition. Sammarco filed a motion to dismiss Asiedu's objections, which was made returnable on the same date as Sammarco's probate proceeding.

5. The parties entered into a stipulation to: (1) amend Sammarco's probate petition to include Asiedu as co-executor of the estate; (2) withdraw Asiedu's objections and cross-petition upon the amendment of the initial petition; and (3) Sammarco's motion was to be withdrawn. Pursuant to the parties' agreement, a decree was signed admitting the decedent's will to probate and appointing Asiedu and Sammarco as co-executors upon their filing a bond in the penal sum of $100,000.00, which at that time was the listed value of the estate. The bond was never posted and letters never issued. Thereafter, Asiedu wrote to the court requesting a conference alleging that Sammarco was hindering the administration of the estate, refusing to provide him with information, and actively concealing information. He further alleged that in spite of being informed by Sammarco and Ulmet that the estate was actually valued at between five and ten million dollars, they refused to provide him with specific information and documentation with respect to those additional assets, noting that their actions were hindering the administration of the estate.

6. An affirmation was subsequently filed by Ulmet seeking to amend the probate petition to list assets valued at just under $17,000,000.00, and requesting the court to amend its decree and direct a bond in the additional amount. Thereafter, Ulmet sought, inter alia, the removal of Asiedu as co-executor and the appointment of another nominated co-executor. In support of the motion to remove Asiedu, it is alleged that Asiedu is not qualified to serve as fiduciary as he failed to move the administration of the estate forward

since 2021, and has been hostile towards Sammarco to such a degree that it has interfered with the proper administration of the estate.

7. Asiedu's cross-motion seeking to have Sammarco removed as co-fiduciary similarly alleges hostility and non-cooperation by Sammarco and Ulmet in moving the estate forward. Asiedu further alleges that Sammarco and Ulmet are conflicted as a result of a contract Sammarco entered into without having authority. Specifically, Mr. Sammarco entered into a retainer agreement with Linking Assets Inc. ("Linking Assets"), to find the decedent's assets as "distributee and co-executor" of the decedent's estate without having been appointed co-executor by the court. The retainer agreement states that Linking Assets will be awarded 15% of the estate's value for their findings. In his motion, Asiedu alleges that Ulmet and Sammarco have engaged in actions that are harmful to the estate and have also taken actions that have impeded his ability to administer the estate, including colluding with Linking Assets, and attempting to intervene with the surety company to prevent him from qualifying for a bond.

8. The AG's cross-motion seeks to have the decree dated April 4, 2025, vacated, and a determination that both nominated co-executors are disqualified from serving, noting that the decedent died almost five years ago and neither co-executor has taken steps to move this matter forward but instead have engaged in actions that have been detrimental to the estate. She references Sammarco entering into the agreement with Linking Assets with no authority.

9. The surrogate removed the executors on the following grounds:

> a. The court held a conference on the record where it was evident that the parties cannot cooperate, and it is clear the animus and hostility is hindering the administration of this estate. Despite the record being insufficient to establish disqualification absent a hearing, the record clearly reveals the acrimonious and hostile relationship that exists among the nominated co-executors. Although antagonism between the nominated co-executors of an estate is not sufficient for disqualification, it is well established that the Surrogate may disqualify a person from receiving letters where the disagreement interferes with the administration of the estate, and future cooperation is unlikely.
>
> b. Here, the parties demonstrate a hostility between them that prevents them from cooperating in the management of the estate. We have a multi-millionaire buried in Potter's field. Given the history of the hostility and non-cooperation between these parties to date, there is no scenario of which this court can conceive that would allow this estate to move forward should the nominated co-executors remain.
>
> c. Moreover, the extreme delay in the administration of this estate, including that the decedent remains interred in Potter's Field almost five years after her death, that the nominated co-executors have been unable to cooperate and agree on how to move this estate forward, as one is allegedly insisting other sign an agreement with Linking Assets without authority, and the alleged possible conflict of interest, the court deems it necessary to appoint a temporary administrator to marshal the assets and comply with decedent's interment wishes.

d. Under the circumstances of this case, to assist in moving this estate forward, the testator's wishes must yield to a third-party-appointed fiduciary, pending the outcome of the probate proceeding.

F. *In re Est. of West,* 2025 Wash. App. LEXIS 157 (Court of Appeals of Washington 2025). Statutory priority for appointment of personal representative does not preclude court discretion when making appointment.

1. Glenn West died testate in 1984. More than forty years later, his estate assets have not been administered. West's will specified an equal distribution of the residue of his estate to his seven named children, including Glenda Santos, should they survive him. In 1985, the trial court named one of West's daughters as the personal representative ("PR"). When that PR passed away, another daughter became the successor PR. When the successor PR passed away, her son, Michael Auayan, requested that he or a neutral third party be appointed PR after another daughter petitioned to be the PR. That daughter later withdrew her petition and then Auayan filed a motion. Auayan, presenting himself as an heir of West, initially sought the position himself, but later withdrew his request and instead argued only for a neutral third-party appointment to administer West's estate. Auayan had the support of the other heirs of the deceased beneficiaries under West's will.

2. Santos, supported by her two remaining living siblings, opposed Auayan's motion and sought to be appointed as PR. Her siblings waived their right to notice on Santos's petition. Auayan agreed that only a beneficiary of gift under the will would be entitled to notice. He argued, however, that as the PR of his mother's estate, he was entitled both to notice and to object to Santos's appointment. He reasoned that because his mother's gift under West's estate passed to her estate, her estate became the beneficiary of gift under West's will.

3. The trial court denied Santos's petition to become PR because of negative family interactions and because the estate has not been settled for more than forty years. The trial court appointed a neutral third-party administrator, without nonintervention powers.

4. Santos appealed and the court of appeals affirmed on the following grounds:

a. Santos claims the trial court erred by appointing a third-party administrator because she was qualified to serve as PR and had first priority under RCW 11.28.120. She essentially argues this statute requires the trial court to appoint the first person with the highest priority who is available and willing to serve as PR.

b. RCW 11.28.120 concerns the initial appointment of a PR and not the appointment of a successor PR. Importantly, the successor personal representative statute, RCW 11.28.280, provides that, if a personal representative dies, the position shall be granted to those to whom the letters would have been granted if the original letters had not been obtained and the successor personal representative shall perform like duties and incur like liabilities as the preceding personal representative, unless the court orders otherwise. The trial court may refuse to grant nonintervention powers to a personal representative if administration of the decedent's estate with nonintervention powers would not be in the best interests of the beneficiaries of the estate. If the court interpreted

RCW 11.28.120 as Santos argues, it would conflict with and negate the discretion granted to courts.

c. The mere fact that Santos was available to serve as PR did not automatically qualify her for appointment, nor did it mean that the court did not have discretion to appoint others. The plain meaning of the statutes provides the trial court with discretion to appoint a PR. There was evidence of disagreement within the family as to the administration of the estate. Because the trial court followed the law and based its decision on the facts before it, the record as a whole demonstrates that the court did not abuse its discretion in appointing a neutral third-party administrator, without nonintervention powers.

d. Auayan's mother was a named beneficiary in West's will. Auayan is the PR of his mother's estate, which is entitled to her portion of West's estate under the will. Therefore, Auayan was entitled to notice. Santos's limited interpretation of who is required to notice is unsupported. As conceded by Santos, if Auayan was entitled to notice, the trial court did not err. Any person interested in a will may file objections in writing to the granting of letters testamentary to the persons named as executors, or any of them, and the objection shall be heard and determined by the court. As the PR of his mother's estate, and as one of his mother's heirs, Auayan had an interest in the distribution of assets in West's estate. As a result, he could file objections in writing, and the court had an obligation to hear them.

e. Santos passingly claims the court erred by appointing a third party for whom Auayan advocated. Santos seems to argue that Auayan allegedly misrepresented his identity as PR of his mother's estate, acted so he could control both his mother's and West's estates, coordinated the declarations submitted by other beneficiaries, and claimed Santos was the source of the dissention within the family. She provides no further argument or citation to authority. Passing treatment of an issue, lack of reasoned argument, or conclusory arguments without citation to authority are not sufficient to merit judicial consideration. There is nothing in the record to support these assertions.

G. *In re Estate of Travis,* 2025 Ga. App. LEXIS 410 (Court of Appeals of Georgia 2025). Co-executor who renounces appointment cannot later seek statutory appointment unless a vacancy occurs.

1. Emory Travis, a widower, died on March 1, 2024. On June 10, 2024, Donna Lisa Butler ("Lisa"), the decedent's daughter, filed a petition to probate the decedent's will in solemn form. The will left the family house to the decedent's son, David Troy Travis ("Troy"), and nominated Lisa and Troy to serve as co-executors. In addition to the will, Lisa's petition attached Troy's written renunciation of his nomination. Troy also agreed in writing to the immediate admission of the will into probate. The will was admitted to probate that morning, and Lisa was issued letters testamentary the following day.

2. In September 2024, Lisa entered into a contract to sell the family home. According to Troy, Lisa told him that they would split the proceeds of the house sale "fifty-fifty" even though the will gave the house to Troy outright. Troy filed objections with the probate court, asking to revoke his renunciation and to be named co-executor. After a hearing, the probate court held that OCGA § 53-6-12 "allows a nominated executor to decline in

writing the right to serve an executor but does not preclude the nominated executor from qualifying at a later time to serve as executor." The court therefore authorized Troy to take his oath as executor. Lisa appealed.

3. On appeal, the court of appeals reversed on the following grounds:

a. An order granting a petition to probate a will and appointing an executor is a final and appealable judgment. Here, as in many probate cases, the issue of the executorship looms large over the estate's disposition. Troy has suggested, for example, that Lisa, now sole executor, is moving forward to evict him from the family home, with Troy seeking to prevent that result by rescinding his declination. Orders such as the one before us, which involves the appointment or removal of an executor, are final and appealable judgments.

b. OCGA § 53-6-12 provides as follows: "A nominated executor may decline in writing the right to serve as executor, but this shall not preclude the nominated executor from qualifying at a later time to serve as executor or administrator with the will annexed to fill a vacancy."

c. OCGA § 53-6-12 replaced the former OCGA § 53-6-71, which barred any recantation of a renunciation, and the new statute envisions circumstances where a renunciation can be undone. But where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden. It is undisputed that Lisa was named sole executor in accordance with Troy's written renunciation and that she never abandoned or was forced out of that office. In the statute's terms, then, no "vacancy" in that office occurred at any time after the renunciation, with the result that the probate court was not authorized to qualify Troy "at a later time."

d. Given that the office of executor has never been vacant, Troy's only recourse in light of his renunciation and the plain terms of OCGA § 53-6-12 was to petition to remove Lisa as co-executor, as (for example) on the ground that when she induced him to renounce his nomination, she ignored the plain terms of the will, which left the house to him outright. The fact remains, however, that Troy could become executor only if that office became vacant, whether by action of the probate court or some other circumstance. Unless and until such a "vacancy" occurs, Troy's renunciation of his right to be co-executor must remain in effect. Nor does the absence of a transcript change this result, where an undisputed fact — here, Lisa's uninterrupted status as executor — was ignored by the probate court.

H. *In re Matter of the Est. of Ryan,* 227 N.Y.S.3d 541; 2025 N.Y. Misc. LEXIS 335; 2025 NY Slip Op 25016 (Surrogate's Court of New York, Monroe County 2025). Appointment of nominated executor may be denied due to delays in administration and actual misconduct.

1. Niss Ryan died on April 4, 2023. She was survived by two children of her first marriage, Susan Houde-Walter and Peter Houde. Barbara Pilcher is the daughter of Niss's second husband, John Ryan. Niss Ryan's husband John died in 2011, and thereafter Susan Houde-Walter assisted her mother in managing her finances and ensuring expenses were paid, such as the expense for caretakers in Mexico. Susan was power of attorney for Niss.

2. In 2016, Niss retained attorney Andrew Dutcher to draft her Last Will and Testament. It named Barbara as executor, of which Susan was aware. At the time, Susan was occupied with the care of her husband, who was ill. Barbara was with Niss when the Will was drafted. The Will provided for the residuary estate to be divided into three equal shares, one each to Niss's two children of her first marriage and one share to her stepdaughter Barbara.

3. Paragraph "SIXTH" of the Will provides as follows: "I direct that any shares of Laser Max owned by me at the time of my death and my interest in my condo in Puerta Vallarta, Mexico, shall be transferred to my residuary beneficiaries in the percentages shown in Paragraph Fourth."

4. In or about 2016, Niss, with Susan's assistance, rented a bungalow at a senior living facility owned by St. John's and kept much of her personal property there. She would spend six months in Mexico and then return, but from 2019 on, she did not return to Rochester. Niss gave up the St. John's bungalow in 2023, and Susan arranged to divide the personal property stored there among her, her brother, and Barbara. At the time of her death, Niss owned not one but two condominiums in Puerto Vallarta, Mexico.

5. After Niss died, Susan made the funeral arrangements, took custody of the ashes, paid the caretaker Isabella, and put her mother's personal property that had not been distributed into storage. She has paid the storage fees from her own funds since July 2022.

6. Upon Niss's passing, Barbara consulted with attorney Andrew Dutcher. She did not file for letters testamentary, although she was aware that she was the nominated executor under Niss's Will. There were two accounts in Niss's name that required administration and distribution and that would pass to legates pursuant to the residuary clause in the Will, one being an investment account and the other a checking account. Rather than applying for letters, Barbara arranged for the sale of the two condominiums in Puerto Vallarta. She retained Mexican counsel. She believed she was entitled to the proceeds of the sale, notwithstanding paragraph "SIXTH" of the Will, based on her understanding of "Mexican law" and a Spanish-language trust agreement dating back to 1989 (a copy of which was not produced). The condominiums were sold, and the net proceeds were approximately $268,000.00. Barbara kept the proceeds in her own bank account.

7. In December 2023, Susan retained attorney Dan Williford, an experienced estate attorney. In May 2024, attorney Dutcher informed Barbara that he would not represent her in the probate of the Will and administration of the estate. She then retained attorney Eric Spoth. In 2024, attorney Williford prepared to file for his client Susan to be appointed administrator c.t.a., given that over a year had passed without any action having been taken by Barbara on behalf of the estate. He exchanged emails with counsel for Barbara, Eric Spoth, concerning whether, since Barbara had never filed to be appointed executor, Barbara would sign a waiver of service of process and consent to Susan's appointment. Spoth responded that she would only if Susan would agree that the proceeds of the sale of the two Mexican condominiums belonged to her. No agreement was reached, and on September 16, 2024, Susan filed to be appointed administrator c.t.a. She also filed a petition to compel production of the Will. Barbara then filed her petition to probate the Will and be appointed executor.

8. The surrogate issued letters c.t.a. to Susan, and denied Barbara's petition, on the following grounds:

a. It is well-settled — indeed, it is far more definite than well-settled, if there is such a standard — that the burden is exceedingly high on one who seeks to deny letters testamentary to one nominated as an executor. The power of the surrogate to refuse letters is limited by statute. If qualified, one named as executor is entitled to the issuance of letters. The testator enjoys the right to determine who is most suitable among those legally qualified to settle his affairs and execute his will, and his solemn selection is not lightly to be disregarded.

b. Also, a nominated executor's character failings may be offensive to others, but unless they, in the aggregate, clearly demonstrate unworthiness for the responsibilities to be undertaken, they cannot bar the appointment.

c. Here Susan seeks to disqualify Barbara, as articulated during closing arguments, as one who does not possess the qualifications required of a fiduciary by reason of improvidence or who is otherwise unfit for the execution of the office. The alleged "improvidence" and "unfitness" consists of: (1) failing to petition to probate the Will for nearly 18 months after Niss passed away and apparently only after Susan filed her petition; and in the course of which left two accounts containing hundreds of thousands of dollars sitting idle; and (2) keeping the proceeds of the sale of the two condominiums in contravention of specific language in the Will that directed that the proceeds be distributed according to the residuary clause, i.e., equally among the three.

d. Improvidence such as to exclude a party from administration is a want of ordinary care and foresight in the acquisition and preservation of property. Also, there must exist such a condition of irresponsibility which so pervades the moral fiber of the individual, so as to render him generally, and under all ordinary circumstances, unfit to act in a fiduciary capacity. There is scant case law dealing with delays in filing for probate as constituting improvidence.

e. Here, however, the delay is nearly 18 months, and during that 18 months, hundreds of thousands of dollars were not being distributed but rather sitting in accounts. No credible reason was given for delaying the probate of the Will, let alone the distribution of a substantial amount of funds to the residuary beneficiaries. And Barbara only filed a petition to probate the Will after Susan had filed petitions for letters of administration c.t.a. and to compel production of the Will. On these facts alone Barbara is improvident and ineligible to administer the estate, having demonstrated a want of ordinary care and foresight in the acquisition and preservation of property.

f. As if that is not enough, however, she also is seriously conflicted. While a potential conflict of interest on the part of a fiduciary, without actual misconduct, is not sufficient to render the fiduciary unfit to serve, here actual misconduct has occurred. Besides not probating the Will and making distributions in a timely manner, Barbara sold two properties in Mexico, one of which was specifically referenced in the Will, and she then kept the proceeds in her belief that she is entitled to them based upon an alleged Spanish-language "trust document" that was never produced.

g. Barbara seeks to administer the estate but has openly rejected the authority of an explicit provision in the Will that directs the proceeds of the sale of (at least) one of the Mexican condominiums to be distributed to the residuary beneficiaries. Her claim of ownership rests on an unproduced and nearly illusory existence of a trust agreement. Thus, the conflict considered in conjunction with the delay in probating the Will constitutes improvidence, thus rendering Barbara ineligible to administer the estate. She claims an absolute right to the proceeds of the Mexican properties, and although it is not her burden to establish that she does not suffer from improvidence, if she was going to provide a rationale for ignoring the language of the Will, it would have helped her rebut the allegation of improvidence if she produced a copy of the Spanish language "trust" agreement. A dark cloud of doubt and suspicion hangs over Barbara's actions with regard to this estate, one that allows the court to conclude that allowing her to administer the estate would "render the estate unsafe and liable to be lost or diminished."

h. Even if her actions do not fit the definitions of "improvidence," they would fall within the more generalized catch-all provision of "unfit for the execution of the office." Barbara's actions, again seen as a whole, render her unfit to be the administrator of the Estate. The court has no guarantee that the administration would take place with the required alacrity upon her appointment, since she did nothing for nearly 18 months to distribute the more than $300,000 that without question was to be distributed to the beneficiaries. She has not made available the "trust" agreement that she says entitled her to the proceeds of the Mexican properties, and she has set up the estate for a costly turnover proceeding to claw back those proceeds. She has exposed the estate to substantial liability for estate income taxes, interest, and penalties.

i. Finally, her explanation for failing to probate the will, that it was on the advice of counsel, is deemed not only not credible, but is ridiculously flimsy and an obvious evasion of responsibility. The court takes it as further evidence of her unfitness to administer this estate. If she had said, for instance, that she was preoccupied with other pressing concerns, or had been relying on attorney Dutcher to file the papers, it would have been more helpful to defeating the claim that she is ineligible than asserting Dutcher told her to sell the property first. It is significant that Dutcher was not called as a witness, and the application of the standard "Missing Witness" charge to determining the outcome seems appropriate here.

I. *In re Supervised Est. of Page,* 2025 Minn. App. Unpub. LEXIS 137; 2025 LX 288572; 2025 WL 665727 (Court of Appeals of Minnesota 2025). Nominated personal representative is unsuitable due to being uncooperative and obtuse, and appointed administrator cannot be removed for cause two days after appointment.

1. David Victor Page died intestate in April 2023 with no surviving spouse or children. At the time of his death, Page had three nieces who inherited his estate: Katherine Disterhaft-Cumings and her sisters, respondents Rachel Disterhaft and Andrea Briese (the "sisters"). From early in the probate proceedings, the district court observed an "irretrievable breakdown in the relationship between" Disterhaft-Cumings and the sisters, and the district court appointed Navigator Fiduciary and Forensic Services, Inc. ("Navigator") as a special administrator, in its capacity as a third-party professional fiduciary.

2. Disterhaft-Cumings petitioned for appointment as the personal representative of Page's estate, asserting statutory priority under Minn. Stat. § 524.3-203. The sisters cross-petitioned for the district court to appoint Navigator as the personal representative.

3. Navigator's president — who had already been involved in managing the estate — testified that Disterhaft-Cumings: (1) demonstrated "a lack of respect in scheduling events" she requested; (2) made "excessive requests for communications"; (3) failed to comply with requests to stop photographing Navigator's employees; and (4) showed "a lack of respect for the shared assets of the Estate," specifically by "interfering in the work to secure Page's home after a recent break-in." As evidence to support the president's testimony, Navigator submitted various email communications with Disterhaft-Cumings for admission into the record.

4. Disterhaft testified about ongoing tension between the sisters and Disterhaft-Cumings. Disterhaft testified that Disterhaft-Cumings engaged in "persistent and consistently repetitive and unnecessary communications," and that the sisters "were unable to reach agreements [with Disterhaft-Cumings] on matters ranging from the simple task of disposal of broken glass from [Page's] home to those which were more complex," such as whether to cremate or bury Page's remains. As supporting evidence, Disterhaft provided three months' worth of text messages — totaling 123 pages — between the sisters and Disterhaft-Cumings.

5. The district court denied Disterhaft-Cumings's petition and granted the sisters' cross-petition, determined that Disterhaft-Cumings was not suitable to act as the personal representative, and appointed Navigator as the personal representative. Two days later, Disterhaft-Cumings petitioned to remove Navigator as the personal representative for cause. The district court denied the petition. Disterhaft-Cumings appealed both decisions.

6. On appeal, the court of appeals affirmed on the following grounds:

> a. Minnesota's version of the Uniform Probate Code ("MUPC") governs appointments of personal representatives. Potential representatives are accorded priority for appointments by statute. However, no person is qualified to serve as personal representative whom a district court finds unsuitable in formal proceedings. Unsuitability is now a ground for refusing appointment, whereas formerly it was only a ground for removal of an executor.
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> b. The MUPC does not define "suitable" and the word has no fixed and inflexible meaning. A district court determines "suitability" by analyzing an individual's temperament, experience, and sagacity to discharge the trust with fidelity, prudence, and promptness, having regard to the special conditions of each estate and those interested in it as creditors, legatees, and next of kin.
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> c. Here, for two reasons, the district court did not abuse its discretion when it found Disterhaft-Cumings unsuitable to serve as the personal representative. The district court explicitly found Disterhaft-Cumings's testimony regarding her suitability not credible. Second, the district court determined Disterhaft-Cumings was "unsuitable" because the evidence overwhelmingly showed Disterhaft-Cumings had difficulty in working with anyone to preserve the estate, as she often was uncooperative and obtuse. These findings were well-supported by the president's and Disterhaft's testimony, and record evidence that documented

Disterhaft-Cumings's disrespectful and uncooperative communication about the estate.

d. Disterhaft-Cumings argued the district court abused its discretion when it denied her petition to remove Navigator as the personal representative, arguing that Navigator was "wasting the estate's money," "rude, unprofessional to the heirs," and "disrespectful to [the heirs]."

e. A petitioner has cause for removal when removal is in the best interests of the estate, or if it is shown that a personal representative or the person seeking the personal representative's appointment intentionally misrepresented material facts in the proceedings leading to the appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

f. Here, Disterhaft-Cumings petitioned for removal only two days after Navigator became the personal representative and the district court had not yet issued the Letters of General Administration to allow Navigator to act as the personal representative. The record amply supports the district court's determination that, during those two days, nothing occurred to warrant removing Navigator as the personal representative. And Disterhaft-Cumings does not point to any evidence demonstrating that the district court acted contrary to logic and the facts in record. Accordingly, the district court did not abuse its discretion when it denied Disterhaft-Cumings's petition for removal.

J. *Maestrales v. Maestrales,* 2025 Fla. App. LEXIS 6162 (Court of Appeal of Florida, Fourth District 2025). Where removal of a personal representative was ordered without notice or an evidentiary hearing, it did not comply with the requirements of due process.

1. Following Father's death, Sophia Maestrales ("Daughter") petitioned for administration of Father's will and for appointment as PR of his estate. The will designated Daughter as personal representative ("PR"). The probate court issued letters of administration to Daughter and entered an order admitting the will to probate and appointing Daughter as PR of Father's estate.

2. Several years later, Father's estranged daughter ("Estranged Daughter") petitioned for partial revocation of the will. Father's son, appellee Peter Maestrales ("Son"), also filed a petition, seeking the removal of Daughter as PR. Two separate hearings were scheduled concerning the respective petitions. Estranged Daughter voluntarily dismissed her petition the night before the scheduled hearing regarding that petition. The probate court nonetheless proceeded to hold the hearing at the scheduled time. Son's attorney appeared at the hearing, but neither Daughter, Estranged Daughter, nor their attorneys appeared. The probate court stated, "counsels' failure to appear was a choice they made." The hearing addressed arguments presented in Son's petition. Following the hearing, the probate court sua sponte removed Daughter as PR of the estate, revoked her letters of administration, and canceled as moot the hearing scheduled to consider Son's petition. Daughter appealed.

3. On appeal, the court of appeals reversed on the following grounds:

a. The Federal and Florida Constitutions guarantee due process of law. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

b. We have held that where removal of a PR was ordered without notice or an evidentiary hearing, it did not comply with the requirements of due process. Due process requires that a party be given a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him. An issue determined in spite of prior notice that it will not be considered is a denial of elemental due process.

c. Here, the probate court sua sponte removed Daughter as PR at a hearing noticed for an issue distinct from that raised by Estranged Daughter. The basis of Daughter's removal had been scheduled to be addressed at a later hearing. The probate court failed to afford Daughter notice and an opportunity to be heard prior to removing her as PR. That is fundamental error.

K. *Marshall v. Regions Bank,* 2025 Ala. LEXIS 3; 2025 LX 31932; 2025 WL 64000 (Supreme Court of Alabama 2025). Court properly exercised its discretion to appoint special fiduciary but exceeded its discretion by ordering the special fiduciary to make factual findings and legal determinations.

1. These proceedings involve the Mabel Amos Memorial Fund ("the trust"), which is a charitable trust created by the will of Mabel S. Amos ("Amos"). Generally, the trust was created for the purpose of providing financial assistance to beneficiaries — which are chosen at the discretion of the board members of the trust through an application process — desiring to obtain higher education. The plaintiffs in the underlying actions — Megan Carmack and Leigh Gulley Manning ("Leigh"), individually and on behalf of Carmack's minor children, Michaelyn Leigh Manning, and Michael Sanders Manning, and Tyra Lindsey, a minor, by and through her mother and guardian, Denese Rankin ("Lindsey") — have alleged in the circuit court that the trustee and board members of the trust breached their fiduciary duties in various respects and commenced the underlying actions in an effort to, among other things, remove the trustee and the board members, have a new trustee and new board members appointed, and restore the allegedly misappropriated assets of the trust. The circuit court appointed a special master and referred the entirety of the underlying actions to the special master. The circuit court also appointed James C. White, Sr., C.P.A., to aid the special master in providing an accounting of the trust.

2. Amos's will directed that, upon her death, certain proceeds of her estate be used to establish the trust. Amos died in 1999, and, after her estate was probated, the corpus of the estate was distributed to create the trust in 2002. Regions Bank served as the trustee of the trust and administered it in conjunction with the trust's board. At times relevant to these proceedings, the following individuals served as board members of the trust: Thomas Albritton, Rick Clifton, John Bell, and Drew McNees ("the board members"). According to Amos's will, "[t]he net income from the trust fund after payment of all costs of administration shall be expended to fund or to provide scholarships for deserving young men and women of this State, and to assist them in attending any educational institution."

Amos's will stated that the trustee is to make distributions from the trust at the direction of the trust's board and that the trustee "shall not engage in any act of self-dealing."

3. The trust did not initially have substantial income. However, in 2011, oil was discovered on a piece of property held by the trust, and the income of the trust substantially increased. From that time forward, the pleadings allege, Regions Bank and the board members breached their fiduciary duties in various respects by, allegedly, charging excessive fees and making distributions contrary to the terms of the trust. As a result, the plaintiffs commenced the underlying actions, which were eventually consolidated, in an effort to, among other things, remove the trustee and the board members, have a new trustee and new board members appointed, and restore the allegedly misappropriated assets of the trust. Attorney General Steve Marshall ("Marshall") filed a motion to intervene in one of the consolidated actions (he had been named as a defendant in the other consolidated action and later had been realigned as a plaintiff).

4. Eventually, the circuit court entered an order appointing a special master. Marshall petitioned the Alabama Supreme Court for writs of mandamus ordering the circuit court to vacate its order, which the Court granted. Lindsey filed an application for rehearing. While the application for rehearing was pending in this Court, the circuit court vacated its order appointing a special master and referring the entirety of the underlying cases to the special master. The circuit court then scheduled a hearing. Before the hearing, Lindsey provided the circuit court with numerous tax filings from previous years that had been filed by the trust with the Internal Revenue Service; those documents were in addition to other of the trust's tax documents that Lindsey had previously provided. Lindsey filed with the circuit court a proposed order that, if adopted, would appoint White as a special fiduciary of the trust. Under Lindsey's proposed order, White would, among other things, take possession of the assets of the trust, administer the trust pending the circuit court's consideration of whether to remove the trustee and the board members of the trust, conduct a full accounting of the trust, and make a determination as to whether Regions Bank had breached its duties as the trustee of the trust.

5. The circuit court invited the parties to submit further written arguments on the appointment of a special fiduciary. Marshall argued that the appointment of a special fiduciary under § 19-3B-1001(b) is essentially the same thing as the appointment of a special master under Rule 53, characterizing Lindsey's request for the appointment of a special fiduciary as a "change[-]of[-]verbiage gimmick." Specifically, Marshall argued that Lindsey's request that White be ordered to conduct a full accounting of the trust and to determine whether Regions Bank had breached its duties as trustee is exactly the kind of order that the Supreme Court directed be vacated. Lindsey argued that it is within the circuit court's discretion under § 19-3B-1001(b) to appoint a special fiduciary to take possession of the trust property and administer the trust and to order an accounting. Moreover, Lindsey argued, Marshall, in the complaint that he had filed against Regions Bank, had previously requested that the circuit court appoint a special fiduciary to take possession of the trust property and administer the trust and to order an accounting.

6. The circuit court entered the following order appointing White as a special fiduciary of the trust to take possession of the trust property and administer the Trust pending a final decision on the removal of the trustees, and to conduct an accounting of the Trust's books and records for purposes of determining the full extent of the trustees' breaches. The court ordered as follow: "The temporary Special Fiduciary is directed to audit the books

and records of the Trust to determine the monetary amount, if any, of all disbursements made by the trustees, including both scholarships and other disbursements, that were in violation of the terms of the Trust. This accounting shall also include the amount of net income, if any, the trustees may have improperly diverted to the Trust's principal instead of using these funds to provide scholarships as required in accordance with Article 5 of the Trust. This accounting shall further include the amount of fees, if any, charged by the current administrative trustee, Regions Bank, that were not 'reasonable under the circumstances,' as required by Ala. Code §19-3B-708(a). If the Special Fiduciary determines that there were trustee fees charged to the Trust that were not reasonable under the circumstances, he shall set forth the methodology he used to make that determination, and the amount considered unreasonable. The temporary Special Fiduciary shall also recommend to this court whether the breaches, if any, discovered by his accounting constitute a 'serious breach of trust' within the meaning of Ala. Code § 19-3B-706(b)(1), making them of sufficient gravity to remove the trustees … Upon receipt of the temporary Special Fiduciary's accounting, this court shall conduct further proceedings to determine if the current trustees of the Trust should be removed and whether the court should order the trustees to make monetary recompense to the Trust, and whether attorney fees and other relief are appropriate."

7. Marshall petitioned the Supreme Court seeking a writ of mandamus ordering the circuit court to vacate its order appointing a special fiduciary. The Alabama Supreme Court, with one dissenting justice, granted the petition in part and denied it in part on the following grounds:

> a. Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.
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> b. The rule has been stated many times that when an appeal is taken, the trial court may proceed only in matters entirely collateral to that part of the case which has been taken up by the appeal, but can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court. This is an application of the general rule that jurisdiction of a case can be in only one court at a time. That general rule, however, applies when an appeal is taken from a lower court to an appellate court; it does not apply when, as here, a petition for a writ of mandamus is filed with an appellate court seeking review of an interlocutory order entered by a lower court.
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> c. The circuit court has subject-matter jurisdiction over the underlying consolidated cases because Marshall properly invoked the jurisdiction of the circuit court by filing a complaint in the consolidated cases below, and the circuit court has properly assumed control of the trust. The parties have also raised arguments as to the standing of Carmack, Leigh, and Lindsey to assert their claims against Regions Bank and the board members. The circuit court has jurisdiction over the cases below based on Marshall's pleadings, and, thus, the court has jurisdiction to consider Marshall's mandamus petitions pertaining to the circuit court's order appointing a special master. The circuit court has jurisdiction over the cases below based on Marshall's pleadings.

d. The entire premise of Marshall's argument is that the circuit court's present order is an order appointing White as a special master under Rule 53 and a referral of the entirety of the cases to him. Marshall's argument glosses over the fact that there is a distinction between an appointment of a special master and an appointment of a special fiduciary. Marshall's argument does not delve into any such distinction and, unfortunately, offers no discussion or analysis of that statute or how it compares or relates. Marshall's argument is lacking in that regard.

e. Under Alabama law, there is a distinction between the appointment of a special master and the appointment of a special fiduciary. A court may appoint a special master. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. The appointment of a special master lies within the sound discretion of the trial court, and its decision to appoint a special master should not be reversed unless the trial court clearly exceeds that discretion. Because of the increased costs, likelihood of delay, and possible lack of confidence in the outcome, the power to order a reference is to be sparingly exercised.

f. Different standards apply in determining the appropriateness of referring to a special master actions to be tried with a jury, actions to be tried without a jury, and actions seeking an accounting. Accordingly, to properly determine if the circuit court's referral of all the matters in these cases to a special master was appropriate, the court must first determine whether the cases were to be tried by a jury or not, and we must also determine whether an accounting has been requested.

g. To remedy a breach of trust that has occurred or may occur, the court may appoint a special fiduciary to take possession of the trust property and administer the trust.

h. A circuit court has the authority, when a breach of trust has occurred or may occur, to "order a trustee to account" and to "appoint a special fiduciary to take possession of the trust property and administer the trust," among other things. The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. If proceedings are brought for the removal of the trustee and it appears necessary or proper during the course of the proceedings that the trust should be administered under the supervision of the court, the court may appoint a special fiduciary until it is determined whether the trustee should be removed and a new trustee appointed. The appointment of a special fiduciary will be terminated by the court when it is determined by the court that the trustee may properly continue as trustee, or when a new trustee is appointed and the title to the trust property is vested in him.

i. One of the purposes for the appointment of a special fiduciary is to protect the assets of the trust. It is an established rule of the court of chancery that, where a trust fund is in danger of being wasted or misapplied, it will interfere, on the

application of those interested in the fund, and by the appointment of a receiver, or in some other mode, to secure the fund from loss.

j. It is apparent that an appointment of a special master is distinct from the appointment of a special fiduciary. A special master serves as an aide to the circuit court to obtain facts necessary for the circuit court to reach a correct result in complex litigation before it. A special fiduciary, on the other hand, serves to protect the assets of a trust from mismanagement and waste by the trustee pending litigation concerning the trust, among other things. Marshall himself has argued in these proceedings that a special master is distinct from a special fiduciary.

k. Marshall himself requested earlier in these proceedings that a special fiduciary be appointed. The circuit court clearly had the discretion to take such action, which Marshall requested. Marshall cannot now, after requesting that the circuit court appoint a special fiduciary, plausibly argue that the circuit court erred in doing that very thing. Marshall has not demonstrated that he has a clear legal right to have set aside the circuit court's order appointing White as a special fiduciary to take possession of and administer the trust; that aspect of the circuit court's order must stand.

l. However, the circuit court also ordered that the special fiduciary conduct an accounting that detailed all the ways in which Regions Bank had breached the terms of the trust. Of course, the circuit court has the discretion to order a trustee to give an account of a trust. The circuit court's order, however, goes far beyond directing White to give a general accounting of the trust. The circuit court's order requires White to make factual findings and legal determinations, going so far as to task White, who is an accountant, to determine if Regions Bank's conduct was a breach of its duties. A circuit court does not have the authority to endow a special fiduciary with its judicial power to make factual findings and legal determinations.

m. It is that aspect of the circuit court's order — appointing White to make factual findings and dispositive legal determinations — that may be, as Marshall argues, a "warmed-over special master order. . . ." A broad and unsubstantiated referral to a special master to make the dispositive legal determinations in a case, such as the circuit court has essentially done here, is an impermissible abdication of the circuit court's judicial function. In the present cases, by referring to the special master all matters without satisfying the applicable standards for doing so, the circuit court abdicated its judicial function and, thus, exceeded its discretion. The circuit court exceeded its discretion in ordering White to make all the factual findings and dispositive legal determinations necessary to decide these cases, which amounts to an impermissible abdication of the circuit court's judicial function.

L. *Pringle v. Mewshaw,* 2025 S.C. App. Unpub. LEXIS 170; 2025 LX 185873 (Court of Appeals of South Carolina 2025). Trustee removed for attempting to convert trust accounts to her own assets, living in house owned by trust without paying rent, and using trust assets for personal legal bills.

1. Sabrina Pringle passed away in March of 2017 after a cancer diagnosis. Prior to that, in September of 2016, with the assistance of attorney friends, she drafted an estate plan including executing a will and creating a trust for her son Alex Pringle's benefit. Sabrina

named her mother, Janet Mewshaw, as the trustee and expressed her desire that the trustee use the Trust assets to care for Alex. Sabrina left to the Trust the residence in which she, Alex, Mewshaw, and Mewshaw's husband (Sabrina's stepfather) had resided together prior to her death. Sabrina expressed her desire that the home remain in the family as a place of importance and family memories for her son. She further stated Mewshaw and her husband could reside in and rent the home for fair market value as determined in the trustee's sole discretion. This family arrangement is all against the backdrop of Sabrina and Alex's father, Philip Pringle ("Pringle"), having gone through a contentious divorce a few years earlier. Sabrina named her brother, Brent Cannon, as contingent trustee in the event Mewshaw was unable to serve.

2. In addition to the family home, Sabrina's assets consisted of several investment accounts, including two retirement accounts with Merrill Lynch valued at $378,010.52 and $19,670.13 at the time of her death. Sabrina executed documents to change the beneficiary of these accounts from Mewshaw individually to the Trust at the time she prepared her will. The designation was to the "Trustee of the [T]rust under the will of Sabrina Cannon Pringle dated September 30, 2016." Sabrina and Mewshaw also had a joint bank account with right of survivorship.

3. After Sabrina's death, Pringle learned of the Trust and had concerns regarding Mewshaw's administration of it. He filed a lawsuit in probate court for an accounting of the Trust assets, to have Mewshaw removed as trustee, and to require Mewshaw to pay back to the Trust any funds wrongfully expended. At trial, it became known that Mewshaw had expended some of these funds in legal fees and on private investigators in an effort to gain custody of Alex. The court hired a person to do a forensic accounting. Mewshaw had been ordered to provide an accounting but failed to do so. The person hired by the court testified she had reviewed records, but some were missing and others lacked specificity. Based on this review, she found wrongful withdrawals and unpaid rent left an amount of $141,320.00 due to the Trust.

4. The probate court determined Mewshaw had violated her responsibilities as Trustee and removed her from the position. The probate court named BNA Wealth Management Division as the Trustee and Sabrina's brother as a Trust Protector. The probate court ordered Mewshaw to repay the Trust $141,320.00 in corpus, $8,300.00 in expert fees, and $10,612.70 in attorney's fees. Mewshaw appealed. Pringle filed a motion to reopen the case to introduce evidence Mewshaw had signed documents to liquidate the Merrill Lynch accounts. The probate court permitted this additional evidence and issued a new order indicating the documents and deposition testimony related to it supplemented prior evidence and further supported what had already been determined — that Mewshaw had wrongfully liquidated the accounts because they belonged to the Trust. The order made no additional or different findings of fact or law and did not grant any additional or different relief than the prior order.

5. On appeal, the court of appeals affirmed on the following grounds:

> a. Mewshaw violated her duty as Trustee in multiple ways. While she may have later been misinformed regarding the ownership of the Merrill Lynch accounts, she initially believed them to be part of the Trust. In spite of this belief and the plain language of the will and trust, explained in more detail below, she attempted to convert the beneficiary of the Merrill Lynch accounts to herself individually and attempted to liquidate the accounts. Additionally, she and her husband occupied

Sabrina's home for more than ten months and failed to pay any rent as stipulated by the Trust. Rather, she paid the mortgage from the Trust funds. Mewshaw was using Trust monies to pay bills and legal fees for a custody battle she was planning against Pringle. Furthermore, her record keeping was not compliant with her duties as a trustee and fiduciary. These actions establish by the preponderance of the evidence that Mewshaw had breached her duties as trustee.

b. The primary purpose of the Trust was to provide for Alex. Sabrina also sought to foster a continuing relationship between Alex and Mewshaw and Mewshaw's husband. The fact that her brother was not named Trustee did not undercut this intent and was reasonable considering the familial relationship between Mewshaw and Cannon. Furthermore, the probate court appointed Sabrina's brother as Trust Protector. As such, Cannon monitors the Trust to ensure funds are spent in a fiscally responsible manner consistent with the wishes of the settlor. Cannon indicated that if he were Trustee, he would use an accounting firm to manage the Trust, so the regular management of the Trust would still not be in his hands. Sabrina was aware that neither her mother nor her brother was well-versed in the management of trusts. Therefore, her intent appears to have been less about management of the Trust and more about ensuring that the people who cared most for Alex would have a voice in how the Trust assets were spent. Given the circumstances of this case and her brother's inclusion as Trust Protector, this decision by the probate court did not violate Sabrina's intent and was properly affirmed by the circuit court.

c. Sabrina's will indicated "any property payable to the Trustee as a result of my death, including any property given to the Trustee under this will, shall be retained in trust." Therefore, when Sabrina designated Mewshaw beneficiary of the Merrill Lynch accounts as Trustee, the funds belonged in the Trust. Mewshaw argues Sabrina's will "carves out the Merrill Lynch accounts from being subject to the probation of the Will and Trust because they are investment accounts." She relies on the provision in Sabrina's will stating "[a]ll my tangible personal property that was not held by me solely for investment purposes . . . shall be disposed of as follows." Because the retirement accounts fall outside the scope of the "tangible personal property," this argument is without merit.

d. The probate court did not determine the bank account was a Trust asset. It determined Mewshaw had wrongfully taken and spent funds specifically denominated for Alex from the Social Security Administration. Mewshaw correctly notes that by statute, if the funds are on deposit in a joint account with right of survivorship, the balance at death becomes the surviving owner's property. However, in this instance, the funds were only placed into the account because Sabrina was the "representative payee" for Alex. Sabrina was under an obligation to use the funds for Alex's benefit. Once Mewshaw became the sole owner of the account, that obligation extended to her to use the money for Alex's benefit. Having failed to show she had done so, the court properly required Mewshaw to repay the funds to the Trust.

e. The probate court's order, affirmed by the circuit court, did not specifically order the home sold, although the request from Pringle was that it be liquidated. However, the order was the practical equivalent of such instruction. The order

stated Mewshaw could remain in the home for six more months if she paid rent and any associated household expenses such as utilities. If she missed a payment, she had 30 days to vacate. In reality, any issue with the property is subsumed by the fact that Mewshaw was removed as Trustee. The Trustee is empowered to make all determinations about what to do with the property. Sabrina indicated keeping the home was a request, not a requirement, and intended only that it be kept until Alex turned 30, provided such was reasonable. The Trustee could rent the home to renters other than the Mewshaws for fair market value, but the Trustee would have discretion to do that or dispose of the property in a way that was in the best interest of Alex and the Trust. The probate court's order did not circumvent Sabrina's intent when, as trustor, she qualified her effort to keep the family home with language specifically recognizing that doing so after her passing might not be possible or reasonable. Under all the circumstances and the language of the Will and Trust, the circuit court did not err in affirming the probate court's order.

M. *S.C. Bd. of Fin. Insts. v. CDM Corp.,* 2025 S.C. App. Unpub. LEXIS 162; 2025 LX 142970; 2025 WL 1517180 (Court of Appeals of South Carolina 2025); 2025 S.C. Unpub. LEXIS 105 (South Carolina Supreme Court). The term "trust business" includes the services of personal representatives, conservators, guardians, and agents and that these roles are subject to regulatory jurisdiction by the State Board of Financial Institutions; South Carolina Supreme Court grants certiorari.

1. CDM Corporation, Inc. ("CDM") and Guardian Fiduciary Services, LLC ("Guardian") are two small businesses created by their principal, Stephen Mantell, "for the purpose of providing needed [fiduciary] services for elderly, disabled, and otherwise compromised individuals in South Carolina." Most of Respondents' clients are referrals from South Carolina attorneys. Mantell claims that not only these attorneys but also South Carolina probate judges have worked with him "for years and trust [him] in" the positions of guardian, conservator, personal representative, and agent pursuant to a power of attorney." Although Mantell would be exempt from the requirement in section 34-21-10 to obtain BOFI's approval if he were acting as an individual, he states, "Operating through my company, instead of individually, allows me to obtain insurance," which he claims benefits not only himself but also his clients.

2. State Board of Financial Institutions ("BOFI") received a complaint that Respondents "appeared to be conducting [a] trust business without prior written approval of [BOFI], as required by S.C. Code Ann. § 34-21-10." BOFI's then-Commissioner of Banking, Richards Green, observed that Respondents' "website advertised the following services: 'Trusteeship,' 'Power of Attorney,' 'Personal Representative,' 'Guardianship' (including a representation that [Respondents were] 'a certified professional guardian agency'), and 'Conservator.'" Commissioner Green sent a letter to Respondents advising them that they were conducting an unlawful trust business and requesting information. Respondents sent some information to BOFI, but Commissioner Green advised Respondents that the information was incomplete. Commissioner Green also advised Respondents that upon his review of the information they sent, it appeared that they were conducting an unlawful trust business. Subsequently, BOFI received a second complaint concerning Respondents' businesses. Although BOFI gave Respondents "several extensions of time to respond," Respondents failed to provide the requested

information. Ultimately, BOFI authorized Commissioner Green to send a "cease and desist" letter to Respondents and to "take legal action," if necessary.

3. BOFI filed this action seeking a declaratory judgment and a permanent injunction against Respondents conducting trust business activities without BOFI's prior approval. Respondents asserted a counterclaim seeking a declaratory judgment that their businesses do not constitute trust businesses, are lawful, and are not subject to regulation by BOFI. After the case was referred to the master, but before the parties filed cross-motions for summary judgment, BOFI unanimously adopted a policy statement "affirm[ing] BOFI's long-standing industry and regulatory interpretation of the phrase 'trust business' as used in S.C. Code Ann. § 34-21-10." The policy statement asserted that BOFI interprets the phrase "conduct a trust business" as used in section 34-21-10 to include serving as a personal representative of a decedent's estate, a guardian, a conservator, or an agent pursuant to a power of attorney.

4. The master issued a written order granting partial summary judgment to BOFI as to Respondents' services as a trustee and enjoining Respondents from advertising for or providing these services. As to Respondents' other fiduciary services, the master granted Respondents' summary judgment motion, concluding that those services did not fall within the term "trust business." The master also concluded that these services were outside of BOFI's jurisdiction because they were regulated by the South Carolina Probate Code. The master later denied BOFI's motion for partial reconsideration. BOFI appealed.

5. On appeal, the court of appeals reversed and remanded on the following grounds:

> a. Section 34-21-10 provides: "No corporation, partnership, or other person shall conduct a trust business in this State without first making a written application to BOFI and receiving written approval from BOFI. Before any such application shall be approved, BOFI shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of BOFI the applicant is qualified to conduct such a business, and whether the conduct of such a business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do business; provided, however, that any person actively engaged in conducting a trust business in this State on January 1, 1972, shall not be required to make the application and receive the approval provided for herein. Provided, further, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee, or in any other fiduciary capacity."
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> b. Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.
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> c. Respondents argue that the plain language of section 34-21-10 limits a trust business to one that administers trusts only. Although Respondents make colorable arguments, they are couched in terms of the absurdity of any other interpretation in light of the special circumstances of Respondents' particular

businesses. Respondents seem particularly concerned about the amounts of BOFI's application fee and annual supervisory fee. Although Respondents' principal, Stephen Mantell, is sympathetic, this court must be mindful of the far-reaching implications of section 34-21-10. The legislature's intent underlying the term "trust business" necessarily addresses circumstances far beyond the specific facts of this case.

d. Giving the term "trust business" its "ordinary meaning" establishes that all institutional fiduciaries fall within BOFI's regulatory authority. The usual and customary meaning of the term "trust" is recognized in secondary sources of law as including a range of fiduciary relationships. A trust is defined as the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title to which is vested in another, but the word "trust" also is frequently employed to indicate duties, relations, and responsibilities that are not strictly technical trusts.

e. To the extent that the term "trust business" may be considered ambiguous, a statute must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect. BOFI correctly points out that the inclusion of "executor, administrator, guardian, committee or in any other fiduciary capacity" in the exceptions to the requirement for trust business licensure in section 34-21-10 shows that these activities would otherwise constitute a trust business if not undertaken by an exempt person, and to view this otherwise would render this final clause of section 34-21-10 "surplusage or superfluous."

f. As to the context in which section 34-21-10 appears, there are numerous sections within the same general statutory law that show the legislature's intent to include personal representatives, conservators, guardians, and agents within the term "trust business."

g. First, in determining the legislature's intended meaning of "trust business," the following definitions in Article 3, which covers common trust funds, are instructive: (1) "Trust institution" means any state bank, any national bank, any building and loan association, savings association, savings and loan association, savings bank, or any trust company authorized to conduct a trust business in this State, or any trust company, authorized to act in a fiduciary capacity in this State, and under the supervision of the Comptroller of the Currency of the United States, or the Federal Reserve System, or the State Board of Bank Control of South Carolina; and (2) The term "fiduciary" means a trust institution undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent."

h. The legislature intended for the term "trust business" to include a business providing services as a personal representative, guardian, conservator, or agent. Further, section 34-21-20 clearly governs organizations like Respondents: "All state[-]chartered banks, building and loan associations, savings associations, savings and loan associations, savings banks, trust companies, and fiduciary corporations authorized to conduct a trust business in this State are subject to

examination by [BOFI] and are further subject to rules and regulations promulgated by [BOFI]."

i. Given that BOFI is charged with regulating an industry affecting large sums of client funds, it is unlikely that the legislature intended to draw a distinction between the types of fiduciary services to be regulated, e.g., trustee services versus conservator services. The requirement in section 34-21-30 for fiduciary assets to be segregated from the other funds of the business is consistent with a broad definition of "trust business" that includes fiduciaries other than strictly trustees.

j. It logically follows that if any institutional fiduciary, whether serving as a trustee, personal representative, guardian, conservator, or agent, maintains possession of beneficiary funds, that particular fiduciary is subject to regulation by BOFI. In other words, common sense dictates that if a business entity is in possession of someone else's money, BOFI should have regulatory authority over that entity. When the act of 1911 was passed, banks were almost sacrosanct in the eyes of the people of the state. The lawmakers, when they granted them power to become executors, administrators, guardians, and trustees, must have realized that they were creating for them a different status in the law than that of an individual executor, but had faith in their fidelity and the security of the funds entrusted to them. The epidemic of bank failures that followed in the years preceding 1930 showed them the fallacy of their faith and induced the passage of the act of 1930, which accurately defines the duties of such fiduciaries in the handling of trust funds. Based on the foregoing, the term "trust business" necessarily encompasses fiduciary services provided by not only the trustee of a trust but also a personal representative, conservator, guardian, or agent. Therefore, we reverse the master's conclusion to the contrary.

k. The jurisdiction of the probate court and the regulatory authority of BOFI can coexist, allowing the probate courts to adjudicate protective proceedings and matters of estate administration while BOFI oversees and regulates the business activities of entities serving in fiduciary capacities. The master was not correct when holding that matters regulated by the Probate Code cannot also fall within BOFI's authority. The master implicitly recognized that the two can coexist when he accepted BOFI's argument that it has regulatory authority over institutions serving as trustees despite the probate court having authority over testamentary trusts. The Probate Code is complemented by the requirement to obtain BOFI approval before a non-exempt entity may serve as a fiduciary and the requirement that such authorized fiduciaries are subject to examination by BOFI and to BOFI's regulations.

l. Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. The Banking Code addresses the qualification of non-exempt entities serving in fiduciary appointments in a more specific and definite manner than the Probate Code. The Banking Code directly acknowledges and incorporates the probate court's general power of

appointment, while also establishing BOFI's specific oversight of the qualifications for a trust company to serve under such a court appointment.

m. The statutes recognize probate court's power to appoint a person as a personal representative, guardian, or conservator but also establish the requirement for a banking corporation or trust company to be legally qualified to accept an appointment, and in this respect, serves as a "qualifier of" the Probate Code's provisions regarding fiduciary appointments by dealing with the "identical issue in a more specific and definite manner."

n. Moreover, the probate court does not have the authority to examine or investigate any person or entity whereas BOFI does have this authority. Statutes dealing with the same subject matter must be reconciled, if possible, to render both operative. The provisions in Title 34 and the Probate Code affecting fiduciaries can be reconciled in a similar fashion.

o. On November 18, 2025, the South Carolina Supreme Court granted the petition for writ of certiorari.

N. *Sharp v. Sharp,* 2025 Conn. Super. LEXIS 516; 2025 LX 8632 (Superior Court of Connecticut, Judicial District of New Britain 2025). Restatement of revocable trust did not automatically revoke appointment of co-trustee prior to restatement.

1. In 2009, Eleanor F. Sharp ("Mrs. Sharp") created the Eleanor F. Sharp Living Trust ("trust"), with herself as the sole initial trustee. In 2014, Mrs. Sharp executed a "restatement" of the trust in which she stated her "desire to restate the entire existing trust agreement. . . ." Jean Sharp ("Ms. Sharp") was designated the "incapacity trustee," to be succeeded, if she was unable or unwilling to serve in that capacity, by her brother James and, if James was unable or unwilling to serve, by her brother Robert ("Dr. Sharp").

2. At the time of the 2014 restatement, Mrs. Sharp continued in her capacity as the sole trustee. In a letter dated August 26, 2015, however, Mrs. Sharp designated Ms. Sharp as her co-trustee, and Ms. Sharp accepted that designation. Mrs. Sharp executed another "restatement" of the 2009 trust in 2021, again expressing her "desire to restate the entire existing trust agreement." That restatement was "made between Eleanor F. Sharp, the trustor, and the following initial Trustee: Eleanor F. Sharp." No mention is made of Ms. Sharp, Mrs. Sharp's co-trustee, and no one else is designated as a co-trustee. In a change from the 2014 restatement, Dr. Sharp is identified as the "incapacity trustee," and James Sharp is identified as his successor should he be "unable or unwilling to serve."

3. Common to the 2014 and 2021 restatements are the following provisions concerning trustees: "While I am alive and competent I may or shall have the right to remove or replace any other Trustee appointed under the Trust Agreement at any time without cause. Written notice of removal under the Trust Agreement shall be effective immediately when signed by the person or persons authorized to make the removal and delivered to the Trustee personally, or within three business days after mailing by certified mail, return receipt requested. The written notice removing a Trustee shall identify the successor Trustee appointed pursuant to the other provisions of this Article."

4. Ms. Sharp claims, and Dr. Sharp does not dispute, that Mrs. Sharp never gave her written notice of her removal as co-trustee or as incapacity trustee. Therefore, she argues, she continued in those capacities even after the 2021 restatement. To the contrary, Dr.

Sharp contends, the 2021 restatement of the trust completely replaces the terms and appointments of prior (re)statements of the Living Trust, obviating the need for Ms. Sharp to be notified of removal from her prior appointment as co-Trustee.

5. The Probate Court found that Mrs. Sharp's execution of her 2021 restatement revoked the prior terms and appointments made under the Trusts. Effectively, the Probate Court held that Mrs. Sharp's execution of the 2021 restatement of her trust did away with the need to give Ms. Sharp written notice of her removal as co-trustee, so designated by Mrs. Sharp in August 2015, and as incapacity trustee, so designated by Mrs. Sharp in the 2014 restatement of the trust.

6. Ms. Sharp appealed, and the superior court reversed the probate court on the following grounds:

a. In both the 2014 and 2021 restatements, Mrs. Sharp stated her intention to "restate the entire existing trust agreement." The fact that in the 2014 restatement she referred to it as "this amendment and restatement" does not change the nature of the document. The Probate Court's focus on the word "amendment" in the 2014 trust restatement to justify its conclusion that the 2021 restatement "revoked" the appointment of Ms. Sharp as incapacity trustee made under the 2014 trust and Mrs. Sharp's designation of Ms. Sharp as her co-trustee was error.

b. In addition, Mrs. Sharp retained in the 2021 restatement the same language as in the 2014 restatement, requiring written notice to a removed trustee before her removal can be effective. Whether Mrs. Sharp failed to give Ms. Sharp the required notice of her removal purposefully or mistakenly is not material. She failed to adhere to the explicit terms she included in both the 2014 and 2021 restatements. Therefore, Ms. Sharp was never effectively removed as either co-trustee or incapacity trustee.

c. That she remained as one of the incapacity trustees is particularly important. On November 24, 2021, a conservator was appointed for Mrs. Sharp, indicating a finding by the Probate Court that she lacked capacity to manage her personal affairs and her estate. Section 4 of Article Three of both restatements provides that, should Mrs. Sharp become incapacitated, "the then serving Trustee shall be replaced by" the person designated as her "incapacity trustee." Thus, Ms. Sharp's status as co-trustee terminated as of November 24, 2021, to be replaced by her status as incapacity trustee, so designated in the 2014 restatement of the Eleanor F. Sharp Living Trust.

d. Jean Sharp and not Dr. Robert Sharp was the incapacity trustee for Eleanor F. Sharp until Mrs. Sharp's death on September 11, 2024. She was so designated in the 2014 restatement of the trust and was not effectively removed. The action of Dr. Sharp on November 7, 2022, changing the situs of the trust to Florida from Connecticut, was beyond any authority he possessed. The situs of the trust remains Connecticut. Likewise, his appointment of a "trust protector" to mediate disputes among the beneficiaries of the trust was invalid and ineffective and is hereby revoked.

O. *Wilson v. Norman*, 2025 U.S. Dist. LEXIS 59421; 2025 LX 163250; 2025 WL 947959 (United States District Court for the Northern District of Illinois 2025). Falsely representing

appointment as trustee and taking control of accounts gives rise to claims for fraud, tortious interference with contract, and inducement of breach of fiduciary duty, and suit may proceed without naming other co-trustee as joint tortfeasor.

1. Michael Wilson passed away in March 2018, and was survived by his wife Suzie, their three children, and his sister Sandra Norman. When he passed away, he was the trustee of, and held the beneficial interest in, a trust initially established by his mother, Adia. His mother's trust provided that on Michael's death, the trust's assets would be distributed in trust for the benefit of his descendants.

2. Michael's mother's trust set forth other requirements for trustees. Michael was required to designate a co-trustee when he reached a specified age, and in 2009 he designated John Koren for that role. The Trust separately set forth how vacancies would be filled in the trusteeship of the various trusts that Adia had established: absent a succession plan created by the beneficiary-trustee themselves, first Michael, then his sister Sandra Norman, would serve as a default trustee for each other's trusts.

3. On the date that Michael passed away, John Koren remained in office as the co-trustee of the Michael Trust. Despite Koren's service as trustee, shortly after Michael died, Sandra Norman filed paperwork with Merrill Lynch asserting herself as trustee of the Michael Trust. Merrill Lynch then recognized her as trustee instead of Koren. This position gave her control over the Trust's assets, and apparently also over Michael and Suzie's other accounts at the bank. Later that month, some of the Trust's assets were sold and proceeds were reaped, and then $189,487.44 was transferred out of the Trust. This transfer allegedly violated the Trust's provision for distribution upon the death of its beneficiary, which required that the assets be distributed only for the benefit of Michael's children.

4. Suzie became aware of these transactions in 2019. She then informed Merrill Lynch that Sandra Norman was not properly a trustee, and that Koren had designated Suzie as trustee of the Michael Trust, as well as of the children's trusts in February of that year. Though Norman initially disputed Suzie's efforts to take control of the trusts, she eventually acknowledged, in July 2019, that Suzie was the trustee of the Michael Trust. Suzie brought this action individually and as trustee of Michael's and the children's trusts, seeking damages for Sandra Norman's actions while purporting to act as trustee. Suzie claims that Norman engaged in fraud, tortious interference with contract, and inducement of breach of fiduciary duty. Norman now moves to dismiss the complaint for a lack of subject-matter jurisdiction and for failure to state a claim on which relief can be granted, as well as for failure to join a necessary party.

5. The federal district court denied the motion to dismiss on the following grounds:

a. The diversity jurisdiction statute provides that federal courts have jurisdiction over a dispute between citizens of different states, and in which the amount in controversy exceeds $75,000. Diversity of citizenship is undisputed here: Norman is a citizen of Georgia, and Suzie is a citizen of Illinois. But the parties disagree on whether the amount in controversy requirement is sufficiently alleged. Norman argues that Suzie failed to establish adequate damages for diversity jurisdiction because the trust's distributions were used to pay off Suzie's personal line of credit, so the trust ought to recover those funds from Suzie, who happens to be their trustee. But a party's ultimate responsibility for a damages claim (that is, the

result of the litigation) does not negate whether the amount of that claim is in controversy.

b. In determining the sufficiency of an amount in controversy, a plaintiff's good faith allegations of the amount control unless the court concludes, to a legal certainty, the plaintiff cannot recover the jurisdictional minimum. Put differently, the court has jurisdiction unless an award for the jurisdictional minimum would be legally impossible.

c. Suzie alleges damages to the trusts in the amount of $189,487.44. That amount was transferred out of the Trust in apparent violation of the Trust's provisions for distribution on death and spendthrift provisions. Under Illinois law, trusts can recover damages from non-trustees for amounts improperly disbursed where the non-trustee had assumed the responsibilities of a trustee. The amount allegedly transferred out of the Trust is properly construed as damages. Yes, Norman might have counterclaims or might be able to subrogate any damages arising from the improper disbursement of the Trust's assets. But Norman's potential claims do not reduce the alleged amount of misappropriated funds. Sandra's potential counterclaims also fail to produce "a legal certainty" that the Plaintiffs (which are not just Suzie in her individual capacity, but also the Michael Trust and the children's trusts) will fail to recover the amount alleged. Because Illinois law allows trusts to recover from non-trustees when a non-trustee improperly disburses funds from a trust, the complaint presents a legal possibility of recovering far more than the jurisdictional minimum from Sandra. Defendant's motion to dismiss for want of diversity jurisdiction is thus denied.

d. Sandra Norman next argues that Koren, as a co-trustee during the period under dispute, is a necessary and indispensable party to this suit, and because his joinder would defeat diversity jurisdiction, the case should be dismissed for failure to join a necessary party. According to Norman, Koren must be added to the case because he was a joint tortfeasor. He would thus be a defendant, which would put an Illinois citizen on both sides of the case, undermining diversity jurisdiction.

e. It is not clear what factual basis there is to think that Norman could be considered a joint tortfeasor with Koren. But even if Koren and Norman could be jointly liable for some kind of tort against the trust, Koren is not a required party here. It is well-established that a plaintiff need not sue all joint tortfeasors. So, although a defendant may have a right to contribution from a joint tortfeasor, the victim is not required to sue more than one of them. There is no requirement here to join Koren.

f. Even if Koren were required to be joined, then there would still be a question over whether the case should move forward. When joinder is not feasible — including when adding a party would undermine complete diversity — then the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. To make that determination, the Court considers: (1) the extent a judgment rendered in the party's absence might prejudice the parties; (2) the extent any prejudice could be lessened or avoided; (3) whether an adequate judgment could be rendered in their absence; and (4) if an adequate remedy would otherwise be available. A court may find prejudice where the party claims an interest relating to the subject of the

action and is so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest. If, in equity and good conscience, the action should not proceed among the existing parties, it should be dismissed.

g. Koren's absence from this suit presents no risk of unduly prejudicing the parties. Under Illinois law, trustees are only liable for their own torts. To the extent that Sandra Norman and Koren could be jointly liable for torts, Norman's interests are not prejudiced by his absence because victims are not required to sue all joint tortfeasors. And, to the extent that the complained-of conduct is not attributable to Norman's actions, Norman has a defense to liability that does not require her to attribute liability to a third party. Koren's absence would not prevent her from showing that the allegations did not arise from her own conduct.

h. The complaint does suggest possible claims against Koren, and Sandra may have a claim for contribution or indemnity from Koren. But the possibility of claims or defenses against a person arising from related events does not automatically render them an indispensable party in a suit over those events. In Koren's absence, Sandra can still fully defend herself, and there is no risk she will be held liable for conduct for which she is not properly liable. Because the parties will not be prejudiced by Koren's absence, there is no need to provide protective measures to lessen prejudice, and an adequate judgment can necessarily be entered in this Court. Because the Court finds no reason to expect Koren's absence would prejudice any of the parties, the Defendant's motion to dismiss for failure to join a necessary party is denied.

i. This dispute ultimately turns on whether Sandra Norman properly became a trustee by default at the time of Michael's death, or if instead the terms of the Trust allowed Koren to serve as a sole trustee. Norman argues that all three of Suzie's claims fail because, under the terms of their mother Adia's trust, "Sandra was a trustee."

j. There is no reason to think that Norman became a trustee when Michael passed away. First, the Adia Trust provides that Adia's children will serve as trustee of their discretionary trust and requires her children to designate a co-trustee. The Adia Trust also provides for default trustees. The pertinent section provides that "[i]n the event of a vacancy in the trusteeship," the named individuals (in this case, Sandra and Michael) "shall act as successor Co-Trustees or Trustee." The section does not specify whether a "vacancy" is the absence of just one co-trustee, or the absence of all trustees. In Michael's case, he designated Koren as the co-trustee of his trust, and Koren remained in that role when Michael passed away.

k. The first clause refers to "trusteeship" only in the singular, reflecting the presumption in the Illinois Trust Code instructing that so long as there still is at least one trustee, "a vacancy in a trusteeship need not be filled." So it is permissible for there to be only one trustee. Section 8 of the Trust does go on to refer to "Co-Trustees," but that simply means that it is possible — not required — for there to be co-trustees.

l. Nor does the Adia Trust provide that there must be multiple co-trustees of Michael's trust. Section 6 provides merely that the beneficiary "and such one or

more other persons ... as shall be designated by name by said beneficiary ... shall become sole Co-Trustees." Although the beneficiary of a discretionary trust must name a co-trustee when they initially become trustee, the beneficiary remains free to remove their co-trustees at any time, with or without cause. Nor does Section 10 require naming a replacement co-trustee when a co-trustee is removed. This implies that a beneficiary need not always have a second trustee. Because "vacancy" is not otherwise defined by the Trust Declaration, because a minimum number of trustees (beyond one) is not required, and because Illinois law provides that a vacancy need not be filled if at least one trustee remains in office, the Trust did not create a "vacancy" for purposes of filling the trusteeship through the default sequence described when Michael passed away. Koren remained in office at that time, and no other provision was automatically triggered.

m. The Illinois Trust Code clarifies that the death of a trustee creates a vacancy in a trusteeship. But the trust code provides "if one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled." Subsection (b) limits the operation of subsection (a), which Sandra relies on, to circumstances in which no trustee remains to control the trust. Although the Trust Code provides for default rules for a vacancy, it does not contemplate that a trust must have more than one trustee. But the trusteeship of the Michael Trust was not vacant when Michael died because Koren remained in office as a trustee. So, Sandra Norman was not a trustee.

n. Norman asserts that the forms that she filed with Merrill Lynch, demonstrating her status as trustee, were not a false statement of material fact. She was not properly installed as trustee (or at least nothing in the pleadings establish that she was), so the forms were necessarily a false statement. Norman signed a letter acknowledging that she was not a trustee, suggesting she knew that the forms she filed with Merrill Lynch were false.

o. Norman argues that Suzie did not allege any reliance on the allegedly false statements; instead, Norman argues that only Merrill Lynch (and not Suzie) relied on these forms. Common law fraud does not strictly require that the plaintiff directly rely on the defendant's false statement. A fraud claim can be supported by a third-party's reliance on the false statement if it is intended to reach the plaintiff and influence them. Put differently, reliance can be established where a defendant deceives a third party and that deception is passed along to the plaintiff. That type of reliance is adequately alleged here. Sandra Norman's assertion that she was the trustee was communicated to Suzie though Merrill Lynch — and Suzie then relied on the representation. Indeed, Suzie alleges that Norman's statement (made through Merrill Lynch) caused Suzie and Koren to refrain from asserting control over the Michael Trust for nearly a year after Michael's death. Suzie relied on Sandra's assertion that she was the trustee. This indirect reliance is enough to satisfactorily plead the third element of fraud under Illinois law. The fraud claim remains intact.

p. Norman contends that Suzie failed to plead specific facts about the allegedly breached contracts and failed to plead that Norman had any intent to induce a breach. Claims for tortious interference with contract generally do not require satisfying a heightened pleading standard. Here, although Suzie's homerun

assertion is that Norman engaged in fraudulent conduct by lying to Merrill Lynch (and to Suzie) that Norman was a trustee, the claim for tortious interference does not depend on proving an outright fraud. Instead, Suzie can win on tortious interference even if Norman did not knowingly lie when she asserted that she was a trustee. Suzie's claim for tortious interference need only meet the pleading standard and state a claim to relief that is plausible on its face.

q. Turning to the merits, under Illinois law, to successfully advance a tortious-interference claim, a plaintiff must adequately allege (1) a valid contract, (2) defendant's knowledge of the contract, (3) defendant's intentional and unjustified inducement of a breach of the contract, (4) a subsequent breach of contract caused by defendant's wrongful conduct, and (5) damages.

r. The complaint alleges that the Michael Trust and Suzie's other accounts were maintained at Merrill Lynch. The complaint also cites the relevant terms of those agreements. The existence of a valid contract between a bank and a depositor is necessarily implied by that relationship. At the pleading stage, a complaint need not present detailed evidence. Even if the assertion of Norman's knowledge of that contract is conclusory, it would be a strange deposit agreement that permitted third parties to willy-nilly access and transact on an account without the owner's permission or awareness. It is true that Suzie did not submit an exhibit detailing the terms of her and the Trust's relationship with Merrill Lynch, but giving the benefit of reasonable inferences to Suzie (as required at the pleading stage), the Complaint sufficiently pleads the existence of a contract, Sandra's knowledge of it, and a breach of that contract.

s. The Complaint alleges that Sandra filed paperwork with Merrill Lynch asserting her status as trustee. That paperwork persuaded Merrill Lynch to give her control of the Michael Trust account. Far from being conclusory, the Complaint sufficiently alleges that Sandra actively asserted herself as trustee to Merrill Lynch. It is hard to see how Sandra intended any purpose for these filings other than inducing Merrill Lynch to recognize her as trustee. Thus, the Complaint also sufficiently pleads the element of intentional and unjustified inducement of the breach. The claim for tortious interference with contract is adequately pleaded.

t. The fiduciary-duty claim — just like the tortious-interference claim — does not depend on an allegation of fraud. In short, this claim can be established even if the fraud claim fails, because the claim does not depend on establishing that Sandra engaged in any intentional and knowing misrepresentations. The Complaint alleges that Sandra benefited by merely being recognized as trustee, and by the opportunity to assert control over the trust. At this pleading stage, the Complaint sufficiently alleges that Sandra received a benefit. No Illinois court has explicitly held that, in the context of a fiduciary-duty claim, a benefit must be strictly tangible or financial. It is true that most cases involve financial benefits to the defendant, but no case excludes non-financial benefits from the purview of fiduciary-duty claims. Here, the Complaint alleges that Norman was recognized as the trustee and controlled the trusts. At the pleading stage, this is enough. After discovery, Suzie will probably need to show more concretely what benefit Norman reaped from the alleged breach of fiduciary duty, but this claim may move forward.

XVII. THIRD-PARTY CLAIMS

A. *Bucklin v. Bank of Am., N.A.*, 2025 U.S. Dist. LEXIS 43707; 2025 LX 186568; 2025 WL 1504043 (United States District Court for the Middle District of Florida, Fort Myers Division 2025). Victim of financial scam cannot sue national bank for Deceptive and Unfair Trade Practices Act, Uniform Commercial Code, Adult Protective Services Act, good faith and fair dealing, negligent undertaking, negligent hiring, or negligent supervision or retention, but claims based on account agreement survive summary dismissal.

1. Lynne M. Bucklin is a customer of Bank of America's banking services. She held two accounts with Bank of America: (1) her personal "Advantage Relationship Banking" checking and savings account ("Personal Account") and (2) a "Wealth Management Advantage Relationship Banking" account belonging to Charles S. Bucklin, her late husband's estate (the "Estate").

2. Mrs. Bucklin received a phone call from an individual going by the name Bruce Williams. Mr. Williams claimed to be an investigative officer and financial expert for the Federal Trade Commission ("FTC"). He informed Mrs. Bucklin that her Social Security number had been compromised. Mr. Williams then sent Mrs. Bucklin a picture of his FTC badge, his badge number, and a letter informing Mrs. Bucklin that her Social Security number, bank accounts, and other sensitive personal information had been compromised and that a formed investigation had been opened. He stated that he was assigned to her case.

3. After gaining unauthorized access to her accounts, Mr. Williams used fraudulent bank statements to convince Mrs. Bucklin that both her Personal Account and the Estate account were compromised. Mr. Williams then instructed Mrs. Bucklin that (1) she needed to move quickly, (2) she could not tell anyone about the involvement of Mr. Williams or she would be in violation of a confidentiality agreement, and (3) she needed to make a series of wire transfers from the accounts and temporarily convert those funds into cryptocurrency.

4. Pursuant to Mr. Williams's instructions, Mrs. Bucklin went to her local Bank of America branch in Naples, Florida, and requested Bank of America to make a $69,900.00 from her Personal Account to an account at Regions Bank in Albany, Georgia. Bank of America did not decline to initiate the wire transfer and did not question the validity or stated purpose of Mrs. Bucklin's request. The wire transfer was sent that same day. Mrs. Bucklin then initiated another wire transfer on February 25, 2022, for $254,369.00 from her Personal Account to a Binance account in California. According to Bank of America's records, the purpose of the February 25 wire transfer was "trade-related." Bank of America did not decline to initiate the wire transfer and did not inquire into Mrs. Bucklin's stated purpose or validity of the transaction.

5. Mrs. Bucklin then initiated the following wire transactions at multiple Bank of America branches in Naples, Florida: (1) a $269,000.00 wire transfer on March 3, 2022, from her Personal Account to a Binance account, (2) a $369,000.00 wire transfer on March 9, 2022, from her Personal Account to a Binance account, (3) a $371,000.00 wire transfer on March 11, 2022, from her Personal Account to Binance, and (4) a $639,000.00 wire transfer on March 15, 2022.

6. Mr. Williams also gained unauthorized access to Mrs. Bucklin's computer, logged onto her Bank of America account, and transferred $1.2 million from the Estate account to Mrs. Bucklin's personal account. Bank of America did not investigate, decline the wire transfer, or otherwise inquire as to the validity of the above wire transfers.

7. On or about March 17, 2022, Mrs. Bucklin contacted the FTC and described her encounter with Mr. Williams. The FTC informed Mrs. Bucklin that she had been the victim of a scam. Mrs. Bucklin then contacted Bank of America's Fraud Department and informed them of the fraudulent wire transfers and electronic transfers. She also submitted a report to the Federal Bureau of Investigation. Bank of America purportedly conducted an investigation into the wire transfers. On May 8, 2022, Bank of America sent Mrs. Bucklin a letter informing her that Bank of America (1) successfully recovered $438,900.00 of the total $1,972,269.00 fraudulently transferred funds; (2) credited $438,900.00 to her Personal Account; and (3) closed the investigation.

8. Mrs. Bucklin sued Bank of America alleging violations of Florida's Deceptive and Unfair Trade Practices Act; violations of Florida's UCC Article 4A; negligence per se; breach of contract; breach of the implied covenant of good faith and fair dealing; negligent undertaking; negligent hiring; negligent supervision and retention; and promissory estoppel.

9. Bank of America moved to dismiss, which the court largely granted on the following grounds:

a. Mrs. Bucklin has adequately alleged standing. Here, the Estate was summarily administered on May 16, 2023, and this suit was brought on February 23, 2024. Once the Estate is summarily administered, Mr. Hillman is still obligated to complete the administration of the Estate without further supervision of the probate court. Mr. Hillman can assign the Estate's right to bring suit to Mrs. Bucklin. Mrs. Bucklin has adequately pleaded standing.

b. Florida's Deceptive and Unfair Trade Practices Act does not apply to federally regulated banks, such as Bank of America.

c. Mrs. Bucklin has failed to adequately plead a viable claim under Florida's Uniform Commercial Code. A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency. If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if the security procedure is a commercially reasonable method of providing security against unauthorized payment orders and the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted. The commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank; the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank; alternative security procedures offered to the customer; and security procedures in general use by customers and receiving banks similarly situated. A "security procedure" means

a procedure established by agreement of a customer and a receiving bank for the purpose of: (1) verifying that a payment order or communication amending or canceling a payment order is that of the customer; or (2) detecting error in the transmission or the content of the payment order or communication.

d. Mrs. Bucklin admits that she personally authorized the wire transfers at her local Bank of America branch in each instance. She sent her fourth wire transfer on March 15, 2023. It wasn't until three days after her fourth transfer that Mrs. Bucklin realized that the wire transfers, ones she personally authorized, were sent to a person with fraudulent intent. Thus, Mrs. Bucklin's argument that the wire transfers were unauthorized is unfounded. Mrs. Bucklin also fails to advance facts showing that Bank of America suspected or knew that the wire transfers were fraudulent at the time the transactions were made. And Mrs. Bucklin has failed to show that Bank of America knew that the wire transfers were suspected fraud, unauthorized, or missing or stolen under the Deposit Agreement. For these reasons, she has failed to plead facts showing that Bank of America violated the Deposit Agreement by failing to utilize commercial reasonable methods of providing security.

e. Mrs. Bucklin has failed to plead a viable negligence per se action under the Florida Adult Protective Services Act. FAPSA requires a bank to report an incident to the Florida Department of Child and Families when the bank knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited. To assert a claim for negligence per se under Florida law, a plaintiff must show a violation of a statute that establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury. Even when a statute imposes a duty upon a defendant, that failure to meet that duty is not enough to establish a negligence per se claim. Rather, a plaintiff needs to either (1) point to a statutorily created private right of action for breach of that duty, or (2) successfully argue that a private right of action should be judicially inferred. Under Florida law, a private right of action will only be judicially inferred if there was legislative intent to create a private remedy against the breaching party. A statutory violation of FAPSA does not create a private right of action because the Florida legislature did not intend to create a private right of action in that statute.

f. Mrs. Bucklin alleges a breach of the Online Banking Agreement. First, Bank of America argues that there was no contract between it and Mrs. Bucklin in her individual capacity. The Court finds this argument unpersuasive. Notably, the Court has reviewed the Online Banking Agreement, which provides that "[t]his Agreement is between each owner of an eligible account, a person applying for an eligible account, or authorized representative appointed or entitled to online access on another person's behalf . . . and Bank of America, N.A." Here, the Court finds that, based on the assignment from Mr. Hillman, Mrs. Bucklin is an authorized representative appointed or entitled to online access on behalf of the Estate. Accordingly, Mrs. Bucklin has pleaded the existence of a contract. In her Complaint, Mrs. Bucklin claims that "Bank of America agreed that Mrs. Bucklin would have no liability for unauthorized transactions which she notified Bank of America within sixty (60) days after the statement showing the transaction has been given to the consumer." Bank of America responds by stating that Mrs.

Bucklin received a written explanation of the investigation into the unauthorized transaction and that because she received an explanation, Bank of America is not liable for it. The Court finds Mrs. Bucklin's argument persuasive. Section 8(a) of the Online Banking Agreement provides that Section 7(B) governs reporting an error involving an unauthorized transaction. However, the Online Banking Agreement has listed Section 7(B) in error, as the correct section is Section 8(B). As such, the Court reviews Section 8(B) for liability for unauthorized transactions. Section 8(B) states that Mrs. Bucklin "will have no liability for unauthorized transactions if [she] notif[ies] [Bank of America] within 60 days after the statement showing the transaction has been sent to [Mrs. Bucklin's Personal Account]."

g. Here, the $1.2 million transfer from the Estate account to Mrs. Bucklin's personal account was initiated by Mr. Williams on March 14, 2022. Mrs. Bucklin notified Bank of America of the unauthorized transfer on March 18, 2022. Meanwhile, Bank of America argues that it is not liable for the unauthorized transaction because it sent an explanation letter to Mrs. Bucklin, which explained the findings of the investigation into the unauthorized transfer. Mrs. Bucklin admits she received a written explanation, and she attached the claim letter to her complaint. However, the Online Banking Agreement is unclear whether the explanation letter absolves Bank of America of liability for the unauthorized transaction between the Estate Account and Mrs. Bucklin's personal account. This is because the language describing the necessity of a written explanation was contained in Section 7(A), which describes errors with an account, rather than Section 7(B). As stated, Section 7(A) directs the reader of the Online Banking Agreement to review Section 7(B) for liability regarding unauthorized transfers. Because the language cited by Bank of America is in a different section of the agreement, the Court cannot conclude at this stage in the litigation that this language absolves it of liability. Taking the facts in the operative complaint as true, the Court finds that Bank of America has failed to show that the written explanation (claim letter) would absolve it of liability for an unauthorized transaction. Thus, Bank of America's motion to dismiss as to Count IV is denied.

h. Mrs. Bucklin alleges in her Complaint that, per the terms of the Funds Transfer Agreement, "Bank of America and Mrs. Bucklin agreed that Bank of America has the responsibility to exercise reasonable and ordinary care in processing, approving, and sending a wire transfer from Mrs. Bucklin's Accounts." However, Mrs. Bucklin failed to attach the Funds Transfer Agreement to her Complaint, and the Court is unable to review the agreement or make a determination as to the terms and conditions within it. Because of this, Count V is due to be dismissed without prejudice. If Mrs. Bucklin chooses to file a second amended complaint, she must attach the Funds Transfer Agreement to the Complaint.

i. Count VI alleges a breach of the implied covenant of good faith and fair dealing. Count VI is not duplicative, but the claim is due to be dismissed because Florida does not impose a duty on banks to investigate transactions. While the Court recognizes some overlap between Mrs. Bucklin's breach of the Online Banking Agreement claim, her breach of the Funds Transfer Agreement claim, and the breach of the implied covenant and fair dealing claim, the Court finds that the breach of the implied duty contains separate allegations. Specifically, Mrs. Bucklin alleges that Bank of America violated the implied duty because the bank failed "to

conduct a good-faith investigation into unauthorized transactions in Mrs. Bucklin's Accounts and to provide her with an explanation as to why her claims were rejected." These allegations are separate and distinct from the breach of the Online Banking Agreement claim and the breach of the Funds Transfer Agreement claim. But, even though the allegations are separate and distinct, Florida law does not impose a duty on banks to investigate transactions, and Count VI is due to be dismissed for failure to state a claim.

j. Mrs. Bucklin has failed to plead a viable claim for negligent undertaking. Mrs. Bucklin asserts that Bank of America had actual knowledge of similar scans, target victims, and social engineering scams. To that end, she claims that Bank of America knew or should have known that Mrs. Bucklin was the victim of a scam. Negligent undertaking liability occurs when one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

k. Mrs. Bucklin has failed to show that Bank of America voluntarily assumed a duty to exercise reasonable care in a competent and commercially reasonable manner. Notably, Mrs. Bucklin has failed to show one of the following: (1) how the bank's failure to exercise reasonable care increased the risk of her authorizing her own wire transfers to Mr. Williams, (2) that the bank undertook a duty owed, or (3) that harm was suffered because of her reliance on the bank. Mrs. Bucklin authorized the wire transfers and fails in her attempt to argue that Bank of America is liable for the transfers that she authorized.

l. Mrs. Bucklin has failed to plead viable claims for negligent hiring and negligent supervision or retention.

m. Florida courts have recognized "a duty to exercise reasonable care in hiring and retaining safe and competent employees." The ultimate question of liability is whether it was reasonable for the employer to permit the employee to perform his job in light of information about him which the employer should have known. A claim for negligent hiring arises when, before the time the employee is hired, the employer knew or should have known that the employee was unfit. Here, Mrs. Bucklin's allegations are insufficient to allege negligent hiring. Notably, Mrs. Bucklin's complaint fails to mention any facts that would suggest that Bank of America was required to undertake an investigation into its employees who authorized the wire transfers for Mrs. Bucklin. Further, Mrs. Bucklin fails to allege that an appropriate investigation would have revealed that the employees were incompetent and did not possess knowledge of how to identify, avoid, or mitigate the harm caused by the scam Mrs. Bucklin fell victim to.

n. Florida courts have recognized a duty to exercise reasonable care in hiring and retaining safe and competent employees. The Florida Supreme Court recognized the tort of negligent supervision in 1954, holding that an employer cannot knowingly keep a dangerous servant which defendant knew or should have known

was dangerous and incompetent. Negligent supervision and retention occurs when, during the employment, the employer knows or should know of an employee's unfitness and fails to take further action such as investigating, discharge, or reassignment. Mrs. Bucklin has failed to allege sufficient facts to plead a viable claim for negligent supervision and retention. Notably, the Complaint lacks facts to suggest that Bank of America had actual or constructive notice of any employees' unfitness to process wire transactions. The Complaint does not name or otherwise describe particular employees. Further, Mrs. Bucklin fails to describe a prior event that would have caused Bank of America to perform an investigation or take corrective action against such employees.

o. Mrs. Bucklin has pled a viable claim for promissory estoppel. Mrs. Bucklin alleges that Bank of America represents that customers, such as Mrs. Bucklin, are not liable for unauthorized purchases or transactions — as long as they are reported promptly. She states that Bank of America reversed its decision that customers are not liable for unauthorized transactions by not refunding Mrs. Bucklin. Bank of America argues that it never made the representation that it would refund all customers for unauthorized transactions. Mrs. Bucklin has sufficiently pleaded her promissory estoppel claim at this stage of litigation because of the representations made in the Online Banking Agreement. Specifically, Section 8(B) states that Mrs. Bucklin "will have no liability for unauthorized transactions if [she] notif[ies] [Bank of America] within 60 days after the statement showing the transaction has been sent to [Mrs. Bucklin]. Mrs. Bucklin states that she relied on "Bank of America's representations regarding liability for unauthorized transaction and representations regarding privacy and security." Adding to that, she states that she disputed the unauthorized transaction in a timely manner, and it denied her claim for reimbursement.

B. *Cuchiara v. Blaney,* 2025 U.S. Dist. LEXIS 194666 (United States District Court for the Northern District of Indiana 2025). Legal malpractice claims against estate planning lawyer dismissed under collateral estoppel where court determined there was no contract to make a will. This is a legal malpractice claim brought by Plaintiffs, who are all siblings, against the lawyer and law firm who prepared their father's and their father's wife's wills.

1. Kenneth Sain ("Kenneth") was the father of Plaintiffs Kenneth Sain, Linda Grevenstuk, Pamela Cuchiara, and Barbara Richey (the "Sain Children" or "Plaintiffs"). In February 1990, Kenneth married Judith Sain ("Judith") who, like Kenneth, had four children from a previous marriage. In 2009, Kenneth and Judith met with counsel to establish an estate plan. According to the complaint, Kenneth and Judith informed counsel that they wanted to provide for both of their sets of children at the time of their death. Under Kenneth's 2009 will, his entire estate and property went to Judith "as her sole and absolute property if she shall survive me." But Kenneth's 2009 will further stated that if Judith did not survive him, all of Kenneth's property would go to the couple's collective eight children (Plaintiffs, the Sain Children, as well as Judith's four children). Judith's 2009 will had similar provisions bequeathing her estate to her husband and to all eight children if Kenneth preceded her in death with one particular exception. That exception stated that any money Judith inherited from her mother would go to only her four children.

2. Plaintiffs' central allegation is that when counsel prepared these wills in 2009, he was negligent in his professional duties. They allege that, despite knowing Kenneth's and

Judith's "explicit intentions" to provide for all eight children, the 2009 wills "did not contain any agreement that the wills were the product of a contract or agreement between Kenneth and Judith and could not be revoked or changed after the death of either client." In effect, Plaintiffs allege that after Kenneth passed, Defendants had failed to prevent Judith from changing her will, disinheriting the Sain Children and leaving everything to only her four children. And that is exactly what happened.

3. In March 2011, Kenneth passed away and his wife Judith inherited his entire estate. No probate was opened as to Kenneth's will at that time or thereafter. The next month, in April 2011, Judith further executed an Affidavit of Death to transfer the Marital Property [a home built together] in her name as sole owner. Then, in January 2014, Judith employed counsel a second time to prepare a revised will. Under the January 24, 2014 will, the Sain Children received nothing from Judith or their late father, Kenneth. In September 2022, Judith passed away and per the terms of her 2014 will (and a previously executed transfer on death warranty deed from 2019), the entirety of Judith's estate, including everything she inherited from Kenneth, passed to her four children. Plaintiffs inherited nothing and this lawsuit was filed on August 30, 2024.

4. Prior to filing, the Sain Children filed a state court action against Judith's Estate and her four children, alleging breach of contract and unjust enrichment relating to effectively the same facts as recounted above. The state court issued an opinion and order granting summary judgment for Judith's estate and children on the breach of contract claim brought by the Sain Children. But the Court denied summary judgment as to the Sain Children's unjust enrichment claim and the matter proceeded to trial. The jury returned a verdict for the Sain Children on the unjust enrichment claim and awarded them $100,000 in damages. The state court entered judgment for the Sain Children, and the defendants in that case (Judith's estate and her four children) appealed. On March 14, 2025, while the present motions were still pending, the Indiana Court of Appeals reversed the jury's verdict, finding that the defendants were entitled to summary judgment on the Sain Children's unjust enrichment claim for the same reasons they prevailed at the trial court on the breach of contract claim. The Indiana Supreme Court denied the Sain Children's request for a transfer and review of the Court of Appeals decision, ending that litigation.

5. The magistrate recommended dismissal of the claims on the following grounds:

> a. This case stems from a dispute over the operation of multiple wills, which is an area traditionally outside federal courts' subject-matter jurisdiction. While neither party has raised the issue, the Court has a duty to independently confirm federal subject-matter jurisdiction in all cases. Here, Plaintiffs' claim for legal malpractice does not seek to have the Court probate or annul a will or estate. Nor would resolution of this case dispose of property within the custody of any state probate court, as no probate proceedings occurred. Instead, Plaintiffs bring state law legal malpractice claims against the lawyer and law firm that prepared their father's will. This is the type of in personam claim for damages that the Supreme Court held does not implicate the probate exception to federal court jurisdiction.
>
> b. Under Indiana law, there are four elements to a legal malpractice claim: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff. Plaintiffs must first prove the

existence of a relationship with Defendants. This relationship need not be express; it may be inferred from the conduct of the parties.

c. Defendants do not cite any case that stands for the proposition that under Indiana law an attorney's duty to third parties in preparing a will depends on their status as direct vs. indirect beneficiaries. Whatever logical support Defendants' argument might have, it is not backed up with any cited authority. Instead, Indiana case law refers to "known" third parties and the focus appears to be on the attorney's knowledge. Plaintiffs plausibly allege, and Defendants do not seriously contest, that when the 2009 wills were drafted, Plaintiffs were known to Defendants as third parties who might benefit under their father's will if his wife preceded him in death. Therefore, the Court cannot confidently rule that Plaintiffs have failed to state a claim upon which relief can be granted or that Defendants did not owe them any duty as a matter of law.

d. The complaint alleges that Plaintiffs were injured and knew of their injury only when Judith passed away in 2022 and her entire estate including what she received form Kenneth passed to her four children only under her revised 2014 will. Waiver and statute of limitations are affirmative defenses. The statute of limitations for attorney malpractice is two years. The two-year period begins to run when the plaintiff knows of, or in the exercise of ordinary diligence could have discovered, the tortious conduct. A motion to dismiss based on failure to comply with the statute of limitations should be granted only where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense. Here, the complaint does not say that Plaintiffs knew of their injuries or were even aware of the specific wills at the time of their father's passing in 2011. Thus it is hard to see how Plaintiffs knew and affirmatively waived their rights. Defendants argue a logical inference that Plaintiffs knew earlier, but at this stage of the litigation, inferences must be drawn in Plaintiffs' favor. Based on the allegations of the complaint, Plaintiffs allege that they only learned of the wills' operation and cumulative effect when Judith passed away in 2022. And if that is the case, the statute of limitations did not begin to run until Judith passed in 2022. Thus, Plaintiffs have alleged enough that this lawsuit should not be dismissed on waiver or statute of limitations grounds.

e. Collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Defendants argue that because the state court ruled against the Sain Children on their breach of contract and unjust enrichment claims against Judith's estate and her children, and those claims necessarily implicated several of the same issues Plaintiffs raise here, they are collaterally estopped from proceeding against Defendants here. While Defendants' argument was not as persuasive based solely on the trial court record, the ultimate disposition of the state court litigation by the Indiana Court of Appeals and Indiana Supreme Court collaterally estops the Sain Children's lawsuit against Defendants. In Indiana, collateral estoppel forecloses any subsequent re-litigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit. It does not matter whether the claims are different in the two lawsuits; what matters are the facts or issues decided.

f. The Sain Children were the plaintiffs in both this case and the state court case, and there was a final judgment. While the Sain Children are correct that legal malpractice was not litigated in state court, the claims need not be identical; the issues are what matters. The Sain Children's view of what was decided by the various state courts is too narrow. The state court case concerned the same critical fact as what undergirds their legal malpractice claim: whether there was an agreement between Kenneth and Judith in 2009 to bequeath their estate (with a carve out for Judith's inheritance from her mother) equally between their eight children. If there was no agreement or intention to do that, then there would be no malpractice claim against Defendants.

g. Here is what the state court ruled on summary as to the breach of contract claim: "The 2009 wills of Kenneth and Judith each provided for the transfer of property to the other as their "sole and absolute property," without restriction or limitation. No language in the 2009 wills of Kenneth and Judith indicates or suggests any restriction or limitation on this transfer such as the existence of an agreement or promise not to revoke or revise their wills in the future. This is important. Having rejected the Plaintiffs' contention that the 2009 wills evidence an express or implied agreement not to revoke or revise their terms in the future, the Court further concludes that Plaintiffs have not presented designated evidentiary material reflecting any agreement or promise by Judith not to revoke her 2009 will. The affidavits reference, at most, an estate "plan" by Kenneth and Judith, but a plan is not evidence of an agreement or promise to never revoke the plan."

h. The Sain Children did not appeal this summary judgment decision and instead took the case to trial on their unjust enrichment claim. They prevailed at trial, but that verdict was reversed by the Court of Appeals.

i. Furthermore, while the Court of Appeals' decision does not explicitly discuss intent on its own as to the unjust enrichment claim, it does adopt the reasoning of the trial court's summary judgment ruling on the breach of contract claim that included an explicit finding as to intent. And the Court of Appeals was explicit that it agreed with the trial court that there was no agreement that the Sain Children could not be disinherited by Judith if Kenneth passed away before him under the couple's 2009 wills. Because the operation of the 2009 wills was clear and unambiguous — and there is no suggestion of fraud in the inducement of the 2009 wills — the Court cannot entertain pure speculation that there was some other supposed intent that Defendants were negligent in failing to follow in order to avoid the application of collateral estoppel. That may be what the Sain Children wished had happened, but it's not what the 2009 wills said and thus not what it intended.

j. Finally, neither of the additional "salient considerations" Indiana law considers require a different result. Here, there is no question that the Sain Children had a full and fair opportunity to litigate whether there was an agreement between Kenneth and Judith in 2009. It was litigated at summary judgment, at trial and then through a full appeals process. Nor is there any fundamental unfairness under the circumstances. As the Indiana Court of Appeals framed it, the fact that Kenneth's children hoped to benefit from the 2009 Will based on the couple's initial estate

planning does not render it unjust for Judith's children to receive what their mother legally owned and chose to give them. Instead, in the Court's view, it would be unfair to allow the Sain Children to continue this lawsuit against Defendants to damages for "legal malpractice" when their claims against the estate they claim wrongfully disinherited them have already been adjudicated against them.

6. The federal district court adopted the recommendations of the magistrate and dismissed the claims.

C. *Henry v. Aleksic,* 2025 Cal. App. Unpub. LEXIS 5962 (Court of Appeal of California, Fourth Appellate District, 2025). Disinherited heir not owed duty of care by drafter of trust amendment, and unauthorized practice of law is not a basis for an intentional infliction of emotional distress claim.

1. Kimberly Henry brought this lawsuit against the drafter of her father's trust amendment ("Aleksic"). The trust amendment disinherited Kimberly and made her son the sole beneficiary of her father's estate. Kimberly's operative first amended complaint ("FAC") alleges causes of action against Aleksic for negligence, intentional infliction of emotional distress, and intentional interference with expected inheritance.

2. Jerry and Denise Henry were Kimberly's parents. Denise died in April 2019, and Jerry died in May 2020. Both of them created revocable living trusts in 1999 and amended their trusts several times. In 2010, Denise was diagnosed with cancer, and Kimberly became her caregiver. Jerry and Denise amended their trusts in 2010 to make Kimberly the sole beneficiary of the trusts and their successor trustee.

3. Kimberly asserted a claim for promissory estoppel, alleging that her father breached an oral promise to leave his entire estate to her. The court of appeals affirmed the judgment for the defendants in that case.

4. Aleksic is not an attorney, but he was Jerry's tax preparer and began doing Jerry's taxes in 2010. Aleksic's business cards and website advertise his ability to prepare living trusts. Around November 2017, Jerry or Denise scheduled an appointment with Aleksic, and Aleksic met them at their home. They told Aleksic that they wanted to remove Kimberly as the beneficiary of Jerry's trust and designate Aleksic as the successor trustee. They also said that they wanted Dylan Heredia-Tamayo (their grandson and Kimberly's son) to be the sole beneficiary of the trust. Jerry and Denise told Aleksic that they were unhappy with Kimberly and that there was "a lot of tension" in their shared home. Aleksic suggested that they specifically disinherit Kimberly by name.

5. Aleksic prepared the trust amendment disinheriting Kimberly, naming Heredia-Tamayo as the sole beneficiary, and designating Aleksic as successor trustee. Jerry and Denise signed the amendment in February 2018 at a skilled nursing facility, where they were patients. Aleksic was "not trained to look for issues like capacity," and he allegedly exerted undue influence over Jerry and Denise. There is ongoing probate court litigation to determine the validity of the trust amendments; Kimberly contends that the 2010 amendment is controlling, but Aleksic contends that the 2018 amendment is valid and controlling. Because of Aleksic's actions, Kimberly is engaged in multistate litigation and has suffered emotional breakdowns and panic and anxiety attacks. Kimberly sued Aleksic for negligence, intentional infliction of emotional distress, and intentional interference with expected inheritance.

6. Aleksic demurred to the FAC and the trial court sustained the demurrer without leave to amend and entered judgment for Aleksic. On appeal, the court of appeals affirmed on the following grounds:

a. In cases involving purely economic harm, there generally is no liability in negligence. There is an exception to the general rule of no recovery for negligently inflicted purely economic losses if the plaintiff and the defendant have a special relationship that gives rise to a duty of care. Aleksic owed Kimberly no duty of care. Kimberly was not the intended beneficiary of the transaction that Aleksic was tasked with carrying out. Heredia-Tamayo was the intended beneficiary of the transaction, and Jerry and Denise intended to disinherit Kimberly. If Aleksic did faulty work and rendered the 2018 trust amendment invalid, then there would be no harm to Kimberly. On the contrary, Kimberly would benefit. Her parents' attempt to disinherit her and name Aleksic successor trustee would be ineffective, which is the same relief she is seeking in the probate court.

b. The FAC does not sufficiently allege causation. To show actual or legal causation, the defendant's conduct must be a substantial factor in causing the plaintiff's injury. Kimberly's claimed injury is that her parents removed her as successor trustee and disinherited her. Aleksic's drafting of the trust amendment was not the legal cause of that injury. Aleksic was merely following the instructions of Kimberly's parents, who wished to make those changes to Jerry's trust. If Aleksic had not prepared the 2018 trust amendment, then Jerry and Denise would have found someone else to prepare it. Kimberly's claimed injury would have occurred even without Aleksic's conduct.

c. To prevail on a cause of action for intentional infliction of emotional distress, the plaintiff must show extreme and outrageous conduct by the defendant with the intent to cause, or reckless disregard for the probability of causing, emotional distress. The FAC fails to allege extreme and outrageous conduct. Kimberly argues that Aleksic acted outrageously by practicing law, suggesting that Jerry and Denise specifically disinherit Kimberly, drafting documents that named himself as successor trustee, and having Jerry and Denise execute the documents in a skilled nursing facility. None of that conduct could reasonably be found to be so extreme and outrageous that it exceeds all possible bounds of decency in a civilized society. Again, Aleksic acted pursuant to the instructions of Jerry and Denise. There was nothing inherently unlawful about their desire to disinherit Kimberly and name Aleksic successor trustee. They contacted Aleksic to make changes to the trust, met with him at their home, and told him what they wanted. He suggested that they disinherit Kimberly by name as a way of implementing their desired changes. And even assuming that Aleksic's actions constituted the unlicensed practice of law, that is not the sort of atrocious and indecent conduct necessary to support the cause of action. Because the FAC does not allege outrageous and extreme conduct, the court properly sustained the demurrer to the cause of action for intentional infliction of emotional distress.

d. The tort of intentional interference with expected inheritance was first recognized in California in 2012. But the cause of action is available only if the plaintiff has no adequate remedy in probate. An individual who alleges an interest in a trust because the amendments purporting to disinherit them are invalid has

standing to petition the probate court. Kimberly has no cause of action for intentional interference with expected inheritance. She has an adequate remedy for her allegedly improper disinheritance in probate court. Indeed, the FAC alleges that there is ongoing probate court litigation to determine the validity of the 2018 trust amendment, and the court in this case took judicial notice of pleadings in the probate court that confirm Kimberly is pursuing that remedy.

D. *McDow v. Harris,* 2025 U.S. Dist. LEXIS 174896 (United States District Court for the Eastern District of California 2025). Claim that bank aided and abetted elder financial abuse dismissed due to lack of actual knowledge of wrongdoing.

1. This litigation arises from a dispute among siblings regarding the provision of care and control of assets for their mother, Lily McDow, who suffered a stroke in 2019 and has since passed away. After being granted leave to amend, Kennedy McDow ("McDow") and the Estate of Lily McDow (collectively, "Plaintiffs"), proceeding pro se, filed the operative second amended complaint ("SAC") on January 26, 2024, suing McDow's four sisters and Bank of America, N.A. ("BANA").

2. Relevant here, the SAC claims that BANA "played a part" in its co-defendants' "elder abuse" of Lily McDow, alleging that BANA's bank manager advised her co-defendants to get a power of attorney so that they could "take over" Lily's BANA account, refused to allow Lily to remove Defendant Betty Harris from the account to "regain control of her money," refused to accept an updated power of attorney by Lily to revoke a previous power of attorney, and advised Defendant Harris to withdraw Lily's funds from the account before she could arrive at the bank to object.

3. BANA moved to dismiss, which the federal district court granted, with leave to amend, on the following grounds:

a. Both the SAC and McDow's responses make clear, however, that Plaintiffs are not attempting to bring a claim for breach of fiduciary duty against BANA. Instead, as described above, Plaintiffs claim BANA "played a part" in the "elder abuse" of Lily McDow by her daughters by assisting them in taking control of Lily's finances.

b. The parties do not dispute that Lily McDow was over 65 in 2019, when the alleged financial abuse began. A defendant may be found liable for assisting in financial elder abuse under an aiding and abetting standard. To state such a claim, the plaintiff must plead that the defendant knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act. When a bank provides ordinary services that effectuate financial abuse by a third party, the bank may be found to have assisted in the financial abuse only if it knew of the third party's wrongful conduct. To be liable for elder abuse, there must be actual knowledge, not constructive knowledge.

c. Plaintiffs fail to allege sufficient facts to support a claim for financial elder abuse. There are no allegations that BANA took or obtained Lily McDow's property for a wrongful use or with intent to defraud. While Plaintiffs allege that BANA's bank manager advised her co-defendants to get a power of attorney so that they could "take over" Lily McDow's BANA account, refused to allow Lily to remove Defendant Harris from the account, refused to accept an updated power of attorney by Lily to revoke a previous power of attorney, and advised Defendant Harris to withdraw Lily's funds from the account, they do not plead any facts

demonstrating that BANA's bank manager undertook those acts with actual knowledge of wrongful conduct by her co-defendant.

E. *Perednia v. Bank of Am.*, N.A., 2025 U.S. Dist. LEXIS 50737 (United States District Court for the Eastern District of Washington 2025). Absent actual knowledge that co-trustee was acting erroneously as sole trustee, bank is not liable for payments made from trust account.

1. This matter arises out of fraud perpetrated on bank accounts opened with Defendant. On January 28, 2020, John Claude Barrier died, leaving a Trust ("the Trust") to co-trustees Charles Barrier, Linwood Sampson, and Quy Barrier. On April 30, 2020, the co-trustees established a bank account with Baird Financial on behalf of the Trust. On December 8, 2020, Ms. Barrier opened an account for the Trust with Defendant Bank of America, representing that she was the sole trustee, and that Mr. Barrier and Mr. Sampson were successor trustees. Ms. Barrier also maintained a personal account with Defendant.

2. Ms. Barrier, who was in her late sixties at the time of incident, allegedly fell victim to nefarious individuals who directed her to withdraw and transfer funds, demonstrated by a series of transactions occurring in late 2022 and early 2023. On December 12, 2022, Ms. Barrier withdrew $135,000 from her personal account as a cashier's check made out to David Rigwald. On January 13, 2023, she withdrew $351,000 from her personal account as a cashier's check made out to herself. On January 31, 2023, she transferred $1.5 million from the Baird Financial trust account to the Bank of America trust account. On February 1, 2023, she transferred $1.2 million from the Baird Financial trust account to the Bank of America trust account. On February 2, 2023, Ms. Barrier transferred $1.2 million from the Bank of America trust account to her personal account. On February 3, 2023, she made a withdrawal of $425,000 from her personal account via a cashier's check to Robert Rehfuss. On February 7, 2023, she made a withdrawal of $500,000 from her personal account, via a cashier check to herself. On February 27, 2023, she transferred $200,000 from the Bank of America trust account to her personal account. On February 28, 2023, she withdrew $370,000 from her personal account via cashier's check made out to Servio Assurance, LLC. On May 19, 2023, she transferred $1.5 million from the Baird Financial trust account to the Bank of America trust account. Between May 23 and May 30, 2023, Ms. Barrier withdrew $797,000 from the Bank of America trust account. On June 9, 2023, she transferred $38,000 from the Bank of America trust account to her personal account.

3. On June 9 and June 10, 2023, Charles Barrier reported concerns about Ms. Barrier's financial activity to a Bank of America branch in Woodinville, Washington, but was not provided any information and the account was not frozen despite presenting a copy of the trust instrument. On June 12, 2023, Mr. Barrier presented a copy of the trust instrument to a Bank of America branch in Spokane, Washington, and was denied information. The employee working that day stated that she needed to seek approval from the Bank of America Legal Department before disclosing any information to co-trustees.

4. Also on June 12, 2023, Ms. Barrier made an international wire transfer in the amount of $518,000 from the Bank of America trust account to Yang Junjie. She made another wire transfer on June 27, 2023, in the amount of $97,609 from her personal account to Hang Seng Bank Ltd. After these transactions, Mr. Barrier was able to obtain financial statements for the Bank of America accounts from Ms. Barrier and discovered the numerous transfers of the funds to third parties, both in the United States and in China.

In total, Ms. Barrier transferred $4,200,000 from the shared Baird Financial trust account, withdrew $1,905,609 from her personal account with Bank of America, and $1,315,000 from the trust account with Bank of America. Mr. Barrier reported the transfers to law enforcement, and at least one individual has been apprehended. Ms. Barrier died on December 10, 2023.

5. Plaintiffs filed this lawsuit alleging aiding and abetting, breach of fiduciary duty, negligence, and breach of contract. Defendant removed this action and moved to dismiss the action. The federal district court granted the motion and dismissed the action on the following grounds:

a. The Washington State Deposit Act states: "In making payments of funds deposited in an account, a financial institution may rely conclusively and entirely upon the form of the account and the terms of the contract of deposit at the time the payments are made. A financial institution is not required to inquire as to either the source or the ownership of any funds received for deposit to an account, or to the proposed application of any payments made from an account. Unless a financial institution has actual knowledge of the existence of dispute between depositors, beneficiaries, or other persons claiming an interest in funds deposited in an account, all payments made by a financial institution from an account at the request of any depositor to the account and/or the agent of any depositor to the account in accordance with this section … shall constitute a complete release and discharge of the financial institution from all claims for the amounts so paid regardless of whether or not the payment is consistent with the actual ownership of the funds deposited in an account by a depositor and/or the actual ownership of the funds as between depositors and/or the beneficiaries of P.O.D. and trust accounts, and/or their heirs, successors, personal representatives, and assigns."

b. Plaintiffs argue that the Deposit Act is inapplicable to their claim because it requires that an issue account be held by human beings and that financial institutions are not shielded from liability by accepting deposits that would conflict with any other applicable state or federal law. First, the statute explicitly says that "actual notice" requires written notice to a branch manager or an officer of the financial institution. The Complaint states Defendant Bank of America received notice of the fraudulent activity and dispute surrounding the Trust in person both at the Woodinville branch and later at a Spokane branch. However, neither of these forms of notice comply with the Deposit Act. As to the issue of the "depositor," Ms. Barrier was the individual in charge of the Trust account opened with Defendant. Moreover, this specific provision of the Deposit Act explicitly states that, absent actual knowledge, the institution is not liable for payment made by, "any depositor to the account," here being Ms. Barrier. And because Defendant Bank of America is not required to inquire into the source or the ownership of the funds received, Plaintiffs have failed to allege that Bank of America had actual knowledge that Ms. Barrier was operating erroneously. Based on the plain language of the statute, any duty Defendant Bank of America may have breached does not result in cognizable damages because it is released from liability. Plaintiffs have failed to state a claim on which relief may be granted.

c. Because the Deposit Act shields Defendant from all claims against it related to transactions of funds deposited into an account, amendment would be futile.

F. *Shega v. Am. Bank of the North,* 2025 Minn. App. Unpub. LEXIS 590 (Court of Appeals of Minnesota 2025). State law provides a cause of action only against the person who committed financial exploitation, not against those who aided and abetted. The Minnesota Supreme Court has not recognized undue influence as a freestanding tort. For aiding and abetting liability to attach, there must be evidence that the bank had actual knowledge of the tortious conduct. In cases alleging aiding and abetting by professionals, "substantial assistance" requires something more than carrying out routine, professional services.

1. This case involves an appeal from an order granting summary judgment to respondent American Bank of the North (the "bank") for disbursing appellant Cheryl M. Shega's certificate of deposit ("CD") funds to the named payee-on-death ("POD"), Laura Craig.

2. Cheryl Shega was the oldest of three children and lived with her parents, Edward and Charlene Shega (the "Shegas"), throughout most of her life. Cheryl's siblings are Nancy Weiser and Gregory Shega. Although Cheryl was not formally diagnosed with a disability until later in life, most people in her life were aware that she suffered from a mental illness. Cheryl maintained a "childlike approach to life," adopting a daily routine of sleeping in, watching TV, and spending time on the internet. Cheryl did not work outside of the home, other than a few jobs in her late twenties. The Shegas financially supported her most of her life, even claiming her as a dependent on their taxes until 2016. One of Cheryl's hobbies was searching for long-lost relatives. In 2012, she reached out to defendant Laura Craig, a woman she believed was her cousin. Laura responded, and the two began communicating primarily via email. In a February 2012 email, Cheryl promised Laura that she would "never tell anyone where you are or that I am in contact with you."

3. When Cheryl's mother, Charlene, died in March 2015, Cheryl began taking care of her father, Edward, and the household chores. During this time, siblings Nancy and Gregory did not live with or near Cheryl. Also during this time, Edward had a "significant number of ambulance runs to the ER" and hospitalizations. Nancy and Gregory grew concerned about their father's health and flew back to speak with Cheryl in November 2016. There, Gregory asked Cheryl to see Edward's trust, and Cheryl became completely out of control, in a way that Gregory had rarely witnessed. Edward passed away in May 2017, and Cheryl remained living in his home.

4. In May 2019, law enforcement responded to a welfare check at the Shega's home. Law enforcement found the house was a mess and discovered Cheryl on the ground, unable to sit up somewhat paranoid and confused in appearance. A neighbor told police that Cheryl had not left the home in five months and crashed her car in a ditch because she was "nearly blind." And according to Gregory, the home was in complete disarray, with piles of newspapers, waste, dozens of mice and rats, soiled clothing, and hair and cat feces everywhere. Cheryl passed away on May 27, 2019.

5. In November 2009, the Shegas executed The Shega Family Revocable Living Trust (the "trust"). The Shegas named Cheryl as the sole beneficiary of the trust, identified her as the personal representative of their wills, and named her as the financial power of attorney. And if Cheryl predeceased the Shegas, then Gregory and Nancy would be the recipients of the trust's assets. The Shegas also signed a joint request for retitlement, which was addressed to the bank and referenced three unnumbered CDs. After Cheryl's death in May 2019, Nancy and Gregory found records of Cheryl's CDs that she inherited while going through paperwork in the home. There were four CDs in particular. Between 2016 and 2017, Cheryl redeemed the CDs she inherited, had new CDs issued in her

name, and named Laura as the POD on the new CDs. The value of the four CDs was approximately $250,000.

6. Two days after Cheryl's death, Nancy met with the bank's retail manager vice president ("regional retail manager VP"). During this meeting, Nancy shared her concerns about Cheryl designating Laura as the beneficiary of the CDs. The siblings' attorney, David Crosby, sent two letters to the bank in June 2019. The first letter, dated June 6, 2019, informed the bank that Nancy and Gregory were "preparing filings with the [district court] regarding [Cheryl's] estate." The letter also explained: "Each of these certificates designated a cousin of Ms. Shega's as the POD owner of the certificate. My clients are concerned because the cousin was not believed to have had any contact with Ms. Shega for some 35 years; it was only after Ms. Shega's longtime caretaker died (her mother in 2015) that the cousin apparently reconnected with Ms. Shega. Due to long-standing medical, physical, and emotional infirmities and dysfunctions, Ms. Shega was a 'vulnerable adult' under Minnesota Statutes section 626.5572, subd. 21(4). My clients have no information as to how or why the cousin was named on the certificates, [or] whether such actions were in accordance with Minnesota law as to financial transactions involving vulnerable adults. This letter advises American Bank of the North of the above facts and requests that no funds be distributed from any of Ms. Shega's certificates or any other accounts with your institution absent compliance with all relevant laws, procedures and policies or other court orders. Ms. [Nancy] Weiser and Mr. [Gregory] Shega intend to continue their investigations and prepare court papers in a timely and expedited manner."

7. On June 10, 2019, the district court appointed Nancy as a special administrator of Cheryl's estate because the "Assets of the Decedent may potentially be disbursed and said allocation may have been the result of fraud and/or undue influence." On June 25, 2019, the siblings' counsel sent a second letter to the bank and informed it that Nancy was appointed as the special administrator for Cheryl. Crosby reminded the bank that Cheryl was a "vulnerable adult" under Minnesota law, and explained that Nancy and Gregory were "gathering information as to the circumstances that led to [Cheryl's] execution of the [CDs]."

8. Also on June 25, 2019, the bank's executive vice president of retail banking emailed the regional retail manager VP and asked how Nancy and Gregory discovered the CDs and the respective POD on each one. The executive vice president also informed the regional retail manager VP that Crosby "contacted [respondent bank employee Gerri Chapman] last week to ask her questions regarding Cheryl's mental stability. I instructed Gerri to not say anything and to have something requested in writing. I then talked to [another bank employee] regarding this as the attorney was going to send a subpoena." The regional retail manager VP answered the executive vice president's question and informed her that she received documentation that Nancy was appointed as the special administrator of Cheryl's estate. The regional retail manager VP also stated: "There is still nothing they can do on the CDs with the cousin being named the POD on the accounts. If she does come in to claim them, I am sure we will have to pay them out to her according to our documentation and then they would have to fight it out in the courts. So far[,] the cousin has not reached out to us at all."

9. The executive vice president replied that, "According to [the Minnesota Bankers Association] legal counsel[,] we need to seek an attorney on this . . . if we want to enter an interplea and turn the money over to the courts."

10. Chapman was unaware that Nancy and Gregory's attorney had reached out. She was also unaware that Nancy had been appointed the special administrator. After Cheryl's death, in June 2019, Chapman attempted to locate Laura online. On July 7, 2019, she found Laura's husband Stephen Craig on Facebook and sent him a friend request "hoping to get a connection to see if [she] could find out anything about Laura." When Stephen did not respond, Chapman messaged him again two days later, stating it was "[v]ery important and time sensitive." In her deposition, Chapman explained that the bank likes to "get in touch with the beneficiaries so we can get their name — the deceased['s] name[] — off the accounts for reporting reasons."

11. On July 8, 2019, the executive vice president emailed Chapman and the regional retail manager VP and explained that Chapman "does not have to talk to [Nancy and Gregory's attorney] and if he so chooses to send a subpoena[,] then so be it." She also explained, "As Gerri has stated, Cheryl was of sound mind and knew who she intended to leave her money to and at this time we will abide by how the accounts are set up." On July 25, 2019, Laura's counsel sent a letter to the bank requesting that it release the funds to Laura because she was the named beneficiary. The bank released the funds from Cheryl's CDs to Laura on July 26, 2019. The regional retail manager VP informed Nancy that Laura's counsel requested that the bank release the CD funds to Laura's account. She explained that the bank was "obligated by [its] legal documents to honor this request to pay out the funds to [Laura] which we did on July 26th."

12. The Estate of Cheryl M. Shega (the "estate") sued Laura and Stephen Craig, claiming that they exploited Cheryl, a vulnerable adult, and unduly influenced her to make Laura the POD of her CDs. Some of the claims raised against the Craigs were dismissed at summary judgment; the remaining claims were tried to a jury. The estate prevailed on all remaining claims against the Craigs. The jury specifically found that Cheryl was a vulnerable adult, that Cheryl's designation of Laura as the beneficiary of the CDs was the product of undue influence, and awarded the estate damages of approximately $250,000. Also named in the lawsuit was the bank, along with its employees (together, the "bank"). The estate claimed financial exploitation of a vulnerable adult, tortious interference, negligence, and aiding and abetting the financial exploitation of a vulnerable adult. The bank moved for summary judgment.

13. In December 2022, the district court granted summary judgment for the bank on all of the estate's claims against it except the negligence claim, on which the bank later prevailed at trial. For the claim of aiding and abetting the financial exploitation of a vulnerable adult, the district court determined that the estate failed to provide sufficient evidence to create a genuine issue of material fact.

14. The estate appealed and the court of appeals affirmed dismissal of the claims on the following grounds:

> a. Minnesota Statutes section 626.557, subdivision 20(a), states, "A vulnerable adult who is a victim of financial exploitation as defined in section 626.5572, subdivision 9, has a cause of action against a person who committed the financial exploitation." The plain language unambiguously provides a cause of action only

against the person who committed the financial exploitation — in this case, Laura Craig. The relevant statutory language does not indicate that a victim may sue for aiding and abetting the financial exploitation of a vulnerable adult. And reading the statute as a whole, it appears this was intentional by the Minnesota Legislature. To be sure, the legislature created aiding-and-abetting liability in another part of the same statute (i.e., defining "abuse" to include "aiding and abetting" varying degrees of assault and criminal sexual conduct, using drugs to "injure or facilitate crime," and soliciting, inducing, or promoting prostitution). Further, the legislature has created statutory causes of action for aiding and abetting in other contexts, such as the Minnesota Human Rights Act (MHRA). The statutory scheme of the exploitation of the vulnerable-adult law and the example of the MHRA demonstrate that the legislature knew how to include aiding and abetting claims, and if it wished to attach aiding-and-abetting liability for the financial exploitation of a vulnerable adult, it would have done so here. Accordingly, reading the statute as a whole, the statute does not provide a cause of action for aiding and abetting the financial exploitation of a vulnerable adult.

b. The Minnesota Supreme Court has not recognized the common-law tort of undue influence. A common-law claim for aiding and abetting presupposes an underlying tort. At summary judgment, the estate asserted that the primary claim underlying the aiding and abetting the financial exploitation of a vulnerable adult was that of undue influence. There is no Minnesota case law identifying undue influence as a tort. Assuming undue influence is a "subtle species of fraud," the estate here does not argue that the bank aided and abetted fraud and did not advance that argument in district court. Undue influence is not a "freestanding tort," and the estate does not identify any underlying tortious conduct. Only the Minnesota Supreme Court has authority to recognize new common-law doctrines for Minnesota. The Minnesota Supreme Court has not recognized undue influence as a freestanding tort.

c. Even if undue influence is a tort, the district court did not err by granting summary judgment because the estate failed to present evidence sufficient to create a genuine issue of material fact as to the elements of the claim.

d. All who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury. There are three elements to prove aiding and abetting: (1) the primary tortfeasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach. The estate does not contest the district court's determination on the first element of aiding and abetting that the primary tortfeasor, the Craigs, committed a tort that caused an injury to the Shegas.

e. The estate did not offer evidence sufficient to create a genuine issue of material fact that the bank had actual knowledge of Laura unduly influencing Cheryl.

f. The bank claims that the "record contains not so much as a hint that [the bank and its employees] knew of any alleged influence on Cheryl's decision to name Laura" as the POD on the relevant CDs. The bank is mistaken. An internal email

between the bank and counsel for the Minnesota Bankers Association demonstrates that the bank was advised about the pending litigation. On June 24, 2019, the Minnesota Bankers Association's counsel wrote: "This is likely a scenario that will require the bank getting legal counsel involved. I don't know if the bank has any reason to suspect the cousin/POD did anything wrong, but if the siblings are serious about fighting this, then they will get the bank involved with the court action at some point. Until that happens, the bank, along with legal counsel, has a choice to make. Now that it has notice of a possible controversy, it could petition the court and start an interpleader action which is basically telling the court that there is/will be a dispute over this money and the bank doesn't want to hold it anymore so we are going to deposit [it] with the court while the two parties fight over it."

g. This shows that the bank was at least aware of the alleged undue influence and the potential for litigation. The question that remains, however, is whether the bank had "actual knowledge" of the Craigs' undue influence.

h. Aiding and abetting liability is based on proof of a scienter — the defendants must know that the conduct they are aiding and abetting is a tort. A "bare inference that the defendant must have had knowledge of the primary violation is insufficient. When the allegedly tortious conduct is not obvious, courts are reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful. Here, the bank lacked a "long-term or in-depth relationship" with the Craigs and, therefore, the bank cannot be said to have constructive knowledge. For aiding and abetting liability to attach in this case, there must be evidence sufficient for a jury to find that the bank had actual knowledge. And although there is some record evidence suggesting the bank was aware of the Craigs' undue influence, nothing in the record supports a finding that the bank had actual knowledge.

i. The estate had to show that the bank substantially assisted or encouraged the primary tortfeasor in the achievement of the breach. In the context of professionals, substantial assistance means something more than the provision of routine professional services. According to the estate, the bank "substantially assisted or encouraged" the Craigs when it released the CD funds to Laura the day after Crosby requested that it not release the funds. But this action occurred two years after the Craigs committed the underlying tort of undue influence by convincing Cheryl to make Laura the POD. And the record is devoid of any evidence proving that the bank substantially assisted or encouraged Laura and Stephen Craig at the time Cheryl named Laura as the POD on her CDs.

j. To convince us otherwise, the estate analogizes its case to that of a bank robbery. In its example, the primary tortfeasor — the Craigs — stood up the bank and demanded money; the aider and abetter — the bank — was waiting in the getaway car, ready to drive off. The estate seems to suggest that although the bank did not substantially assist the Craigs in unduly influencing Cheryl to name Laura as the POD, the bank ultimately facilitated the achievement of the crime by releasing the funds. This analogy is unpersuasive.

k. The bank in this hypothetical is more akin to a taxi driver providing routine, professional services. To this end, the supreme court has affirmed that in cases

alleging aiding and abetting by professionals, "substantial assistance" requires something more than carrying out routine, professional services. The bank was discharging a typical duty of disbursing funds that Laura was legally entitled to according to the POD on Cheryl's CDs.

l. Minnesota Statutes section 45A.06(a) (2018) provides that a broker-dealer or investment adviser may delay a disbursement if it reasonably believes that the "requested disbursement or transaction may result in financial exploitation of an eligible adult." But, the only instance when a bank must delay disbursement is when the "commissioner of commerce, law enforcement agency, or prosecuting attorney's office" informs the bank that financial exploitation "may have occurred, may have been attempted, or is being attempted." Here, the bank received no such notice from either agency or office.

G. *Simonson v. Olejniczak,* 2025 U.S. App. LEXIS 26474 (United States Court of Appeals for the Seventh Circuit 2025). Counsel not responsible for surcharge against fiduciary where counsel could withdraw from representation due to nonpayment of fees.

1. John Hohler died in 2013. The assets in his estate and living trust were to be distributed to three sub-trusts: one for each of his daughters (Barbara Simonson and Mary Vaira) and one for his only grandchild. Simonson was named as trustee and personal representative of the estate.

2. In June 2014, Simonson retained counsel to represent her, the estate, and the trusts. Counsel and the firm did so until August 2015, when Simonson was about $80,000 behind in paying for the firm's services. Simonson disputed some of the bills but never provided details of her objections, and after repeatedly demanding payment without much success, the firm decided that it would no longer handle her affairs on credit.

3. The retention contract authorized the law firm to withdraw if Simonson failed to pay fees on time. At the end of July 2015, counsel wrote to Simonson: "[W]e believe our representation is concluded." Simonson disagreed with this stance, which led the law firm to ask the state's probate court for permission to withdraw. The motion to withdraw, coupled with the email the previous month, provided Simonson with the notice required by the retention contract. The court granted the law firm's motion on August 26, 2015, and it did nothing further on Simonson's behalf.

4. Early in August 2015, Simonson or her counsel should have filed papers to close the estate. Counsel and his firm did not file those papers. On August 31, Simonson sought an extension of time. The court granted that request, giving her until October 30 to file the necessary papers. In September, she filed a "Personal Representative's Statement to Close Estate," which the probate court deemed insufficient. By letter on September 18, the court identified several additional documents that it needed and set a new closing date of October 5. When Simonson neither tendered the documents nor requested extra time, Vaira filed a motion to hold her in contempt. The court set a hearing for November 9. Simonson sent an email to Vaira's attorney stating that she was not available on November 9 and that someone would need to ask the court for a different date, but neither she nor anyone else did that. When Simonson did not appear, the probate court removed her as trustee and personal representative, and the court later imposed surcharges that reduced the assets distributed to Simonson's sub-trust. Simonson's appeals within the state system were unsuccessful.

5. Simonson sued counsel and his firm of breaching the retention contract and sought to collect damages at least equal to the amount her sub-trust lost because of the probate court's sanction. The district court granted summary judgment for the defendants. Simonson appealed and the Seventh Circuit Court of Appeals affirmed on the following grounds:

a. Wisconsin requires contracting parties to keep their promises. That's the principle underlying Simonson's claim: the law firm promised to represent her but failed to close the estate. The need to keep promises likewise is the principle underlying the defense: Simonson promised to pay but did not, and she agreed that nonpayment would justify withdrawal. Once the arrearages were enough to be a material breach, defendants maintain, they were entitled to lay down their pens and unplug their word processors. Although Simonson insists that she would have paid eventually (the estate had enough assets), defendants took her foot-dragging as a sign that they were in for a fight and elected to cut their losses. The contract, after all, required monthly payment; the law firm did not agree to work indefinitely on long-term credit.

b. Whether nonpayment justified the law firm's withdrawal has been decided by the state's probate court, which gave an affirmative answer. Principles of issue preclusion do not allow Simonson to relitigate the propriety of withdrawal. The state judge granted leave to withdraw "based on the motion" — and nonpayment was the only reason given in the motion. The propriety of withdrawal for nonpayment therefore was litigated and resolved in state court. Simonson could have appealed the probate judge's order within Wisconsin's judicial system but didn't. She asserts that she did not receive notice of the probate judge's decision, but she concedes receiving a copy of defendants' motion to withdraw and could have inquired to see what the state judge had done. She also could have sought more time to respond to the law firm's motion or appeal the judge's decision, but she did not do either of those things. By the end of August, Simonson had begun to file papers on her own behalf; she evidently knew that she was unrepresented.

c. To the extent that there is room for an independent federal decision, a reasonable jury could not find that Simonson kept her part of the bargain. Her material breach allowed the law firm to withdraw.

d. Still, she observes, the time to close the estate was early August 2015 — after defendants said that they deemed the representation concluded but before the state judge allowed them to withdraw. If the defendants had done the job in early August, Simonson asserts, she would not have been hit with a surcharge. That may be so, but she had an obligation to mitigate damages. The court granted her more time to close the estate, and when her filing in September proved to be inadequate, the court told her what more was needed. She did not hire a new lawyer yet chose not to comply with the court's instructions (saying in an affidavit in the federal litigation that she was sure that she had done enough). Then she did not appear at the hearing set for November 9. She asserts in this suit that she was unavailable and anyway thought the date tentative, but the right time to make such assertions was before the scheduled date, and the right place was state rather than federal court.

H. *Smith v. Wells Fargo Bank, N.A.,* 2025 U.S. Dist. LEXIS 193903 (United States District Court for the Northern District of California 2025). Once presented with the power of attorney, bank could rely in good faith on its validity despite it being a forgery and client notifying bank of fraud, and other related claims fail due to lack of actual notice of fraud or lack of duty owed by bank.

1. Plaintiff Faye Smith was a victim of a fraudulent scheme in which her own stepson and his wife stole hundreds of thousands of dollars of Plaintiff's and her late husband's savings. Plaintiff and her husband, Robert Smith Sr., held various checking and savings accounts with Defendants Wells Fargo Bank ("Wells Fargo") and JPMorgan Chase Bank ("Chase"). Plaintiff and Robert Sr. created a family trust (the "Trust"), naming themselves as Settlors and Co-Trustees, and after Robert Sr. passed away on October 20, 2019, Plaintiff became the Trust's sole Trustee and beneficiary. Shortly after Plaintiff fell gravely ill and required extensive medical care, her stepson Robert Jr. and his wife Camille moved in with her, "purportedly to provide care" during her time of need. Robert Jr. and Camille instead embarked on an endeavor to take control of all Faye's finances in order to enrich themselves.

2. To achieve this aim, Robert Jr. and Camille forged a power of attorney and certification of resignation as trustee, purporting to appoint Robert Jr. as both Plaintiff's attorney-in-fact and as Trustee of the Trust. On its face, the power of attorney bore the signatures of Plaintiff and a notary, along with the notary's certification and stamp. In relevant part, the power of attorney authorized Robert Jr. to: "Open, maintain, or close bank accounts (including, but not limited to, checking accounts, savings accounts, and certificates of deposit), brokerage accounts, retirement plan accounts, and other similar accounts with financial institutions; Conduct any business with any banking or financial institution with respect to any of my accounts, including but not limited to, making deposits and withdrawals, negotiating or endorsing any checks or other instruments with respect to any such accounts, obtaining bank statements . . . money orders . . . and certificates or vouchers payable to me by any person, firm, corporation, or political entity; Perform any necessary act to deposit, negotiate, sell, or transfer any note, security, or draft of the United States of America, including U.S. Treasury Securities; To transfer any of my assets to the trustee of any revocable trust created by me, if such trust is in existence at the time of such transfer; and To utilize my assets . . . to fund a trust created by my Agent for my benefit or the benefit of my dependents, heirs, or devisees."

3. As alleged, Robert Jr. and Camille submitted the forged documents to Defendants, who accepted them and granted Robert Jr. and Camille access to Plaintiff's accounts. Robert Jr. and Camille proceeded to transfer funds out of Faye's accounts to pay for their own expenses, including vacations, credit card payments, transfers to their own investment accounts, and various other expenditures. To keep their actions secret, Robert Jr. and Camille had the banks forward any statements or correspondence to their home in Texas. It was not until December 2021 that Plaintiff discovered Robert Jr.'s and Camille's fraud. After filing a police report, Plaintiff began contacting Defendants through in-person visits to the Defendants' branch locations and via phone calls to the hotline identified by representatives of Defendants. Defendants refused to investigate the fraud, return the funds wrongfully transferred, or even remove Robert Jr. and Camille from having authority to make withdrawals from Plaintiff's accounts. As of late 2023, Chase and Wells Fargo still had not revoked Robert Jr.'s and Camille's access to Plaintiff's

accounts. Robert Jr.'s and Camille's "final unlawful withdrawal" took place on January 26, 2023, when they closed out the account at Wells Fargo.

4. Plaintiff separately filed suit against Robert Jr. and Camille, where she was awarded a judgment of $908,194.37. Plaintiff brought ten claims against Defendants: (1) aiding and abetting breach of fiduciary duty; (2) constructive fraud; (3) financial abuse of an elder under the California Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"); (4) violations of the California Unfair Competition Law ("UCL"); (5) breach of contract; (6) breach of the implied covenant of good faith and fair dealing; (7) conversion; (8) aiding and abetting conversion; (9) negligence; and (10) violations of California's Commercial Code.

5. Defendants moved to dismiss, which the court granted with leave to amend on the following grounds:

a. Wells Fargo argued that the case should be dismissed because Robert Jr. and Camille are necessary parties whose joinder to this action is impossible. A party is required to be joined if feasible under two conditions. First, a party must be joined if in that person's absence, the court cannot accord complete relief among the existing parties. Second, a party must be joined if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Wells Fargo's position is that Robert Jr. and Camille were already found "fully liable for all Plaintiff's losses," and the Contra Costa Superior Court did not have the opportunity to consider potential joint and several liability or to apportion relief among all potential defendants. The Court is not persuaded by Wells Fargo's arguments. Wells Fargo makes no attempt to explain why the Court cannot accord complete relief between it and Plaintiff — instead focusing on whether any portion of liability it could face should be shared by Robert Jr. and Camille. Wells Fargo does not assert that Robert Jr. or Camille have claimed an interest in this litigation, and there is no indication that they have. Because neither absent party has claimed any interest in this case, it is not necessary for the Court to consider whether their absence would leave Wells Fargo subject to incurring double, multiple, or otherwise inconsistent obligations. For these reasons, Wells Fargo's motion to dismiss under Rule 12(b)(7) is denied.

b. California Probate Code § 4303 provides, in relevant part: (a) A third person who acts in good faith reliance on a power of attorney is not liable to the principal . . . for so acting if all of the following requirements are satisfied: (1) The power of attorney is presented to the third person by the attorney-in-fact designated in the power of attorney. (2) The power of attorney appears on its face to be valid. (3) The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witnesses.

c. A power of attorney is "legally sufficient" for purposes of § 4303 immunity if it meets the requirements of § 4121. Specifically, the power of attorney must (a) contain the date of its execution, (b) be signed by the principal, or in the principal's name by another adult in the principal's presence and at the principal's direction, and (c) be acknowledged before a notary public. Plaintiff alleges that Defendants "operated in bad faith, knowing that it was in their financial interest to allow for

the fraudulent actions to occur," or "knowing that" their "actions/inactions would cause substantial harm to Plaintiff." These bare-bones assertions are insufficient to plead bad faith. And Plaintiff does not allege any facts plausibly explaining how Defendants knew, when the power of attorney was presented, Robert Jr. and Camille were committing fraud, as required for the heightened pleading standard for claims sounding in fraud.

d. In addition, Plaintiff's own allegations, coupled with the attachment of the power of attorney to her complaint, show that even as pled, § 4303's safe harbor applies. First, Plaintiff alleges that Robert Jr. and Camille submitted the power of attorney to Defendants. Plaintiff also alleges that the power of attorney was "facially and obviously fraudulently prepared" and that the "fraudulent nature was apparent for numerous reasons." These conclusory allegations are not sufficient to support her claims, and even if they were, the power of attorney attached to the complaint as Plaintiff's own exhibit contradicts her allegations. On its face, the exhibit bears all the hallmarks of a facially valid power of attorney. It contains a signature purporting to be Plaintiff's and the date of execution. The contents of the document make clear that it is a legal instrument authorizing the attorney-in-fact to take various actions, including the ability to transfer funds, set up a trust account, make deposits or withdrawals, among other things. And the power of attorney includes a forged certification by a notary public that appears valid on the face of the document. That certification includes the notary public's stamp with the seal of the State of California.

e. Plaintiff nonetheless alleges that several inconsistencies existed in the power of attorney, pointing out that the signature differed from her standard signature, and that no "wet copy" of the power of attorney was presented. Plaintiff argues that the certification by a notary public must be an actual (i.e., non-forged) certification to satisfy § 4303(a)(3). And she also seems to argue that the banks should have investigated the purported inconsistencies in the certification of notary public. The logical result of Plaintiff's argument is that third parties would have to verify independently that certifications of a notary public were not forged. But Plaintiff presents no California authority establishing these claimed requirements and duties, or anything suggesting that this was the legislature's intent. The Court finds that Plaintiff's position is untenable and would impose a duty on Defendants that is unsupported by California law. Once presented with the power of attorney, therefore, Defendants were entitled to rely in good faith on its validity.

f. Plaintiff's argument that Defendants are not immune under § 4303 because they also relied on a forged certification of resignation of trustee is unpersuasive. The power of attorney expressly authorized Robert Jr. not only to open a trust account for his own benefit, but also to fund that account and "perform any act necessary to deposit . . . any note," such as the check representing the life insurance proceeds issued to Plaintiff. The Court notes that Plaintiff also alleges harm based on Defendants' actions after she reported the fraud. Plaintiff alleges that upon discovering her stepson's fraud in December 2021, she notified both Chase and Wells Fargo of the fraudulent power of attorney and transfers that had taken place under that document's guise of authority. Taken together and making all reasonable inferences in favor of Plaintiff, as the Court must at this stage, these

allegations suggest that Plaintiff's position is that, based on her report, Defendants had a duty to independently investigate the validity of the power of attorney and secure her accounts to prevent any additional unauthorized withdrawals or other transfers.

g. Ultimately, however, no California authority cited by Plaintiff establishes the duty she asserts, which would conflict with § 4303's safe harbor. The Probate Code clearly delineates banks' duty in this situation: once presented with a qualifying power of attorney, they were bound to follow it, and cannot be sued for doing so. While the facts here are certainly sympathetic, Plaintiff's suggestion that Defendants should be liable for post-notice conduct is inconsistent with the statute's bright line rule. The premise of a power of attorney is that the principal is legally no longer able to speak for themselves. Here, the power of attorney was a durable power of attorney, which continues even after the principal's incapacity. It would be strange, therefore, for the Probate Code's safe harbor to be overcome by the (presumptively incompetent) principal saying that a bank should not follow the power of attorney. And, if a principal wishes to revoke her power of attorney, whether general or durable, she must do so in accordance with the requirements of the Probate Code.

h. Plaintiff does not allege that she revoked the power of attorney, or that she gave notice to the banks that she did so. To the extent Plaintiff could amend her complaint to plead that she did revoke the power of attorney and notified defendants of that revocation, the Court would have to consider what that would mean for her claims.

i. California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. A defendant can be held liable as a co-tortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort. To adequately plead this prong, Plaintiff must allege facts that Defendants had actual knowledge of the underlying wrong for which she seeks recovery. In other words, Plaintiff must plead sufficient facts that Defendants had actual knowledge that Robert Jr. had fraudulently stolen the money she seeks to recover here and intended to facilitate that conduct.

j. Plaintiff's allegations fall short of the required pleading standard. As an initial matter, her allegations are circular. They rely on an assumption that the banks had knowledge that the power of attorney was forged. Even as pled, there was no plausible reason for the banks to suspect that anything was amiss given the document's facial validity. Additionally, the contractual relationship between bank and depositor does not involve any implied duty to supervise account activity or to inquire into the purpose for which the funds are being used. Even Plaintiff's alleged notice to Defendants of the fraud is not enough — all it establishes is that Plaintiff reported what she characterized as fraud to the banks. This notice may have put Defendants on alert that "something fishy was going on," but it does not establish that Defendants had actual knowledge that Robert Jr. had breached his fiduciary duty by stealing Plaintiff's money. The Court therefore finds that the complaint fails to adequately plead actual knowledge.

k. The Court finds that Plaintiff's allegations here fall short of the plausibility standard for actual knowledge. As discussed above, Plaintiff's only allegations that could possibly support knowledge concern her notice to defendants of the alleged fraud. She identifies no obligation of the banks to assist in investigation of the fraud and confirm the alleged theft of her money. Additionally, it is far from self-evident that the alleged post-notice banking transactions could establish intent here, where the banks were not only legally obligated under the facially valid power of attorney to process such transactions, but also had no duty to investigate that document's validity.

l. Defendants' relationship with Plaintiff was straightforwardly that of a bank and its depositor. Plaintiff has not pled facts to suggest that her relationship with Chase or Wells Fargo was anything more than that, and she pleads nothing plausibly supporting her allegation that this was a "confidential relationship." Under California law, banks are not fiduciaries for their depositors. Nor is the bank-depositor relationship a special relationship such as to give rise to tort damages when an implied contractual covenant of good faith is broken. Because as a matter of law, no fiduciary or other "special relationship" exists between a bank and its depositor, Plaintiff's claim for constructive fraud is dismissed.

m. EADACPA states that "financial abuse of an elder" occurs when a person or entity assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. Courts have interpreted the term "assist" in this context to require that the defendant had actual knowledge of the underlying wrong it purportedly aided and abetted. Actual knowledge is required to state a claim against an entity that allegedly assisted in financial abuse of an elder. Plaintiff has not pleaded sufficient facts to show that Defendants had actual knowledge of the primary wrong.

n. Plaintiff also alleges that Defendants' conduct violated the UCL. The UCL limits the remedies available for UCL violations to restitution and injunctive relief. Plaintiff has not alleged that either bank "acquired" the money deposited in the banks. Instead, as Plaintiff alleges, it was her stepson Robert Jr. and his wife Camille who took "hundreds of thousands of dollars from" her. Plaintiff's claim for violations of the UCL is dismissed.

o. Under California law, a claim for breach of contract consists of four elements: (1) a contract, (2) the plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to the plaintiff from defendant's breach. Plaintiff's form pleadings allege only the bare bones of these elements. According to Plaintiff, she "entered into a written contract" with Chase and Wells Fargo when she originally opened accounts and deposited money with each of them, that she performed her allegations under the contract, Defendants breached, and she has suffered damages. Plaintiff does not allege specific contractual terms with any particularity, and she has not attached the alleged contract as an exhibit to the complaint. Her fifth cause of action for breach of contract is therefore dismissed.

p. In a similar vein, a claim for breach of the implied covenant of good faith and fair dealing requires Plaintiff to first plead that there was a contract between it and the defendant. Plaintiff has not made anything other than cursory allegations that

she entered a contract when she opened accounts with Defendants. Without alleging specific contractual terms, or attaching the contract itself to the complaint, Plaintiff's claim fails. Even if Plaintiff could allege such terms, however, her claim is not viable because the bank-depositor relationship is not a special relationship such as to give rise to tort damages when an implied contractual covenant of good faith is broken.

q. Plaintiff's conversion claim also fails as a matter of law. California law is well-settled in this area that a claim against the bank for conversion will not lie. Because title to a deposit passes immediately to the bank upon deposit, a depositor has no conversion claim against a bank under California law.

r. To state a claim for aiding and abetting conversion, Plaintiff must allege that Defendants had actual knowledge of the specific primary wrong; and substantially assisted. Plaintiff's allegations fall short of the actual knowledge requirement.

s. The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. Rather, banks are not fiduciaries for their depositors, and instead their relationship is founded on contract. Absent controlling precedent that Defendants owed a duty of care to Plaintiff beyond their contractual relationship, Plaintiff's negligence claim is barred by the economic loss rule. Fundamentally, purely economic losses flowing from a financial transaction gone awry are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence.

t. Plaintiff brings a tenth claim under California Commercial Code § 1104 for an unauthorized payment order. Section 11204 states, in relevant part: "If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 11202, or (ii) not enforceable, in whole or in part, against the customer under Section 11203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund."

u. Bank customers are responsible for payment orders that they authorize. But payment orders are effective as an order of the customer, whether or not authorized, under two conditions: (1) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the bank's obligations under the security procedure and any agreement or instruction of the customer. The parties disagree about whether the complaint sufficiently alleges that Defendants processed wire transfers made from her accounts as part of Robert Jr.'s fraudulent scheme. Even if Plaintiff did sufficiently allege the wire transfers at issue, that complaint does not include sufficient allegations, let alone any allegations, concerning whether the security measures employed at Wells Fargo or Chase were commercially unreasonable, as is required.

I. *Snead v. Wright,* 2024 U.S. Dist. LEXIS 94764 (United States District Court for the District of Alaska 2024); *Snead v. Wright,* 2025 U.S. Dist. LEXIS 130800 (United States District Court for the District of Alaska 2025). Plaintiffs provided sufficient evidence of incapacity or undue influence for a reasonable jury to find that bank could not reasonably rely on representations in the trustee certifications in processing wire transfers and change of beneficiary form.

1. At the time of the death of John H. Snead ("Mr. Snead"), his estate included interests in two businesses — Airland Transport, Inc., and J&H Land — as well as trust assets. On December 23, 1998, Mr. Snead established the John H. Snead Revocable Trust and, as sole trustee, maintained two accounts with Merrill Lynch's Anchorage, Alaska office. Mr. Snead opened the first account ("the 7695 Account") on January 1, 1998, as an individual account and converted the account to a trust account in the name of the Revocable Trust on December 31, 1999. Mr. Snead opened the second account ("the 5343 Account") as a trust account on August 22, 2016. The 7695 Account held an annuity that Mr. Snead purchased from Transamerica Life Insurance Company in 2003, while the 5343 Account held investments managed by Merrill Lynch's advisors. Michael Murphy, a Merrill Lynch financial advisor at its branch office in Anchorage, was responsible for the Revocable Trust at the time of the transactions at issue here. Mr. Snead also allegedly established the John H. Snead Irrevocable Trust ("the Irrevocable Trust"). But Merrill Lynch did not maintain any account on behalf of the Irrevocable Trust.

2. Mr. Snead had two children from his marriage to Plaintiff Karen Snead: John G. Snead, adopted by Mr. Snead after marrying Karen Snead, and Monique Snead. Karen Snead and Mr. Snead divorced in October 2005.

3. Mr. Snead and Ms. Wright met in December 2005 and began dating shortly thereafter. In December 2006, Ms. Wright moved into Mr. Snead's home. Except for two periods of separation in November 2006 and February 2014, the two lived together in Mr. Snead's home until his death. Between July 2000 and August 2017, Ms. Wright worked for the Jay/Kibler group of advisors at Merrill Lynch. Ms. Wright never worked with Mr. Murphy or the group of advisors responsible for Mr. Snead's accounts, and did not provide account-related services for Mr. Snead. Ms. Wright had access only to the accounts of the clients of the financial advisor for whom she worked.

4. In 2014, Mr. Snead executed a will, in which he left his estate to his children, John Snead and Monique Snead (then Galosich). In 2016, Mr. Snead requested that his attorney, Peter Brautigam, modify his 2014 will and bequest his residence at 2300 Leopard Circle to Ms. Wright, instead of his children. In January 2017, Mr. Snead also called Mr. Brautigam and asked him to prepare an Alaska transfer on death deed ("TODD"). On January 3, 2017, Mr. Brautigam sent Mr. Snead a draft of his will, amended according to his request. Ultimately, on February 7, 2017, Mr. Snead executed the TODD, which would transfer his residence at Leopard Circle to Ms. Wright upon his death, but decided not to sign the amended will. Mr. Snead signed the TODD in his truck in the parking lot of Mr. Brautigam's office. Mr. Brautigam observed Mr. Snead, who was alone, sign the document and notarized his signature. Later, Mr. Brautigam noted that he believed Mr. Snead understood what he was doing by signing the TODD and did so freely. A few months later, in April 2017, Mr. Snead and Ms. Wright opened a joint bank account at Northrim Bank and added Ms. Wright to Mr. Snead's preexisting account at AlaskaUSA. Ms. Wright had made Mr. Snead a joint accountholder on her account at AlaskaUSA in

2015. Around the same time, on April 4, 2017, Mr. Snead contacted Mr. Murphy at Merrill Lynch and asked that his daughter, Monique, be removed from his accounts.

5. In his later years, Mr. Snead experienced a number of health issues. He suffered a stroke in 1999 or 2000; was diagnosed with a heart condition that required the placement of a pacemaker in 2003; and suffered from diabetes, neuropathy in certain joints, arthritis, eye disease that impaired his vision, among other conditions. In 2016 and 2017, Mr. Snead's health further deteriorated. In 2016, he chose to stop driving. In 2017, Mr. Snead began to work half days at the Airland office. He continued to work until approximately two months before his death. And, although Mr. Snead's health declined during this period, his colleagues judged that he remained intellectually able and continued to be involved in the operation of Airland and its financials.

6. In 2017, Mr. Snead's health began to suffer further. In January, Mr. Snead visited the hospital on four occasions due to a malfunctioning pacemaker. Then, in early June 2017, Mr. Snead was hospitalized in Providence Alaska Medical Center because he suffered bouts of tachycardia that caused his pacemaker to fire. He was admitted to the emergency room or hospitalized again at least four times due to the same issues: tachycardia and his pacemaker repeatedly firing. On August 6, 2017, Mr. Snead visited the Providence emergency room twice — first, in the morning, for a catheter issue, and second, in the evening, when his pacemaker fired. After Mr. Snead arrived in the emergency room in the evening, hospital staff intubated him.

7. In the several months prior to his death, Mr. Snead made transactions with respect to the trust accounts at issue in this action. In May 2017, Mr. Snead and Ms. Wright decided to move to Tucson, Arizona. They agreed to purchase property in Tucson, together with a home that was to be built on the property. On May 9, 2017, and on June 21, 2017, Mr. Snead instructed Merrill Lynch to transfer funds totaling $15,460 from the Revocable Trust to Richmond American Homes of Arizona to be used as earnest money related to the home purchase. On June 16, Mr. Snead spoke with Mr. Murphy at Merrill Lynch about his plans to purchase the Tucson home and informed him that he planned to liquidate assets in the 5343 Account to fund his purchase and raise $50,000 immediately, and $300,000 later. Furthermore, he specifically indicated that he did not wish to have a mortgage to finance the purchase but wanted to pay for the property in full. Merrill Lynch duly sold $50,000 worth of securities in the 5343 Account and transferred the proceeds.

8. On July 25, 2017, while Mr. Snead was hospitalized at Providence, Mr. Murphy conducted a telephonic review of the Trust Accounts with Mr. Snead. In the course of this discussion, Mr. Snead asked who the named beneficiary on the Transamerica Annuity was. Mr. Murphy responded that Mr. Snead's ex-wife, Karen Snead, was listed as the beneficiary and noted that Mr. Snead appeared surprised that this was the case. On July 31, 2017, Ms. Wright emailed Marlaina Haretuku, a Merrill Lynch client associate working with Mr. Murphy, to request that she send a blank Change of Beneficiary Form to Mr. Snead's Airland email address. The next day, on August 1, 2017, Ms. Haretuku emailed a blank Change of Beneficiary Form to Mr. Snead's Airland email as requested. The same day, Ms. Wright, at the direction of Mr. Snead, retrieved a document from Mr. Snead's locked cabinet at the Airland office and printed a copy of the Change of Beneficiary Form. When Ms. Wright brought the documents home, Chris Olsen, an Airland employee and Mr. Snead's power of attorney, was visiting Mr. Snead. Mr. Olsen filled out the Change of Beneficiary Form as instructed by Mr. Snead and Mr. Snead signed the form using a

stamp with his signature. Later, Olivia Dekreon, a Merrill Lynch client associate who worked with Mr. Murphy and was a friend of Mr. Snead and Ms. Wright's, visited Mr. Snead and Ms. Wright at their home on the evening of August 1. When Ms. Dekreon was leaving, Mr. Snead handed her a sealed envelope containing the completed Change of Beneficiary Form and asked her to take the envelope to Mr. Murphy at Merrill Lynch. Ms. Dekreon then delivered the envelope to Ms. Haretuku later that day. Another Merrill Lynch employee, Tara Buchholdt, applied a medallion signature guarantee to the form and Ms. Haretuku faxed the form to Transamerica on August 4, 2017. Following Mr. Snead's death, Ms. Wright allegedly made a claim on the Annuity.

9. Separately, on July 31, 2017, while Mr. Snead was hospitalized, he called Merrill Lynch and directed them to liquidate the assets in the 5343 Account and transfer those funds to Mr. Snead and Ms. Wright's joint account at AlaskaUSA Federal Credit Union. Ms. Wright was on the line with Mr. Snead during this call to assist with information and Mr. Snead's instructions. However, Mr. Snead confirmed that Merrill Lynch was authorized to transfer funds without her assistance or participation. In total, Merrill Lynch wired $358,000 to the joint account to finance the home purchase.

10. Mr. Snead went into cardiac arrest, and, despite attempts to resuscitate him, died just after midnight on August 7, 2017.

11. Monique Snead sued Merrill Lynch for: (1) breach of fiduciary duty as to the John H. Snead Irrevocable Trust; (2) negligence as to the John H. Snead Revocable Trust; (3) vicarious liability; (4) violation of Alaska Stat. § 45.50.471; (5) breach of fiduciary duty as to the John H. Snead Revocable Trust; (6) negligent hiring, training, and/or supervision; and (7) fraud, as well as Karen Snead's claims for (8) breach of the covenant of good faith and fair dealing and (9) negligence and breach of fiduciary duty. She also sued with respect to Ms. Wright for: (1) wrongful removal of assets/undue influence; (2) conversion; (3) fraud by nondisclosure; (4) fraudulent use of Merrill Lynch's Signature Stamp; (5) fraudulent procurement of a signature; and (6) professional malpractice. In a second complaint, Plaintiffs asserted additional claims. Following the Court's order on a motion to dismiss, claims remained for: (1) fraud; (2) conversion; (3) intentional interference with contract; and (4) undue influence against Ms. Wright.

12. The court granted in part and denied in part Ms. Wright's motion for summary judgment, and granted Merrill Lynch's motion for summary judgment.

13. Plaintiffs' allegations arise from transactions involving two accounts that the John H. Snead Revocable Trust ("Revocable Trust") held with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"). The first account (the "5343 Account") held investments managed by Merrill Lynch employee Michael Murphy and the second (the "7695 Account") held an annuity issued by Transamerica. Plaintiffs specifically dispute: (1) the last wire transfer from the 5343 Account totaling $358,000 (the "Wire Transfer") to a joint credit union account maintained by John H. Snead and Ms. Wright; and (2) the execution of a change of beneficiary form for the Transamerica annuity held in the 7695 Account ("Change of Beneficiary") that named Ms. Wright as the sole beneficiary of the annuity.

14. On May 23, 2024, the Ninth Circuit Judicial Council issued Order No. 22-90121, addressing a judicial misconduct complaint filed against former Judge Joshua M. Kindred. The Council released the order to the public on July 8, 2024. In view of the findings, the

Judicial Council certified that Judge Kindred "engaged in conduct that might constitute one or more grounds for impeachment under Article II of the Constitution," ordered public reprimand, and requested his voluntary resignation.

15. Prior to the Council's order, Judge Kindred appeared before the Council on April 5, 2024. Oral argument on Merrill Lynch's motion for summary judgment was held before Judge Kindred on April 11, 2024. Judge Kindred issued the order regarding Defendants' summary judgment motions on May 28, 2024 (the "206 Order"). The 206 Order granted Merrill Lynch's motion for summary judgment in full and partially granted summary judgment in favor of Ms. Wright. The 206 Order denied Ms. Wright's motion for summary judgment on Plaintiffs' claim for conversion of the Transamerica annuity; Ms. Wright did not seek summary judgment on Plaintiffs' undue influence claims.

16. On July 3, 2024, Judge Kindred issued the order denying Plaintiffs' motion for reconsideration (the "208 Order"). That same day, Judge Kindred resigned from his position as United States District Judge; the resignation became effective on July 8, 2024.

17. Plaintiffs subsequently filed the instant motion on September 9, 2024. Plaintiffs ask this Court to vacate the 206 Order and the 208 Order and review anew Defendants' summary judgment motions pursuant to Federal Rule of Civil Procedure 60(b)(6). Plaintiffs also request relief under Federal Rule of Civil Procedure 54(b) and the Court's common law authority to review and vacate orders in the furtherance of justice.

18. The federal district court vacated in part and denied in part, and dismissed the claims in part, on the following grounds:

a. The 206 and 208 Orders did not end the litigation on the merits and leave nothing for the court to do but execute the judgment, as the Court did not enter an appealable order or a final judgment as to either Defendant. Therefore, Rule 60(b) does not apply here. Accordingly, to the extent that Plaintiffs' motion seeks relief from the 206 and 208 Orders under Rule 60(b), the motion is denied.

b. Rather, a district court has inherent power rooted firmly in the common law to rescind an interlocutory order over which it has jurisdiction. Thus, because this Court retains jurisdiction in this case, it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient. Reconsideration of a non-final order is appropriate when it is necessary to correct clear error or prevent manifest injustice.

c. The focus of Plaintiffs' current motion, as with their prior motion for reconsideration, is on the granting of Merrill Lynch's summary judgment motion. Consequently, the Court will not disturb the 206 Order or the 208 Order with respect to Plaintiffs' claims against Ms. Wright, as Plaintiffs have not identified any manifest error in those rulings.

d. The 206 Order determined that Merrill Lynch was "immune from liability" under Alaska Statute § 13.36.079(f), based on the Trustee Certification forms signed by Mr. Snead as trustee of the John H. Snead Revocable Trust in 1999 and 2016. On this basis, the Court dismissed all of Plaintiffs' claims against Merrill Lynch related to its role in performing the Wire Transfer and in processing the Change of Beneficiary form. Specifically, the 206 Order found that there was no "evidence to suggest that Merrill Lynch's reliance on these Trustee Certifications was

unreasonable." The summary judgment order also dismissed Plaintiffs' negligent hiring claims for failure to present evidence that Merrill Lynch knew or should have known of any risk in hiring Ms. Wright and dismissed Plaintiffs' negligent training and supervision claims for failure to present evidence suggesting a system-wide problem that involved the same wrongdoing or supervisory negligence.

e. There are several manifest errors of fact in the 206 and 208 Orders. The 208 Order acknowledged a factual error in the 206 Order; in the 206 Order, the Court had found no genuine dispute of fact that Mr. Snead had had a telephonic account review with his Merrill Lynch advisor Michael Murphy on July 25, 2017, during which Mr. Snead was surprised to learn that his ex-wife was still listed as the beneficiary of the Transamerica annuity. In fact, there is no record of such a call occurring on that date and whether that review took place at all before the Change of Beneficiary form was completed is clearly disputed. The 208 Order acknowledged this error in the 206 Order, but determined "this factual error is not material." Next, the 208 Order repeatedly references an August 3, 2017 phone call in which Mr. Snead authorized the Wire Transfer; in fact, it is undisputed that this phone call occurred on July 31, 2017. And the 208 Order faulted Plaintiffs for not producing any evidence showing that "Merrill Lynch knew Mr. Snead lacked capacity at the time of the August 3, 2017 call." But Plaintiffs' opposition to Merrill Lynch's summary judgment motion cited to appended evidence that Mr. Snead was in the hospital on the date of the July 31, 2017 authorization, that he was "very groggy and lightheaded when on the highest dose of lidocaine," that the Wire Transfer was conducted on Ms. Wright's personal cell phone number, and that the Wire Transfer funds were to be transferred into the same account where Ms. Wright's Merrill Lynch paychecks were direct deposited.

f. More fundamentally, the 208 Order held that summary judgment for Merrill Lynch was warranted because the "plain language" of AS § 13.36.079(f) "makes clear that Plaintiffs may not recover against Merrill Lynch unless it had actual knowledge that Mr. Snead lacked capacity to make the Wire Transfer." According to the 208 Order, "[t]he issue is not whether Merrill Lynch had reason to suspect Mr. Snead lacked capacity, but rather whether Merrill Lynch knew that to be the case." The 208 Order then determined that Plaintiffs "produced no evidence that Merrill Lynch knew Mr. Snead lacked capacity." Notably, Merrill Lynch in its briefing did not assert this was the proper standard; rather, it argued it was entitled to summary judgment because "Plaintiffs have not put forth evidence showing that [Merrill Lynch] was or should have been aware that (a) [Mr. Snead] lacked the capacity to instruct [Merrill Lynch] to carry out the disputed transactions; or (b) Wright was allegedly exercising under influence over him."

g. There is no case law from the Alaska Supreme Court directly addressing AS § 13.36.079(f). Given this absence of controlling law, the Court strives to predict how the Alaska Supreme Court would decide the issue. The 206 Order cited two district court cases, *Schroeder v. James B. Nutter & Co.* and *Johnson as Trustee of Nina J. Cummings Revocable Living Trust v. Wells Fargo Bank, N.A.*, as examples of other jurisdictions barring common law claims pursuant to statutes with language it described as similar to AS § 13.36.079(f).

h. Citing *Johnson*, the 208 Order concluded that, under the "plain language" of AS §13.36.079(f), Plaintiffs were required to produce evidence showing that Merrill Lynch had "actual knowledge" that Mr. Snead lacked the capacity to confirm the Wire Transfer and Change of Beneficiary. However, unlike the Nevada statute and the California Probate Code, the Alaska statute adds the word "reasonable" to the reliance requirement in part (f) of AS § 13.36.079. AS § 13.36.079(f) states: "A person who acts in reasonable reliance on a certification of trust without knowledge that the representations contained in the certification of trust are incorrect is not liable to another person for acting in reasonable reliance on the certification of trust and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely because the person relying on the certification is holding a copy of part of the trust instrument."

i. In Alaska, "[t]he reasonableness of a third party's reliance on an alleged principal's manifestations is generally a question of fact" and "only in the most straightforward cases" is it appropriate for a court to decide the issue of reasonable reliance at the summary judgment stage.

j. The legislative history for AS § 13.36.079 indicates that paragraph (f) was "designed to allow a party to provide a financial institution certain portions of information relating to the trust document so the financial institution can be certain that the trust exists and that they are dealing with the trustees. They can then proceed, for example, with a payment from an account and not be responsible for making a mistake because they don't have the full trust document because it may contain certain personal information [the trustees] don't want to share."

k. Here, there is no issue whether the representations regarding Mr. Snead's role as the trustee made in the Trustee Certifications are incorrect — they are indisputably correct, as Mr. Snead was the trustee with the power to execute transactions involving his accounts with Merrill Lynch. In the Trustee Certifications, Mr. Snead represented that he had the power to make distributions or transfers of the Revocable Trust's assets and exercise all rights associated with the ownership of an annuity, including designating beneficiaries. Rather, the question is whether Merrill Lynch could reasonably rely on those certifications to process the Wire Transfer and the Change of Beneficiary form. Plaintiffs maintain the Trustee Certifications did not absolve Merrill Lynch of its duties owed to Mr. Snead, including a duty to protect its elderly clients from financial exploitation. Neither Johnson nor Schroeder address capacity or undue influence. And, as set forth below, Plaintiffs provided sufficient evidence of incapacity or undue influence for a reasonable jury to find that Merrill Lynch could not reasonably rely on Mr. Snead's representations in the Trustee Certifications in processing the July 31, 2017 Wire Transfer request and in processing the subsequent Change in Beneficiary to the Transamerica annuity. In sum, the 206 Order and the 208 Order manifestly erred by requiring Plaintiffs to produce evidence that Merrill Lynch had actual knowledge that Mr. Snead either lacked the capacity or was unduly influenced by Ms. Wright to effectuate the Wire Transfer and Change of Beneficiary in order to survive summary judgment. Moreover, Merrill Lynch's reliance on the Trustee Certifications does not address Plaintiffs' assertions that Merrill Lynch breached its fiduciary duty to and acted negligently

toward Mr. Snead by allowing Ms. Wright to access Mr. Snead's private information and provide instructions for transactions in her sole interest. Merrill Lynch owes these duties in its capacity as a broker-dealer and investment advisor to Mr. Snead as a client. These duties are separate from Merrill Lynch's status as a third party relying on representations in a trustee's certification.

l. Portions of the 206 and 208 Orders do address whether Merrill Lynch could reasonably rely on the Trustee Certifications, an analysis seemingly at odds with the actual knowledge requirement discussed elsewhere in the Orders. In ruling on a motion for summary judgment, a court must view the facts and draw all reasonable inferences in the light most favorable to the non-moving party. But here, the 206 Order relied primarily on the facts as presented by Defendants and erroneously treated those facts as undisputed. For example, the 206 Order concluded that "the only evidence that might undermine the reasonableness of Merrill Lynch's reliance" on the Trustee Certification for the Wire Transfer was the recording of the telephone conversation during which Mr. Snead confirmed the Wire Transfer. The 206 Order relied on Mr. Snead's three-word confirmation of the fund transfer at the end of the call in which Mr. Snead authorized the transaction to conclude that "Merrill Lynch's reliance was entirely reasonable." Ms. Wright does not speak at all in the limited portion of the call that was recorded. However, the Merrill Lynch employee participating in the conversation, Marlaina Haretuku, noted that Ms. Wright and Mr. Snead were both on the call and informed her that Ms. Wright would be assisting with information and instructions; and although the funds were being transferred out of an account solely in Mr. Snead's name to the parties' joint account, Ms. Haretuku's notes repeatedly refer to what "they" want when memorializing the transaction.

m. Plaintiffs have provided other evidence that a reasonable jury could view as undermining Merrill Lynch's reasonable reliance on Mr. Snead's Trustee Certifications. Plaintiffs point to medical records showing that Mr. Snead was hospitalized at the time of some of the alleged actions taken by Ms. Wright and other Merrill Lynch employees to effectuate the Wire Transfer and Change of Beneficiary. On July 31, 2017, Ms. Haretuku's notes indicate that she spoke to Mr. Snead at 8:05 am that morning regarding the Wire Transfer. The hospital record from that day described Mr. Snead as "extremely lightheaded — near syncopal when trying to get up this morning" and noted that he had received a lidocaine drip until 10:00 am that day.

n. Plaintiffs also provided evidence showing that Merrill Lynch employees allowed Ms. Wright access to Mr. Snead's financial information and documents. Ms. Wright testified that Mr. Snead's only email address was his business account. However, there is evidence that Merrill Lynch employees discussed Mr. Snead's accounts with Ms. Wright via her Merrill Lynch email address and her personal email address. Ms. Wright's email address and cell phone were used to conduct transactions between Mr. Snead and Merrill Lynch, including the Wire Transfer and Change of Beneficiary. And Ms. Wright's deposition testimony that she didn't know the reason the Change of Beneficiary form was emailed to Mr. Sneadis was directly contradicted by her email to Ms. Haretuku on July 31, 2017 — the same day as the Wire Transfer request — in which Ms. Wright wrote, "John would like to update beneficiary on the annuity. Can you email him a blank annuity beneficiary

form." Ms. Wright testified that she and Mr. Snead left the hospital sometime after 4:00 pm on the following day, August 1, 2017. Before leaving the hospital, Ms. Wright testified that she emailed Chris Olsen, the operations manager of Mr. Snead's business, who considered Ms. Wright a friend. In the email, Ms. Wright stated the following: "Next time you are here, there is a form he wants you to update in your presence as a witness/POA. It's a beneficiary update for his annuity. The form is being emailed to Airland Transport."

o. Ms. Wright's testimony and emails also indicate that an hour or two after leaving the hospital, she accessed Mr. Snead's locked cabinet at his place of business with his key, accessed his computer at work with his password to print the Change of Beneficiary form, and contacted Mr. Olsen to come to the house to complete the form. Mr. Snead did not accompany Ms. Wright when she retrieved the form from his place of business.

p. Mr. Olsen acknowledged his own handwriting on the completed Change of Beneficiary form, but he testified that he did not have any recollection of filling out the form. Nor did he recall whether Mr. Snead used his signature stamp, or whether he was present when the medallion signature guarantee stamp was affixed to the form. Mr. Olsen also testified that Mr. Snead was "pretty physically incapacitated" the last few years of his life and Mr. Snead's medical needs became Ms. Wright's "primary occupation." Further, Ms. Wright's actions violated Merrill Lynch's internal policies requiring that any beneficiary change must be completed directly with the insurance carrier and prohibiting employees from being named as a beneficiary of a client's annuity. In sum, when all reasonable inferences are drawn in Plaintiffs' favor, a reasonable jury could conclude that Mr. Snead was unaware of the completion of the Change of Beneficiary form and did not affix his signature stamp to the form; and further, a reasonable jury could find that Merrill Lynch should have been aware that Mr. Snead lacked the capacity to instruct Merrill Lynch to carry out the disputed transactions and/or that Ms. Wright was allegedly exercising undue influence over him.

q. For the foregoing reasons, the Court finds, contrary to the 206 Order and the 208 Order, that Plaintiffs have provided sufficient evidence that could lead a reasonable jury to determine that Merrill Lynch did not reasonably rely on the Trustee Certifications on July 31, 2017 and on the following days when it effectuated the Wire Transfer and processed the Change of Beneficiary of the Transamerica annuity to Ms. Wright. And it was manifest error to conclude that AS § 13.36.079(f) provided Merrill Lynch with "immunity" from suit by virtue of Mr. Snead's Trustee Certifications.

r. It appears to be undisputed that Merrill Lynch did not maintain any accounts associated with the Irrevocable Trust. There was no manifest error in the summary judgment order insofar as it dismissed any remaining claims against Merrill Lynch related to the Irrevocable Trust.

s. Plaintiffs assert that a fiduciary relationship existed between Merrill Lynch and Mr. Snead that applied to both accounts in the Revocable Trust. Plaintiffs assert a breach of fiduciary duty under Alaska law, but they primarily rely on the federal fiduciary standards for investment advisers. Under federal law, an "investment adviser" is "any person who, for compensation, engages in the business of

advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." Investment advisers owe their clients a duty of loyalty and a duty of care, including a duty to act in their clients' best interest, and seek the best execution of their clients' transactions. The Supreme Court has recognized that an investment adviser owes a duty of "utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to avoid misleading his clients." In contrast, broker-dealers are any persons "engaged in the business of effecting transactions in securities for the account of others." Because broker-dealers "typically provide transaction-specific recommendations and receive compensation on a transaction-by-transaction basis (such as commissions)," their duty is limited to "deal[ing] fairly with clients and broker[ing] transactions in a way that is suitable to those clients' individual traits and needs." Merrill Lynch is registered as a broker-dealer and investment adviser with offices in Alaska. Mr. Murphy is registered as an investment adviser in Alaska. Merrill Lynch acknowledges it owed a fiduciary duty to Mr. Snead for the 5343 Account, stating that a "broker handling a discretionary account becomes the fiduciary of his customer in a broad sense." There is evidence that Mr. Murphy provided investment advice to Mr. Snead with respect to both the discretionary and the non-discretionary accounts held by the Revocable Trust. Plaintiffs cite to notes taken from an annual review of accounts on August 10, 2016. They allege that these notes show Mr. Murphy provided investment recommendations and advice to Mr. Snead for both Revocable Trust accounts, including how to invest his Transamerica annuity. The Ninth Circuit has also recognized that "particular factual circumstances may serve to create a fiduciary duty between a broker and his customer even in the absence of a discretionary account." Based on the foregoing, Plaintiffs have presented sufficient evidence that, if accepted as true, would support a finding that Merrill Lynch had a fiduciary relationship with Mr. Snead for both Revocable Trust accounts.

t. Mr. Snead's Client Agreement with Merrill Lynch states that "[t]his Agreement is made and will be interpreted under the laws of the State of New York (without regard to its choice of law principles)." Therefore, Merrill Lynch asserts that its duty was limited by the agreement such that New York law governing breach of fiduciary duty should apply here. Plaintiffs do not appear to directly address this contention in their opposition to Merrill Lynch's summary judgment motion. In Alaska, claims involving a professional's alleged breach of a duty of due care resulting from a contractual undertaking "may be reasonably said to arise either in tort or in contract." Here, Merrill Lynch's fiduciary duty arose both from Mr. Murphy's duties as a registered investment adviser and broker-dealer and also under the Client Agreement for the Revocable Trust accounts. Because there is sufficient evidence to support a breach of fiduciary duty by virtue of Merrill Lynch's role as an investment adviser to Mr. Snead, Plaintiffs are not required to prove the elements of breach of fiduciary duty under New York law.

u. Merrill Lynch also alleges that it did not fail to manage Mr. Snead's discretionary account in accordance with his chosen investment objectives and, therefore, it did not breach its fiduciary duty. Further, Merrill Lynch counters that even under the assumption that it was required to protect Mr. Snead from financial exploitation, "the evidence shows that [Merrill Lynch] had no knowledge that the Wire Transfer

and Change of Beneficiary form were anything other than transactions of [Mr. Snead]'s own volition and free will." Plaintiffs respond that Merrill Lynch had a fiduciary duty to protect Mr. Snead from financial exploitation. They maintain that the duty was heightened because of Mr. Snead's age and his declining health at the time of the Wire Transfer and Change of Beneficiary, particularly in light of Merrill Lynch's internal policies and the Financial Industry Regulatory Authority ("FINRA") rules addressing financial abuse of at-risk persons. They assert Merrill Lynch breached not only its heightened duty to protect Mr. Snead from financial exploitation, but also its duty to prevent third parties, namely Ms. Wright, from accessing Mr. Snead's private financial information and assets.

v. In this case, Merrill Lynch's fiduciary duty to Mr. Snead encompassed a duty to protect him from financial exploitation with respect to his assets held through Merrill Lynch. Although the FINRA rules relating to financial exploitation of seniors were not effective until February 5, 2018, and Alaska Statute § 45.56.430 requiring broker-dealers and investment advisers to act in good faith and exercise due care to prevent financial exploitation of adults over age 60 was not in effect until 2019, Merrill Lynch's "Reporting Suspected at Risk Client Financial Abuse Policy," created on June 21, 2011, was in effect at the time of the transactions at issue. The policy requires Merrill Lynch employees "to report . . . suspected abuse, neglect, or exploitation of At-Risk Persons residing in the United States to their supervisor or immediate manager."

w. Under Merrill Lynch's policy, an "At-Risk Person" includes an individual over the age of 60. Internal training materials published by Merrill Lynch on April 27, 2016, also provide guidance for recognizing potential financial abuse, including a change to the At-Risk Person's financial management or new joint accounts, or the presence of a caregiver or other individual who shows excessive interest in the At-Risk Person's finances or assets, is directing a new activity pattern, or is using improper documentation to conduct financial transactions on behalf of the At-Risk Person."

x. While Merrill Lynch's policies do not carry the force of law, they are a factor to support finding a fiduciary duty by the Court. Further, when the facts are viewed in the light most favorable to Plaintiffs, a reasonable jury could find that Merrill Lynch should have recognized Mr. Snead as an At-Risk individual and therefore breached its heightened duty to him by providing Ms. Wright with access to Mr. Snead's private information without proper authorization. Through exhibits, Plaintiffs show that Ms. Wright was provided with physical copies of forms and account statements and that her cell phone was used to confirm transactions on Mr. Snead's account. As set forth above, Mr. Snead and Ms. Wright called Merrill Lynch to provide instructions related to the Wire Transfer while Mr. Snead was hospitalized and taking lidocaine. Further, Merrill Lynch employees assisted Ms. Wright with processing the Change of Beneficiary form that named her as the sole beneficiary of the Transamerica annuity.

y. In sum, summary judgment to Merrill Lynch is denied with respect to Plaintiffs' claim of breach of fiduciary duty regarding the Revocable Trust transactions.

z. In Alaska, negligence requires a duty of care, breach of the duty, causation, and harm. In deciding whether a defendant owes a plaintiff a duty of care, Alaska

courts first determine whether a duty is imposed by statute, regulation, contract, or existing common law tort doctrine. Plaintiffs have sufficiently shown that genuine issues of material fact exist as to whether Merrill Lynch, through its agents, failed to exercise reasonable care with respect to the processing of the Change of Beneficiary form and that this conduct caused Plaintiffs' injury. Summary judgment is denied with respect to Plaintiffs' claim of negligence regarding the Change of Beneficiary form.

aa. Negligent hiring imposes liability on an employer for exposing the public to an employee who is a known risk or who is an improper person for the specific job. It requires a showing that the employer should have known that hiring the employee would lead to the risk of the offending conduct happening. In their brief in opposition to Merrill Lynch's summary judgment motion, Plaintiffs do not assert any facts related to negligent hiring of Ms. Wright or any other employee. Plaintiffs do not provide sufficient evidence of system-wide problems involving client accounts or any failure by Merrill Lynch to correct such problem to demonstrate a triable issue of fact on this claim. Consequently, summary judgment to Merrill Lynch is granted and the claim is dismissed.

bb. Plaintiffs allege that Merrill Lynch is vicariously liable for the acts of Ms. Wright because her duties as an employee included "providing customer service" and she used her position as a Merrill Lynch employee to provide instructions, physically transmit forms to and from Merrill Lynch "at Merrill Lynch's request," and communicate with Merrill Lynch regarding transactions in Mr. Snead's accounts. They assert that her actions were "reasonably incidental" to her employment at Merrill Lynch. An employee's conduct does not fall outside the scope of employment simply because it is discouraged, or even prohibited. And yet the Alaska Supreme Court has held that some purpose to serve the master must be present. Plaintiffs' claims against Ms. Wright, taken as true, do not show that her actions involving the Wire Transfer and the Change of Beneficiary form were within the scope of her employment for purposes of vicarious liability. As set forth by this Court in its previous order granting dismissal of this claim in one of the cases prior to consolidation, although Ms. Wright was employed by Merrill Lynch as a Client Associate, she did not work for Mr. Snead's investment adviser, Mr. Murphy, and was not a member of Mr. Murphy's team. There is no evidence that Ms. Wright's job description and duties included assisting Mr. Murphy's clients with forms or processing such forms. Moreover, Ms. Wright's actions only benefitted her as an owner of the joint account into which the Wire Transfer was sent and as the new sole beneficiary of the Transamerica annuity; these actions did not further Merrill Lynch's interests in any manner. In short, Plaintiffs have not demonstrated any genuine disputes of fact on this claim that could render Merrill Lynch vicariously liable for the actions of Ms. Wright.

cc. Plaintiffs allege that Merrill Lynch and its agents breached the covenant of good faith and fair dealing by violating its internal policies related to the Transamerica annuity. Specifically, they allege that Merrill Lynch failed to comply with its policy prohibiting employees from being named as a beneficiary of a client's annuity and with its policy that any beneficiary change be completed directly with the insurance carrier. Here, it is undisputed that Mr. Snead had a contractual relationship with Merrill Lynch through his Client Agreement and that

this contract included language notifying Mr. Snead that Merrill Lynch owed "certain fiduciary responsibilities" to him as a client. When the disputed facts are viewed in the light most favorable to Plaintiffs, a jury could reasonably find that the facts and circumstances surrounding the Wire Transfer, Change of Beneficiary, and the involvement of Merrill Lynch employees, ran counter to Mr. Snead's reasonable expectations under the Client Agreement and the associated fiduciary responsibilities of Merrill Lynch, particularly given that those duties were heightened due to Mr. Snead's status as an At-Risk Person under Merrill Lynch's own policies. Thus, Plaintiffs' claim for breach of the covenant of good faith and fair dealing against Merrill Lynch is sufficient to survive summary judgment.

dd. The Court declines to grant summary judgment to Merrill Lynch on the punitive damages claim. At the close of Plaintiffs' case in chief at trial, Merrill Lynch may address the punitive damages claim, as a court should not submit a punitive damages claim to the jury when there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice.

XVIII. CHARITIES

A. *Wood Mem'l Libr. Ass'n, Inc. v. Friends of Wood Mem'l Libr. & Museum, Inc.*, 2025 Conn. Super. LEXIS 69; 2025 LX 34875; 2025 WL 251871 (2025). Where dispute between two charities involve a property dispute and fraudulent misrepresentation rather than the enforcement of terms and restrictions regarding completed charitable gifts, the attorney general is not the exclusive party able to bring the action.

1. The Wood Memorial Library Association Inc., as Trustee of The Wood Memorial Library Trust (the "Trust"), filed a five-count complaint against the defendant, Friends of Wood Memorial Library and Museum, Inc., (the "Friends"), alleging fraudulent and negligent misrepresentation resulting in monetary and pecuniary damages. The Trust alleged the Friends laid claim to collections, antiques, and other items of property donated to or for display at the Wood Memorial Library and Museum (the "Wood") located in South Windsor, Connecticut. The Trust's claims of fraud and misrepresentation were premised on the documentation provided by the Friends purporting the Friends' ownership of the property at issue. Additionally, the Trust maintained the Friends negligently misrepresented the Wood in its publications and website when using the full name: Friends of the Wood Memorial Library and Museum, and that this misrepresentation resulted in gifts and donations intended for the Wood being used by the Friends for endeavors separate from the Wood, specifically the Nowashe Village (a separate and distinct charity).

2. The Trust claims breach of fiduciary duty sounded in an established principal-agent relationship (despite the lack of any writing establishing this relationship). The Trust argued the Friends has a fiduciary duty to act for the sole benefit of the Trust as per the principal-agent relationship established in 1971, and that claiming the ownership of Trust property and competing with the Wood for donations and gifts via the Nowashe Village is a breach of fiduciary duty owed to the Trust. The Trust also alleged unfair competition by directing donations to the Nowashe Village.

3. The Friends moved to dismiss, which the court denied on the following grounds:

a. The authority of the attorney general, acting in the public interest to protect charitable gifts, is well-established by case law in Connecticut. Connecticut is among the majority of jurisdictions that have entrusted the attorney general with the responsibility and duty to represent the public interest in the protection of any gifts, legacies, or devises intended for public or charitable purposes. The Friends argues the attorney general is the only party to have standing to bring an action regarding the ownership of the charitable assets at issue.

b. Here, the parties are individual charitable organizations alleging ownership and neither party is a third-party benefactor. Additionally, neither party is seeking the enforcement of specific terms and restrictions on the disputed property.

c. Because the Trust has asserted a claim sounding in property dispute and fraudulent misrepresentation rather than the enforcement of terms and restrictions regarding completed charitable gifts, the attorney general is not the exclusive party able to bring this action and the court retains subject-matter jurisdiction over the present matter.

XIX. ARBITRATION

A. *Charles v. Toone (In re Toone Living Tr.),* 2025 Ariz. App. Unpub. LEXIS 573; 2025 LX 140703; 2025 WL 1603929 (Court of Appeals of Arizona, Division Two 2025). Mandatory arbitration provision in trust valid and precluded appellate court from reviewing the substance of arbitrator's decision.

1. Shauna Charles, along with her siblings, is a beneficiary of a trust her parents executed in 2014. She began serving as trustee by November 2018. The trust became irrevocable in 2022. Two years later, due to a dispute over the trust's final accounting, Charles participated in an arbitration with her sister, Cheryl Toone, another beneficiary. The arbitrator decided that Charles had committed a breach of trust and that neither the trust nor Arizona law entitled Charles to compensation for her services as trustee.

2. After receiving that decision, Charles appealed it to the superior court. She also petitioned for supervised administration and to reform the trust's terms to allow for trustee compensation. Toone, in turn, petitioned to remove Charles as trustee. Finding that the parties' participation in valid arbitration was final and non-appealable pursuant to the terms of the trust, the superior court dismissed Charles's appeal of the arbitration decision and entered judgment. Charles then filed this appeal. The court separately decided Charles's petition for supervised administration and Toone's counterpetition to remove Charles as trustee.

3. On appeal, Charles challenged the arbitration decision, as well as certain orders entered by the superior court after she had filed her notice of appeal.

4. On appeal, the court of appeals affirmed on the following grounds:

a. Charles's opening brief failed to comply with numerous provisions of the Arizona Rules of Civil Appellate Procedure. It contained no cogent statement of the case and no recitation of the applicable standard of review. It failed to provide citations to legal authority or reference any portion of the record. Charles waived her arguments on appeal, as the court holds unrepresented litigants to the same standards as attorneys. The court, however, addressed her arguments to the extent it understood them.

b. A trust may provide for mandatory arbitration to resolve disputes involving the administration or distribution of the trust under A.R.S. § 14-10205. Here, the trust required arbitration because this dispute involved the "administration or distribution" of the trust. That provision is valid. In addition, the trust provides that any arbitration decision on a trust-related dispute is not appealable, a provision that is also valid. Therefore, the court may not address the merits of the issues decided by the arbitrator.

c. A party to arbitration may move to vacate an arbitration decision on limited grounds. These grounds include, as relevant here, "corruption, fraud, or other undue means" or an arbitrator's bias. Charles argued that she was coerced into participating in the arbitration, that her attorney at the arbitration was corrupt, and that the arbitrator was biased. However, she did not identify anything in the record that would support those assertions. Charles also argued that the superior court improperly continued to make rulings after she had filed her notice of appeal. Although an appeal typically prevents a superior court from proceeding except as necessary to further the appeal, the court may proceed in deciding issues unrelated to the appeal. Here, Charles had appealed from the court's ruling on one issue: whether the arbitration is appealable. The court certified that ruling under Arizona Rule of Civil Procedure 54(b), which allows a court to enter final judgment "as to one or more, but fewer than all" claims.

d. Charles pointed to two rulings entered by the superior court after she had filed her notice of appeal. But she did not amend her notice of appeal to include these rulings. The court therefore lacked jurisdiction to address them.

B. *Hollingsworth v. Swales,* 2025 Tex. App. LEXIS 871; 2025 WL 479545 (Court of Appeals of Texas 2025). Grandchildren who accepted benefit under a will are bound by arbitration clause for claims whether testator fully exercised power of appointment in will.

1. In December of 2011, Richard C. Harris ("R.C.") and his wife, Barbara, created the RC/B Trust (the "RCB Trust"). The RCB Trust agreement contained a Testamentary General Power of Appointment in favor of the second to die (the "Power of Appointment"). Barbara died in January of 2012. Following her death, the RCB Trust was split into two separate trusts: the RC/B Survivor's Trust (the "Survivor's Trust") and the RC/B Bypass Trust (the "Bypass Trust").

2. R.C. subsequently executed a Last Will and Testament on December 13, 2017, and a Codicil thereto on February 18, 2020 (collectively, the "Will"). The Will contained provisions exercising the Power of Appointment and also contained an arbitration provision. R.C. died in March of 2021. On April 12, 2021, R.C.'s Will was admitted into probate.

3. Nancy Harris Hollingsworth and Steven Harris, as Trustees of the RC/B Survivor's Trust and the Bypass Trust ("Children"), sued seeking a declaration construing the Will. April Swales, Wesley Harris, and Jamie Cochran ("Grandchildren") sued seeking a declaration that the Will only partially exercised the general power of appointment concerning the Survivor's Trust.

4. The Children moved to compel arbitration pursuant to the Will, which provided: "Despite any other provision of this instrument or in my overall estate plan, arbitration as provided herein shall be the sole and exclusive remedy for the resolution of any dispute

of any kind involving this Will (including any trust established hereunder), including any kind of action brought against the Executor or Trustee for any matter, including a breach of fiduciary duty, and even if a claim is brought in good faith and with just cause. No legal proceeding shall be allowed or given effect, except as it may relate to enforcing or implementing this provision. I intend that this binding arbitration provision be applied equitably to any party that seeks to resolve a dispute. As such, this provision is not meant to be unconscionable, and therefore I do not want it to be attacked in court as such as a means of escaping arbitration. This arbitration provision shall extend to and be binding upon me, the Executor(s), Trustee(s), and all of my beneficiaries (including my children and other descendants) and their respective heirs, executors, administrators, legal representatives, and successors. By accepting any benefit under this instrument or by attempting to enforce any right created by this instrument, a beneficiary agrees to be bound by this arbitration provision himself or herself and for those minor, unborn, or unascertained beneficiaries or parties who derive their interests in a trust established by this instrument from and through that beneficiary."

5. After a hearing, the trial court denied the Children's motion to compel arbitration. On appeal, the court of appeals reversed and remanded on the following grounds:

> a. The Texas Supreme Court determined in *Rachal* that although an agreement under the Texas Arbitration Act ("TAA") need not meet all the formal requirements of a contract, it must be supported by mutual assent. Usually, a party manifests its assent by signing an agreement. However, a Will is a unilateral instrument, and, as such, it becomes enforceable when the promisee, in this case a beneficiary, accepts by actual performance. The requirement of mutuality is met by performance. Thus, the instrument does not become binding until the promisee has performed, or at least partly performed, under the agreement.
>
> b. It is undisputed that the Grandchildren have already taken benefits under the Will. Thus, they have performed under the Will, and mutuality of the arbitration agreement under the Will has been met. Consequently, the arbitration agreement is valid.
>
> c. When determining whether claims fall within the scope of the arbitration agreement, we look to the factual allegations, not the legal claims. Once a valid arbitration agreement is established, a strong presumption favoring arbitration arises, and the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement. We resolve doubts as to the agreement's scope and other issues unrelated to validity in favor of arbitration.
>
> d. The Grandchildren claimed in a cross-petition for declaratory judgment that pursuant to the Will, R.C. only partially exercised his general power of appointment over the Survivor's Trust's assets and thus, the Grandchildren should receive 1/3 of the trust's assets. The Children generally denied this claim. The Grandchildren agreed in their response to the motion to compel arbitration that their suit requires the court to construe the Will.
>
> e. It is clear from this provision that the Grandchildren's suit to construe the Will brought against the Children as trustees comprises "a dispute of any kind involving this Will" and that this suit is an action brought against a "Trustee for any matter." Thus, the suit is within the scope of the arbitration agreement.

f. It is not correct that the arbitration agreement cannot be enforced because the probate court has exclusive jurisdiction of this probate dispute. The Texas Arbitration Act specifically excludes certain agreements from arbitration. Those are: collective bargaining agreements, small contract disputes except those agreed to in writing by the parties and their attorneys, personal injury claims except those agreed to in writing and on the advice of counsel, and any agreements made before January 1, 1966. Probate matters are not included in this list. If the Legislature had wanted to exclude probate matters from arbitration, it could have included it in this section. It did not.

g. An arbitration agreement does not dismiss a case filed in the trial court; the proceeding is only stayed. The trial court decides whether to confirm the arbitration award, enters an order, and enters a corresponding judgment conforming to the order. Thus, the trial court discharges its duty in hearing the case. Further, the determination of whether R.C. fully or only partially executed his power of appointment appears to be only a part of the entire probate proceeding. Thus, after the arbitration, the probate proceeding could foreseeably continue in the probate court regarding issues that are not disputed or subject to the arbitration provision in the Will during the normal course of probate.

C. *LP Louisville Quinn Drive, LLC v. Leonard-Ray*, 704 S.W.3d 386; 2025 Ky. App. LEXIS 1; 2025 LX 96552; 2025 WL 63353 (Court of Appeals of Kentucky 2025). Arbitration agreement applied to subsequent nursing home stay under remain-in-effect clause.

1. On June 6, 2015, Rockford Smith appointed his sister, Barbara Leonard-Ray, to be his attorney-in-fact by signing a Durable Power of Attorney ("DPOA"). Smith was admitted to the Signature HealthCARE at Rockford Rehab and Wellness Center ("Signature") nursing home facility on several occasions in 2018 and 2019. The two stays at issue occurred from July 18 to September 14, 2018, and March 21 to September 20, 2019. Signature required all incoming residents to sign an arbitration agreement as a condition of admission to the nursing home. On the first occasion, Leonard-Ray signed the arbitration agreement ("First Agreement"). On the second occasion, Signature presented the identical arbitration agreement to Smith ("Second Agreement"), and he placed what appeared to be his initials on the line intended for the resident's signature.

2. The Agreements each consist of an identical preprinted form titled "AGREEMENT TO INFORMALLY RESOLVE AND ARBITRATE ALL DISPUTES." The form states: "Please know we require all new residents and/or their legal representatives to read, agree, and sign this Agreement for admission. Please know you can choose care at another facility if you do not wish to sign." The form contains a description of the arbitration process and cautions the resident, facility, and any other person signing the form that: "THIS MEANS THAT NO ONE WILL FILE A LAWSUIT AGAINST THE OTHER, AND THAT EACH PARTY IS GIVING UP, OR WAIVING, THE RIGHT TO FILE A LAWSUIT AND HAVE A JUDGE OR A JURY DECIDE THE DISPUTE AND/OR ANY ISSUES ABOUT THIS AGREEMENT."

3. The form contained a "remain-in-effect" clause, which provides that the agreement will remain valid if the resident is discharged and later re-admitted and will apply to all subsequent stays: "This agreement will also remain valid, and of full force and effect, even if the Resident is discharged and then later re-admitted to the Facility. It will also apply to all of the Resident's subsequent admissions and stays at any Signature facility."

4. After Smith passed away, Leonard-Ray, as the administratrix of his estate, brought an action for negligence, medical negligence, corporate negligence, and wrongful death against Signature. The complaint alleged Rockford received substandard care at Signature, resulting in falls, pressure ulcers, MRSA, osteomyelitis, sepsis, malnutrition, respiratory failure, medication errors, and death. Signature filed a motion to dismiss and/or to compel arbitration, citing the First and Second Agreements. Following a hearing, the circuit court denied the motion on the grounds that the Second Agreement rendered the First Agreement void and that the initials on the Second Agreement resident signature line were not a "valid indication of assent" on Smith's part.

5. Signature appealed and the court of appeals, with one lengthy dissenting opinion, reversed and remanded on the following grounds:

a. Neither Leonard-Ray nor Signature challenged the validity of the DPOA, nor did they argue that Leonard-Ray lacked authority under the DPOA to execute the First Agreement. Leonard-Ray argued that the First Agreement is nonetheless unenforceable because (1) she did not complete the section of the Agreement specifying the capacity in which she was acting; (2) a Signature representative did not sign the Agreement; and (3) the First Agreement was superseded by the Second Agreement.

b. Leonard-Ray's signature was sufficient to create an enforceable arbitration agreement. Leonard-Ray signed her name in full on the line designated for "Resident's Authorized Representative/Individual* Signature" on the last page of the First Agreement. The asterisk refers to a footnote immediately below the line which states: "Representative understands and agrees s/he is signing in both representative and individual capacities and that this agreement binds Representative, as well as Resident." Leonard-Ray did not, however, fill out the section of the Agreement that is to be completed if the resident is not signing for him or herself, and represents the authority to bind another person to the agreement, ratifies this agreement, and agrees not to contest its validity or enforceability.

c. Leonard-Ray did not check any of the sections in this part. She did provide Signature with a copy of the DPOA document. She contended that the Agreement is unenforceable because she signed at most in her individual capacity, not as Smith's attorney-in-fact.

d. Kentucky law does not require a party to explicitly state they are acting as an attorney-in-fact. Leonard-Ray represented herself as Smith's authorized representative and as an individual, according to the signature line. She did not affirmatively state that she was acting in any other capacity. She did not affirmatively hold herself out as signing in a capacity which would not allow her to enter into an arbitration agreement, such as a spouse or solely in her own capacity. Leonard-Ray's signature did not render the agreement unenforceable.

e. As to the contention that the First Agreement was unenforceable because it was not signed by a representative of Signature, it is not always necessary for both parties to sign a contract, particularly where one has signed and both parties thereafter act as if they had a binding contract. Kentucky courts will also enforce unsigned arbitration agreements where the parties have indicated acceptance of

the contract through their actions. Signature was the party that drafted and presented the First Agreement and made signing it a mandatory condition of Smith's admission to the nursing home facility. Signature's assent to the terms of the First Agreement is manifest from these actions.

f. There is no support for the assertion that the First Agreement was null because Smith had completed his stay at the facility. The "remain-in-effect" clause in the First Agreement plainly states that the agreement to arbitrate applies to all subsequent stays. By its explicit terms, the First Agreement was in effect when Smith was admitted to the Signature facility on March 21, 2019. The question is whether the presentation of the Second Agreement to Smith indicated that Signature intended to abandon or rescind the First Agreement or that the Second Agreement was so plainly contradictory to the First Agreement that it constituted a novation.

g. A series of federal court cases applying Kentucky state law have addressed the enforceability of successive arbitration agreements. They have held that the presentation of a second agreement by a nursing home to an incoming resident may constitute a novation or abandonment of the first agreement, but only when the arbitration agreement is not a condition of admission and when the resident or the resident's representative has expressly declined the second arbitration agreement.

h. Smith was not offered a choice to refuse the Second Agreement because the agreement to arbitrate was a condition of admission to the facility. Smith continued to be bound by the First Agreement and a refusal to sign the Second Agreement would merely have meant he would not be admitted to the nursing home. The Second Agreement did not, therefore, present a manifest inconsistency; it merely repeated the terms of the First Agreement and was, essentially, a reiteration of the parties' intent to arbitrate. The length of time between Smith's admissions in this case was relatively short and the presentation of the Second Agreement, while admittedly unnecessary, did not offer Smith the opportunity to act inconsistently with his prior decision to arbitrate. The First Agreement was still in effect on March 21, 2019, and the presentation of the Second Agreement merely confirmed the ongoing intent of the parties to arbitrate.

i. Because the First Agreement continued to be enforceable, there is no need to address the finding of the trial court regarding the validity of Mr. Smith's signature or his competency at the time the Second Agreement was presented.

j. Leonard-Ray argued neither arbitration agreement can be enforced generally as to all the heirs' wrongful death claims. However, neither party raised this argument at the trial court level. An appellate court is without authority to review issues not raised in or decided by the trial court.

6. One dissenting judge noted that the trial court did not review the enforceability of the First Agreement, the trial court's finding that Smith did not give his assent to the Second Agreement was supported by clear and convincing evidence, and the First Agreement was explicitly abandoned in the larger packet of agreements Signature presented to Smith at the same time as the Second Agreement. The judge commented that asserting facts as to the First Agreement's enforceability is not an appropriate determination for an

appellate court. There was a disputed issue of fact regarding Smith's capacity to contract. Examination of the trial court's order, alongside the briefs alone, demonstrates Smith's capacity to contract was in dispute. The record demonstrates Smith's estate requesting, in the event the trial court might be inclined to find Signature's prima facie burden had been met, a period of limited discovery on the issue of capacity. No reasonable interpretation of the trial court's order could conclude an affirmative finding of Smith's capacity to contract was made. The majority Opinion failed completely to address this. Capacity, both legal and mental, is a necessary and constituent element of a simple contract. The trial court's order should, at most, be vacated and remanded for a determination of Smith's capacity to contract when he, as principal, was presented the Second Agreement, which was not identical to the First Agreement.

D. *Richard Kallman as Co-Tr. of the Kallman Fam. Irrevocable Trust v. Kineret Kallman as Co-Tr. of the Kallman Fam. Irrevocable Trust,* 2025 N.Y. Misc. LEXIS 5259; 2025 LX 117701 (Supreme Court of New York, New York County 2025). Tort claims not subject to arbitration contract signed by trustee, but arbitration agreement applied to claims under respondeat superior.

1. Richard Kallman (in both his personal capacity and trustee capacity, "Plaintiff") and Kineret Kallman (in both her personal capacity and trustee capacity, "Mrs. Kallman") were married in 1996, have two children, and in 2019 were both designated as co-trustees of an irrevocable trust that was initially funded by Plaintiff's parents (the "Trust"). The Trust was originally being held in an account managed by non-party JP Morgan. Then in 2023, Mrs. Kallman informed Plaintiff that she wanted to move her personal accounts and the Trust account to defendant UBS Financial Services ("UBS"), with the Trust account to be managed by a UBS employee ("Employee," collectively with UBS, "Defendants").

2. Plaintiff consented to the move, and in the process signed a UBS Client Relationship Agreement ("CRA"), which contained a binding arbitration provision. Plaintiff alleges, based upon information and belief, that by this point Employee and Mrs. Kallman were already engaged in an extra-marital affair, Mrs. Kallman was planning a divorce, and that the move was orchestrated by Mrs. Kallman and Employee in an attempt to gain control over the Trust and its assets. Part of the plan, as alleged by Plaintiff, was to use the control over the Trust in order to extort extra money in the divorce proceedings and to "buy favor" with the couple's children.

3. A few months after the Trust account was transferred to UBS, Mrs. Kallman moved in with Employee and told Plaintiff that she wanted a divorce. As the divorce proceedings progressed, Employee would appear on behalf of Mrs. Kallman and make demands for settlement payments. Employee is alleged to have engaged in numerous improper attempts to influence and control the divorce proceedings, including making demanding calls to Plaintiff's employer and brother, making false allegations to the police, using ethnic slurs to refer to Plaintiff's divorce attorney, and threatening said attorney with physical violence. Employee is also accused of having made distributions from the Trust without Plaintiff's consent in violation of the Trust terms. Plaintiff filed the underlying proceeding in October of 2024. The amended complaint contains thirteen causes of action, pled against Employee, UBS, Mrs. Kallman, and unidentified UBS employees who aided Employee.

4. UBS moved to compel arbitration and to stay this proceeding pending the outcome of arbitration. Employee likewise moved to compel arbitration and stay the action. The court

granted the motions to compel arbitration as to all claims asserted against UBS and all claims asserted against Employee with the exception of the Intentional Infliction of Emotional Distress, which were stayed pending determination of the arbitration, on the following grounds:

a. The CRA's arbitration provision states, in the relevant part, that the parties agree to "resolve any controversy, claim or issue in any controversy that may arise between you and UBS Financial Services Inc. by arbitration, including but not limited to controversies, claims or issues in any controversy concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement."

b. New York law does not extend the right to compel arbitration to a party that did not sign the agreement in question. An arbitration provision cannot be enforced against a party in their individual capacity if they only signed the relevant agreement in their official capacity. Defendants' argument that there was no limiting language added to the signature line does not avail them, as the lack of such language does not in and of itself provide a rational basis for the argument that a signatory intended to be bound in their individual capacity. The CRA is clearly an agreement related to the Trust. The signature page requires that the Trust's TIN be entered, it is called a "Trust Signature Page," it states that "all trustees must sign this document," and further describes the signature as a "Trustee Certification." Plaintiff clearly signed the CRA in his trustee capacity and not his individual capacity.

c. Plaintiff's claims that are brought in his individual capacity would not be subject to the CRA (which he did not sign in his individual capacity), and therefore the claims would not be subject to binding arbitration. Of the claims brought against Defendants, the majority clearly relate to the Trust, have alleged violations of the terms of and fiduciary duties arising from the Trust, and were brought by Plaintiff in his capacity as trustee. For example, the eleventh cause of action alleges that "[Employee] and the UBS Employees violated the terms of the Trust by facilitating an unauthorized distribution of Trust funds from the UBS account" and alleges that UBS is liable for this behavior under a respondeat superior theory. These claims have been brought by Plaintiff in his capacity as trustee, and therefore for these claims Plaintiff was a signatory to the CRA.

d. But the tenth cause of action, asserting intentional infliction of emotional distress against Mrs. Kallman and Employee, is clearly brought by Plaintiff in his personal capacity. The allegations are that Employee was engaged in an intentional or reckless scheme to extort millions from Plaintiff during the course of his divorce proceeding, and that Employee's behavior during said proceeding inflicted severe emotional distress upon Plaintiff. These allegations clearly constitute a private tortious claim against Employee, and do not arise out of Plaintiff's trustee capacity. Therefore, the tenth cause of action does not fall under the scope of the CRA because Plaintiff (as a private individual) was not a signatory to the CRA.

e. The general rule in New York law is that claims of fraud in the inducement must be determined by an arbitrator. In order to avoid the arbitration provision, a party must show that fraud permeated the entire agreement to the extent that the

agreement did not result from arm's length negotiations. The agreement in question was made between Plaintiff and UBS, not Plaintiff and Employee or Plaintiff and Mrs. Kallman. There have been no allegations that go to the lack of arm's length negotiations between Plaintiff and UBS as relates to the CRA. Because there has not been a showing of fraudulent inducement of the arbitration provision itself, nor that the CRA was not the result of arm's length negotiation between Plaintiff and UBS, the question of fraudulent inducement is one for the arbitrator, not the Court.

f. The language of the arbitration provision is very broad, stating that it applies to "any controversy, claim or issue in any controversy that may arise" between the parties. Plaintiff points to the language-related breach of the CRA, but the words "including but not limited to" clearly indicate that the list that follows is not meant to be exhaustive. Furthermore, Defendants have cited to multiple FINRA cases that involved claims such as respondeat superior and fact patterns involving intermarital affairs, showing that these claims are capable of being resolved in arbitration.

g. Finally, there is a scope issue regarding claims asserted against Employee. Employment-related claims against an agent of a signatory to an arbitration provision likewise entitles the agent to demand arbitration. Therefore, to the extent that the claims asserted against Employee relate to Employee's employment with UBS and status as an agent of the company, such claims are subject to the arbitration provision. The third and fourth causes of action allege that Employee's behavior towards the Trust and distributions from it were a breach of fiduciary duty and aiding a breach of Mrs. Kallman's fiduciary duty as trustee. The causes of action all revolve around allegedly unauthorized distributions and transfers from the Trust. These claims involve actions taken by Employee in his role as an agent of UBS, thus bringing him under the arbitration provision in the CRA.

h. The CRA does not govern the Trust or the direct administration of it, but instead delineates the relationship between trustees and the entity managing the Trust. The arbitration provision of the CRA does not conflict with the forum clause of the Trust because the claims in this matter arise out of the client relationship between Plaintiff as trustee and UBS (and its employee Employee), and do not arise out of a dispute over the terms of the Trust itself.

i. It would be just to stay the claims asserted against Mrs. Kallman, with the exception of the IIED claim, pending the arbitration. Most of these claims involve her status as a co-trustee of the Trust and could reasonably be impacted by the res judicata of the arbitrator's determination. They also involve similar allegations of unauthorized distributions and disbursements from the Trust. The Court does not, however, find that it would be just to stay the proceeding as to the IIED claim against Employee and Mrs. Kallman. The tenth cause of action involves allegations regarding Employee and Mrs. Kallman's tortious behavior towards Plaintiff and others during the divorce proceedings, separate and apart from the allegations of mismanagement of the Trust that the arbitrator will be dealing with. On these facts, the tenth cause of action may proceed forward.

E. *Szantho v. THI of N.M. at Sunset Villa, LLC,* 2025-NMCA-006; 2025 N.M. App. LEXIS 4; 570 P.3d 203; 2025 LX 136671; 2025 WL 441775 (Court of Appeals of New Mexico 2025). Third-party beneficiary doctrine does not permit a signatory to enforce an arbitration contract against a non-signatory third-party beneficiary where the third-party beneficiary has not otherwise sought to enforce the contract.

1. When Bill Foster ("Father") was admitted to a long-term care facility operated by Defendants THI of New Mexico at Sunset Villa, LLC d/b/a Sunset Villa Care Center and THI of New Mexico, LLC, one of his children, Don Foster ("Son"), signed the admission paperwork, including a stand-alone arbitration agreement. Son did not have power of attorney for Father and the parties agree that Son did not sign the documents as Father's legal representative. Father did not sign any of the documents.

2. The first page of the arbitration agreement stated that it was "an Agreement between [Father] ("Resident") and/or [Son] ("Representative"), and Sunset Villa ("Facility"). The arbitration agreement explained the effect of a resident's representative signing the agreement.

3. Son signed the arbitration agreement on the line designated "Signature of Representative." Father did not sign the arbitration agreement.

4. Just over one year after he was admitted to Sunset Villa, Father passed away. Plaintiff Andras Szantho, as personal representative of Father's wrongful death estate, filed a wrongful death lawsuit against Defendants claiming that Father died due to a number of injuries he suffered during his stay at Sunset Villa. Son is not a party to the litigation. Defendants moved to compel arbitration based on the arbitration agreement signed by Son. The district court denied Defendants' motion and concluded that the arbitration agreement could not be enforced against Father's wrongful death estate.

5. Defendants appealed, and the court of appeals affirmed on the following grounds:

a. The question of who decides a particular issue — the district court or the arbitrator — is not new. The answer in each case depends on what the parties agreed to arbitrate. The cardinal precept of arbitration is that it is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration. Where parties contract to arbitrate their disputes, such agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. However, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

b. Parties may agree to arbitrate the merits of their claims as well as threshold or gateway questions about the arbitrability of those claims, including the enforceability, scope, applicability, and interpretation of the arbitration agreement. But not all arbitrability issues can be delegated. The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause.

c. Accordingly, when faced with a motion to compel arbitration, the court must first determine whether the parties to the litigation have agreed to arbitrate. Only

if the answer is "yes" do courts proceed to consider whether the parties have agreed to delegate questions of arbitrability to the arbitrator.

d. Resolving the dispute about who decides — the court or the arbitrator — whether Father, a non-signatory, is bound by the arbitration agreement depends on whether the issue is one of contract formation or contract enforceability. The questions presented are a matter of contract formation, and therefore, the district court did not err in deciding as a threshold matter whether Father, a non-signatory, had agreed to arbitrate.

e. In this case, neither party asserts that Son had legal authority to act on behalf of Father at the time Son signed the contract. Indeed, Defendants have expressly disclaimed that they are attempting to enforce the arbitration agreement under an agency theory. Consequently, this is not a case of whether the arbitration agreement is enforceable based on Son's actual or apparent authority to sign the contract on Father's behalf.

f. Because Son did not have authority to bind Father to the agreement, the arbitration agreement at issue is, at most, a contract between Defendants and Son in his individual capacity. In every arbitration case, the first question a court must answer is whether the parties to the litigation agreed to arbitrate. In this case, the parties are Defendants and the personal representative of Father's wrongful death estate, who stands in the shoes of Father. Son is not a party to the lawsuit. The issue is, therefore, whether there exists a valid agreement to arbitrate between Defendants and Father. This is not a "secondary agreement," but rather the primary and central issue. The formation of an agreement to arbitrate between Defendants and Son in his individual capacity does not answer whether an agreement to arbitrate was formed between Defendants and Father.

g. In this case, whether Father, a non-signatory to the agreement, can be said to have agreed to arbitrate is a formation question the court must resolve before it may order arbitration. The general rule in New Mexico is that nonparties to an arbitration agreement generally are not bound by the agreement and are not subject to arbitration. New Mexico also recognizes exceptions to this general rule that allow non-signatories to be bound by an arbitration agreement under limited circumstances: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. Indeed, when New Mexico courts have decided cases involving non-signatories, they have concluded either that (1) the non-signatory is not a party to the arbitration agreement and never agreed to arbitrate any claims, or (2) the non-signatory could be said to have agreed to arbitrate by means other than signing a contract based on one of five theories arising out of contract and agency law.

h. Where a non-signatory is involved in a motion to compel arbitration under a contract, there is a question as to the very existence of an agreement involving the non-signatory. Because this issue calls into question the formation of the specific arbitration clause that a party seeks to have the court enforce, it is a matter for judicial determination. Unless the court is satisfied that a non-signatory has agreed to arbitration, the non-signatory cannot be compelled to arbitrate.

i. It is not necessary to reach Defendants' remaining arguments related to the arbitration agreement's delegation clauses, specifically that (1) there is clear and unmistakable evidence of an agreement to arbitrate arbitrability, and (2) Plaintiff failed to specifically challenge the delegation clauses. Simply put, even the most sweeping delegation cannot send the contract-formation issue to the arbitrator, because, until the court rules that a contract exists, there is simply no agreement to arbitrate. Most federal courts and a number of state courts have embraced this conclusion and have held that formation issues must always be resolved by the court, even where the agreement contains a delegation clause.

j. This approach is consistent with the basic principle expressed in New Mexico and elsewhere that arbitration is strictly a matter of consent, and the court cannot order arbitration of a particular dispute unless it is satisfied that the parties agreed to arbitrate that dispute. Even where a contract contains a delegation clause, questions of contract formation must be decided by the court and may not be delegated to the arbitrator. The district court correctly determined that it was for the district court, rather than an arbitrator, to decide whether Defendants and Father agreed to arbitrate.

k. The court concluded that under New Mexico law, an agreement can be enforced against a third-party beneficiary if the third-party beneficiary accepts the contract after it is made. The district court concluded that the agreement was not enforceable in this case because there is no evidence that Father accepted the arbitration agreement after it was made. The third-party beneficiary doctrine does not permit Defendants to enforce the arbitration agreement against Plaintiff.

l. New Mexico courts have previously recognized that non-signatories may be bound by an arbitration agreement under principles of contract, agency, or equity. New Mexico courts have not previously had an opportunity to consider whether the third-party beneficiary doctrine applies to allow a signatory to enforce an arbitration agreement against a non-signatory. Resolution of this question is governed by principles of state contract law.

m. In New Mexico, the third-party beneficiary doctrine is an exception to the general rule of law that one who is not a party to a contract cannot maintain suit upon it. The New Mexico Supreme Court recognized that a third party may be a beneficiary of such contract, and as a beneficiary may have an enforceable right against a party to a contract. Thus, although intended third-party beneficiaries are not in privity of contract, they are accorded traditional contract remedies with respect to the bargain intended for [their] benefit.

n. Without addressing this body of law or acknowledging that the issue they have raised is a matter of first impression in New Mexico, Defendants devoted the bulk of their briefing to establishing that Father and, therefore, his estate were third-party beneficiaries of the arbitration agreement. However, even if the court were to conclude that Father was a third-party beneficiary of the stand-alone arbitration agreement — a matter the court expressly did not decide — Defendants have not established that New Mexico law permits a contract to be offensively enforced against a third-party beneficiary under the circumstances here.

o. New Mexico law has not recognized the right of a signatory to enforce a contract against a non-signatory third-party beneficiary. State appellate courts in Florida, Mississippi, and South Carolina all rejected the application of the third-party beneficiary doctrine to enforce a contract against a non-signatory. Defendants have not offered any analysis as to why New Mexico should expand the third-party beneficiary doctrine as they propose. Under existing New Mexico law, an intended third-party beneficiary may bring suit to enforce a contract signed by others. There is no support for the assertion that the third-party beneficiary doctrine works "the other way around" to enable a contracting party to enforce a contract against a non-signatory. Two parties cannot bind a third — without the third party's agreement —merely by conferring a benefit on the third party.

p. When a plaintiff sues under a contract to which the plaintiff is not a party, the court ordinarily enforces an arbitration clause contained in that contract, absent some other valid defense. A third-party beneficiary cannot seek the benefit of the contract while avoiding other provisions; she must take the contract as she finds it and abide by its terms. Nevertheless, those facts are not present here. Plaintiff did not seek to enforce the contracts entered into between Defendants and Son — either the stand-alone arbitration agreement or the admission agreement. Rather, Plaintiff brought claims for wrongful death, negligence, violation of the Unfair Trade Practices Act, and punitive damages. Under the facts in this case, the third-party beneficiary doctrine as recognized in New Mexico does not provide a basis for binding Plaintiff to the arbitration agreement.

F. *UBS Fin. Servs., Inc. v. Saunders,* 2025 Fla. App. LEXIS 8770 (Court of Appeal of Florida, Second District 2025). Co-trustee that did not sign arbitration agreement bound by estoppel.

1. In 2001, Mrs. Catherine Meo Saunders' brother Joseph A. Meo opened a Resource Management Account (the "Trust Account") with UBS Financial Services, Inc.'s predecessor on behalf of the Robert & Agnes Meo Trust FBO Catherine Meo Saunders (the "Trust"). Mr. Meo signed the account application on behalf of the Trust as "Joseph A. Meo, Trustee." In doing so, he agreed "on behalf of the account holder . . . to all of the terms and conditions in the Master Account Agreement."

2. In turn, the Master Account Agreement defines the "Client" as the "trust" designated as the "Account Holder." Under the agreement, UBS is to provide various resource management services to the Client, including sending "monthly or quarterly account statements." The agreement permits the Client to take various actions upon the Trust Account including the ability to "write checks or authorize drafts against" it. Among other terms, the agreement also requires arbitration of "any and all controversies which may arise between UBS and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement."

3. In 2024, Mrs. Meo Saunders filed a complaint against Mr. Meo, both individually and as co-trustee of the Trust, and against UBS. The complaint expressly alleges that Mrs. Meo Saunders is both a beneficiary and co-trustee of both the Trust and the Trust Account. As against UBS, the complaint alleges that as a co-trustee of the Trust, Mrs. Meo Saunders has the same authority over the Trust Account as her brother Mr. Meo. It alleges that UBS "[f]ail[ed] and/or refus[ed] to recognize Plaintiff's position and authority as co-trustee of the Trust." It alleges that, contrary to Mrs. Meo Saunders' authority as co-trustee, UBS took several wrongful actions, including: (1) placing a freeze on the Trust

Account, (2) refusing to honor a check drawn on the Trust Account, (3) failing to send her statements of the Trust Account, and (4) refusing to communicate necessary information about the Trust Account to her.

4. UBS moved to compel arbitration. Acknowledging that Mrs. Meo Saunders did not sign the agreement herself, UBS argued that because she claimed benefits of the Master Account Agreement with her lawsuit, she was estopped from avoiding the arbitration provision therein. The trial court denied the motion to compel. UBS appealed.

5. The court of appeals reversed and compelled arbitration on the following grounds:

a. Even though Mr. Meo was the one who opened the Trust Account and signed on behalf of the Trust, Mrs. Meo Saunders should likewise be bound by the terms of the arbitration clause in the Master Account Agreement because her claim expressly seeks the benefits of that agreement.

b. Because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. However, a non-signatory may be bound to arbitrate under certain circumstances: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel.

c. In the arbitration context, equitable estoppel provides that a party to a lawsuit may not rely on a contract to establish his claims while avoiding his obligation under the contract to arbitrate such claims. Mrs. Meo Saunders' lawsuit expressly asserts that she is a co-trustee of the Trust that is the Client as defined in the Master Account Agreement with UBS. The Trust Account is expressly governed by the Master Account Agreement.

d. By her lawsuit, Mrs. Meo Saunders seeks authority over the Trust Account equal to that of Mr. Meo, the signatory. She claims entitlement to direct account services that UBS is obligated to provide only by virtue of the Master Account Agreement, which places such authority squarely in the hands of the Client. In this context, by expressly claiming the benefits of the Master Account Agreement in her lawsuit, Mrs. Meo Saunders should be estopped from disclaiming its arbitration provision.

e. Because Mrs. Meo Saunders by her lawsuit seeks benefits under the subject contract, the trial court should have estopped her from disclaiming its arbitration provision and should have compelled arbitration.

XX. MEDIATION, SETTLEMENT, RELEASES, & INDEMNIFICATION

A. *Adams v. Atkinson*, 2025 Ala. LEXIS 53 2025 LX 97079 (Supreme Court of Alabama 2025). "Indemnify" and "hold harmless" are synonyms when they appear as a doublet, even when those terms appear separately in an agreement but perform the same function.

1. The parents of Joy Goodwin Adams ("Joy") created two trusts. In 1986, they created one for Joy's benefit ("the Shares trust"), which was operated as two separate trusts that were sometimes called "the Shares I trust" and "the Shares II trust." In 1987, they created the other trust ("the Grandchildren's trust") for the benefit of Joy's two daughters, Tiffany and Kate. In 1989, Joy created a third trust: the Joy Goodwin Rudd Irrevocable Trust ("the 1989 trust"). Both the Shares trust and the 1989 trust allowed the

trustees to distribute income to Joy on a regular basis and to distribute the principal for her "health, education, support and maintenance." During her lifetime, Joy was the sole beneficiary of those trusts. If Joy died, however, any remaining assets from the Shares II trust and the 1989 trust would flow to the Grandchildren's trust — and thus to Tiffany and Kate.

2. In later years, Joy executed two separate agreements. The first was a 2011 release-and-indemnification agreement ("the 2011 agreement") between Joy and a co-trustee of the Shares trust, Branch Banking & Trust ("BB&T"). In that agreement, Joy and BB&T agreed to terminate the Shares trust because, in their view, its value did not justify the cost of managing it. In doing so, Joy promised to "indemnify" BB&T "against any and all liability, loss or expense (including, but not limited to, reasonable counsel fees) that may be incurred as a result of any claim arising from the administration and termination of the Shares trust."

3. The second agreement arose after Tiffany and Kate sued Joy along with several trusts and two corporate trustees. Tiffany and Kate alleged various breaches of fiduciary duties, contending that Joy had improperly accessed money from the Shares trust and the 1989 trust. Goodwin Capital Partners and KATISAM were also parties to the lawsuit, but BB&T was not. To resolve the dispute, Joy and the defendants executed a settlement agreement ("the 2013 agreement"). The 2013 agreement provided: "Joy shall indemnify Tiffany and Kate from and against any damages suffered ('Damages') by Tiffany and Kate as a result of any material breach of the representations and warranties made by Joy in paragraph C of Article II of this Agreement." Under the 2013 agreement, Joy warranted that, among other things, an attached catalogue for Goodwin Capital Partners and KATISAM accurately reflected then-current assets, liabilities, and pending litigation. The agreement also provided: "[The defendants] ... agree to hold Joy and any trust or other entity which is a Party to this Agreement and which has custody of any assets for Joy's benefit, harmless against any claim, demand, action, or liability by any corporate trustee sued by or at the instance of Tiffany and/or Kate for attorneys' fees incurred by such trustee in its successful defense of any claim or suit arising from its administration of the Share II Trust, the 1989 Trust, and the Marital Trust, which was asserted against it by Tiffany, Kate, or by any other entity at Tiffany or Kate's instance."

4. After the parties executed the 2013 agreement, Tiffany and Kate sued BB&T and another corporate trustee for negligence. They alleged that those corporations had permitted Joy to breach fiduciary duties that were owed to Tiffany and Kate under the Shares trust and the 1989 trust. The case was eventually removed to the United States District Court for the Northern District of Alabama. In federal court, BB&T filed a summary-judgment motion as to Tiffany and Kate's negligence claim and asserted a third-party claim against Joy. Citing the 2011 agreement's indemnification provision, BB&T demanded that Joy reimburse it for past and future attorneys' fees relating to its defense against Tiffany and Kate's suit. In response, Joy sought summary judgment in her favor on this claim.

5. The federal district court ultimately granted BB&T's summary-judgment motion on Tiffany and Kate's negligence claim, and it denied Joy's motion on BB&T's indemnification claim. Shortly thereafter, Joy demanded that the defendants pay the attorneys' fees that had been sought by BB&T, citing the 2013 agreement's hold-harmless provision. They refused. Joy then settled BB&T's claim for attorneys' fees for $614,791.62.

6. Joy sued to enforce the 2013 agreement's hold-harmless provision and require the defendants to pay her $614,791.62, plus interest and other costs. The defendants moved to dismiss. The circuit court granted the defendants' motion and dismissed Joy's suit with prejudice. Joy appealed.

7. On appeal, the Alabama Supreme Court reversed and remanded on the following grounds:

a. In the law as in life, we usually resort to common understandings of words and phrases when we communicate. But the word "indemnify" and the phrase "hold harmless" are not common. They are instead what lawyers call "legal terms of art." And these terms often appear together — i.e., "to indemnify and hold harmless" — in a unit known as "doublet." A doublet refers to a pair of synonyms that both "amplif[y]" the intended meaning and "maximize" the reader's understanding.

b. The court has encountered variations of the "indemnify and hold harmless" doublet on a number of occasions, but has never noted a distinction between the terms. Alabama legal authorities similarly treat these terms as interchangeable. Alabama's treatment of this doublet aligns with the majority view that "hold harmless" and "indemnify" are synonymous. A good working definition of "indemnify" is "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default."

c. But a minority of other jurisdictions say that these terms have distinct meanings, even when they appear in the doublet form. For instance, a California court contended that "'[i]ndemnify' is an offensive right — a sword — allowing an indemnitee to seek indemnification. 'Hold harmless' is defensive: The right not to be bothered by the other party itself seeking indemnification." Under this understanding, an "indemnification" provision means that Party A seeks to put someone else, which may be Party B, on the hook for liability arising from Party A's future negligent conduct. In contrast, a "hold harmless" provision means that Party A is personally asking Party B to release him from liability for his future negligence.

d. This doctrinal shift from treating "indemnify" and "hold harmless" as synonyms to distinct terms having independent meaning likely arose from lawyers aggressively applying the interpretive canon against "surplusage." That canon instructs interpreters to prefer readings that do not render a word meaningless or redundant. This canon is not a bad rule when legal drafters abstain from larding their contracts with surplusage, but it's a horrible rule when they do.

e. This history informs the analysis of the core issue in this case, which is one of first impression for the Court: what do the terms "indemnify" and "hold harmless" mean if they are split into separate contractual provisions? The court has not squarely faced a case that hinged on that term's particular meaning. The 2013 agreement does just that. The indemnity provision states that "Joy shall indemnify Tiffany and Kate from and against any damages suffered ... by [them]," while the hold-harmless provision states that "[the defendants] agree to hold Joy ... harmless against any claim, demand, action, or liability. ...."

f. These terms are synonymous. As shown above, the court and various Alabama authorities treat them as synonyms, particularly when they appear together. And while it is true that the court presumes that a word or phrase bears the same meaning throughout a text and that "a material variation in terms suggests a variation in meaning," that rule is unsuitable for synonyms. Absent indications that a term is used in a special or technical sense, the court presumes that the parties intended it to have its ordinary meaning. And nothing in the record indicates that the parties used a peculiar definition of "hold harmless."

g. A parsing of the hold-harmless provision demonstrates that the defendants agreed to reimburse Joy for a portion of the fees she paid to BB&T. If Tiffany or Kate later sued BB&T for its actions as trustee, and BB&T successfully defended itself, the defendants agreed to hold Joy harmless against any claim by BB&T for attorneys' fees. The litigation described above satisfies each condition for indemnification. Joy has plausibly demonstrated that the defendants promised to indemnify her against the portion of attorneys' fees that BB&T incurred in its "successful defense" against claims relating to its "administration of the Share II Trust." Any other construction of "hold ... harmless" would be artificial and contrary to the settled understanding of these terms.

h. Defendants contend that "hold harmless" means only a first-party release, endorsing the view adopted by a minority of jurisdictions. In their view, the hold-harmless provision merely requires that they "hold Joy harmless (i.e., not hold Joy responsible for) from any liability that the defendants may incur as a result of BB&T's statutory right for reimbursement of fees and expenses should it prevail in the federal case. They bolster their argument by pointing to the separate indemnification provision, which exclusively uses the word "indemnify," arguing that the court must give a different meaning to "hold ... harmless" as used elsewhere in the 2013 agreement. The defendants' reading relies on a peculiar meaning of "hold harmless" as only providing a release of first-party claims. That definition has not been recognized by our Court. And, even on its own terms, their reading of the hold-harmless provision is the less natural one. The hold-harmless provision plainly covers actions by BB&T against Joy, which would not be the case if "hold ... harmless" merely meant that the defendants personally released Joy from liability. Use of the word "against" later in the same provision confirms this. It mentions "any claim or suit ... which was asserted against [BB&T] by Tiffany [or] Kate." Earlier, it says that the defendants agree to "hold Joy ... harmless against any claim, demand, action, or liability by [BB&T]. ..." The provision thus contemplates actions by BB&T against Joy, not just actions by a third party against the defendants arising from BB&T's statutory right to reimbursement from trust assets. In short, the defendants cannot grant Joy a first-party release from a third-party claim against her.

i. The 2013 agreement's indemnity provision confirms that these terms are synonymous. That provision states: "Joy shall indemnify Tiffany and Kate from and against any damages suffered ... by [them] as a result of any material breach of the representations and warranties made by Joy." As described above, Joy made warranties and representations about then-current assets, liabilities, and pending litigation for Goodwin Capital Partners and KATISAM. Any "damages" arising from a breach of those warranties and representations would then arise

either directly from Joy's conduct or from suits initiated by third parties. As used in this provision, then, "indemnify" takes on its standard meaning.

j. The phrase "hold ... harmless" does the same work in the 2013 agreement that the word "indemnify" does. Just as the parties agreed that Joy would "indemnify" Tiffany and Kate "from and against" damages, so too did they agree that the defendants would indemnify Joy "against any claim, demand, action, or liability by [BB&T] ... for attorneys' fees." And, as stated earlier, the presumption that a material variation in terms implies a variation in meaning is unsuitable for synonyms. "Indemnify" and "hold ... harmless" are therefore synonymous as used in the 2013 agreement.

k. This holding is narrow and confirms the settled understanding that "indemnify" and "hold harmless" are synonyms when they appear as a doublet. As shown above, this understanding naturally extends to those terms when they appear separately and perform the same function. And while it is possible that, in other agreements, "hold harmless" appearing on its own may act as a first-party release, that should not be the starting presumption. Because "hold ... harmless" as used in the 2013 agreement is synonymous with "indemnify," the circuit court erred in dismissing Joy's suit with prejudice.

B. *Estate of Sentoso,* 2025 Cal. App. Unpub. LEXIS 5229 (Court of Appeal of California, Second Appellate District, Division Four 2025). Court enforced settlement agreement where parties represented by counsel and refuses to find fraud merely because one party's primary language was not English.

1. When Mulyadi T. S. Sentoso ("Mulyadi") passed away in February 2020, his surviving spouse, appellant Keiko Hasegawa ("Hasegawa"), and his son, appellant Philip Sentoso ("Philip") were named the administrators (the "Administrators") of his estate. Mulyadi's sister, Haryati Sentoso ("Sentoso"), filed a timely creditor claim against Mulyadi's estate, alleging Mulyadi executed a promissory note in 1995 under which he was to pay her $3 million, plus interest and attorney's fees. Appellants rejected Haryati's creditor claim. Haryati filed a separate civil action against appellants as representatives of Mulyadi's estate, and an amended complaint naming Hasegawa as a defendant in her individual capacity. Haryati alleged at least one cause of action for breach of contract in addition to unspecified claims against Hasegawa in her individual capacity.

2. The parties participated in a mediation and reached a global settlement on Haryati's claims in both the probate action and her separate civil suit. The parties' agreement was reduced to writing, which was executed by the parties and approved by their respective attorneys that same day. The settlement agreement specified that Mulyadi's estate would pay Haryati $450,000 and would enter into a stipulated judgment of $2,550,000 in Haryati's favor in the civil action. The agreement further provided that Haryati could enforce the stipulated judgment against Mulyadi's separate property or any community property that was not administered in the probate proceedings. In return, Haryati agreed to dismiss all claims asserted in her amended civil complaint, except her cause of action for breach of contract.

3. Administrators petitioned in probate court for an order approving the July 20 settlement agreement and release. The petition was accompanied by signed verifications from both Administrators. Their verifications each affirmed the content and representations

contained in the petition under penalty of perjury. At the hearing, Hasegawa appeared and stated that she wanted to withdraw her petition to approve the settlement. The court denied her request but continued the hearing on the petition to May 9, 2024. The court also authorized Haryati to file a motion to enforce the settlement agreement to be heard on that same date. Administrators subsequently filed a written notice stating they were withdrawing their petition for approval of the settlement. Haryati moved to enforce the settlement agreement. The motion was accompanied by a declaration from Haryati's counsel, who stated he was personally present for and participated in the mediation that led to the settlement agreement, which all parties signed. According to counsel, appellants were represented by counsel at the mediation who approved the form of the settlement agreement.

4. Administrators opposed Haryati's motion and alleged Haryati fraudulently induced them to settle the case by sending them "fraudulent documents" shortly before the mediation that allegedly supported her claims against Mulyadi's estate. Administrators alternatively alleged that enforcing the settlement agreement would be against the public interest because: (1) there were factual errors in the promissory note and Haryati's amended complaint; (2) the promissory note was notarized by an Indonesian Notary and not a notary authorized by the California Secretary of State's office; (3) the passport number listed for Mulyadi on certain documents presented by Haryati did not match his actual passport number; and (4) Haryati fabricated documents to induce appellants to settle the litigation. Appellants' opposition was accompanied by a declaration from Hasegawa. In her declaration, Hasegawa claimed that her attorney received documents from Haryati "only two days prior to the private mediation," which "purported to be memorandums with a bank statement and a check that were allegedly faxed to and from [Mulyadi] in support of the existence of the Promissory Note." Hasegawa claimed the existence of these documents "ultimately made [her] sign the Settlement Agreement." She claimed she "was pressured to sign the Settlement Agreement under the assumption that the documents were true and authentic." However, at some unspecified time after she signed the agreement, she claims to have discovered that the documents were "fraudulently created by Haryati." Hasegawa argued the documents must have been forged by Haryati because Mulyadi "did not read, write, or have any working knowledge of the English language (yet allegedly Mulyadi's memo is entirely in English), and the bank statements referenced in the documents are altered and not reconcilable with any other known bank statements."

5. Hasegawa's declaration attached a declaration from Mulyadi that was filed in other litigation in which he stated that: "My native language is Indonesian which I read, write and speak with ease. I also speak Mandarin Chinese to a lesser extent. English is a distant third language. I do not speak, read or write English very well. . . . For documents in English, I rely on persons familiar with English and Indonesian or Mandarin Chinese to explain the content. This Declaration was read to me twice in Mandarin Chinese, I asked a number of questions, made comments and reviewed revisions before I signed it."

6. Judge Uzcategui granted the motion to enforce the settlement agreement and rejected Hasegawa's claim of fraud as not being supported by specific allegations of when and how the Administrators became aware of the alleged fraud, reliance on those documents where it was apparent on their face that they were in English, and other proof deficiencies. The court rejected the argument that the settlement agreement ran contrary

to the public interest. The Administrators appealed, and the court of appeals affirmed on the following grounds:

a. The trial court's determination that the parties entered into a binding settlement is supported by substantial evidence, specifically the verified representations of appellants in their petition to approve the settlement agreement as well as counsel's declaration. This sworn testimony established: (1) the terms of the settlement; (2) that the settlement was the result of an arm's length negotiation mediated by a retired judicial officer; and (3) the voluntary assent of all parties and the approval of all counsel.

b. Administrators were the ones seeking to rescind the contract for fraud, and bore the burden of proof to establish fraud. Hasegawa's declaration was the only evidence put forth by Administrators in support of their allegations of fraudulent inducement. The trial court found Hasegawa's testimony on this point was not credible. Administrators' evidence was not so compelling as to require finding in their favor as a matter of law. As proof of fraud, appellants alleged that documents purporting to be memoranda authored by Mulyadi must have been fraudulently created by Haryati because they were written in English and Mulyadi could not read or write English. As the trial court pointed out, the fact that these documents were written in English would have been apparent from the face of the documents. Administrators do not explain how they reasonably relied on these memoranda in settling the litigation if they knew Mulyadi could not read or write English.

c. Hasegawa's claim that the memoranda were forged is belied by the very declaration from Mulyadi that Hasegawa attached to her declaration. Mulyadi's declaration is written in English. As he explained in the declaration, he was, in fact, able to read, speak, and write in English but could not do so "very well." Nonetheless, he was able to review and sign his English-language declaration because he had the declaration read and explained to him before signing. Hasegawa's own evidence therefore establishes that Mulyadi was fully capable of ratifying and executing documents written in English despite his limited familiarity with the English language. This significantly undermines Hasegawa's claim that the memoranda must have been forged because they were in English.

d. Appellants did not offer any evidence showing the bank statements were irreconcilable with other records. The allegations of fraud were not supported by specific allegations showing when and how they became aware of the alleged fraud. These deficiencies in Hasegawa's declaration diminished both the weight and credibility of her testimony. The trial court was not obligated to credit Hasegawa's testimony.

e. There is a strong public policy favoring settling of disputes. Appellants offer no argument or authority showing prejudice to the public interest such as to warrant rescission of the settlement agreement. The court may disregard conclusory arguments that are not supported by pertinent legal authority. Appellants do not claim the settlement agreement itself contained illegal or unconscionable terms. Instead, appellants appear to argue that there were weaknesses in Haryati's underlying claim, and it would be generally unfair to enforce the settlement agreement because Haryati may not have ultimately been able to prevail on her

claim at trial. This argument is unavailing. Nothing in the record suggests these purported weaknesses in Haryati's case were unknown to Administrators at the time they entered into the settlement agreement. Administrators were free to use these alleged deficiencies and irregularities in Haryati's supporting documents to negotiate a lower settlement or they could have refused to settle entirely on the basis that they would prevail at trial. Administrators appear to have done so here, as Haryati abandoned her claim for interest under the promissory note in agreeing to the settlement. Settlements are rarely admissions of fault or liability and are often compromises motivated by practical concerns such as the parties' respective assessments of the risks and costs of continued litigation. This is precisely the case here. Administrators' decision to settle this action despite the possibility that they could have prevailed on the merits in no way prejudices the public interest and instead is entirely consistent with the strong public policy of this state to encourage the voluntary settlement of litigation.

C. *Hillman v. Polacheck,* 2025 U.S. Dist. LEXIS 162046 (United States District Court for the Central District of California 2025). "No representations" and integration clauses in settlement agreement do not result in summary dismissal of claims that settlement was product of fraud due to misrepresentation of value of trust assets in dispute.

1. On April 27, 1973, Stuart Hillman and Marion Hillman created The Hillman Family Revocable Trust Agreement. On November 30, 2005, they amended and restated the trust in its entirety (collectively "Revocable Trust"). This trust was created for the benefit of their children: Ron, Lori, and Julie.

2. Stuart passed away on May 13, 2010. Under the terms of the Revocable Trust, the trust in its entirety was divided into a Bypass Trust and a Survivor's Trust. Marion served as the sole trustee of the trusts until her death. As a trustee, Marion amended the Survivor's Trust several times. Ron disputed each of Marion's amendments. After Marion's passing, Defendants Lori and Julie became co-trustees of the Survivor's Trust. Alan Solursh was the financial planner of The Hillman Family Trust.

3. In an effort to negotiate a resolution to the disputes, the parties entered into a confidential release and settlement agreement on October 15, 2021. The Agreement "allocate[s] $2,123,192.00 to Ron's share of the trust," or "one-third of the net Trust assets . . . to be offset per the terms of the Trust, by the amounts Ron received from his parents during their lifetime" and by "the monthly stipends Ron has already received," resulting in net distribution of $1,760,335.48. The Agreement also includes a release waiver and covenant not to sue. All parties waived a formal accounting by the Trustees. The Agreement also provides that: "No Party has relied upon any statement, representation, warranty, promise, or condition (whether oral or written), except as expressly set forth herein. Any statement, representation, warranty, promise, or condition (whether oral or written) not specifically incorporated herein is not binding, and is of no force or effect." Finally, the Agreement provided that each party has received or had the opportunity to receive legal counsel about the contents of the Agreement.

4. Ron sued Lori, Julie, and Alan alleging fraud, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Defendants removed the case to the federal district court and Julie and Alan moved to dismiss. The court granted the motion and dismissed the Complaint with leave to amend, finding that Plaintiff's claims "[fell] squarely within the scope of claims that Plaintiff released under

the Agreement." Since Plaintiff's counsel failed to appear at the hearing, Plaintiff was ordered to show cause why claims against the remaining Defendant (Lori Hillman) should not be dismissed. Plaintiff responded by averring that he intended to amend the complaint to allege fraudulent inducement with greater particularity. Plaintiff filed his amended complaint, and Defendants moved to dismiss contending that the release bars Plaintiff's claims.

5. The federal district court refused to dismiss the complaint on the following grounds:

a. Plaintiff contends that the Court must void the Agreement as he was fraudulently induced into executing the agreement. Under California law, a release is invalid when it is procured by misrepresentation, overreaching, deception, or fraud.

b. Plaintiff contends that Defendants misrepresented the true value and income of the Alabaster property in the Settlement Agreement itself, alleging that Lori and Julie knew that the building was valued at $3.2 million and drew a monthly income of $17,000, but concealed this fact from Ron. Exhibit A to the Agreement lists the value of each asset, including $2.775 million for Alabaster.

c. The Settlement Agreement does not definitively preclude a fraudulent inducement claim. California law acknowledges that a "no representations" and integration clause, akin to the provisions here, does not establish as a matter of law that any reliance by appellants on misrepresentations not contained in the contract was unreasonable. Similarly, a waiver of California Civil Code section 1542 can be set aside, if procured through fraud.

d. Here, Plaintiff alleges that Defendants' induced him to enter the Agreement by concealing the true value of the Alabaster property. Assuming this allegation to be true, as the Court must at this stage, the Agreement could be found to be unenforceable.

e. Plaintiff alleges that he entered into the Agreement based on Defendants' representation that the figures reflected in the Attachment to the Agreement were in fact the entirety of the entire estate. The Agreement's no-representation clause does not preclude Plaintiff from alleging that he relied on Defendants' representations. And here, the Court cannot determine if his reliance was justified. At the pleading stage, this suffices.

f. Plaintiff alleges that Lori and Julie are co-trustees of the Trust, of which he was a beneficiary; that they breached their fiduciary duty by fraudulently inducing Plaintiff to enter the Agreement; resulting in Plaintiff's financial loss. Again, that is enough at this pleading stage.

g. Here, Plaintiff alleges that Defendants sought to frustrate the purpose of the parties' Agreement by misrepresenting the Alabaster property's true value. This claim too is adequately alleged.

h. California law lacks a standalone claim for unjust enrichment. Both unjust enrichment and restitution describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request. Accordingly, when a plaintiff alleges unjust enrichment, the courts construe the cause of action as a quasi-contract claim seeking restitution. Plaintiff alleges that

he was fraudulently induced to accede to the Agreement, see supra, and that Defendants were unjustly enriched as a result. At this stage, that is enough.

D. *Libby v. Libby,* 2025 U.S. Dist. LEXIS 12025; 2025 LX 113868 (United States District Court for the Eastern District of Missouri, Northern Division 2025). Alleged agreement to divide estate fails for lack of consideration.

1. Plaintiff Roger Libby filed this diversity suit against Defendant Eric Libby, his brother, asserting a state law breach of contract claim. In his pro se amended complaint, Plaintiff alleges that he and Defendant agreed to divide their late mother's estate equally With respect to the agreement, Plaintiff specifically alleged: (1) Plaintiff phoned his defendant brother on their mother's cell phone from the Lovelock Correctional Center ["LCC"]; the sole purpose of this telephone meeting was to discuss their mother's recent death and to agree upon a set of terms for the division of cash assets located in their mother's bank account and the community property belonging to her estate; (2) during this brief telephone meeting, both parties expressly agreed that all such assets should be divided equally between them, creating an oral, recorded contract with mutuality of obligation upon both parties for the fifty percent equal division of all the community property and cash assets of said estate.

2. Plaintiff maintained that a recording of the agreement exists in the prison phone system at the LCC. Plaintiff further alleged that, prior to the commencement of probate proceedings in connection with their mother's estate, Defendant withdrew $220,402.66 from her checking account and started pilfering items from her residence.

3. Plaintiff sought a declaratory judgment that a lawful contract exists between the parties entitling him to 50% of all the cash assets and community property that belonged to his mother's estate. Plaintiff also sought monetary damages, including actual damages equivalent to half of the total value of cash assets and community property that Defendant removed from their mother's estate.

4. Defendant was personally served at the Fulton Reception and Diagnostic Center. Plaintiff filed a motion for entry of default judgment, which the Court construed as one for entry of default by the Clerk of Court. The Clerk granted an entry of default against Defendant.

5. The federal district court dismissed the claim without prejudice on the following grounds:

a. The essential elements of a contract claim are not met, most distinctly that of legal consideration. Consideration is created by "either a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party."

b. Plaintiff's amended complaint allegations do not suggest that the purported agreement was supported by any form of legal consideration, nor do any allegations in the amended complaint permit the Court to infer that some form of consideration might exist. Plaintiff is therefore not entitled to default judgment on his breach of contract claim.

c. Because Plaintiff failed to allege the essential elements of his claim, it is dismissed without prejudice.

XXI. SELF-DEALING

A. *Conn v. 01150274 Rowene Macmillan Conn*, 2025 Cal. App. Unpub. LEXIS 5900; 2025 LX 417066 (Court of Appeal of California, Fourth Appellate District, Division Three 2025). Trustee breached duties by funding trust based on an outdated valuation, and funding trust with an unsecured promissory note from the trustee.

1. Laurence ("Larry") and Robert ("Robby") Conn are the adult children of Ralph Conn, who married Rowene in 1986. In 2007, Ralph and Rowene established an inter vivos revocable trust. At that time, they transferred their residence in Newport Beach into the trust. Under the terms of the inter vivos trust, upon the first death of one of the spouses, three new trusts would be created, only two of which are relevant here: the Survivor's Trust, to be funded with the survivor's one-half share of the community estate, and the Exemption Trust, to be funded with decedent's one-half share. The surviving spouse became the sole trustee of both trusts.

2. The Exemption Trust provided: "Upon the death of the Deceased Grantor and in the event that the Deceased Grantor is Grantor Husband, all of the assets of the Exemption Trust shall be distributed to the children of RALPH CONN: CATIE CONN TIMME, ROBERT LEE CONN, and LARRY C. CONN." However, somewhat inconsistently, it then provided: "In the event the Exemption Trust is not distributed to the beneficiaries described above, the Trustee shall pay to the Surviving Grantor, all of the net income of the Exemption Trust." The Surviving Grantor also had a power of invasion: "If at any time, in the discretion of the Trustee, the Surviving Grantor shall be in need of additional funds for his or her reasonable health, education, support or maintenance, the Trustee, in addition to the income payments herein above provided, may in its discretion, pay to or apply for the benefit of the Surviving Spouse of the Grantor such amounts of principal of the Exemption Trust, up to the whole thereof, as the Trustee may, from time to time deem advisable. The Surviving Grantor need not exhaust other sources of income or assets to be entitled to such payment."

3. The parties interpreted these provisions as providing the surviving spouse with a life estate in the Exemption Trust, with the children being remainder beneficiaries. Elsewhere, the inter vivos trust provides discretion to the trustee to make any property divisions either in kind or in money. The inter vivos trust also specified that the interests of income beneficiaries were considered primary over remainder beneficiaries. The inter vivos trust provided a six-month grace period for the surviving spouse to make any property distributions pursuant to the trust, and, within that period, "the deferred division or distribution shall be made as if it had taken place at the time prescribed in this instrument."

4. Ralph died in November 2010. Rowene commissioned an appraisal of the residence as of the time of Ralph's death, which valued the residence at $1,172,500. Rowene did not fund the Exemption Trust at that time, nor within the six-month grace period provided by the inter vivos trust. Instead, in September 2013, she essentially sold the 50 percent interest in the residence to herself by funding the Exemption Trust with an unsecured "Demand Note" in the amount of $475,321.34, which bore interest at a rate of 0.35 percent per year. That amount was calculated by taking the appraised value of the home as of November 2010, subtracting the existing mortgage, and dividing the remainder by two to come up with the amount of Ralph's community property interest. She then

conveyed Ralph's fifty percent interest in the residence to a new trust, of which she was the primary beneficiary. This was all done on the advice of counsel.

5. Beginning in March 2018, Robby began asking for a meeting with Rowene and her counsel to go over the administration of the trust. His requests were repeated numerous times and in various ways over the ensuing seven months, but Rowene either ignored him or put him off. Sometime near the end of April 2018, Rowene mailed to Ralph's children a document titled "Disbursement to the Children of R. B. Conn." That document stated, "I, Rowene M. Conn, do hereby make the final distribution from the Estate of Ralph B. Conn, their father, to his three heirs: to Catharine Conn Timme, Robert L. Conn, and Laurence C. Conn." It then went on to explain the use of the Demand Note, as well as how the value of the residence was calculated. It also explained the amount of each heir's distribution. It concluded: "Please sign, date, and return to me that you are receiving the final payments and that the demands of the Note have been fulfilled."

6. When Larry received the Disbursement Letter, he was aware that Robby had concerns about the administration of the trust. He was also aware that Robby did not intend to sign it. Nevertheless, with the exception of asking for a correction of the spelling of his name, Larry signed it without further objection. Larry received his distribution of $145,623.12. Robby, however, did not sign the letter and continued seeking a meeting with Rowene. That meeting finally occurred on October 10, 2018. According to Robby's testimony, Rowene's counsel admitted at the meeting that the Exemption Trust had not been properly funded and that the Exemption Trust was entitled to a 50 percent interest in the residence.

7. Larry filed a petition in the probate court against Rowene, and alleged Rowene breached the trust by undervaluing the residence and backdating the demand note. He further alleged that Rowene's distribution fraudulently denied Larry the benefit of appreciation on the residence, both by undervaluing the residence and by including an interest rate well below the expected appreciation of the residence. Larry sought damages of at least $162,900.37, plus punitive damages. Rowene filed a cross-petition and alleged that Larry fraudulently induced the disbursement by signing it without any intention to honor the finality of the payment. Rowene sought recission of the disbursement and damages. Robby filed his petition against Rowene, and alleged breaches of fiduciary duty, Robby sought damages and removal of Rowene as trustee. He also alleged a cause of action for elder abuse.

8. The court held that Larry Conn had no credibility, affirmed the enforceability of the Disbursement Letter, finding Rowene had acted in good faith, and denied Larry's petition in its entirety. The court denied Rowene's cross-petition for fraud against Larry. The court granted Robby's petition in part. It ruled that Rowene was entitled to fund the Exemption Trust with an unsecured IOU, but that she breached the trust agreement by funding the Exemption Trust in 2013 based on an appraisal of the property as of 2010. The court then calculated the difference between the 2010 and 2013 valuations, and awarded Robby his 1/3 share of that difference in damages. It then calculated interest at 10 percent per year, resulting in a total damage award to Robby of $76,383.57. The court rejected Robby's claim for elder abuse.

9. Larry and Robby appealed, and Rowene filed a cross-appeal. The court of appeals reversed and remanded on the following grounds:

a. Rowene breached the terms of the trust by funding the Exemption Trust with an unsecured demand note. Rowene was required to divide the existing res of the trust on the death of the deceased spouse, which Rowene failed to do at that time. That was a breach of trust.

b. The funding of the Survivor's Trust was expressly permitted to "be satisfied in cash or in kind, or partly in each, only with assets to be valued at the date or dates they are distributed to the Survivor's Trust." The provisions concerning the Exemption Trust do not contain a similar provision, but instead require funding with "the balance of the Trust Estate," which was expected to consist of Ralph's separate and community property. Nevertheless, under the general powers of the trustee, section 16.1(O), a similar power to fund in either cash or in kind is conferred: "In any case in which the Trustee is required, pursuant to the provisions of the Trust, to divide any Trust property into parts or shares for the purpose of distribution, or otherwise, the Trustee is authorized, in the Trustee's absolute discretion, to make the division and distribution in kind, including undivided interests in any property, or partly in kind and partly in money, and for this purpose, to make such sales of the Trust property as the Trustee may deem necessary on such terms and conditions as the Trustee shall see fit." Given the way the trust is structured and the powers conferred to the trustee, the funding requirements applicable to the Survivor's Trust apply equally to the Exemption Trust. Rowene was entitled to fund the trust with either an interest in the property or its cash equivalent.

c. Rowene breached the trust by funding it in 2013 but relying on a valuation of the residence as of 2010. This breached the provision that the asset be "valued at the date or dates they are distributed." Rowene was also not entitled to fund the Exemption Trust with an unsecured promissory note. The trust required that the funding be in "cash" or "in kind." Those are straightforward terms. "Cash" is about as clear as can be: it means money; currency. The term "in kind" has a well-known meaning in the law: it means the property itself. A "distribution in kind" is a transfer of property in its original state, such as a distribution of land instead of the proceeds of its sale. This is consistent with the trust itself, which qualifies the term "in kind" with the phrase "including undivided interests in any property." This shows the trust itself understood "in kind" to refer to actual property as well. A promissory note is neither cash nor "in kind" property.

d. The "absolute discretion" is the discretion to choose between a cash distribution or an in-kind distribution; it is not the absolute discretion to fund the trust with something else altogether. And while the trustee does have the power of sale, that power is qualified by the phrase "for this purpose" — i.e., for the purpose of a cash or in-kind distribution. In other words, the trustee can sell the property and distribute the cash proceeds from the sale. But that power does not alter the fundamental obligation to fund the Exemption Trust with either cash or an interest in the property itself. In concluding otherwise, the trial court erred.

e. The court should have granted Robby his full distribution, but Robby was not entitled to interest between 2013 and 2018. The court awarded Robby the difference between the 2010 appraisal and the 2013 appraisal. But this would only make sense if Robby had already received the distribution based on the 2010

appraisal. Unlike Larry, he did not. Thus, he should have been awarded the full amount of his distribution utilizing the 2013 appraisal.

f. Rowene reads too much into the Disbursement Letter. It was not a waiver agreement. Nowhere does the Disbursement Letter mention anything about a waiver or release of liability. The closest it gets is (1) describing the distribution as "final," and (2) a signature line acknowledging receipt of the distribution and "that the demands of the Note have been fulfilled." The Note was a breach of her duty, and thus that part of the Distribution Letter has no effect. Beyond that, the recipients were not asked to agree to anything at all, much less a waiver of liability.

g. Ultimately, Rowene decided to fully distribute the principal of the trust prior to her death. She was not required to do that. However, as the trial court observed, once she made that decision, she had to carry it out in a manner that was consistent with her fiduciary duties. That included a requirement that she properly calculate the principal and fully distribute it to all of the beneficiaries. Because she took on that duty as trustee, Robby was entitled to enforce it. However, awarding interest damages from 2013 was error. Indeed, Larry concedes the error. The problem is that the trust is clear that Rowene is the income beneficiary of the Exemption Trust. Larry and Robby are remainder beneficiaries. Even when Rowene dies, while the principal must be distributed to Ralph's children, Rowene's children are entitled to any income that had not been previously distributed to Rowene. Because Robby is not entitled to any income generated by the principal of the trust, there was no sound basis for awarding Robby interest from the period of 2013 through the time of trial.

h. The trial court made an express finding that Rowene was relying on the advice of counsel in good faith throughout her administration of the trust, and we have no reason to disturb that finding. The case is remanded to the trial court to consider in the first instance whether interest can and should be awarded from 2018 onward.

i. The trial court denied Larry's petition in its entirety. However, the conclusions above apply equally to Larry. He is also entitled to a full distribution from the trust based on the 2013 appraisal. The Disbursement Letter was not a waiver. When the Disbursement Letter used the word "final," that meant Rowene intended to fully distribute the Trust, leaving nothing to be distributed in the future. What it did not purport to do is waive any breaches of the trust or release Rowene from any liability as trustee. Nowhere in the Disbursement Letter is the word "waiver" or "release" mentioned. It simply did not touch on that topic at all. Moreover, it did not even require an acknowledgment that the terms of the trust had been fulfilled — it required an acknowledgment that the terms of the Demand Note had been fulfilled.

j. Additionally, even if the Disbursement Letter had purported to release Rowene, it would not have complied with state law that provides that a beneficiary may release a trustee from a breach, but such a release is not effective in the following circumstances: "(1) Where the beneficiary did not know of his or her rights and of the material facts (A) that the trustee knew or reasonably should have known and (B) that the trustee did not reasonably believe that the beneficiary knew," and "(2) Where the transaction involved a bargain with the trustee that was not fair and

reasonable." There was no evidence that Larry actually knew about Rowene's breach of trust, and the transaction did involve a bargain with the trustee that was not fair — Rowene sold the residence to herself at a below-market price. Larry was not precluded from seeking his full distribution under the trust.

k. There is a three-year statute of limitations from the date a beneficiary receives sufficient disclosure of a claim. Rowene argued the limitations period began in April 2018 when she transmitted the Disbursement documents. Robert's petition was filed in May 2021. Even assuming the statute began to run in April 2018, Robert's claims are timely. In response to the COVID-19 pandemic, the Judicial Council enacted Emergency Rule 9(a), which tolled unexpired statutes of limitations from April 6 to October 1, 2020. That 178-day tolling period extends the three-year limitations window, in this case, to October 2021. Because Robert filed in May 2021, his claims fall well within the extended period.

l. Robby asserted a cause of action for financial elder abuse based on him turning 65 on August 12, 2020. Even though most of the relevant events of this case took place before he turned 65, he contends Rowene still committed elder abuse because, after he turned 65, Rowene retained the property. However, his argument depends on the premise that Rowene was obligated to transfer an interest in the residence to the trust. As we have already concluded, Rowene had the option of funding the Exemption Trust with money or in kind, and in 2013, she chose money (albeit mistakenly believing a promissory note satisfied that condition). Since that occurred well before Robby turned 65, his claim for elder abuse fails.

m. Rowene's fraud claim was based on Larry's testimony stating that he did not intend the Disbursement Letter to be final and did not intend the Disbursement Letter to be a contract. Rowene's fraud claim makes very little sense. The Disbursement Letter was not clearly a contract. The only arguable contractual term in it came in the signature line and was an acknowledgment that the terms of the Demand Note had been satisfied. The ambiguity Larry may have felt upon reading it was understandable.

n. Moreover, Rowene's fraud claim has another, more fundamental problem. This is not your typical promissory fraud case where a party promises to do something without any intent to do it. There was nothing left for Larry to do. He signed the acknowledgment, and the Disbursement Letter did not call for any other action on his part. To the extent the Disbursement Letter created any legal obligations, it would have been enforceable regardless of Larry's subjective intent. So, it is not clear what exactly the misrepresentation was. He was certainly entitled to file a lawsuit to test the validity and scope of the agreement, and, in any event, if the claim is that he committed fraud by filing a lawsuit, that claim would run headlong into the litigation privilege. Accordingly, Rowene's fraud claim was problematic on multiple levels and the court was correct to reject it.

B. *Potter v. Wall (In re Potter Exemption Tr.*, 2025 MT 231; 2025 Mont. LEXIS 1201; 2025 LX 405707 (Supreme Court of Montana 2025). Trustee's employment, compensation, housing, and supervisory roles with company owned by trust preclude summary judgment that transactions between trust and company were not affected by conflicts of interest, and trustee was required to disclose company financial information to trust beneficiary.

1. In 2003, Betty Potter ("Betty") and her late husband Orrin ("Bill") Potter established a family trust that, upon Bill's passing in 2013, split into three separate trusts: the Survivor's Trust, the Marital Trust, and the Potter Exemption Trust ("PET"). By operation of the family trust instrument, Betty became the income beneficiary of the PET, but not a trustee, and Mary Potter Vero ("Mary") and William S. Potter ("Spike"), Bill's children from a prior marriage, were named as the remainder beneficiaries. The family trust instrument provided that Land Lindbergh, James Masar, and Henry Goetz, Bill's long-time friends, would serve as the initial successor trustees of the PET. Various assets transferred to the PET, including: (1) approximately 4,000 undeveloped acres near Greenough, Montana ("PET land"); and (2) 26.7% ownership interest in E Bar L that runs a historic guest ranch located on land it owns (about 85 acres) and on land it leases from the PET for commercial recreational activities. The PET land is encumbered by, among other things, a conservation easement in favor of The Nature Conservancy ("TNC").

2. The PET provides for Betty, the sole beneficiary, to receive discretionary income/principal distributions sufficient to maintain her standard of living as measured at the time of Bill's passing. It also provides that Betty must continue living in the Potter home, which is located on land E Bar L owns. The PET rents the Potter home from E Bar L under a reciprocal agreement conditioned on the E Bar L's leasing the PET land. At the trustees' discretion, upon Betty's passing, the PET assets may pass to Mary and Spike or their descendants. Mary's daughter, Juanita Vero ("Juanita"), is an E Bar L manager and partner.

3. The PET requires trustees to manage intertwined trust assets, including the PET land and the PET's partnership interest in E Bar L, which operates, in part, on land it leases from the PET. The PET earns income as the lessor of its land and as an E Bar L partner. Given this special, historical relationship between the PET land and the E Bar L, Bill and Betty designated Lindbergh, Masar, and Goetz as PET co-trustees. According to the trust instrument, trustees have full discretion to select their successors. In 2018, the original successor trustees retired and appointed Caitlin Wall ("Wall"), James Stone ("Stone"), and George Hirschenberger as their replacements. Hirschenberger died suddenly in 2022, and Wall and Stone have been the PET's only trustees since then. Stone is a contractor employed by the E Bar L for fencing and irrigation work. Wall works for the E Bar L as an assistant manager; lives in employee housing on E Bar L property; and reports directly to E Bar L partners. Original successor co-trustees Lindbergh and Goetz recognized Wall's potential conflict of interest when they appointed her but decided that Wall's familiarity with E Bar L operations outweighed any risk of conflict.

4. In 2010, Bill and Betty entered into a 5-year lease with E Bar L for use of the 4,000 acres the PET now owns. After the PET came into existence upon Bill's 2013 death and the 4,000 acres were transferred to it, the successor trustees negotiated shorter 1-year leases until 2022, when all three successor co-trustees (Wall, Stone, and Hirschenberger) negotiated a 5-year lease. The 2022 lease provided for optional renewal for up to two more 5-year terms, unless a party declines to renew. The 2022 rent was $50,000 annually, increasing each year by a certain percentage based upon the U.S. Consumer Price Index. The 2022 lease also imposed additional requirements, including an annual operating plan for land use and compliance with TNC's conservation easement.

5. Betty was at odds with Bill's children, Mary and Spike, Mary's daughter Juanita (an E Bar L partner), Matt Knox (E Bar L's corporate representative), and trustee Wall (an E Bar

L employee). Betty contended that Wall moved the PET office out of Betty's home into Wall's home and would not meet her in person without a third-party present. Wall conceded her relationship with Betty is strained. Stone, the only other PET trustee, is Betty's point-of-contact. Betty believed Wall's hostility toward her was motivated by Wall's desire to act in her bosses' favor when administering the PET and to conceal a conflict of interest. Betty was especially concerned that, since the PET and E Bar L changed accounting firms in 2020, she no longer received E Bar L partnership financial information like she received from the original successor co-trustees.

6. Betty petitioned for information and removal of Wall as a PET trustee. Betty alleged Wall was operating under a disqualifying conflict of interest as both a PET trustee and E Bar L employee and violated her fiduciary duties by encouraging favorable contracts for E Bar L, including the 2022 lease agreement. Betty, who wanted Wall removed and replaced, named three potential appointees to replace her. Betty also sought disclosure of E Bar L partnership financial records she alleged were necessary to protect her PET interests and prevent what she suspected was a breach of trust by Wall. During discovery, Betty filed a motion to compel discovery from E Bar L to remedy incomplete discovery responses. The court ultimately denied Betty's motion because the information Betty sought was the subject of her petition and entitlement remained in dispute.

7. The parties filed competing motions for summary judgment and attorneys' fees. The District Court denied Betty summary judgment on all her claims and granted summary judgment to the PET and E Bar L on their claims, except it partially denied summary judgment on the PET's claim to define the scope of the trustees' obligations to Betty. The court determined that the question of what obligations the trustees owed to Betty when acting for the PET as an E Bar L partner was "not ripe for the court's consideration." The District Court concluded that Wall was not administering the PET under any conflict of interest. Based on its conclusion there was no conflict, the District Court found no need to remove Wall, allow Betty access to E Bar L's partnership financial records to investigate mismanagement or a breach of trust, or find the lease voidable. The court also concluded that, although the PET initially had three co-trustees, the family trust instrument did not mandate any number of trustees or authorize Betty to appoint successor trustees. Finally, the court determined all parties were responsible for their costs and attorney fees.

8. Betty timely appealed and the Montana Supreme Court reversed and remanded on the following grounds:

> a. Whether a conflict of interest exists is a question of fact, assessed on a case-by-case basis. Ordinarily, questions of fact are not amenable to summary judgment. Montana's Uniform Trust Code prescribes a trustee's duty of loyalty to beneficiaries, including the duty to administer the trust solely in the beneficiaries' interests. In managing trust assets, income and expenses, and distributions, a trustee must act with the utmost good faith toward the beneficiary and may not act in her own interest, or that of a third party. A conflict between the trustee's fiduciary and personal interests is presumed where a trustee enters into a transaction involving management of trust property with an enterprise in which the trustee has an interest that might affect the trustee's best judgment. Any transaction involving management of trust property affected by a conflict of interest between the trustee's fiduciary and personal interests is voidable by an affected beneficiary, except under circumstances not at issue here.

b. A trustee also has a fiduciary duty to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. A trustee's conflict of interest or failure to inform and report are breaches of trust and may be grounds for the trustee's removal. Removal is also permitted where there has been a substantial change in circumstances and removal is in the best interests of all beneficiaries, not inconsistent with the trust's purpose, and a suitable successor trustee is available. State law also permits unqualified removal where a trustee has committed a serious breach of trust.

c. Whether Wall was operating under a conflict of interest was a question of fact that could be resolved on summary judgment only if there was no genuine dispute as to the material facts and reasonable minds could reach but one conclusion. This question could be determined on the summary judgment record as a matter of law. Here, it is undisputed that Wall is an assistant manager at E Bar L who receives free year-round housing and seasonal meals in addition to compensation. It is also undisputed that Wall has received pay raises and bonuses from her E Bar L employer since becoming a PET trustee. Wall admitted that E Bar L's continued existence depends on its ability to lease land from the PET. Therefore, Wall's livelihood and financial success is inextricably linked to the success and continued existence of E Bar L, which ultimately depends on E Bar L's being able to lease PET land. These circumstances are sufficient to raise a factual issue that Wall's best judgment might be affected by her personal interests in E Bar L.

d. It is not required that the trustee own an interest in the entity on the other side of the trust transaction for a conflict of interest to arise. The undisputed facts regarding Wall's employment, compensation, housing, supervisory relationships, and E Bar L's dependence on PET land leasing, at minimum, create a genuine issue of material fact whether PET-E Bar L transactions were "affected by" a conflict. Reasonable minds could conclude that Wall's participation as a trustee in transactions with E Bar L involving PET property renders those transactions presumptively affected by a conflict of interest. Therefore, the District Court erred in resolving as a matter of law against Betty the question of whether Wall's E Bar L employment while serving as a PET trustee created a conflict of interest.

e. Because there are genuine issues of material fact as to whether Wall's employment by E Bar L during negotiation and administration of the 2022 lease triggers the statutory presumption of a conflict, the District Court erred in entering summary judgment for the trustees on conflict-based claims.

f. The erroneous resolution of Wall's conflict of interest raises fact questions regarding the reasonableness and fairness of the 2022 PET-E Bar L lease agreement, which must be determined upon considering Wall's dual roles as PET trustee and E Bar L employee. After operating under 1-year leases since 2015, all three PET co-trustees and E Bar L negotiated a new lease for use of the 4,000-acre PET land in 2022. The lease is for a 5-year term and subject to automatic renewal for two consecutive 5-year terms unless a party declines to renew. The initial rent is $50,000 annually, with increases annually based on the U.S. Consumer Price Index. The lease grants E Bar L exclusive use of the PET land, subject to other third-party leases and the PET's timber harvesting rights. For

capital improvements, the lease provides that E Bar L and the PET shall agree upon which party will bear the cost and whether E Bar L will be entitled to reimbursement for any remaining value of the improvement(s) at the end of the lease term and what that amount will be. Additionally, the PET and E Bar L must annually negotiate and implement an operating plan to establish rights and responsibilities of the parties, costs, and payment of the same, including capital improvements, the employment of a Land Steward Manager, results of annual reviews by interested third parties (including TNC), and the annual grazing schedule. The Land Steward Manager's primary responsibility is "to ensure the [E Bar L] meets its performance obligations" under the lease and annual operating plan.

g. By its own terms, the lease term is historically longer than any lease of record in this case — three times longer. Also, the $50,000 annual rent is substantially lower than historical rents, which were as high as $125,000 in 2020, and that historically low rent with small incremental annual increases is locked in for up to 15 years. Finally, the lease provides for additional, embedded decision-making between the PET and E Bar L, and therefore Wall and her employer, regarding who will fund capital improvements, whether the E Bar L will be reimbursed for a portion of those expenditures at the end of the lease term, and who will pay for the Land Steward Manager and how he or she will be directed, under the operating plan, to ensure E Bar L performs under the lease.

h. Because the conflict-presumption question and the reasonableness of the 2022 lease are intertwined fact questions on this record, summary judgment on the reasonableness of the lease was improper. The parties presented competing evidence bearing on lease term length and structure, the fee level relative to historical rents, CPI escalators, capital improvement burdens, operating plan cost allocations, and the Land Steward Manager's role — matters a trier of fact must assess. Whether Wall had a conflict that operated to E Bar L's benefit and PET's detriment, if any, presents a genuine issue of fact material to whether the lease was valid or should be set aside and precluded summary judgment on this issue.

i. The UTC imposes a duty upon trustees to promptly respond to a qualified beneficiary's request for information that is reasonably necessary to enable the qualified beneficiary to enforce the rights of the qualified beneficiary under the trust or to prevent or redress a breach of trust. True, the PET's partnership K-1 discloses its distributive share, which ordinarily would be sufficient for Betty to protect her distributive interest, but it is only a piece of the partnership's overall financial picture and provides no insight into Wall's conflict or how it affected or will affect PET-E Bar L transactions. The court cannot read the duty to inform and report so narrowly as to require a beneficiary to prove a breach of trust before being entitled to information reasonably necessary to prevent a breach of trust, because that would render the beneficiary's right to information meaningless. Failure to comply with this duty may mask more serious violations by the trustee. Accordingly, when a trustee conflict of interest exists, the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny.

j. Though the PET and E Bar L are correct that entity financial information is ordinarily confidential, we are not convinced it is outside a beneficiary's reach in

all circumstances. A trustee's duty to disclose confidential information is excused only if compliance is unreasonable under the circumstances, including if disclosure is forbidden by other law or would be seriously detrimental to the beneficiaries' interests. However, within the bounds of this reasonableness limit, it is generally up to the beneficiary to determine what information is relevant to protect her interests.

k. Generally, tax return information is confidential, except in limited circumstances, and the only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care. A partner's duty of loyalty is to account and hold as trustee all partnership property and to avoid conflicts of interest and competing with the partnership; the duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. These statutes are not an absolute bar to the otherwise broad information sharing requirements of the UTC. Instead, the court must carefully balance the beneficiary's right to know and discover facts material to preventing or redressing a breach of trust with the confidential or privileged nature of that information.

l. E Bar L's financials were relevant to Betty's claim for Wall's removal, and the PET's and E Bar L's claim that the 2022 lease agreement was valid and enforceable. Trustee Stone and original trustee Goetz testified that what E Bar L could afford to pay — based on its current and projected seasonal income and expenses — was historically a determinative factor in the "fairness" of the land-use lease agreements, making the partnership's profit-and-loss statements relevant for that purpose. Also, the lease terms require the PET and E Bar L to negotiate an annual operating plan, which contemplates spending by both parties. According to Paraic Neibergs, an appraiser for E Bar L, "which entity is burdened by" obligations under the lease's operating plan is the better measure of overall fairness. If Betty is only able to see what the PET pays for, and not E Bar L, she is unable to ascertain whether Wall is in fact negotiating transactions, like the 2022 lease and annual operating agreements, to E Bar L's benefit and PET's detriment.

m. Betty was entitled to this information to prevent or redress Wall's breach of trust. Because the court decided as a matter of law that Wall was not operating under a conflict of interest, it did not consider Betty's information request in context of preventing or redressing Wall's conflict when it authorized grounds for disclosure. Betty is entitled to targeted discovery "reasonably necessary" to enforce her rights and to prevent or redress a breach of trust, subject to appropriate confidentiality protections. The District Court must require a privilege log for any withheld items and may manage production using in camera review and a protective order as needed to balance trust-administration transparency with any legitimate confidentiality concerns. "Reasonableness" and "fairness" of the 2022 lease remain fact questions that the court cannot resolve on summary judgment without this discovery.

n. The court was incorrect that Wall's dual role as PET trustee and E Bar L employee did not create the presumption of a conflict of interest that "might affect" her best judgment in negotiating and administering trust transactions. Accordingly, the District Court must reconsider whether Wall's conflict (1)

constituted a serious breach of trust; (2) interfered with her ability to administer the PET effectively and impartially; and (3), considering her deteriorating relationship with a PET beneficiary, would make Wall's removal in the beneficiaries' interests. As with the 2022 lease agreement, the District Court cannot resolve these fact questions on summary judgment without discovery of E Bar L's financial information "reasonably necessary" to test Wall's conflict and the nature and extent of its effects on her administration of trust property.

XXII. FIDUCIARY DUTIES GENERALLY

A. *Henry v. Henry,* 2025 Tex. App. LEXIS 5917 (Court of Appeals of Texas, Second District 2025). Close family relationship inadequate to support claim for breach of fiduciary duty.

1. Mozelle Henry died on November 6, 2019. At the time of her death, she was unmarried and had four children: Senter Lee Henry III, John Mark Henry, Darrell Wayne Henry, and Laura Lea Hefley. Mozelle owned a ranch (the "Ranch") composed of several tracts that totaled 912 acres. In December 2009, Mozelle conveyed an undivided one-half interest in a 2.25-acre tract — not part of the Ranch — to Darrell. An attorney, Greg Underwood, prepared the deed. Then, in April 2010, Underwood prepared two more deeds.

2. The first deed conveyed the remaining one-half interest to the 2.25-acre tract to Darrell. The second deed ("Disputed Deed") conveyed the entirety of the Ranch to Darrell. Darrell promptly recorded the two deeds to the 2.25-acre tract after their executions, but he did not record the Disputed Deed to the Ranch.

3. In the later years of her life, Mozelle suffered from numerous health problems that resulted in several hospitalizations. In the spring of 2019, she briefly moved into a rehabilitation facility after a hospital stay but left against medical advice after only a few weeks. Mozelle — then ninety-one years old — required the assistance of caretakers when she returned home. She frequently stayed in her home and required medical assistance to walk and perform household activities. Throughout 2019, Darrell helped manage the Ranch and negotiated pipeline easements on Mozelle's behalf.

4. In April 2019, while driving by Mozelle's home, Darrell claimed that he saw Mozelle sitting outside on her electric scooter. Darrell claimed that he stopped his vehicle and that Mozelle drove her scooter into her home, returned with a manilla envelope containing the Disputed Deed, and handed it to him. His siblings later disputed whether Mozelle was physically capable of doing this.

5. On November 6, 2019, Mozelle died, leaving behind a will dated February 2, 2016 ("Will"). The Will devised all her property to her children in equal shares and named Senter as the executor of her estate. A month after her death, Darrell recorded the Disputed Deed. The Disputed Deed contained a front page — which Mozelle had signed — and two pages describing the seven tracts that constituted the Ranch. The two pages that described the Ranch were labeled as Exhibit A. Meanwhile, there was no evidence that Mozelle had ever amended or revoked her 2016 Will, and on September 23, 2020, the 2016 Will was admitted to probate.

6. Darrell did not tell his siblings that he had recorded the Disputed Deed. Instead, they learned of Darrell's actions after Mozelle's death when Laura went to the county tax office to pay the property taxes on the Ranch and was told that Mozelle had deeded the property

to Darrell. In 2021, Darrell sold 70.16 acres of the Ranch to unrelated third persons and collected $257,151 in net proceeds.

7. Senter, as dependent administrator of Mozelle's estate, sued Darrell, seeking to remove the cloud on the Ranch's title and for breaching his fiduciary duty to Mozelle. The case proceeded to trial. Laura and a doctor who specializes in geriatric psychiatry presented testimony on Mozelle's lack of capacity to convey and deliver the Disputed Deed to Darrell. A forensic document and handwriting examiner provided testimony on the likelihood of alteration of the Disputed Deed. The document examiner compared the Disputed Deed's first page and the two deeds to the 2.25-acre tract against Exhibit A, and she explained that, in her opinion, Exhibit A was not originally included with the first page of the Disputed Deed. Her opinion was based on several considerations, including Exhibit A's spacing, font, style, paragraphing, and lack of pen indentations.

8. The trial court found that Exhibit A had not been attached to the Disputed Deed on the date that it was executed and that the Disputed Deed was not valid, was fraudulent, and should be set aside. The trial court further found that the forensic document examiner's testimony was credible but that Darrell's testimony was not credible or consistent with the evidence presented at trial. The trial court also found that Mozelle had lacked capacity in 2019 to deliver the Disputed Deed to Darrell, that she never intended to convey the Ranch, and that she did not physically deliver the Disputed Deed to him. The trial court further found that Mozelle had a relationship of trust and confidence with Darrell, which relationship was based on and related to her ownership of the Ranch. The trial court concluded that Darrell had defrauded Mozelle by deceiving her of his intentions with the Ranch and by selling seventy acres of the Ranch and retaining the proceeds. The trial court ordered Darrell to pay $257,151 to Mozelle's estate as disgorgement of profit from his sale of the seventy acres and granted Senter $514,302 in exemplary damages.

9. Darrell appealed and the court of appeals affirmed in part and reversed in part on the following grounds:

> a. The evidence is legally and factually sufficient to support the trial court's finding that the Disputed Deed is fraudulent. A forged deed is void as a matter of law and passes no title. The forensic document examiner explained that the first page of the Disputed Deed was a heavier quality paper with a watermark while Exhibit A was copy paper without a watermark. The first page was printed from a laser printer while Exhibit A was photocopies and many generations away from the first generation. There was also font differences, spacing abnormalities, and typographical variances between the Disputed Deed's first page and Exhibit A. The document examiner further explained that the Disputed Deed's first page had a footer that was absent in Exhibit A.
>
> b. All three deeds were allegedly prepared by the same attorney, and the first page of all three deeds had the same font. But, unlike Exhibit A in the Disputed Deed, each subsequent page of the two 2.25-acre tract deeds had the same font, spacing, paper quality, footers, and paragraphing. Additionally, Exhibit A did not describe or refer to the instrument to which it was an exhibit, but by contrast, the two 2.25-acre tract deeds contained such a description. Moreover, there was no pen indentations on Exhibit A from Mozelle's signature on the first page of the Disputed Deed. There is legally sufficient evidence to support the trial court's finding that Exhibit A was fraudulent.

c. Because there is legally insufficient evidence to support the trial court's finding that Darrell owed a fiduciary duty to Mozelle, the judgment must be reversed. A confidential fiduciary relationship may exist where influence has been acquired and abused or where confidence has been reposed and betrayed. A confidential relationship exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence. Subjective trust alone is not sufficient to establish a confidential relationship.

d. In examining whether the plaintiff's trust is justified, we examine whether she actually relied on the other for moral, financial, or personal support or guidance. Another factor is the length and depth of the parties' relationship, although a long personal relationship alone is insufficient to create a fiduciary relationship. For example, a familial relationship, while considered a factor, does not by itself establish a fiduciary relationship. Fiduciary relationships may arise when the parties have dealt with each other in such a manner for a sufficient period of time that one party is justified in expecting the other to act in her best interest.

e. The record is missing evidence of additional circumstances that demonstrate Darrell's relationship with Mozelle caused her to relax the care and vigilance that she would have ordinarily exercised for her own protection. Moreover, Senter failed to present evidence that Mozelle's trust in Darrell was justified; that she actually relied upon Darrell for moral, financial, or personal support or guidance; or that they dealt with each other in such a manner that she expected him to act in her best interest. Mozelle may have trusted Darrell to negotiate pipeline easements or perform work on the Ranch, but at best, that evidence merely demonstrated subjective trust. Likewise, the fact that Darrell was one of Mozelle's children and that he had a good relationship with her does not — absent additional circumstances — give rise to a fiduciary duty. Here, the circumstantial evidence presented at trial does not demonstrate that Mozelle was accustomed to being guided by the judgment or advice of Darrell.

f. The evidence fails to show that an informal relationship of trust and confidence existed between Mozelle and Darrell. Moreover, even if we were to presume that Darrell had owed a fiduciary duty to Mozelle, there is likewise insufficient evidence of a breach. Senter asserts that Darrell breached his duty to Mozell during her lifetime because he deceived her regarding his intent to claim ownership of the Ranch. However, the record is devoid of any evidence that Darrell made a material representation of fact to Mozelle — much less, that it was false, that Darrell knew it was false, or that Mozelle had relied upon it. Accordingly, the evidence is legally insufficient to support the trial court's judgment for breach of fiduciary duty because there is less than a scintilla of evidence that Darrell had owed Mozelle a fiduciary duty. The damage awards of $257,151 as disgorgement of profit and $514,302 in exemplary damages are reversed.

B. *Khan v. Khan,* 2025 Conn. App. LEXIS 239 2025 LX 304780; 2025 WL 2301009 (2025). Trustee breached duties by transferring insurance policy proceeds to her personal account, contrary to the policy surrender form, knowingly misrepresenting that the bank account to which she transferred the policy proceeds was titled in the name of the trust, and hiding her actions from the grantor and beneficiaries, and is not entitled to indemnification under the trust terms.

1. On April 19, 2007, Ahmed M. Khan ("grantor") and Lisa C. Khan ("Khan"), who were married, entered into an agreement establishing the Khan Family Trust ("trust"). Khan was the sole trustee and the primary beneficiary of the trust and the six children of the grantor and Khan were the eligible beneficiaries. In connection with the establishment of the trust, Khan purchased a $2 million whole life insurance policy ("policy") on the grantor from Northwestern Mutual Life Insurance Company ("Northwestern Mutual"). The policy paid annual dividends in the form of interest accrual at an annual rate of 3.5 percent. The grantor initially was the named insured and owner under the policy; the trust thereafter became the owner of the policy.

2. The annual premium for the policy was $36,210. The grantor paid the policy premiums until 2012, when the grantor and Khan divorced. To ensure that the policy remained in effect for the benefit of her children, Khan thereafter paid the monthly policy premiums from 2013 until 2018, in an amount totaling $220,624.58. Khan considered each monthly premium payment to be a loan from her to the trust.

3. On October 5, 2018, Khan submitted a form titled "Surrender of Policy for Cash Value/Term" to Northwestern Mutual, instructing Northwestern Mutual to electronically transfer the net cash surrender value of the policy to her personal bank account at Farmington Bank, now known as People's United Bank ("People's United"). Section 3 of the policy surrender form prohibits disbursement to a trustee in his or her individual capacity.

4. Northwestern Mutual thereafter issued a confirmation of policy surrender, effective October 6, 2018, confirming the electronic transfer of the policy's net proceeds in the amount of $377,264.13 "to the credit of Farmington Bank . . . for deposit to [the] checking account number . . . of [the] Khan Family Trust." The policy proceeds, however, were not transferred to a trust account; they were posted in Khan's personal account at People's United on October 10, 2018, resulting in an account balance of more than $400,000. On October 11, 2018, Khan made two transfers, totaling $400,000, from her People's United account to her personal brokerage accounts at Fidelity Investments ("Fidelity"). She thereafter purchased a number of securities during the period from October 12, 2018, to May 10, 2019, with a value of approximately $380,000.

5. Khan did not inform the children or the grantor that she had terminated the policy or that the proceeds of the policy had been invested in her personal accounts. In December 2019, after being informed by the grantor's attorneys that her conduct was improper, Khan opened a trust account at Fidelity in the name of the trust and funded it with $180,866.62 that she had transferred from her personal brokerage accounts.

6. In April 2020, the plaintiffs commenced the trust action against Khan claiming breach of fiduciary duty, conversion, statutory theft, and imposition of a constructive trust due to Khan's alleged mismanagement of trust assets. The plaintiffs sought as relief money damages, common-law punitive damages, treble damages, the removal of Khan as a trustee and the appointment of a successor trustee, and imposition of a constructive trust, as well as attorney's fees, costs, and interest. Khan commenced an the indemnification action against the grantor, claiming that the actions she took regarding the policy were within the scope of powers identified in the trust as "Insurance Powers," including the powers to "surrender any policy for its cash value," to "borrow money for any purpose," and "to rely on others to pay [premiums], with no obligation . . . to make such payments or take any action to keep any policy in force. . . ." She sought a declaration

that, if she were found liable to the plaintiffs in the trust action, the grantor was required to indemnify her and hold her harmless for any damages the plaintiffs recover. Khan also sought an order that the grantor reimburse her for attorney's fees and expert fees incurred in defending the trust action. The grantor filed an answer and special defenses asserting that Khan had breached the implied covenant of good faith and fair dealing and had unclean hands. The trust action and the indemnification action were consolidated and tried to the court.

7. The court found in favor of the plaintiffs in the trust action on their claims of breach of fiduciary duty, conversion and imposition of constructive trust and in favor of Khan on the plaintiffs' claim of statutory theft. As to the statutory theft count, the court found that, although Khan's conduct was improper, the plaintiffs did not prove that she had the requisite intent to deprive the plaintiffs of the policy proceeds. The court further ordered that Khan be removed as trustee upon the appointment of a successor trustee. The court found in favor of the grantor with respect to Khan's indemnification action. In the trust action, the court awarded the plaintiffs both money damages and prejudgment interest totaling $295,738.67 but credited against that amount the $220,624.58 it found that Khan loaned to the trust between 2013 and 2018, resulting in a net damage award to the plaintiffs of $75,114.09. It stated that it would conduct a hearing at a later date to appoint a successor trustee, at which time it would address the plaintiffs' claims for attorney's fees, costs, and offer of compromise interest. Khan filed a motion to reargue in the indemnification action, which the court denied. Khan also filed a motion to reargue in the trust action, which the court granted in part, stating: "The court will issue a corrected memorandum of decision with respect to the calculation of the monthly loans for payment of the insurance policy premiums and the resulting damages award. The court will hear argument on [Khan's] contention that she remained the primary beneficiary of the [trust] after her divorce from the grantor."

8. The court issued a corrected memorandum of decision on July 25, 2023, in which it corrected its prior decision to reflect that Khan was the primary beneficiary of the trust, and the children are the eligible beneficiaries. The court also corrected the amount that Khan loaned to the trust from $217,260 to $220,624.58. Additionally, the court entered an order on July 25, 2023, awarding to the plaintiffs $182,374.50 in attorney's fees and $12,785.27 in nontaxable costs as common-law punitive damages and $791.83 as costs.

9. Khan appealed and the court of appeals affirmed on the following grounds:

a. In its decision, the court explained, in detail, how it calculated the award of damages and the evidence on which the award was based. Specifically, it awarded damages to the plaintiffs on the first, second, and fourth counts of the complaint in the amount of $196,397.51. This figure represented the difference between the $377,264.13 in policy proceeds that Khan had improperly transferred to her personal account and the $180,866.62 that Khan transferred to the trust account at Fidelity.

b. The trial court next considered whether to award prejudgment interest, and found that an award of interest to the plaintiffs at the rate of 8 percent per annum was fair and equitable given the wrongful detention of money by Khan, the failure to fully fund the trust created at Fidelity with all of the policy proceeds, the inability to determine precisely which securities were purchased with the policy proceeds and their current value, and the fact that the plaintiffs were compelled to litigate

this matter for several years, through trial, in order to obtain a judgment in their favor for the benefit of the trust.

c. The court next considered when the interest began to run. The court awarded interest at the rate of 8 percent per annum for two different time periods. It first awarded interest on the policy proceeds of $377,264.13 from October 6, 2018, when Khan misappropriated the policy proceeds, to December 5, 2019, when Khan created and funded the new account at Fidelity. The court next awarded interest from December 5, 2019, through the date of its original decision in this matter on May 23, 2023.

d. Khan transferred the policy proceeds to her personal account, contrary to the policy surrender form, which prohibits disbursements to a trustee in his or her individual capacity. Khan knowingly misrepresented to Northwestern Mutual that the bank account to which she transferred the policy proceeds was titled in the name of the trust, when she knew that she was directing the funds to her personal account. Khan did not advise the plaintiffs or the grantor that the policy had been terminated or that the policy proceeds had been invested in her personal accounts and, further, Khan opened the trust account at Fidelity on December 5, 2019, only after being advised by the grantor's attorneys that she had improperly transferred the policy proceeds to her personal accounts.

e. Khan acknowledged that she had commingled the trust assets with her personal accounts. She further testified that she did not know which stocks she had purchased with the money that was transferred from the trust account to her personal account. Khan advanced her own interests to the plaintiffs' detriment, resulting in damages to the plaintiffs proximately caused by Khan's actions.

f. Considering all the evidence, the court then awarded damages based on the difference between the policy proceeds on the date Khan surrendered the policy and the date Khan opened a new trust account at Fidelity, plus prejudgment interest, and then credited the money that Khan loaned to the trust, resulting in a net damage award to the plaintiffs of $75,114.09. The court's decision reflects careful consideration of the evidence admitted at trial. The evidence was sufficient to support the court's damages determination and, therefore, the court's award of $75,114.09 was not clearly erroneous. Khan, therefore, cannot prevail on her claim that the court improperly found her liable for breach of fiduciary duty.

g. Khan acted without authorization (and without the plaintiffs' knowledge and consent) in terminating the policy, transferring the policy proceeds into her personal banking and investment accounts, commingling those funds with her personal funds, and purchasing securities in her own name (at least in part with the policy proceeds), all to the plaintiffs' detriment. The court's findings support the conclusion that Khan's conduct was willful. Khan acknowledged at trial that she transferred money from the trust account into her personal bank account even though the cash surrender form required that the trustee not be the payee in his or her individual capacity. Khan never informed Northwestern Mutual that the money was being transferred to her individually. Khan testified that the following day, she transferred approximately $377,000 of trust assets plus approximately $23,000 of her own assets to her individual brokerage accounts. Khan acknowledged that the money from the trust account was commingled with her

other money until she opened a new trust account approximately fourteen months later.

h. The court's finding that Khan did not have the requisite intent to deprive the plaintiffs of the policy proceeds for purposes of the statutory theft count does not require a conclusion that Khan's conduct was not willful. Accordingly, Khan cannot prevail on her claim that the court improperly found her liable for breach of fiduciary duty based on conduct that was not willful.

i. The court's finding that Khan did not have the requisite intent to deprive the plaintiffs of the policy proceeds for purposes of the statutory theft count does not compel a conclusion that Khan's conduct was not willful. Further, reading the court's decision as a whole reveals that the court made numerous findings showing that Khan exhibited a reckless indifference to the rights of the plaintiffs or an intentional and wanton violation of those rights. As these findings are supported by the record, Khan cannot prevail on her claim that the court erroneously awarded punitive damages.

j. Having found in favor of the plaintiffs on the first and second counts of the complaint and having found that Khan breached her fiduciary duty as trustee and committed acts that constitute a "serious breach of trust," the court ordered that Khan be removed as trustee upon the appointment of a successor trustee. The Connecticut Uniform Trust ("code") provides that the code applies to all trusts created before, on, or after January 1, 2020, and to all judicial proceedings concerning trusts commenced on or after January 1, 2020. The court properly relied upon the code in removing Khan from her position as trustee. The court's findings regarding Khan's removal as trustee are supported by the record and support the court's conclusion that removal was necessary to prevent future harm to the trust. Khan, therefore, cannot prevail on her claim that the court improperly removed her as trustee.

k. Although the trust terms granted Khan the right to appoint and remove a trustee, she did not retain that right once she was removed as trustee. Khan's removal as trustee created a vacancy. The court, having removed Khan as trustee pending appointment of a successor trustee, properly applied the provisions of the statute and stated, pursuant to the terms of the trust, that it would conduct a hearing to determine whether the named successor trustee was willing and able to serve and, if not, how to appoint a successor.

l. In her motion requesting a reasonable trustee fee, Khan sought a trustee fee of 3 percent of the trust's average cash value of $221,000 for the years 2012 through 2022, or $6,630 per year. She also sought a reduced fee of $2,500 per year for the years 2007 through 2011. The court denied Khan's request for a trustee fee. The court did not abuse its discretion in denying Khan's request for a trustee fee.

m. Khan commenced an indemnification action against the grantor, claiming that the actions she took regarding the policy were within the scope of powers identified in the trust as "Insurance Powers," including the powers to "surrender any policy for its cash value," to "borrow money for any purpose," and "to rely on others to pay [premiums], with no obligation . . . to make such payments or take any action to keep any policy in force. . . ." Khan relied on article XIII (C) of the

trust, in which the grantor agreed, "[o]n behalf of [himself] and [his] legal representatives, successors, heirs and assigns . . . [to] indemnify and hold harmless [his] Trustees from all claims, liabilities, penalties and costs, including attorney's fees, arising from any claim, demand, order or action related in any way to investing in and retaining any such insurance policies and the exercise or nonexercise of any Insurance Powers or other incidents of ownership therein."

n. The court properly interpreted the trust and determined that the grantor did not intend to indemnify Khan for her conduct in the present case. Although Khan is correct that the grantor agreed, in the indemnification clause, to "indemnify and hold harmless [his] Trustees from all claims, liabilities, penalties and costs," this clause was limited to claims "arising from any claim, demand, order or action related in any way to investing in and retaining any such insurance policies and the exercise or nonexercise of any Insurance Powers or other incidents of ownership therein." Construing the trust to effectuate the intent of the grantor, and in light of the facts found by the trial court, the court properly concluded that Khan was not entitled to indemnification under the circumstances of this case. Specifically, the court found that Khan had breached her fiduciary duty to the trust by removing trust assets without authorization, knowingly made misrepresentations to Northwestern Mutual, commingled trust assets with her own funds and purchased securities in her own name, at least in part with the policy proceeds. Such conduct does not fall within the parameters of the indemnification clause in article XIII (C) of the trust regarding claims "arising from any claim, demand, order or action related in any way to investing in and retaining any such insurance policies and the exercise or nonexercise of any Insurance Powers or other incidents of ownership therein." Khan, therefore, cannot prevail on her claim that she was entitled to indemnification pursuant to the plain and unambiguous language of the indemnification clause.

XXIII. ATTORNEYS' FEES & COSTS

A. *In re Elaine Emma Short Revocable Living Tr. Agreement,* 2025 Haw. LEXIS 225 (Supreme Court of Hawai'i 2025). Determining if a trust litigant's participation advanced the interests of all the trust beneficiaries, for purposes of payment of attorneys' fees from the trust, requires a determination on the merits, followed by a determination of whether the litigant's appearance assisted in clarifying the duties of the trustee in the face of an ambiguity.

1. Elaine Emma Short ("Elaine") was married to Clarence Short ("Clarence") and they had two sons, David Short ("David") and William Short ("William"). Elaine's brother, Leroy Cook, had five children (collectively, "the Cooks"). In 1984, Elaine established a revocable living trust ("initial trust"), as did Clarence ("Clarence's trust"), for the purpose of providing for each other, as well as their two sons. Elaine named Clarence as the trustee of her estate, with David, William, and First Hawaiian Bank ("FHB") as successor trustees.

2. The initial trust provided that, if Elaine was not survived by her spouse, subtrusts would be created for her sons from which the successor trustee could distribute principal and income to David and William as needed. On March 10, 1993, Elaine amended the trust, to provide the Successor Trustee with full discretion to withhold distribution of income to David and William if warranted by the circumstances. The amended trust provided only for the distribution of income, and not principal, from the subtrusts to meet the sons' needs for "health, education, support, and maintenance," as determined by the

Successor Trustee. Additionally, the amended trust failed to provide for termination of the sons' subtrusts.

3. William passed away, unmarried and without children, on June 8, 1993, and Clarence passed away on April 10, 2010, both predeceasing Elaine. Elaine became incapacitated in 2005 and passed away on January 3, 2012. David is unmarried and has no children.

4. Trustee First Hawaiian Bank ("FHB") filed a petition to modify Elaine's trust. FHB, through its petition, sought to: (1) instruct the trustee that David's subtrust terminate upon the death of David; (2) instruct the trustee that discretionary distributions of principal may be made from David's subtrust; (3) modify Elaine's Trust to provide for a termination date and the discretionary distribution of principal; and (4) allow payment of FHB's attorneys' fees and costs. In the petition, FHB listed the Cooks as heirs at law and contingent beneficiaries under Elaine's Trust.

5. The Cooks contested the petition. While agreeing that David's subtrust should terminate at David's death, the Cooks opposed FHB's proposed modification allowing the distribution of principal to David. Also, the Cooks sought reimbursement for their attorneys' fees. FHB argued the trust was ambiguous because, while it did not explicitly authorize distributions of principal, it also did not expressly prohibit such action either.

6. The probate court entered an order modifying Elaine's Trust to provide for discretionary payments of principal to David and terminating his subtrust at his death. The probate court also concluded that the Cooks were not entitled to financial information from FHB. Finally, the probate court ordered that the attorneys' fees for all parties involved in the proceedings be paid from the principal of Elaine's Trust.

7. The Cooks appealed and David cross-appealed. The court of appeals affirmed the probate court in all respects except as to the granting of the Cooks' attorneys' fees and costs, which were to be paid out of the Trust, which the court of appeals reversed. The Cooks appealed to the Hawaii Supreme Court, which held that the court of appeals erred in affirming the probate court's order and judgment instead of remanding the case to the probate court with instructions to render findings of fact, because the probate court order contained no findings of fact as to whether the Trust was ambiguous and the probate court did not articulate the factual basis of its ruling.

8. The Supreme Court also addressed the application of Hawai'i Probate Rules ("HPR") Rule 20, which provides, "[t]he court by written order may retain a contested matter on the regular probate calendar or may assign the contested matter to the civil trials calendar of the circuit court." Although the probate court was not obligated to adopt any and all rules that the parties request, it must exercise its discretion to do so with regard to what is right and equitable under the circumstances and the law. By not issuing an HPR Rule 20 order, the parties were not provided an opportunity to request that the probate court adopt Hawai'i Rules of Civil Procedure Rule 52 and render findings of fact at the time an order of retention should have been issued." While the probate rules do not specifically require findings in all contested cases retained by the probate court, their omission in a dispositional ruling may require an appellate court to remand the case for the making of findings to enable the appellate court to meaningfully review the probate court's decision.

9. The Supreme Court concluded it was unable to conduct an appropriate appellate review due to the complete absence of findings by the probate court precluding determination of which facts the court relied upon, and which underlay the court's modification of

Elaine's Trust. The Supreme Court also held that the court of appeals erred in holding that the terms of Elaine's Trust can supersede state law to limit which beneficiaries are entitled to trust and accounts information from the trustee. State law requires a trustee to keep the beneficiaries of the trust reasonably informed of the trust and its administration. Hawai'i law is clear that a trust beneficiary is any person with a "future interest, vested or contingent." While their interest may be divested if a greater claim arises, this does not mean that the Cooks are not currently reasonably entitled to accounts information regarding Elaine's Trust. Finally, the Supreme Court acknowledged but did not reach a decision regarding the Cooks' third contention that the court of appeals erred in determining that the probate court abused its discretion in awarding attorneys' fees and costs to the Cooks.

10. The Supreme Court vacated and remanded the case. On remand, FHB filed a new Petition for Instructions Regarding Principal Distributions and Attorneys' Fees, and for Modification of Trust in its capacity as trustee for the Elaine Short Trust. The probate court entered written findings of fact and conclusions of law regarding FHB's September 29, 2020, Petition for Instructions Regarding Distributions and Attorneys' Fees, and for Modification of Trust. The probate court made findings of fact, and concluded that the Cooks were not entitled to payment of their attorneys' fees out of the trust. The probate court concluded that the Contingent Remainder Beneficiaries' position was self-serving and clearly did not benefit the interests of all beneficiaries.

11. The Cooks appealed, and the court of appeals determined that the probate court failed to follow the Supreme Court's findings because the probate court again decided the issue without first issuing an HPR Rule 20(a) order. Therefore, the court of appeals vacated the probate court's findings of disputed facts because the probate court's failure to enter an HPR Rule 20(a) order was structural error and this structural error was a departure from the supreme court's mandate and required another remand of the contested matter.

12. The court of appeals concluded that the Cooks' request for attorneys' fees to be paid from Trust principal arises independent of the probate court's failure to enter an HPR Rule 20(a) order, and that fees of counsel for a litigant whose interest is contingent cannot be allowed out of the trust fund. The court of appeals' finding that the exception to the rule requiring parties to bear their own fees and costs when the party advances the interests of all beneficiaries of a trust did not apply. The court of appeals concluded that the probate court did not abuse its discretion by following the law and denying attorneys' fees to the Cooks.

13. The Cooks then sought certiorari review of the affirmance of the probate court's denial of attorneys' fees. The Hawai'i Supreme Court vacated the court of appeals to the extent that it affirmed in part the probate court's March 5, 2021 "Order Granting Petition for Instructions Regarding Principal Distributions and Attorneys' Fees, and for Modification of Trust" as to the denial of the Cooks' request for attorneys' fees, but otherwise affirmed, and remanded the case back to the probate court, on the following grounds:

> a. The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. In other words, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

b. The Cooks' participation in the litigation was not in the interest of the trust and all its beneficiaries was premature in the absence of a decision on the merits of the underlying issue.

c. Because the probate court could not properly conclude that the Cooks' "position was self-serving and clearly did not benefit the interests of all beneficiaries" without first reaching the merits of the case in a manner consistent with the dictates of HPR Rule 20, the denial of the Cooks' fees was not "independent of the probate court's failure to enter an HPR Rule 20(a) order." The ICA therefore erred when it remanded the case but left the probate court's denial of fees intact.

d. That the Cooks have failed to identify with any specificity what further evidence could have been adduced at an evidentiary hearing does not necessitate another outcome. Here, remand is required so that the probate court can finally decide the threshold question of whether FHB, as trustee, may properly distribute principal to David during his lifetime. Only then may the probate court properly determine if the Cooks' participation was in the best interest of the trust, for example, by finding that their participation, with their conflicting claims, their evidence and their arguments, was of assistance to the court in its determination of the duty of the trustees.

e. There is a two-step test to determine whether a party in trust litigation may recover attorneys' fees. In summary, the first question in this type of case is whether the proceeding was for the benefit of the estate and in the interest of all parties concerned. If it was, the trust estate should bear the costs and expenses, including a reasonable attorneys' fee, of all parties affected and brought before the court. The next question, however, is: To what part of the estate should such expenses be charged? That depends upon the circumstances of each individual case. Where the suit affects the corpus, it is reasonable and proper that the corpus should bear such expenses. Likewise, where the suit affects the income, generally the general income should bear such expenses. If it affects both the corpus and the general income, it should be prorated accordingly. When "neither the corpus of the trust estate nor the general income accrued or to accrue therefrom was affected," then the particular fund affected should bear the expenses of the suit.

f. Trust litigation, like other civil litigation, follows the American rule when it comes to attorneys' fees. Early case law held contingent beneficiaries were not entitled to attorneys' fees from the "trust fund."

g. Subsequently, the analysis shifted away from a categorical prohibition on awarding attorneys' fees for contingent beneficiaries. A contingent beneficiary is limited to recovery from the trust's income only if the controversy is in regard to the enjoyment of the income. Here, the dispute does not involve trust income, but rather distributions from the corpus.

h. This shift in approach, permitting recovery from the portion of the trust at issue in the case, is consistent with an analysis for which the operative question is not the type of interest held by the litigant, but rather the purpose of the litigant's action, i.e., whether it benefited the trust as a whole. This trend toward focusing

on the purpose of the action, rather than the interest held by the litigant, was codified in the 2018 Uniform Trust Code ("UTC"), which the Hawai'i legislature adopted in 2021. The UTC provides in relevant part: "In a judicial proceeding involving the administration, interpretation, or validity of a trust, the court may award reasonable attorney's fees, costs, and expenses to any party to the trust who has acted in the best interest of the trust as a whole, to be paid by another party or from the trust that is the subject of the controversy."

i. This position is also consistent with the approach announced in Comment D to § 88 of the Restatement (Third) of Trusts, which provides that "a court may, in the interest of justice, make an award of costs from the trust estate to a beneficiary for some or all of his or her attorney fees and other expenses." Under both the UTC and the Restatement (Third) of Trusts, a contingent remainder beneficiary may properly be awarded attorneys' fees if they acted "in the best interest of the trust as a whole." Thus, the UTC and the Restatement (Third) no longer recognize the distinction made between classes of beneficiaries for purposes of awarding reasonable attorneys' fees. Thus, if decided under the UTC, the Cooks could properly be awarded attorneys' fees if the probate court found they "act[ed] in the best interest of the trust as a whole." While not controlling here, the evolution of the law in the UTC provides persuasive support for a more liberal approach to awarding attorneys' fees in this context.

j. Courts have found resolving ambiguity in the trust to be in the interest of the trust, particularly when the issues presented are questions of first impression clarifying a trustee's duties. The proper inquiry when determining if a trust litigant's participation advanced the interests of all the trust beneficiaries requires a determination on the merits, followed by a determination of whether the litigant's appearance assisted in clarifying the duties of the trustee in the face of an ambiguity. Because the probate court's determination of the merits of the case was vacated by the court of appeals due to its failure to enter an HPR Rule 20(a) order, the probate court's denial of attorneys' fees must also be vacated.

k. The probate court based the denial on an erroneous view of the law. In its findings of fact and conclusions of law, the probate court concluded that the Cooks were not entitled to attorneys' fees because (1) the Cooks are contingent remainder beneficiaries and (2) the Cooks' position "did not benefit the interests of all beneficiaries." Specifically, regarding the award of attorneys' fees to contingent remainder beneficiaries, the probate court concluded that fees were not permissible. As discussed above, the correct inquiry for the probate court is not whether the party-litigant is a contingent remainder beneficiary but rather whether their position was in the best interest of the trust as a whole. Thus, the probate court's conclusion of law was erroneous.

l. Further, as a separate basis for its denial, the probate court concluded the Cooks' position "did not benefit the interests of all beneficiaries" because it found that the Cooks' declarations were self-serving. In reaching this conclusion, the probate court again applied the incorrect standard. The proper inquiry for determining whether a trust litigant's participation advanced the interests of all the beneficiaries of the trust includes whether the party's appearance assisted in clarifying the duties of the trustee in the face of an ambiguity. The Cooks' position

that distributions of trust principal would be inappropriate effectively advocated for maintaining the status quo, with distributions being limited to the income. The probate court did not address whether this position was in the best interest of the trust. The probate court also did not address whether the Cooks' position would have benefited David's issue, should he have children, and was thus in the interest of the trust as a whole. Further, the probate court did not directly address whether "[t]he appearance of these parties, with their conflicting claims, their evidence and their arguments, was of assistance to the court in its determination of the duty of the trustees."

m. On remand, the probate court should determine whether the Cooks' participation in the trust litigation advanced the interests of all the beneficiaries of the trust. A proper determination would include whether the Cooks' participation assisted the probate court in clarifying the duties of the trustee in the face of an ambiguity.

B. *In re Est. of Klingensmith,* 2025 Pa. Super. Unpub. LEXIS 1153; 2025 LX 2418 (Superior Court of Pennsylvania 2025). Attorneys' fees award supported by vexatious and obdurate conduct by participating in the unauthorized removal of jewelry from home and safe deposit box.

1. Siblings Joseph G. Klingensmith ("Joseph") and John A. Klingensmith ("John") (collectively, "Appellants") appealed from the decree of distribution of the estate of their father, James G. Klingensmith ("Decedent"). In their appeal, Appellants challenged the Orphans' Court's January 20, 2021 order awarding their sister-in-law Cynthia Klingensmith ("Cynthia") attorneys' fees and costs in the amount of $36,108.16. Also before this Court was Cynthia's application for attorneys' fees and costs associated with this appeal and prior appeals in this matter.

2. Decedent had three sons: Joseph, John, and James C. Klingensmith ("James"). James and Cynthia married in 2005. That same year, Decedent, who was a widower, moved into a residence with James and Cynthia. Decedent continued to reside with James and Cynthia until his death in 2011.

3. Consistent with the provisions of Decedent's will, letters testamentary were issued to James. In 2012, James filed an inventory of Decedent's estate — which identified, inter alia, twelve pieces of jewelry as Decedent's property — and an inheritance tax return. Appellants petitioned for a citation to show cause why James should not file an account of his administration of Decedent's estate. After a court conference, James agreed to provide an informal accounting to all beneficiaries. James died on August 22, 2015, one month after a pancreatic cancer diagnosis. In September 2015, letters testamentary were issued to Appellants, in accordance with the terms of Decedent's will.

4. Appellants petitioned Cynthia to appear for deposition and bring with her certain jewelry that allegedly belonged to Decedent's estate. Cynthia filed an answer and new matter, in which she alleged that Decedent gave her the disputed jewelry prior to his death. Cynthia further sought the return of personal property, including jewelry, allegedly removed from her home and a safe deposit box by James' adult children, Janeen Hughey ("Janeen") and James J. Klingensmith ("Jimmy").

5. The Orphans' Court conducted a two-day bench trial. Janeen and Jimmy testified that, weeks before James' death, they removed jewelry from James and Cynthia's home and safe deposit box at their father's request. Janeen stated her father told her that Cynthia

"hid a lot of things" that did not belong to her, including jewelry, and "he needed to make things right" before he died. According to Janeen and Jimmy, they showed James each piece of jewelry in Cynthia's jewelry box, her armoire, and the safe deposit box and only removed the items that their father stated belonged to Decedent's estate. Janeen and Jimmy testified that, after they removed the jewelry, they "handed it to [their uncle Joseph and told him it was] now [his] burden."

6. The Orphans' Court determined that Cynthia's account of the removal of the jewelry was more credible than that of Janeen and Jimmy. The court found Janeen and Jimmy had, without the consent of or prior knowledge of James or Cynthia, entered and searched the home of James and Cynthia in an apparent search for estate assets. Those individuals, without permission, removed all jewelry from Cynthia's jewelry box and from her armoire during a time that Cynthia was hospitalized for six days. Additionally, without prior knowledge or consent of James or Cynthia, a PNC Bank safe deposit box which had been jointly leased by James and Cynthia was opened with a key apparently obtained during the search for personalty at the home of James and Cynthia. The court found that Janeen and Jimmy undertook their search for property at the direction of Appellants.

7. At the conclusion of trial, Appellants returned to Cynthia the engagement ring she received from James — which was removed from the safe deposit box three years prior — apologizing for the "mix-up." The Orphans' Court found that Cynthia established by clear and convincing evidence that Decedent gave her approximately ten pieces of the disputed jewelry during his lifetime. However, the court directed Cynthia to return five pieces of jewelry that appeared on the estate inventory James filed in 2012, as well as any sports memorabilia that she retained. Appellants appealed and the appellate court found their challenges to the ruling meritless. However, because Cynthia was not in possession of the jewelry items the Orphans' Court's order instructed her to return, the appellate court vacated the order and remanded for the court to correct its order. Appellants filed a petition for allowance of appeal, which our Supreme Court denied.

8. Following remand, Cynthia petitioned to implement the court's instructions and for an award of reasonable attorneys' fees and costs. The Orphans' Court held a hearing on the petitions at which Cynthia's counsel appeared, but neither Appellants nor their counsel were present. The court entered an order after the hearing awarding Cynthia $55,648.16 in attorneys' fees and costs. Appellants filed a motion for reconsideration of the order, which the court granted. After further argument, at which counsel for all parties were present, the court entered an order on January 20, 2021, awarding Cynthia $36,108.16 in attorneys' fees and costs. On that same date, the court filed an order correcting the distribution of the disputed jewelry to require their return to Cynthia.

9. On appeal, the court of appeals affirmed the Orphans' Court's award of attorneys' fees and costs on the following grounds:

> a. The party seeking attorneys' fees bears the burden of demonstrating her entitlement to fees pursuant to statute. See id. Here, Cynthia sought — and the Orphans' Court awarded — fees pursuant to a statute that awards fees as a sanction against another participant for dilatory, obdurate, or vexatious conduct during the pendency of a matter. Vexatious conduct is without reasonable or probable cause or excuse; harassing; annoying; generally speaking, obdurate conduct may be defined in this context as stubbornly persistent in wrongdoing. Conduct is dilatory where the record demonstrates that counsel displayed a lack

of diligence that delayed proceedings unnecessarily and caused additional legal work. A trial court need only find that defendants engaged in dilatory, vexatious, or obdurate conduct when awarding counsel fees.

b. The Orphans' Court specifically found that Appellants' participation in the unauthorized removal of property from James and Cynthia's home and safe deposit box was vexatious and obdurate. Joseph and John could have, by proper pleading, pursued any personalty of the Decedent which they believed may have been excluded from the estate inventory that James had filed during his tenure as executor. Regardless of any suspicions that any heir might have had that some items of personalty belonging to the estate had been sequestered at a residence or in the safe deposit box, no heir possessed a license to access, without authorization or consent, the safe deposit box or to enter or direct others to enter the home of James and Cynthia for the purpose of discovering and seizing personalty based upon a suspicion that estate personalty had been misappropriated or, as yet, unaccounted for by the executor.

c. The Orphans' Court further determined that Appellants' misconduct extended to their retention of the disputed jewelry and the filing of an action against Cynthia in their official capacities as representatives of Decedent's estate. Some portion of the personalty taken from the residence of James and Cynthia, including items from Cynthia's jewelry box and armoire, was determined not to be property of the estate, but Cynthia's own jewelry. Appellants' obdurate conduct in their fiduciary capacity compounded the administration of the estate, a consequence which was entirely foreseeable.

d. The Orphans' Court did not abuse its discretion in finding that Appellants engaged in vexatious and obdurate conduct meriting an award of attorneys' fees to Cynthia. The record supports the court's conclusion that Appellants acted "without reasonable or probable cause" when they participated in the unauthorized removal of Cynthia's jewelry from her home and safe deposit box. Furthermore, the evidence shows that Appellants were "stubbornly persistent in wrongdoing" by retaining the disputed jewelry, much of which rightfully belonged to Cynthia, throughout the pendency of the action.

e. Appellants' conduct was committed prior to the commencement of the litigation against Cynthia when awarding counsel fees. While a party's pre-litigation conduct is generally not relevant, a court may consider such conduct when it bears upon a party's reasons for pursuing a lawsuit. The return of some of the jewelry to the estate did not preclude the award of attorneys' fees to Cynthia.

f. The Orphans' Court did not err or abuse its discretion when granting Cynthia's fee petition without holding an evidentiary hearing. The parties fully litigated the issues related to the removal of the disputed jewelry from James and Cynthia's home and safe deposit box at the two-day trial in July 2018. The Honorable Michael E. McCarthy presided over both the trial and the fee petition and therefore was intimately familiar with the facts of the case. Appellants have not identified any evidence they would have presented at an evidentiary hearing on the fee petition that was not already before Judge McCarthy. Additionally, although Appellants requested an evidentiary hearing in their motion for reconsideration, at

oral argument following the court's grant of reconsideration, Appellants did not seek to present evidence to rebut the allegations in Cynthia's fee petitions.

g. It is well-settled that a party may either expressly or impliedly consent to a court's personal jurisdiction. In other words, a party may affirmatively state his consent or take such steps or seek such relief that manifest his submission to the court's jurisdiction over his person. A party who enters a general appearance in Orphans' Court consents to the court's personal jurisdiction. The Orphans' Court obtained personal jurisdiction over Appellants in their individual capacities when they filed a petition challenging James' administration of the estate in 2013. By entering their general appearance, Appellants consented to the court's jurisdiction over them. It is immaterial that Cynthia was not a party to this matter in 2013, as personal jurisdiction concerns a party's relationship to the forum, rather than to another litigant or the specific claims asserted. Therefore, because the Orphans' Court had previously obtained personal jurisdiction over Appellants in their individual capacities, Cynthia's fee petition did not require a preliminary decree for the issuance of a citation against Appellants.

h. A petition for counsel fees under Section 2503 is not a separate suit for fees, but rather, a matter connected to but ancillary to the underlying action. Therefore, a party may file a fee petition up to thirty days after a judgment or final order, even if an appeal has already been filed in the matter. Cynthia timely filed her fee petition. A party need not wait until after the entry of a final order to file a fee petition. Here, this Court vacated the Orphans' Court's December 11, 2018 final order and remanded the record for further proceedings on November 27, 2019. Cynthia filed her fee petition on July 7, 2020, following remand and prior to the court's entry of a new final order. Therefore, Cynthia's fee petition was timely.

i. Appellants have not engaged in dilatory, obdurate, or vexatious conduct in connection with this appeal. Furthermore, while Appellants' appellate issues do not merit relief, they did not lack a basis in law or fact. Accordingly, Cynthia's application for attorneys' fees and costs for the appeal was denied.

C. *Rogers v. Mary Kay Holding Corp.,* 2025 Del. Ch. LEXIS 1310 (Court of Chancery of Delaware 2025). Company not required to advance legal costs incurred by chairman for trust-related claims.

1. Richard R. Rogers ("Richard") is a longtime director and the Executive Chairman of Mary Kay Holding Corporation ("MKHC"). He co-founded Mary Kay in 1963 and, after retiring as CEO in 2006, continued to serve on MKHC's board, attending meetings and voting on board matters.

2. Mary Kay Ash, as settlor, established a trust for her son Richard and his descendants. In addition to this trust, Mary Kay Ash created other trusts for her remaining children and their descendants. Originally, she conveyed stock of the family business to each trust, and over time, the assets within these trusts have expanded and diversified. Initially, all sixteen family trusts were managed independently. In late 2021, MKHC formed two subsidiaries, Golden Rule Management, LLC ("GRM") and Golden Rule Investments, LP ("GRI"), to create administrative ease and efficiencies in the management of the family trusts. The Board of MKHC, including Richard, received a presentation and approved the establishment and funding of GRM and GRI. Now, GRM serves as the general partner of

GRI, while the family trusts hold limited partnership interests in GRI. GRI, encompasses all sixteen family trusts, including the trust for Richard and his descendants.

3. In 2023, Richard, while serving as a director and Executive Chairman of MKHC, began investigating issues related to the Golden Rule entities and initiated a series of Section 220 books-and-records demands. MKHC responded and produced a significant volume of responsive information.

4. Beginning in 2021, Richard and his wife, Nancy, requested substantial monthly distributions from the Richard R. Rogers 1975 Trust (the "Trust"), which the co-trustees approved. Richard ultimately received approximately 70% of those distributions. He later demanded additional payments, sparking further disputes over information and trust administration. On November 1, 2024, the Trust's co-trustees, Richard's son, Ryan T. Rogers ("Ryan"), and Tolleson Private Bank ("Tolleson Bank"), filed a declaratory judgment action in Dallas County, Texas (the "Texas Action"), seeking court guidance regarding the administration of the Trust and aimed to ensure they complied with their fiduciary duties to the Trust beneficiaries in light of Richard's increased requests for distributions, which if granted could end up paying Richard hundreds of millions of dollars in additional distributions.

5. Richard answered and asserted counterclaims, including breach of fiduciary duty and breach of trust against Ryan and Tolleson Bank. His counterclaims allege, among other things, that Ryan procured MKHC board approval for GRM and GRI based on incomplete information, concealed his sole discretion over GRM distributions, and backdated approvals. Richard sought relief tied to the co-trustees' conduct and the GRM/GRI structure.

6. Richard requested advancement from MKHC for expenses incurred in defending the Texas Action and submitted a written undertaking to repay the company if indemnification proved unwarranted.

7. After consulting counsel, the board, and its D&O insurers, MKHC agreed to advance Richard's expenses, including an immediate $200,000 retainer, while reserving its rights. However, on December 16, 2024, MKHC reversed course and denied further advancement, asserting that the Texas Action did not arise "by reason of the fact" of Richard's MKHC service.

8. Richard sought summary judgment compelling MKHC to advance his legal fees for the Texas Action. Both parties then moved for summary judgment.

9. The magistrate granted MKHS's motion for summary judgment, and denied Plaintiff's motion, on the following grounds:

> a. Delaware law interprets the statutory and contractual "by reason of the fact" standard broadly and in favor of indemnification and advancement. This pro-advancement presumption reflects Delaware's policy of encouraging capable persons to serve as corporate fiduciaries by assuring litigation expense protection when claims bear a sufficient relationship to service in an official capacity.
>
> b. At the same time, Delaware law strictly construes the scope of advancement proceedings. When a charter or bylaw includes a mandatory advancement provision, Delaware courts enforce that provision as a matter of contract and

enforce them according to their terms. Ambiguities in advancement provisions are generally construed against the corporation and in favor of advancement.

c. Applying these principles here, Article IX of the Company's charter provides for advancement subject to the standard "by reason of the fact." Article IX mandates indemnification "to the full extent permitted by the DGCL." The charter's use of the term "advance" and its "to the full extent" formulation reflect Delaware's pro-advancement policy. By expressly committing to advance expenses to the fullest extent permitted, Article IX contractually adopts the causal-nexus standard. Therefore, any textual ambiguities in Article IX concerning scope or eligible proceedings are construed against the Company and in favor of advancement.

d. Advancement under 8 Del. C. § 145(e) requires that the underlying "proceeding" be brought "by reason of the fact" that the person is or was a director or officer of the corporation. The Delaware Supreme Court has construed this standard to demand a sufficient nexus or causal connection between the claims at issue and the individual's corporate capacity. Delaware courts have recognized that if there is a nexus or causal connection between any of the underlying proceedings contemplated by section 145(e) and one's official corporate capacity, those proceedings are "by reason of the fact" that one was a corporate officer, without regard to one's motivation for engaging in that conduct. This procedure also assures, for example, that a director receives advancement for defending a claim brought against him because of something he did in his capacity as a director — even though such an action may be filed against him as an individual.

e. Here, Richard asserts that Ryan seeks approval for actions taken as an MKHC director related to GRM/GRI in the Texas Action. He identifies this as the "nexus" between his board service and the Texas litigation. However, it is apparent that the Texas Action arises from a personal trust dispute concerning the administration of a family trust, beneficiary distributions, and the conduct and performance of the trustees. While Richard in his role as director approved the creation of GRM, the pleadings and requested relief in the Texas Action are directed to trust governance, trustee duties, compliance with trust instruments, and not to the management, policies, or affairs of MKHC and its ability to create GRM.

f. The claims in the Texas Action neither challenge decisions made by Richard in his MKHC corporate capacity nor require proof that he exercised MKHC corporate powers. There is no allegation that Richard exercised MKHC corporate authority to effectuate the challenged trust-related actions, nor that any purported misconduct required the use of MKHC powers. At most, the reference to Richard's actions as a director approving GRM and GRI in the Texas Action simply provides factual context for trust administration issues; it does not plead corporate wrongdoing, misuse of corporate office, or breach of corporate duties.

g. Although the plaintiff also argues that the Texas Action was a result of Richard's investigation into GRM and GRI, the record demonstrates that the Texas Action was not brought in response to the books and records requests but rather was brought in response to Richard and Nancy's extraordinary distribution demands, objections from other beneficiaries, efforts to remove the corporate trustee,

complaints about investments, and concerns regarding whether Richard's demands were voluntary and free from undue influence and not because of the 220 investigations. Discovery in the Texas Action does not support a showing that Richard's actions as a director and MKHC's actions in creating GRM are the reasons for the Texas litigation.

h. Lastly, the counterclaims reinforce the trust-centric character of this action as they seek remedies for alleged trustee breaches, not redress for harm tied to corporate acts. The counterclaims focus exclusively on the management of the Trust and the fiduciary duties of the co-trustees. They include accusations of breach of fiduciary duty for not distributing trust funds to Richard, breach of the Trust agreement by Tolleson for failing to disclose information to beneficiaries, and further breaches related to the management of the Trust, among others.

i. Mentions of MKHC are limited to explaining the source of the Trust's assets and the context of dividend reductions that impacted Richard's financial needs. Richard's requests for relief confirm that the Texas Action is directed at the Trust and the co-trustees, not MKHC, and do not seek to exonerate him from any misconduct in his capacity as an officer or director of MKHC.

XXIV. STANDING & PARTIES

A. *Bentley v. Cywes,* 2025 U.S. Dist. LEXIS 187692 (United States District Court for the Southern District of Ohio 2025). Joinder of beneficiary not where claim brought by trustee on behalf of trust beneficiaries and claim does not request any relief that would harm beneficiaries.

1. Colette Cywes Bentley filed a Complaint against her brother, Mr. Cywes, bringing claims in her individual capacity and on behalf of the Cywes Family Trust as Co-Trustee for declaratory judgment, breach of fiduciary trust, and removal of Mr. Cywes as Co-Trustee of the Cywes Family Trust. The Cywes Family Trust was formed by the Parties' Father, Sidney Cywes, in Ohio in 1998. Sidney named himself, Ms. Bentley, and Mr. Cywes as Trustees. The Trust requires the Trustee to make any distribution directed by Sidney during his lifetime. After Sidney's death, which occurred in April 2020, the Trustee has discretion over distributions of income and principal to Marlene Cywes (Sidney's spouse and the Parties' mother), Ms. Bentley, and Mr. Cywes. After Marlene's death, the remaining income and principal is to be divided into equal shares and distributed to Mr. Cywes and Ms. Bentley, who are the remainder beneficiaries.

2. Ms. Bentley moved for summary judgment on all three of her claims. The Court granted in part and denied in part her motion for summary judgment. Ms. Bentley's claims for declaratory judgment and breach of fiduciary duty remain for trial.

3. Mr. Cywes raised the affirmative defense of failure to join necessary or indispensable parties in his Answer to Ms. Bentley's Complaint. Mr. Cywes identified Marlene Cywes as a necessary or indispensable party in his answer to a set of interrogatories from Ms. Bentley. Plaintiff states that it is undisputed that Marlene resides in South Africa and that she "was declared legally incompetent in 2017 as a result of an Alzheimer's dementia diagnosis and she remains under the guardianship of a court-appointed curator(s) in South Africa."

4. Mr. Cywes filed a Motion for Summary Judgment on all three claims. He did not argue that Marlene Cywes needed to be joined and did not otherwise raise the defense of failure

to join necessary or indispensable parties. The Court denied Mr. Cywes's Motion for Summary Judgment.

5. Attached to Ms. Bentley's response in opposition to Mr. Cywes's Motion for Joinder is an email dated September 5, 2023 from her counsel to "Attorney Curr," identified by her counsel as "curator bonis for Marlene Cywes." In a Declaration also attached to the response in opposition, Ms. Bentley's attorney states that the email was to notify Marlene Cywes's South African legal guardian of the existence of this suit and to invite her to participation in Court-ordered mediation that was scheduled to occur in September 2023.

6. Mr. Cywes filed a Motion for Joinder of Marlene Cywes and to Continue Trial Schedule, which the court denied on the following grounds:

a. Federal Rule of Civil Procedure 19 governs the required joinder of necessary parties. Courts in the Sixth Circuit apply a three-part test to determine whether a party must be joined under Rule 19. First, the court must determine whether the person or entity is a necessary party under Rule 19(a). Second, if the person or entity is a necessary party, the court must then decide if joinder of that person or entity will deprive the court of subject-matter jurisdiction. Third, if joinder is not feasible because it will eliminate the court's ability to hear the case, the court must analyze the Rule 19(b) factors to determine whether the court should in equity and good conscience dismiss the case because the absentee is indispensable.

b. A party is necessary if either (1) in the party's absence, the court cannot accord complete relief among existing parties, or (2) if the party claims an interest relating to the subject of the action and disposing of the action in the party's absence may (i) as a practical matter impair or impede the party's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring multiple or otherwise inconsistent obligations because of the interest.

c. Because Marlene Cywes is not a necessary party, the Court denies Mr. Cywes's Motion for Joinder. Ms. Bentley brought this action individually and as Co-Trustee on behalf of the Cywes Family Trust. The Court granted her Motion for Summary Judgment in part and entered declaratory judgment that a 2015 Document did not lawfully amend the Cywes Family Trust and that Mr. Cywes forged Ms. Bentley's signature on a resignation document, meaning the document did not accomplish Ms. Bentley's resignation from the Cywes Family Trust. Accordingly, the 1998 version of the Cywes Family Trust, which names Ms. Bentley as a Co-Trustee, remains in effect. The Court also granted Ms. Bentley's Motion for Summary Judgment regarding the removal of Mr. Cywes as a Co-Trustee of the Cywes Family Trust and ordered his removal as a Co-Trustee. Last, the Court ordered the Parties to confer and name a third-party professional entity to serve as a Co-Trustee with Ms. Bentley.

d. The breach of fiduciary duty issues remaining for trial in this lawsuit relate to contested distributions issued from the Trust to Mr. Cywes during the lifetime of the Parties' father, Sidney. Those distributions were made when Sidney, Ms. Bentley, and Mr. Cywes were all Trustees, but only Sidney had the power to order distributions from the Trust in his discretion. At the time, Marlene, Mr. Cywes, and Ms. Bentley each had a future interest in the Trust as income beneficiaries. After Sidney's death, Ms. Bentley sued Mr. Cywes in her capacity as a beneficiary

of the Trust and "as a co-trustee on behalf of all trust beneficiaries." Accordingly, Ms. Bentley sued on behalf of Marlene Cywes who, at present, is an income beneficiary of the Trust.

e. The Parties do not dispute that Ms. Bentley, in her capacity as a Co-Trustee of the Cywes Family Trust (both at the time of the disputed distributions and when she filed this lawsuit), is a real party in interest in this matter. A trustee of an express trust may sue in their own name without joining the person for whose benefit the action is brought. Ms. Bentley's ability to bring this lawsuit as a Co-Trustee on behalf of the Trust for the benefit of the Trust and its beneficiaries, including Marlene Cywes, suggests that Marlene is not a necessary party in this action.

f. Furthermore, because the distributions at issue were made when Marlene, Ms. Bentley, and Mr. Cywes each had only a future income interest in the Trust, Ms. Bentley and Marlene share an equivalent interest in the outcome of the disputed distributions. If Mr. Cywes breached his fiduciary duty as a Co-Trustee by ordering distributions from the Trust without Sidney's approval, the appropriate remedy may be to order the return of those disputed assets to the Trust (as requested by Ms. Bentley). If so, Ms. Bentley and Marlene, as present income beneficiaries (along with Mr. Cywes), would benefit equally. Accordingly, the Court can accord both Ms. Bentley and Marlene complete relief on that claim without joining Marlene as a party.

g. The same is true on the remaining declaratory judgment issues, which substantially overlap with the breach of fiduciary duty claim. Ms. Bentley does not request any relief that would exclusively benefit her to the exclusion of Marlene. If the Court enters declaratory judgment that Mr. Cywes lacked the power to cause the disputed distributions and that he has an obligation to return those funds to the Trust, those assets will return to the Trust for the benefit of all income beneficiaries, including Marlene, Ms. Bentley, and Mr. Cywes. And if the Court orders Mr. Cywes to provide a full accounting of the Trust funds and assets, the accounting will be used by Ms. Bentley and the professional third-party Co-Trustee, in their capacity as Co-Trustees, to manage the Trust in the interest of the three income beneficiaries. Additionally, Mr. Cywes has not demonstrated that Ms. Bentley's future interest as an ultimate remainder beneficiary after the death of Marlene renders Ms. Bentley unable to represent the interests of Marlene or impedes the Court's ability to bring about complete relief to the parties.

h. This case is not like those in which some, but not all, income beneficiaries sue for the removal of a trustee and restoration of trust assets, among other relief. Ms. Bentley is not suing alone in her capacity as a beneficiary to the exclusion of other beneficiaries; she is suing in her capacity as a co-trustee, on behalf of all income beneficiaries, including Marlene. Ms. Bentley can sue as a Trustee on behalf of Trust beneficiaries without requiring joinder of the beneficiaries, and Ms. Bentley does not request any relief that would cause distributions from the Trust to her to the detriment of Marlene.

i. Furthermore, this case is not like those where the requested relief involves termination of the trust or a declaration that the trust itself is invalid, which could threaten the interests of current or future beneficiaries. There is no such risk here.

Ms. Bentley's remaining claims and requested relief do not contemplate a termination or alteration of the Trust in any way that threatens Marlene's current interest as an income beneficiary.

B. *Correa v. Tovar-Restrepo,* 2025 Fla. App. LEXIS 1353 (Court of Appeal of Florida, Third District 2025). Trustee of trust has standing to sue to enforce claims assigned to trust despite not averring his authority to sue in this representative capacity in his initial and subsequent complaints.

1. The underlying action concerned a dispute among family members over substantial assets held in three trusts. Jose Pablo Tovar Parra ("Mr. Tovar") created three revocable trusts in 2015 (the "2015 Trusts"). In 2016, he made them irrevocable, which divested him of control of the trust assets. In 2018, he sued his daughters, Marcela and Ana Maria, and an entity allegedly controlled by Marcela, Kvinner LLC (hereinafter jointly "the Daughters"), to invalidate his actions that made the 2015 Trusts irrevocable.

2. The complaint was brought by Mr. Tovar individually and as settlor/trustee of the 2015 Trusts and alleged seven causes of action: (1) statutory termination of the trust amendments due to undue influence; (2) statutory termination of the trust amendments due to fraud; (3) statutory reformation of the trust amendments based on mistake; (4) injunctive relief to freeze the trust assets absent court order; (5) civil theft based on exploitation of an elderly person; (6) declaratory relief adjudicating Mr. Tovar's status as trustee of the three trusts at issue; and (7) breach of fiduciary duty.

3. The Daughters contested the claims, which were not resolved on the merits because Mr. Tovar passed away in late 2020. Following Mr. Tovar's passing, the underlying litigation shifted to whether Maria Eugenia Correa could proceed with the case in Mr. Tovar's stead.

4. Ms. Correa moved to be substituted as plaintiff. Her motion relied upon a previously undisclosed trust created by Mr. Tovar (hereinafter "the Colspak Revocable Trust") to which Mr. Tovar had assigned his causes of action against his daughters. Ms. Correa asserted she appeared "individually and as Trustee of the Colspak Revocable Trust" and as grounds for the substitution alleged, in pertinent part, the following: "In June of 2018, Mr. Tovar, as settlor and grantor, created the Colspak Revocable Trust, which was initially funded with the assets at issue in this litigation. At the time the Colspak Trust was created, Mr. Tovar himself was the sole Trustee. Pursuant to Article IV, section A, of the Colspak Trust, Movant bec[a]me the sole Trustee of the Colspak Trust upon the death of Mr. Tovar. Moreover, Mr. Tovar also assigned from himself individually, and to himself, as the Sole Trustee of the Colspak Revocable Trust, "any and all of my rights and interest in any and all claims that can be, may be, or will be brought or pursued against my daughters, MARCELA TOVAR RESTREPO and ANA MARIA TOVAR RESTREPO, individually."

5. Although the litigation had been ongoing for several years, the Daughters averred this was the first time they learned of the existence of the Colspak Revocable Trust. Ms. Correa was eventually substituted as Plaintiff, both individually and as Trustee of the Colspak Revocable Trust. That order, however, preserved the Daughters' rights to challenge Mr. Tovar and Ms. Correa's standing.

6. The Daughters subsequently moved for summary judgment. The trial court granted the Daughters' motion. The trial court specifically concluded that Mr. Tovar lacked standing

to initially commence the lawsuit because he previously assigned all his rights to bring the lawsuit to the Colspak Revocable Trust, leaving him with no interest to enforce. The trial court further concluded that Ms. Correa, individually and as Trustee of the Colspak Revocable Trust, could not cure the standing deficiency by being substituted as plaintiff. Finally, the trial court concluded that the relation back doctrine was not applicable because there was no identity of interest between the original plaintiff and the substituted plaintiff.

7. Ms. Correa appealed and the court of appeals reversed on the following grounds:

a. The Florida real party in interest rule permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest. Thus, where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing.

b. Mr. Tovar was the sole grantor, trustee, and beneficiary of the Colspak Revocable Trust during his lifetime. As the sole trustee, therefore, he was permitted to bring the underlying action in his own name. And he was not required to join the trust as a party. Mr. Tovar was both the sole trustee and the sole beneficiary of the Colspak Revocable Trust at the time he brought the underlying action. As such, he too had standing to bring the action. Florida law has long recognized that it is generally the trustee, and not a beneficiary, who is the real party in interest with authority to bring an action on behalf of the trust.

c. Furthermore, Mr. Tovar was not required to allege that he was suing in his capacity as trustee of the Colspak Revocable Trust. It is not necessary to aver the authority of a party to sue or be sued in a representative capacity except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

d. Here, the Daughters were permitted to amend their answer and affirmative defenses to properly raise the issue of Mr. Tovar's standing to sue based on his failure to allege that he was bringing his action as trustee of the Colspak Revocable Trust. They then moved for summary judgment on the defense and Ms. Correa sufficiently established that Mr. Tovar had standing to sue at the inception of the underlying action because he was trustee of the Colspak Revocable Trust, as detailed above. Accordingly, the fact that he did not aver his authority to sue in this representative capacity in his initial and subsequent complaints, standing alone, did not deprive him of standing.

e. Mr. Tovar did not assign his rights to a wholly unrelated third party, but rather he assigned it to himself in a different capacity. In this sense, the assignment was only a means to transfer the legal title to himself in a different capacity. The fact remains that he, Mr. Tovar, still held these rights, only now in his capacity as trustee of the Colspak Revocable Trust. Accordingly, he still had standing to sue.

f. Furthermore, contrary to the Daughters' arguments, there is no prejudice to them. This is because, while Mr. Tovar's standing may be based on his capacity as trustee of the Colspak Revocable Trust because of the assignment, the fact remains that the underlying claims are based on Mr. Tovar's individual rights. This

is because what Mr. Tovar assigned to the Colspak Revocable Trust were his individual "rights and interests in any and all claims that can be, may be, or will be brought or pursued against [his] daughters, MARCELA TOVAR RESTREPO and ANA MARIA TOVAR RESTREPO, individually." As such, the underlying claims and defenses remain the same. This is true no matter to whom or how many times over Mr. Tovar's rights to recover against his daughters may be assigned.

g. Upon his passing, Ms. Correa obtained standing to continue to prosecute the underlying action as successor trustee of the Colspak Revocable Trust. Accordingly, the trial court properly substituted Ms. Correa as plaintiff, but erred in subsequently concluding that she lacked standing to continue to pursue the action.

C. *Est. of Morgan v. Morgan,* 2025 Ind. App. LEXIS 180 (Court of Appeals of Indiana 2025). The personal representative of deceased child's estate may not maintain cause of action under Indiana Child Wrongful Death Statute except upon the death of the person to whom custody of the child was awarded.

1. Judah Morgan was born drug-positive in June 2017, shortly after the Indiana Department of Child Services ("DCS") substantiated allegations that his parents, Alan Morgan and Mary Yoder, had abused and neglected Judah's older brother. DCS removed Judah from Alan and Mary's care before he ever left the hospital, and he was soon found to be a child in need of services ("CHINS"). For most of his CHINS case, Judah was placed in foster care with Jenna Hullett. But in April 2021, DCS returned Judah to Alan and Mary's care on a "Trial Home Visit" basis. Roughly three months later, DCS petitioned to close Judah's CHINS case. And less than four months after that, Judah was killed. Alan eventually pleaded guilty to Judah's murder, and Mary pleaded guilty to neglect resulting in Judah's death.

2. Hullett was later appointed as Personal Representative of Judah's Estate. In that capacity, she sued Alan for intentionally beating, torturing, and murdering Judah. Hullett then timely filed an amended complaint that also asserted a "Tort Claim" against DCS. In pertinent part, this First Amended Complaint alleged and prayed as follows: "For the six-month period prior to Judah's death, Judah was savagely beaten, tortured, abused and neglected by his parents, Mary Yoder and Alan Morgan. This six-month period overlapped the period from April 7, 2021 until June 27, 2021, when DCS had legal custody of Judah but had placed Judah in a trial home visit. As a direct and proximate result of the reckless, careless, negligent, and wrongful acts and omissions of DCS, Judah Morgan was neglected, beaten, tortured and eventually murdered on October 11, 2021."

3. DCS moved to dismiss Hullett's First Amended Complaint, arguing that Hullett lacked standing to bring a wrongful death claim under the Indiana's Child Wrongful Death Statute ("CWDS"). Hullett responded with an unopposed motion to file a Second Amended Complaint, which the trial court granted. In her Second Amended Complaint, Hullett asserted a "Survival Claim" and "Wrongful Death Claims" against DCS. Her Survival Claim cited the Survival Statute and requested "all damages allowed by law." Meanwhile, her Wrongful Death Claims specifically requested damages under Indiana's General Wrongful Death Statute ("GWDS") and CWDS. DCS soon moved to dismiss Hullett's Second Amended Complaint. As to Hullett's Survival Claim, DCS argued that the claim was time-barred under the two-year statute of limitations for personal injury claims. As to her Wrongful Death Claim under the GWDS, DCS argued that the claim was time-barred

by the GWDS's own two-year filing requirement. And as to her Wrongful Death Claim under the CWDS, DCS again argued that Hullett lacked standing.

4. The trial court agreed with DCS's arguments and dismissed Hullett's Second Amended Complaint without prejudice. Hullett then filed a Third Amended Complaint as a matter of right. In her Third Amended Complaint, Hullett asserted the same claims as in her prior complaint; however, she specifically alleged that any limitation period was tolled by DCS's fraudulent concealment of relevant facts. DCS promptly moved to dismiss Hullett's Third Amended Complaint, reiterating its previous arguments. The trial court granted the dismissal and incorporated by reference its order dismissing Hullett's Second Amended Complaint.

5. Hullett appealed and the court of appeals reversed in part and affirmed in part on the following grounds:

> a. The Survival Statute authorizes the personal representative of a decedent's estate to maintain an action against a person whose wrongful acts or omissions caused personal injuries to the decedent during their life. The GWDS authorizes the personal representative of a decedent's estate to maintain an action against a person whose wrongful acts or omissions caused the decedent's death. The statute, however, distinguishes between decedents who leave behind a spouse, dependent children, or dependent next of kin and those who do not. For the latter category of decedents, which includes children, the GWDS permits recovery of only medical, hospital, funeral and burial expenses and costs and expense of estate administration, including attorney fees. Such damages inure to the benefit of the service providers and the personal representative, respectively.
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> b. The CWDS, in turn, operates as an "amplification" of the relief available for child decedents under the GWDS. The CWDS permits recovery for a parent's loss of the child's services and loss of the child's love and companionship. Such damages inure to the benefit of the child's parents or, if the child was not survived by a parent, to a custodial grandparent.
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> c. A claim under the Survival Statute is subject to a two-year statute of limitations. Here, there is no dispute that Hullett filed her Third Amended Complaint more than two years after Judah's death. But the Survival Claim she asserted in her Third Amended Complaint related back to the Tort Claim she asserted in her timely filed First Amended Complaint. Though Hullett specifically requested damages under the CWDS, she also prayed for all other just and proper relief. Considering the operative facts of Hullett's Tort Claim with this general prayer, DCS was on notice that Hullett sought all available damages for Judah's injuries. A party is not required to adopt a theory of the case at the outset. Rather, it is sufficient to plead the operative facts of the case so the defendant is put on notice as to the evidence that will be presented at trial. So long as the pleading provides such notice, there is no procedural bar to pursuing both a wrongful death and survival claim. Because the Survival Claim that Hullett asserted in her Third Amended Complaint arose out of the same conduct, transaction, or occurrence as the Tort Claim she asserted in her First Amended Complaint, the Survival Claim related back to the date of the First Amended Complaint and was timely filed.

d. The GWDS explicitly states that a wrongful death action shall be commenced by the personal representative of the decedent within two years. The GWDS Claim she asserted in her Third Amended Complaint related back to the Tort Claim she asserted in her timely filed First Amended Complaint.

e. Here, there is no dispute that Hullett was appointed as Personal Representative of Judah's Estate within two years after his death. Indeed, she specifically filed her First Amended Complaint in that capacity, and her Third Amended Complaint did not seek to change her legal status. Rather, the GWDS Claim Hullett asserted in her Third Amended Complaint sought to specify "other just and proper relief" for the Tort Claim she asserted in her First Amended Complaint. Davis-Brumley is therefore inapplicable. Because the GWDS Claim that Hullett asserted in her Third Amended Complaint arose out of the same conduct, transaction, or occurrence as the Tort Claim she asserted in her First Amended Complaint, the GWDS Claim related back to the date of the First Amended Complaint and was timely filed.

f. The CWDS provides: "The action may be maintained by … in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and a guardian, for the injury or death of a protected person." Because Hullett was court-appointed to be responsible for Judah's property, she claims to qualify as a "guardian" under Parsely. But Hullett overlooks that the CWDS's guardian provision only applies in actions "for the injury or death of a protected person." Judah's Estate is not an individual; thus, it cannot be a "protected person" under the CWDS's guardian provision no matter how "guardian" is defined. When an action is brought under the CWDS, it must be brought by the decedent's parents, by the parent who has custody of the child following a divorce or dissolution of marriage, or the guardian of the child. The personal representative of the decedent's estate may not maintain the cause of action except upon the death of the person to whom custody of the child was awarded. No other result may be obtained according to the language employed by the legislature. Hullett therefore lacked standing to bring her CWDS Claim.

g. Concluding that Hullett lacked standing to bring her CWDS Claim, that claim is dismissed.

D. *Estate of Tarlow,* 109 Cal. App. 5th 124 (Court of Appeal of California, Second Appellate District 2025). When a will creates a trust, the named trustee has standing to file a petition to compel trust funding.

1. Attorney Barry Tarlow executed a will in November 2005, to which he made minor modifications in 2006. He made a series of specific gifts, then left the balance of his estate ("Estate") to be evenly divided between his sister, respondent Barbara Tarlow Rapposelli ("Barbara"), and their brother, respondent Gerald Tarlow ("Gerald"), "in equal shares." According to the terms of the will, Gerald was to receive his share "outright and free of trust," but Barbara's share was to be deposited in the "Barbara Tarlow Trust" ("Trust"). The will named a trustee for the Trust, appellant David Henry Simon ("Simon"), who was to distribute Trust funds to Barbara as he felt necessary "for her support, maintenance, health and education." On Barbara's death, all Trust assets would be distributed to Gerald outright; if Gerald had already died, the assets would be distributed to a donor-advised fund at Fidelity Charitable Gift Fund ("Fidelity Fund").

2. Barry Tarlow died on April 30, 2021. The will nominated Simon as executor, but Simon declined that role at the request of Barbara and Gerald. This allowed Barbara and Gerald to become the executors themselves, while Simon retained his more limited role as trustee of the Trust. The will was admitted to probate in July 2021. Barbara's share of the residual interest in the Estate, the portion intended to fund the Trust, was valued at more than $20 million.

3. In December 2021, Barbara contracted to buy the Fidelity Fund's remainder interest in the Trust for $100,000. The sale contract notes that because Gerald is five years younger than Barbara, the price reflects a discount based on the likelihood that Barbara would predecease Gerald and Fidelity Fund's interest would then be extinguished. It also records Barbara's intent to petition for modification of the Trust, and her intent to disclaim her interest in the Trust if that petition should prove unsuccessful.

4. In January 2022, Barbara and Gerald filed an ex parte petition to be appointed as trustees of the Trust, replacing Simon, and to modify the terms of the Trust to allow Barbara to decide how the trust assets would be distributed after her death if Gerald predeceased her. Simon objected, and the trial court denied the petition without prejudice because the requirements for an ex parte application had not been met. Also in January 2022, Barbara and Gerald settled the only creditor's claim made against the Estate. Marcia Morrissey, Barry Tarlow's long-term partner, had filed a claim for $16 million. Barbara and Gerald settled the claim for $4.5 million.

5. In July 2022, Barbara and Gerald filed a petition for final distribution of the Estate and payment of attorney's fees. The petition stated that Barbara had disclaimed her share of the residue of the Estate, and Gerald disclaimed his interest in the tangible personal property of the Estate, a portion of which had already been sold for $694,721. Under the terms of the will, this meant Barbara would get Gerald's share of the tangible personal property in the Estate, and Gerald would get Barbara's share of everything else.

6. In September 2022, Simon objected to Barbara and Gerald's petition, arguing Barbara had not properly disclaimed her interest and authorizing the distribution would improperly deprive the Trust of funds for both Barbara and the Fidelity Fund. In October 2022, Simon filed his own petition asking the court to distribute Barbara's interest to him as trustee of the Trust, and to rescind Barbara's purchase of the Fidelity Fund's interest in the Trust as an illegal contract.

7. Barbara and Gerald demurred to Simon's petition on the grounds that Simon lacked standing to seek relief against Barbara. The trial court sustained Barbara and Gerald's demurrer, with leave to amend, ruling Simon had no standing to file a petition. Simon filed an amended petition, again asking the court to determine that Barbara had neither properly disclaimed her share of the residue of the Estate, nor properly purchased Fidelity Fund's remainder interest in that share. Barbara and Gerald again demurred. The trial court sustained the demurrer, without leave to amend, finding that Simon had not changed his petition except to add further legal argument which it found unpersuasive.

8. Simon timely appealed. On appeal, the court of appeals reversed and remanded on the following grounds:

> a. Section 11700 provides a means for the court to adjudicate the "rights of [an] heir, devisee, or legatee to a share of the estate." An "heir" is a person "entitled to take property of the decedent by intestate succession" under the Probate

Code. In contrast, a "devisee" is a "person designated in a will" as the recipient of a "devise," or gift of property. Where a will creates a trust, the trustee "is a devisee under the will" because they are the person designated to receive the trust property from the estate and administer it according to the terms of the bequest. In the case of a devise to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees. The trustee's legal title to the trust property vests "as of the date of death."

b. Here, because Simon is the named trustee of the Trust, he is a devisee under the will, entitled to receive and administer the trust property from the Estate, and therefore is a "person claiming to be … entitled to distribution of a share of the estate." Thus, Simon is one of those persons who "may file a petition," under the statute. He has standing to proceed.

c. Barbara and Gerald argue that Barbara has a statutory right to disclaim the Trust, her disclaimer should be presumed valid, and Simon cannot force her to accept a gift she does not want. However, the presumption that disclaimers are valid is not conclusive. And a demurrer is not an evidentiary motion to which such a presumption may be applied.

d. Barbara and Gerald argue that Simon has failed to properly plead the invalidity of Barbara's disclaimer, and that there is no factual dispute requiring an evidentiary hearing. Simon need not plead facts concerning the disclaimer to establish his standing. That section provides standing to any "person claiming to be … entitled to distribution of a share of the estate." It is undisputed that Simon was named trustee of the Trust and therefore is a person with a claim to be entitled to distribution of a share of the Estate. The validity of Simon's claim is to be determined by the proceedings on his petition. Barbara and Gerald cite no authority which requires Simon to preemptively plead facts invalidating Barbara's disclaimer.

e. Probate proceedings are statutory in nature, and standing is determined by the applicable statute. Here, the proceeding before the trial court was a petition under section 11700. That section authorizes any person who has a claim to distribution from an estate to file a petition. Simon has such a claim. Therefore, he has standing to bring the petition. Whether Barbara's disclaimer invalidates Simon's claim goes to the merits of the petition. It does not affect Simon's standing.

E. *Harry & Irene Schneider Trust v. PNC Bank N.A.,* 2025 U.S. Dist. LEXIS 100721 (United States District Court for the District of New Jersey 2025). Attorney may be able to represent himself as trustee, but after disqualification as counsel due to a conflict may not proceed pro se, and alleged harm to familial relationships does not meet standing requirements.

1. On September 10, 2006, Elias and David Schneider ("David") jointly applied for and opened a checking account designated for the Harry & Irene Schneider Distribution Trust (the "Trust") with PNC. Elias is an authorized signatory for the account.

2. Elias and his wife Cynthia Schneider ("Cynthia") maintain a home equity line of credit ("HELOC") with defendant. On November 10, 2006, Elias and Cynthia applied for and executed an amendment to the HELOC. The amendment includes a payment provision in which HELOC payments were to be automatically drawn from the Trust checking

account. Elias thereafter received monthly account statements for the HELOC. In 2023, Elias first disputed the payments from the Trust checking account to the HELOC.

3. The Trust, Elias as co-trustee, and David as co-trustee and beneficiary filed suit in Superior Court of New Jersey to have defendant removed. The operative third amended complaint adds Cynthia as a plaintiff and asserts nine counts — including breach of contract and negligence and conversion — relating to defendant's "invasion" of the Trust checking account. Plaintiffs seek declaratory relief, $2 million or sums sufficient to reasonably compensate them, fees, costs, and punitive damages. The $2 million sought relates to expenses that stem from defendant's purported invasion, including tax liens on real property owned by the Trust, expenses from defending foreclosure actions, and the cost of making the Trust property suitable for sale.

4. Defendant answered and asserted a counterclaim against Elias and Cynthia for indemnification. On the same day that it answered, defendant moved to disqualify Elias as counsel for David and the Trust. David filed a purported waiver of conflict. On February 20, 2024, Magistrate Judge Douglas E. Arpert granted defendant's motion to disqualify, concluding that on the facts presented, a clear and unmistakable "concurrent conflict of interest" exists by virtue of Elias's representation of himself and his wife, whose interests are at odds with those of his brother and the Trust inasmuch as the funds withdrawn from the Trust checking account were used to pay Elias and Cynthia's personal obligations on the HELOC account. Further, because PNC maintains that Elias expressly authorized these withdrawals, he will necessarily be an important witness in the trial of this case. Judge Arpert rejected Elias's proposal that he be questioned at trial by his son — who is a lawyer at his office. He further concluded that David's waiver was inadequate because it mischaracterized and insufficiently explained the nature of the conflict, lacked an accurate description of defendant's allegations, and was not witnessed or executed under penalty of perjury.

5. Plaintiffs were provided 30 days to amend the pleadings to remove any conflict, retain new counsel, or — in the case of Elias, Cynthia, and David — indicate that they intended to proceed pro se. Elias filed a letter advising that new counsel had not been retained, he intended to continue representing himself and Cynthia, and he did not believe that any counts will be dismissed, only the names of the plaintiffs, so no new pleadings need to be filed.

6. Elias and David indicated during a conference with Magistrate Judge Sharon A. King that they intended to retain counsel for the Trust. Nevertheless, Elias and Cynthia filed a motion for declaratory judgment, which the court administratively terminated for failure to first obtain leave of the Court, and, noting that trusts may not proceed pro se, dismissed the Trust's claims, and directed the Clerk to terminate both the Trust from the case and Elias's appearance on behalf of David.

7. Elias proceeded to submit multiple filings seeking reconsideration. The court warned Elias of sanctions if motion practice revealed that he was without a reasonable basis to assert his claims and suggested that the parties confer or engage in mediation. The court denied the motion for reconsideration, granting the requests to proceed with summary-judgment motion practice, and stating that Cynthia and David were to file their own cross-motions unless they agreed to voluntarily dismiss their claims.

8. Stuart Schneider entered a substitution of attorney to represent both Elias and Cynthia and proceeded to file an opposition brief and amended brief. The court struck the briefs because of the conflict between Elias and Cynthia, directed the Clerk to remove Stuart's appearance, and provided Stuart until August 30, 2024 to clarify who he intended to represent.

9. Stuart never submitted a response and, instead, Elias filed both an opposition to defendant's motion and a separate motion on behalf of himself and Cynthia. The court struck both filings based on the repeated finding that Elias could not represent Cynthia due to his conflict of interest.

10. The court again cautioned Elias about sanctions if his claims turned out to be frivolous, and appointed a mediator. Defendant wrote to the court to advise that mediation was unsuccessful.

11. The court then granted summary judgment for the bank in part on the following grounds:

a. Defendant first asserted that Elias and Cynthia are without standing because David is the sole beneficiary of the Trust and thus the only one with a cognizable interest in the Trust property. Elias and Cynthia further cannot demonstrate the harm necessary to confer standing. On the merits, defendant argues that the record shows that Elias and Cynthia authorized the payments to the HELOC and benefited from them.

b. Elias likens defendant's argument that it was following his authorization to the acts of war criminals during World War II and claims that defendant seeks to deflect its participation in the joint wrong. Defendant was on notice that the Trust checking account contained the funds of others and cannot invoke estoppel when it knowingly participated in the wrong. Elias cites the "Two Hats Doctrine" and claims that he signed the HELOC wearing the hat of a borrower and not as trustee. On the issue of standing, Elias contends that he has only been terminated as attorney for the Trust and that he remains trustee and attorney for himself as trustee.

c. Elias the attorney seeks to represent Elias the trustee. Ordinarily, this may be permissible. Elias has standing to sue as trustee, but may not do so pro se because he is a non-attorney pro se litigant by virtue of his disqualification. Non-attorney trustees may not proceed pro se. This is a logical result. The issue of standing and who may bring what claims in what capacity admittedly peers through to the merits of case and the undisputed facts because they are intertwined with why Elias was disqualified in the first place. To borrow a horror trope, the allegations are squinting out the window for a supposed bogeyman, but the unrebutted facts show that the call is coming from inside the house. Elias the trustee's best claim might well be against Elias the individual, which is one reason why Judge Arpert disqualified him in the first place. Elias has confirmed as much on multiple occasions. These quick changes from one role to another do not obscure Elias's obvious conflict, they only make it clearer.

d. Of course, Elias may represent himself in pursuing any personal claim that he may have. Count 7 of the third amended complaint seeks personal damages for stress, anxiety, embarrassment, aggravation, humiliation, and adverse effects on

his familial standing and relationships. During the motion hearing, the court pointedly asked Elias what his personal damages were, to which he cited his fractured relationship with David. Elias proposed having a jury decide the monetary value of a damaged familial relationship. Even if Elias may theoretically pursue his personal claim on behalf of himself, that does not necessarily mean that he meets the requirements for standing. Elias must establish standing — requiring harm, traceability, and redressability — for each form of relief sought.

e. The alleged harm to his familial relationships does not readily meet the standing requirements. Any fractured relationship between he and David most logically relates to Elias's own actions in authorizing payments from the Trust checking account to the HELOC. It is also unclear that a ruling in Elias's favor would mend the relationship. The court need not speculate on the traceability or redressability of Elias's purported harm because it is Elias's obligation at this stage to set forth specific facts to establish standing.

f. It is apparent that David has abandoned whatever claims he may have had. David failed to appear in person for the July 15, 2024 hearing for the motion for reconsideration and so the court called him from the bench. David confirmed over the phone that he understood that he was proceeding pro se and stated that he was of the understanding that he "was pretty much out of this whole thing with [his] brother." David never filed a cross-motion or opposition to defendant's motion. This despite defendant sending a copy of its motion to David's address of record via FedEx. It has thus been more than 10 months since David has participated in this case in any manner despite his knowledge that dispositive motion practice was commencing. Courts possess discretion to dismiss cases sua sponte for failure to prosecute. David has not advanced any argument of his own. The record is clear that payments to the HELOC were debited from the Trust checking account, of which David is the alleged sole beneficiary. The extent to which defendant is liable for these payments has not been adequately fleshed out and any potential liability appears to be shared with Elias and Cynthia. David's claims are dismissed for failure to prosecute.

g. Elias was or should have been aware of the inherent conflict present in his representation of the Trust and its interests from the outset of this litigation. Any doubt — the product of hope or otherwise — should have been resolved in February 2024 when Judge Arpert disqualified him. From that point, Elias's choices were simple: seek outside counsel or cease his pursuit. He instead chose to not amend the complaint or retain counsel, challenge the order dismissing the Trust's claims, and engage in summary-judgment motion practice. Elias does not contest that he "may have benefitted" from the payments from the Trust checking account to the HELOC or that he "will have to work [that] ... out with the Trust at some point," but rather takes the position that he as trustee has chosen not to sue himself for any potential impropriety. The interest of justice requires imposition of sanctions in the form of defendant's reasonable attorney's fees and costs from February 20, 2024, the date of Judge Arpert's disqualification order, to present.

F. *Holguin v. Lourido*, 2025 Fla. App. LEXIS 7058 (Court of Appeal of Florida, Third District 2025). Claimant lacks standing due to signing premarital agreement releasing all present and future claims against spouse's estate.

1. This appeal stems from a protracted and contentious probate dispute between Mary Ann James de Holguin, Rodrigo Holguin's (the "Decedent") second wife, and the Decedent's adult children (the "Children") from his first marriage. The underlying probate dispute involves, inter alia, a marital agreement containing an express release of all claims against the Decedent's property or estate. A brief history of the parties' marital history is therefore necessary. It is undisputed that in March 1965, the Decedent married his first wife in Illinois. The marriage was subsequently registered in Colombia, where they were citizens and resided. They had three children together. In May 1984, the parties obtained a final judgment of divorce in Florida. But their marriage remained registered in Colombia.

2. The Decedent and Mary Ann, his second wife, have a complicated marital history. In June 1984, the Decedent and Mary Ann attempted to marry, but at that time, both the Decedent and Mary Ann were legally married to other people. It is undisputed that this first attempted marriage was not legally valid.

3. In June 1985, the Decedent and Mary Ann attempted to marry a second time. Mary Ann contends that this marriage was valid and that she and the Decedent were continuously married from 1985 until the Decedent's death in 2019. The Children assert that the second attempted marriage was not valid because the Decedent was still married to his first wife. This is supported by the unrefuted record, which shows that the Decedent did not obtain a divorce decree in Colombia from his first wife until April 1997. Moreover, the record also contains an October 1997 Colombian divorce decree, signed by both Mary Ann and the Decedent, declaring that the parties agree to end their June 1984 and June 1985 civil marriages.

4. Mary Ann and the Decedent would go on to marry a third time. But before doing so, they entered into an "Antenuptial Agreement" in August 1999. The Agreement states that the "parties plan to marry each other" and that the intent of the Agreement is to address all the property outside of Colombia "because of the contemplated marriage." The Agreement provides for the disposition of, among other things, a Key Biscayne condominium and a Co-Op Apartment in New York. The Agreement also contains a Release Provision, which provides as follows: "Except as otherwise provided in this agreement, each party releases all claims or demands in the property or estate of the other, however and whenever acquired, including acquisitions in the future."

5. In November 1999, Mary Ann and the Decedent were legally married in New York according to a City of New York Marriage Certificate. This was their third and final marriage.

6. In June 2019, the Decedent executed his Florida Will, which concerns "only [Decedent's] assets located in the State of Florida, and, if applicable, elsewhere in the United States[.]" The Will expressly excludes Mary Ann: "Notwithstanding anything expressed or implied in this agreement to the contrary, I intentionally omit Mary Ann James de Holguin and her descendants as beneficiaries under this will."

7. In October 2019, approximately three months before the Decedent died, Mary Ann and the Decedent executed a Memorandum of Understanding (the "MOU"), which provides for the distribution of various assets in Colombia and the United States. The MOU also

contains a Release Provision: "Notwithstanding the preceding or anything to the contrary in this MOU and/or the prenuptial agreement, in any case each of the parties hereby reciprocally releases the other party from all and/or any claims over the marital partnership, community property claims, rights and/or interests under the laws of any jurisdiction, in relation to the properties held, either directly or indirectly, by the other party, as well as from any and all income or increases thereof."

8. In December 2019, the Decedent died in Colombia, survived by his three Children from his first marriage and Mary Ann. In June 2020, the lower court admitted the Decedent's Florida Will to probate. In September 2020, Mary Ann filed the Objection and Counter-Petition seeking to be appointed personal representative and to invalidate the Will for undue influence based on an alleged romantic relationship between the Decedent and the attorney who prepared his Will. The Counter-Petition does not mention the August 1999 Antenuptial Agreement or the MOU, both of which provide for the disposition of assets outside of probate and contain provisions releasing all present and future claims in the property or the estate.

9. In November 2020, the Personal Representative moved to dismiss Mary Ann's Objection and Counter-Petition. The court granted the Personal Representative's Motion to Dismiss based on the Antenuptial Agreement. Mary Ann appealed the dismissal, and the court of appeals reversed. On remand, the Children moved for summary judgment. Mary Ann cross-moved for Summary Judgment. Rather than seeking to invalidate the Will, which was the relief she sought in her Objection and Counter-Petition, Mary Ann argued that under the Antenuptial Agreement and the MOU, she was entitled to the Key Biscayne condominium and the New York Co-Op. Additionally, in her Reply in support of her Cross-Motion for Summary Judgment, Mary Ann relied on two 2002 Trusts. She argued that the Trusts provided her with an interest in the Key Biscayne and New York properties.

10. The trial court granted the Children's Motion for Summary Judgment concluding that there is no genuine issue of material fact that [Mary Ann] executed an Antenuptial Agreement, which contains a release provision and bars any claim to challenge Decedent's Florida Will. The trial court further concluded that [Mary Ann] has not established that she will stand to gain if the Decedent's Florida Will is somehow invalidated because Colombian law would control (as Decedent was a Colombian domiciliary and died in Colombia) and [Mary Ann] would not be entitled to an elective share under Florida law. The court also denied Mary Ann's Cross-Motion for Summary Judgment because her Counter Petition was brought as a Will challenge, and the relief she now seeks, an interest in two properties, should have been brought as a creditor claim.

11. Mary Ann timely appealed. On appeal, the court of appeals affirmed on the following grounds:

> a. Mary Ann signed an Antenuptial Agreement releasing all present and future claims in the Estate. Such an agreement is authorized and enforceable under Florida law. Mary Ann does not argue that the Agreement is invalid due to fraud, deceit, duress, coercion, misrepresentation, or overreaching, nor does she argue that the Agreement is unfair or unreasonable. Instead, Mary Ann argues the Agreement may or may not be enforceable depending on disputed material facts because it was entered into after she was married, and Colombian law

prohibits [*10] antenuptial agreements. This argument is rejected because the record conclusively shows that Mary Ann was not married when she signed the August 1999 Antenuptial Agreement.

b. This is evident from the October 1997 Voluntary Divorce, signed by both Mary Ann and the Decedent. The document expressly states that the June 1984 marriage and the June 1985 marriage are ended. Moreover, the parties signed an August 1999 Antenuptial Agreement and a September 1999 Prenuptial Agreement, both of which make clear that the parties are not married and that the agreements are being entered into in contemplation of marriage. Finally, the record contains a City of New York Marriage Certificate showing that the parties were married in November 1999.

c. The trial court did not err in determining that there is no genuine issue of material fact that Mary Ann lacks standing to contest the Will. The unrefuted record shows that Mary Ann signed valid and enforceable agreements before she was married, in which she agreed to release all present and future claims against the Estate.

G. *In re Estate of Scott,* 2025 Tex. App. LEXIS 8595 (Court of Appeals of Texas, Second District, Fort Worth 2025). Non-party to suit cannot appeal judgment.

1. Appellant Glendell Thompson, pro se, attempts to bring a restricted appeal of the trial court's November 21, 2024 order admitting a will to probate as a muniment of title. The court dismissed the appeal on the following grounds:

a. To sustain a restricted appeal, the filing party must show that (1) he filed notice of the restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying lawsuit; (3) he did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.

b. Thompson filed his pro se notice of restricted appeal within six months of the probate court's order, but the record does not reflect that he was a party to the underlying lawsuit.

H. *In re Labelle,* 2025 Mont. LEXIS 1392 (Supreme Court of Montana 2025). Pro se litigant cannot appear on behalf of trust.

1. Representing herself, Laura L. Labelle has filed a Petition for Writ of Supervisory Control along with a Motion to File Oversized Petition for Writ of Supervisory Control wherein she seeks to file a pleading of 6,200 words. Labelle requests supervisory control over the Eleventh Judicial District Court, Flathead County, and the Honorable Danni Coffman in a civil action concerning a trust.

2. Labelle puts forth that the District Court's Orders and rulings are inconsistent with Montana law. She argues that a trust is not a separate legal entity. She further argues that the court has not ruled on her pro se motions. Labelle contends that the District Court "applies an inapplicable law," because trusts and estates are different. Labelle cites to a Montana case, however, she posits that she "is a named individual and co-trustee facing potential personal liability for fiduciary obligations." She states that "her individual status

is inseparably bound to her fiduciary duties, rendering the order itself contradictory and unenforceable, as it denies Petitioner her constitutional right to appear pro se."

3. The District Court advised Labelle that "she may only represent herself in her individual capacity but may not represent herself pro se in her capacity as Co-Trustee of the subject trust." Labelle includes a copy of a September 10, 2025 transcript where the District Court directed Labelle to comply with the court's orders or file a Petition for Writ of Supervisory Control with the Montana Supreme Court. The District Court further stated that Labelle will face contempt of court as she "may not just simply disagree and disregard [c]ourt orders."

4. The court denied the petition on the following grounds:

a. Supervisory control is an extraordinary remedy, reserved for extraordinary circumstances. A petitioner must demonstrate a case with purely legal questions and urgent or emergency factors making the normal appeal process inadequate, and the other court is proceeding under a mistake of law, causing a gross injustice.

b. This matter is not the case for supervisory control. Labelle misunderstands the law. This Court has explained many times that a pro se litigant cannot appear on behalf of or represent another person or entity.

c. Labelle admits she is "inseparably bound to her fiduciary duties[.]" That affiliation does not supersede the requirement for obtaining counsel here. Pursuant to the Montana Uniform Trust Code, a person is defined not only as an individual, but also a corporation, business trust, estate, trust, and partnership, along with several other legal or commercial entities. Montana recognizes a trust as a separate entity such as a person, and Labelle cannot represent herself and a trust. Non-lawyers who attempt to represent corporations or partnerships in court are guilty of contempt of court. The same general rule applies here. Labelle cannot represent herself and another person. She does not have a right to defend herself as a Co-Trustee or to appear pro se for a trust as a Co-Trustee under Montana law.

d. The court has informed her that she should retain counsel, and she has not complied. Labelle is not entitled to a writ of supervisory control. She is not entitled to her requests to vacate the court's June Orders or to compel any other rulings on her prior motions. She has a remedy of appeal when she receives a final, written judgment.

I. *Internal Path Ecclesiastical Tr. v. Toyota Motor Credit Corp.,* 2025 U.S. Dist. LEXIS 250894 (United States District Court for the District of the Northern Mariana Islands 2025). Whether person validly assigned car loan debt to ecclesiastical trust does not support federal court jurisdiction.

1. On August 22, 2025, Plaintiff Internal Path Ecclesiastical Trust ("the Trust") filed a Complaint against Defendant Toyota Motor Credit Corporation ("TMCC") for declaratory relief pursuant to 22 U.S.C. § 2201 seeking a declaratory judgment confirming three matters: (1) that the Trust holds a lawful secured interest in a private agreement assigned by its Trustee; (2) TMCC failed to respond or cure after being served with formal notice and opportunity; and (3) that no further administrative action is required before the Trust proceeds.

2. Mr. Best established the Trust in July 2025 with the filing of a "Certificate of Trust" in the Gwinnett County Superior Court in Georgia, which Certificate names Mr. Best as Trustee. Mr. Best then filed a Uniform Commercial Code Financing Statement purporting to publicly assert the Trust's secured interest over the individual named OTIS LEE BEST III (identifying Mr. Best as debtor, the Trust as secured party, and "[a]ll assets, property, accounts, proceeds, rights, titles, entitlements, and beneficial interests, now existing or hereafter acquired by the Debtor, including legal name, SSN, all public and private records, commercial paper, contracts, and rights to income" as collateral, and setting forth a "fee schedule" listing monetary penalties "against any and all parties . . . who interfere with, infringe upon, or make authorized use of the Debtor, the collateral, or the secured interest of the Trust").

3. Thereafter, Mr. Best filed a Uniform Commercial Code Financing Statement Amendment purporting to assign Mr. Best's interest in a claim against TMCC to the Trust arising from TMCC's failure to respond to an "Affidavit of Default" that Mr. Best served on TMCC in June 2025. Mr. Best served TMCC with copies of the Certificate of Trust, the Financing Statement and Amendment, and a "Final Notice of Default and Opportunity to Cure," to which TMCC did not respond.

4. Prior to the purported assignment of his interest to the Trust, Mr. Best filed complaints with federal and Georgia government agencies concerning TMCC's wrongful acts and default arising from Mr. Best's purchase of a vehicle from a Lexus dealership in Gwinnett County, which purchase was financed by TMCC.

5. The Trust sought a declaratory judgment that: recognize[s] Internal Path Ecclesiastical Trust as the real party in interest, lawfully assigned all rights, claims, and authority regarding the subject matter, and acting by and through its authorized Trustee; affirm[s] the Trust's standing to assert secured party rights and enforce its interests, without third-party representation or rebuttal; declare[s] that Defendant failed to respond to or cure a properly noticed claim, and that such silence constitutes acquiescence and final commercial default; and declare[s] that all non-judicial remedies were exhausted by the assignor, and that Plaintiff may proceed in full authority under said assignment.

6. The court dismissed the claims on the following grounds:

> a. The Trust's reliance on 28 U.S.C. § 2201 as the relevant "law[] . . . of the United States" under which its claims "aris[e,]" is misplaced. The Declaratory Judgment Act does not create a cause of action and thus cannot be a standalone basis for jurisdiction. The Trust does not identify any other federal law that "creates [its] cause of action," and the Court discerns none.
>
> b. The Trust's allegations do not show that its attempt at "vindication of a right under state law" through this case "necessarily turns on some construction of federal law." Among the issues the Trust lists for resolution by declaratory judgment, whether Mr. Best validly assigned his interests to the Trust, such that the Trust may prosecute the claim against TMCC, is governed by state contract and commercial law. Similarly, whether the Trust properly noticed its claim against TMCC and the consequences of TMCC's failure to respond to the Trust's notice are governed by state law.
>
> c. As to the Trust's request for judicial findings concerning exhaustion of remedies and perfection of its interest such that the Trust can bring suit against TMCC —

which request appears to be based on Mr. Best and the Trust's attempt to obtain a declaratory judgment to invalidate any debt or debt repayment obligations arising out of TMCC's financing of Mr. Best's purchase of a vehicle: declaratory judgment actions must satisfy Article III's case-or-controversy requirement. At a minimum, this means that the dispute must be "real and substantial" and "admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

d. Thus, to the extent that the Trust may have claims that touch upon federal law, the Court lacks subject-matter jurisdiction over such claims because there is no actual case or controversy.

e. The Complaint fails to establish, on its face, that the Court has subject-matter jurisdiction over the claims set forth therein because the Court's federal-question jurisdiction does not extend to a declaratory judgment action that relies solely upon the Declaratory Judgment Act, raises state law issues, and fails to allege a case or controversy. The Court therefore lacks the authority to proceed further with the Complaint, including any entry of default and default judgment proceedings, and must dismiss the Complaint without prejudice. As the Complaint's jurisdictional defects are not technical in nature and cannot be cured by amendment, the Court's dismissal of the Complaint is without leave to amend.

J. *Kings v. Bridgecrest Acceptance Corp.,* 2025 U.S. Dist. LEXIS 167588 (United States District Court for the District of Arizona 2025). A nonlawyer cannot represent herself to the extent that she appears in her capacity as trustee for a trust.

1. Sherri Denienne Nixon ("Ms. Nixon") filed this action pro se on behalf of the Ministry of Kings and Queens of Moorish National Ministry Trust (the "Trust"), claiming authority to proceed as trustee. The Complaint seeks damages related to an alleged vehicle lien dispute.

2. The court ordered the Trust to either retain an attorney or otherwise show why this case should not be dismissed. Ms. Nixon argues trustees may proceed pro se. Ms. Nixon asserts that as Trustee, she holds "legal title to the property and rights of action belonging to the Trust" and "[a]ccordingly, [is] the real party in interest for the purposes of this litigation, and under Rule 17, [is] authorized to bring suit directly in [her] own name." Ms. Nixon further asserts that she is appearing in her "fiduciary capacity, sui juris, as Trustee, which is a distinct role from attorney representation."

3. The magistrate recommended the Court dismiss the Complaint without prejudice on the following grounds:

a. In general, a trust lacks the capacity to sue or be sued under Arizona law. At common law, a trust cannot sue or be sued because it is not a juristic person. In most jurisdictions, a trust is not an entity separate from its trustees, and cannot sue or be sued in its own name, and therefore, the trustee, rather than the trust, is the real party in interest in litigation involving trust property. Because a trust is not a legal entity, and does not have capacity, any suits involving the trust must be brought by or against the trustees. Generally, a common-law trust is not considered a legal entity capable of suing or being sued; therefore, any suit involving the trust must be brought by or against its trustee. By contrast to a common-law trust, some states allow a business trust to sue and be sued in its

own name. "Business trust" means an unincorporated association or trust of the type which at common law was known as a "business trust" or "Massachusetts trust," created by an instrument under which property is held and managed by trustees for the benefit and profit of such persons as are or may become the holders of transferable certificates evidencing beneficial interests in the trust estate.

b. Regardless of whether the Trust has the capacity to sue or be sued, it must be represented by counsel. A nonlawyer cannot represent herself to the extent that she appears in her capacity as trustee for a trust.

c. As this case cannot be maintained without counsel, the Complaint should be dismissed without prejudice because it was filed pro se by Ms. Nixon.

4. The federal district court adopted the magistrate's recommendation and dismissed the action.

K. *Kromer v. Arthritis Found., Inc.,* 2025-Ohio-661 (Court of Appeals of Ohio, Tenth Appellate District 2025). Only attorney general has capacity to sue to enforce charitable trust.

1. Thomas R. Kromer filed a declaratory judgment action against the attorney general, the Arthritis Foundation, Inc. ("Arthritis Foundation"), and the Central Ohio Chapter Arthritis Foundation, Inc. ("Ohio Chapter"). The Arthritis Foundation is a national charitable organization, of which the Ohio Chapter was a local chapter. The Ohio Chapter was a charitable trust. Kromer is a former director of the Ohio Chapter and a retired, inactive attorney.

2. In the early 1990s, the Ohio Chapter conducted a capital campaign to construct a facility to meet the needs of people with arthritis. The complaint states that "the then-presiding Ohio Chapter Board Chairman sought and received a waiver from the Arthritis Foundation allowing all capital campaign funds raised locally to" fund the construction of the facility. The waiver allowed the Ohio Chapter to deviate from its typical practice of remitting a percentage of all donations to the Arthritis Foundation. The Ridge Mill Drive facility, which was constructed with the capital campaign contributions, opened in 1994.

3. Effective January 1, 2011, the Ohio Chapter merged with the Arthritis Foundation, Great Lakes Region, Inc. ("Great Lakes"), and the Ohio Chapter then ceased to exist. Pursuant to Article XIII of the Ohio Chapter bylaws, "[i]n the event of dissolution of this Chapter or the surrender or loss of charter, the assets of this Chapter shall be transferred to the [Arthritis] Foundation to be used for the purposes of the [Arthritis] Foundation, within the Chapter's area." The bylaws defined the Ohio Chapter's "area" as 25 specified counties within central Ohio. However, when the Ohio Chapter merged with Great Lakes, "all property, real, personal and mixed, . . . and all and every other interest" that the Ohio Chapter owned was vested with Great Lakes.

4. In 2016, Great Lakes transferred its assets to the Arthritis Foundation before dissolving. The Arthritis Foundation sold the Ridge Mill Drive facility in 2021.

5. Relying on Article XIII of the Ohio Chapter bylaws and the waiver obtained during the capital campaign, the complaint requested the trial court declare the Arthritis Foundation must maintain the assets of the Ohio Chapter and the proceeds of the sale of the Ridge Mill Drive facility as restricted-use assets, with use limited to the central Ohio counties listed in the Ohio Chapter bylaws. The complaint also requested the trial court order the

Arthritis Foundation to make annual reports regarding the restricted-use assets to the attorney general and former board members of the Ohio Chapter.

6. The attorney general moved to dismiss Kromer's complaint for lack of standing. The trial court granted the motions to dismiss. Kromer appealed.

7. The court of appeals affirmed on the following grounds:

a. By statute, only the attorney general may bring suit to enforce a charitable trust.

b. In his complaint, Kromer requests that the trial court enforce Article XIII of Ohio Chapter's bylaws and the Arthritis Foundation's waiver of its share of capital campaign donations by declaring that certain assets held by the Arthritis Foundation are restricted-use assets. According to the complaint, the Arthritis Foundation now holds the assets of the defunct Ohio Chapter in Georgia, which Kromer contends violates Article XIII and the donation waiver. The relief sought in the complaint would require the Arthritis Foundation to use the assets in central Ohio, as Kromer believes it must to comply with its obligations. In short, Kromer seeks to enforce a charitable trust.

c. Kromer did not lack standing. Rather, Kromer lacked the capacity to file suit. A plaintiff must have both standing and capacity to commence a lawsuit. Standing depends on whether the plaintiff has alleged a sufficient personal stake in the outcome of the controversy to obtain a judicial resolution. To establish traditional standing, a plaintiff must establish (1) an injury that is (2) fairly traceable to the defendant's unlawful conduct, and (3) likely to be redressed by the requested relief. A party may have standing but lack capacity to sue. Capacity to sue refers to the eligibility of a person to commence an action. In determining whether an individual has the capacity to sue, a court examines the substantive law to ascertain whether the party has the right to appear in a court in the first instance. A person with capacity has the legal qualifications to sue, either as an individual or on behalf of another.

d. R.C. 109.24 provides that, "[t]he attorney general shall institute and prosecute a proper action to enforce the performance of any charitable trust, and to restrain the abuse of it." Consequently, substantive law designates the attorney general as the only person eligible to commence and pursue an action to enforce the performance or restrain the abuse of a charitable trust. The attorney general, therefore, is the sole person with capacity to bring the instant action. Because Kromer does not have capacity to bring the action, the trial court did not err in dismissing his action for failure to state a claim upon which relief could be granted.

e. The trial court, however, dismissed Kromer's action for lack of standing, not lack of capacity to sue. This was incorrect. While the court sustains Kromer's first assignment of error, the court did not reverse the trial court's judgment because the trial court reached the correct result, even though it relied on the wrong legal doctrine to dismiss Kromer's action.

f. Amendment of the complaint could not endow Kromer with capacity to obtain the relief he wants. No matter what cause of action Kromer pleads, only the attorney general has the authority to enforce a charitable trust. The trial court,

therefore, did not abuse its discretion in denying Kromer's request for leave to amend because amendment would be futile.

g. Kromer alleged in the complaint that he is a retired, inactive attorney. Kromer, therefore, cannot practice before the trial court or this court on behalf of another person or entity. If Kromer could somehow bring this action in his capacity as a trustee for or of the Ohio Chapter, he would be representing the interests of the Ohio Chapter and, thus, engaging in the unauthorized practice of law.

L. *McCord v. State Farm Fire & Cas. Co.*, 2025 U.S. Dist. LEXIS 93828 (United States District Court for the Southern District of Mississippi, Southern Division 2025). To pursue claim on behalf of the estate, the estate must be opened and administered through the chancery court as of the commencement of suit.

1. On August 29, 2021, Hurricane Ida damaged Ferdinand Loyacano's ("Loyacano") residence, which was insured under a homeowner's insurance policy issued by Defendant State Farm Fire and Casualty Company ("Defendant" or "State Farm"). Loyacano reported the loss to State Farm, which completed an initial loss adjustment of $2,343.39. The Complaint alleges that Plaintiff Tina McCord ("Plaintiff") retained a licensed public adjuster, who calculated that the damages amounted to $174,825.48. Responding to that estimate, State Farm revised its estimate to $2,475.91.

2. On October 7, 2021, Loyacano sold his home, and on February 14, 2023, he passed away. Plaintiff Tina McCord alleges that in his will, Loyacano named her "as heir and executor of his estate," and, purporting to proceed on behalf of Loyacano's estate, she filed this lawsuit advancing survival claims for breach of contract and reckless disregard of Loyacano's rights. In her prayer for relief, Plaintiff asked that "[t]his Honorable Court order Tina McCord be the administrator of Ferdinand Loyacano's Estate for the purposes of this claim until the probate court issues letters testamentary."

3. State Farm removed the case to federal Court, invoking diversity jurisdiction, then moved to dismiss for lack of standing. The federal district court dismissed the action without prejudice on the following grounds:

a. Prudential standing requirements exist in addition to the immutable requirements of Article III as an integral part of judicial self-government. A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

b. Mississippi's survival statute provides that executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. Breach of contract claims constitute personal actions under Mississippi law.

c. Plaintiff invokes the survival statute by bringing insurance claims for property damage that belonged to her deceased father. In the event the litigants wish to pursue a claim on behalf of the estate of the deceased, such estate must, of course, be opened and administered through the chancery court. A plaintiff bringing a survival claim must be the administrator as of the commencement of suit. Thus, opening an estate after a lawsuit is filed and then naming a plaintiff as

the administrator of that estate does not cure a lack of standing at the time of filing the lawsuit.

d. Although the Complaint makes a general statement that Plaintiff is heir and executor of Loyacano's estate, it only supports that assertion by alleging that such is stated in Loyacano's will. At no point does the Complaint contend that the estate had actually been opened, or that Plaintiff had been appointed executor or administrator of the estate by a chancery court judge. Thus, Plaintiff's claim that she is heir and executor to the estate constitutes an unsupported conclusory assertion.

e. Moreover, the Complaint requests that the Court enter an order making Plaintiff administrator of the estate for purposes of maintaining this suit because a chancery court had not issued letters testamentary. This contradicts the Complaint's assertion that Plaintiff was already the executor and administrator of the estate. Plaintiff then states in her Response that she is "in the process of opening an estate for the deceased insured Ferdinand Loyacano and intends to seek leave to add the estate as a party." In sum, Plaintiff's contention in the Complaint that she is executor of Loyacano's estate is contradicted by both the Complaint itself and by her representations to the Court in her Response. As such, the Complaint does not adequately allege that Plaintiff has standing to bring this suit.

M. *Ministries v. Regions Bank, N.A.*, 2025 U.S. Dist. LEXIS 252388 (United States District Court for the Middle District of Florida, Fort Myers Division 2025). Trustee does not have the right to serve as legal counsel for a private ecclesiastical trust domiciled within the Florida Republic.

1. Coldstream Ministries, proceeding without a lawyer, is a "private ecclesiastical trust domiciled within the Florida Republic, acting by and through its living trustees, Daman-Thomas Caldwell and Jennifer-Leigh Caldwell." The court struck the complaint on the following grounds:

a. Although the Federal Rules of Civil Procedure allows a trustee to sue on behalf of the trust (the real party in interest), the rules do not confer upon the trustee the right to serve as legal counsel for the trust.

b. The right to appear pro se is limited to parties conducting their own cases and does not extend to non-attorney parties representing the interests of others. The complaint filed by Daman-Thomas and Jennifer-Leigh Caldwell on behalf of the trust is a legal nullity that must be disregarded.

N. *Newland & Assocs., PLLC v. Lasiter*, 2025 Ark. App. 385 (Court of Appeals of Arkansas, Division Four 2025). Interest as a creditor is not a direct interest in a legal malpractice action and is tangential or collateral, which cannot support intervention.

1. This is a companion case to the appeal filed in *Lasiter v. Newland & Associates, PLLC*, 2025 Ark. App. 348, S.W.3d ("Lasiter I").

2. The decedent, Michael Allen Lasiter, and Caroline Lasiter were married. Michael Allen Lasiter retained the services of Newland & Associates, PLLC, to create a comprehensive estate plan that eventually included two trusts and a pour-over will. The trusts named

Newland & Associates, PLLC, as the trustee of both trusts and the executor of the pour-over will.

3. After the death of the decedent and over the ensuing years, Caroline, the surviving spouse, made several demands and claims against the estate of Michael Allen Lasiter and the trustee, including, but not limited to, a petition to change trustee. These disputes eventually led Newland & Associates, PLLC, in its capacity as trustee of both trusts, to file a declaratory judgment action against Caroline Lasiter in the Fifth Division Pulaski County Circuit Court on April 19, 2019 ("Lasiter I"). After years of litigation, Lasiter I finally concluded with a judgment being entered in favor of Newland & Associates, PLLC, as trustee of the Michael Allen Lasiter Revocable Trust ("Newland Trustee") against Caroline in the amount of $1,403,724.84, with interest at the rate of 2.5 percent per annum, and $168,098.14, with interest at the rate of 4.5 percent per annum. Caroline appealed Lasiter I.

4. Before she filed Lasiter I, Caroline filed Lasiter II in the Twelfth Division of the Pulaski County Circuit Court, which can be generally described as a legal malpractice action against J. Richard Newland, Jr., individually and as trustee of the Michael Allen Lasiter ("MAL") Irrevocable Insurance Trust; Elizabeth Abney Caldwell, individually and as trustee of the MAL Irrevocable Insurance Trust; and Newland & Associates, PLLC, corporately and as trustee of the MAL Irrevocable Insurance Trust ("Newland Defendants").

5. After the $1,403,724.84 judgment was entered in Lasiter I in favor of Newland Trustee, Caroline and the Newland Defendants reached a settlement in the legal malpractice claim in Lasiter II wherein the Newland Defendants offered to pay Caroline $2 million. However, before Lasiter II was dismissed, the judgment creditor in Lasiter I, Newland Trustee, filed a motion to intervene in Lasiter II, hoping to somehow execute on the $2 million settlement proceeds in satisfaction of the Lasiter I judgment. The circuit court denied Newland Trustee's motion to intervene, and Newland Trustee appealed here in Lasiter II.

6. On August 21, 2017, Caroline filed her initial complaint in Lasiter II; she subsequently filed two amended complaints. In her second amended complaint, filed on June 7, 2019, she named the Newland Defendants. Although the specific allegations made in this second amended complaint are not relevant to this appeal, Caroline generally alleged multiple causes of action against the Newland Defendants, including professional and ordinary negligence in the handling of her, individually, and her late husband's estate, conflict of interest and breach of fiduciary duty, and breach of trust agreements.

7. On March 8, 2023, Caroline and the Newland Defendants reached a settlement for $2 million. The Newland Defendants drafted and delivered a proposed order dismissing the case with prejudice. Caroline disagreed with some of the language in the proposed order, and the Newland Defendants subsequently moved to enforce the settlement on May 11, 2023, seeking entry of an order of dismissal.

8. Caroline objected to the motion to enforce the settlement and argued that "Newland [Trustee] improperly and in bad faith attempted to garnish the proceeds from the settlement of its own malpractice claims." She explained that on April 16, 2023, a writ of garnishment from Lasiter I in favor of Newland Trustee was filed and served on Caroline's attorney, Danny Crabtree, in this legal malpractice case, Lasiter II. Caroline, either rightfully or wrongfully, equated Newland Trustee and the Newland Defendants as the same entity. She argued that dismissal in Lasiter II was not appropriate until after the

Lasiter II court had the opportunity to address her objections to the garnishment and bad faith. She prayed that the circuit court deny the motion to intervene, "that the Court not dismiss this case until the issues with Newland's bad faith attempts to avoid paying the settlement proceeds are resolved and upon appropriate motion by Caroline, that the Court preclude Newland from attempting to garnish funds it agreed to pay Caroline to settle the malpractice claims against it, that the Court award her attorney fees incurred to defend the Motion, and for all other relief the Court deems just and proper."

9. The Newland Defendants maintained that any objections to the writ of garnishment were not properly before the circuit court in this case but should be filed in the case "in which the writ of garnishment was filed, Lasiter I." Therefore, the Newland Defendants argued that they were entitled to an order enforcing the settlement and dismissing the case with prejudice.

10. The circuit court held a hearing on the motion to enforce settlement on June 12, 2023. On June 15, 2023, the circuit court entered an order enforcing the settlement, required that the $2 million settlement funds be deposited into the registry of the court (less certain expenditures), and ordered that the funds remain in the registry until the Lasiter I court determined whether the funds in this case were subject to garnishment to satisfy the judgments in the declaratory judgment case. On July 3, 2023, the court entered an agreed order granting the motion to enforce settlement.

11. On July 14, 2023, Caroline filed a post-settlement petition for release of funds to pay attorney's fees, contending that she owed Rose Law Firm a 20 percent contingency fee in addition to Mr. Crabtree's legal fees that were already deducted from the settlement. She therefore requested that the circuit court release an additional $400,000 from the registry to satisfy Rose Law Firm's valid attorney's lien.

12. The Newland Defendants filed a response on July 20, 2023, asking that Caroline's motion be denied. They argued that the Lasiter I court should resolve the superiority to any claims to the funds in the registry and requested that the circuit court immediately file an order dismissing the case with prejudice.

13. The Newland Trustee filed a motion to intervene in Lasiter II. Intervenor Newland Trustee requested a shortened response time, expedited hearing, and motion for continuance. Intervenor Newland Trustee argued that it had an interest in the net settlement proceeds by virtue of Lasiter I where it was attempting to enforce the judgments rendered against Caroline, which now had an aggregate outstanding balance of $1,618,151.84. As a judgment creditor, Intervenor Newland Trustee sought to intervene in this case, Lasiter II, to contest Caroline's petition to release funds to protect its ability to collect from the remaining net settlement proceeds.

14. The Newland Defendants initially filed a response to the motion to intervene, stating that they did not object to the intervention. They later supplemented their response and explained that Intervenor Newland Trustee had an undeniable right to intervene on behalf of the revocable trust beneficiaries. They further explained that they were not in a position to protect such interest because they do not represent the revocable trust beneficiaries. Caroline, on the other hand, objected on grounds that the Newland Defendants were one and the same as Intervenor Newland Trustee, contending that by attempting to garnish the settlement proceeds, the Newland Defendants had acted in bad faith.

15. The circuit court entered two separate written orders denying the Intervenor Newland Trustee's motion to intervene, granting Caroline's petition for release of funds, and granting dismissal of the lawsuit with prejudice. Intervenor Newland Trustee appealed.

16. The court of appeals affirmed on the following grounds:

a. A party is entitled to intervention when it has made a timely application and claims an interest relating to the property or transaction which is the subject of the action and the party is so situated that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

b. Arkansas courts have shown a strong reluctance to grant intervention after final judgment. Post-judgment intervention is generally allowed only upon a strong showing of entitlement by the applicant or a demonstration of unusual and compelling circumstances. Further, if a party seeking intervention will be left with his right to pursue his own independent remedy against the parties in the primary proceeding, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right.

c. Although we acknowledge the circuit court's statement in its oral findings on the record that it was denying the motion to intervene because it did not understand Intervenor Newland Trustee's "standing" in this matter, it is clear from the context of the discussion at the hearing that the circuit court found that Intervenor Newland Trustee did not have a "recognized interest" as required.

d. Intervenor Newland Trustee sought to intervene to contest the attorney's fees claimed by Rose Law Firm after the underlying legal malpractice dispute had already been settled. Accordingly, any dispute regarding Rose Law Firm's entitlement to attorney's fees is not the property or transaction that was the subject of the underlying legal malpractice suit and therefore fails to meet the first requirement. In other words, Intervenor Newland Trustee's purported interest as a creditor was not a direct interest in the legal malpractice action in Lasiter II as required but rather was tangential or collateral.

O. *Rotheimer v. Corcoran,* 2025 IL App (1st) 240976-U (Appellate Court of Illinois 2025). Status as former beneficiary under a validly superseded will does not qualify person as an interested person in probate proceedings, and nonparties do not become parties by informally inserting themselves into a case.

1. This case is yet another in a long line of cases surrounding the estate and trust of Filip Rotheimer. During his life, Filip owned and managed several residential and commercial properties that were held in land trusts under the direction of various limited liability companies. In 1998, Filip formed the Filip Rotheimer Revocable Trust. In 2006, he executed a full will and trust and distributed his assets as follows: 30% to his daughter, Silvia; 30% to his daughter, Florence; 20% to his son, Phillip; and 20% to his grandchildren. The respondent, Gabriella Smillie, an attorney who no longer practices law, is Silvia's daughter and Filip's granddaughter. In the 2006 will and trust, Gabriella was named successor executor after Silvia, and successor trustee after Silvia and Florence. In September of 2012, however, Filip executed a new will and a restatement of his trust, where he distributed his assets as follows: 40% to Phillip; 40% to Florence; 10% to Silvia;

and 10% to James McGinn. Florence is named as successor trustee. Filip did not leave any assets to Gabriella and she is not mentioned in the documents.

2. In November of 2012, Silvia filed a guardianship petition for Filip, in which she alleged that he was no longer able to manage his personal and financial affairs. In 2013, the circuit court granted the petition, and appointed MB Financial Bank, N.A. ("MB") as the temporary limited guardian of Filip's estate and as successor trustee of the trust.

3. In 2014, Silvia objected to the first current accounts of Filip's estate and trust prepared by MB, which covered the period from MB's appointment on July 3, 2013, through June 30, 2014. MB amended the first current accounts, but Silvia continued to object. Silvia's daughter, Gabriella Smillie, who filed her appearance pro se in 2014 and in 2015, filed a "Joinder to objections to first current accounts of estate and trust."

4. Filip died on September 13, 2015. He was survived by Silvia, Phillip, and Florence. After Filip's death, MB's role as successor trustee ended, and Florence was appointed successor trustee.

5. The court approved MB's first current accounts of the trust and estate on March 2, 2016. On July 26, 2016, MB filed an amended second and final accounts for the period of July 1, 2014, through April 12, 2016. Silvia filed objections. A court order dated December 20, 2017, states that Gabriella "further joins in the objection to the Second and final account of both the estate and trust." After permitting multiple extensions, the court required MB to supplement its amended second and final accounts by March 8, 2023, and to file its third supplement to the final accounts by March 29, 2023. On April 3, 2023, Silvia, who was no longer represented by counsel, filed a pro se petition for rule to show cause, alleging that MB had failed to comply with the court's orders regarding the final accounting. Gabriella subsequently filed a pro se motion to join Silvia's motion for rule to show cause.

6. At a hearing on September 21, 2023, when Gabriella said she would "like to start on behalf of the moving parties today," counsel for Florence objected to her "saying anything," arguing that Gabriella "has no standing in this case." He stated, "She is not a party to this case. She's not a beneficiary of the estate, so she has no standing." Florence's counsel noted that "this is the objection of Silvia Vince. This is a motion filed by Silvia Vince who is pro se. There's nobody else who can argue it besides Ms. Vince. She's the only movant before the court." Silvia agued in response that Gabriella "joined my motion" and "[n]obody objected. She joined by objection in the first accounting, so she had standing there. She joined my objecting on the second accounting, so she had standing there. And that it was never raised, so I object to that. It should have been objected to at the level when she joined my motion." Counsel for Florence reiterated that Gabriella "has no standing at all in this matter. She's not a stakeholder. She's not an interested person under the statute. And she is not a licensed attorney in this state. Filing an appearance alone is not sufficient to give you standing." The court agreed, telling Gabriella, "you do not have standing to argue this motion."

7. Florence filed a motion to bar Gabriella from participating. The circuit court found that Gabriella lacked standing to participate in the proceedings, and it denied her motion to reconsider on April 16, 2024. Gabriella timely appealed.

8. The court of appeals affirmed on the following grounds:

a. The sole issue before us is whether Gabriella has standing to participate in the proceedings regarding her mother Silvia's objections to MB's final trust and estate accounts. A party must assert its own legal rights and interests, rather than assert a claim for relief based upon the rights of third parties.

b. Standing under the Probate Act is entirely a creature of statute. The Probate Act defines an "interested person" as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative."

c. Gabriella argues that she qualifies as an "interested person" and possesses a financial interest in these accounting proceedings because she was named as a beneficiary under Filip's 2006 will. However, that will was invalidated by Filip's 2012 will, and the validity of the 2012 will is not at issue in these proceedings. Therefore, Gabriella's former status as a beneficiary under Filip's superseded will does not vest her with a financial interest, property right or fiduciary status that might be affected by the current proceedings, the subject of which is solely Silvia's objections to MB's final accounts of Filip's estate and trust. This distinguishes her case from those where former beneficiaries were directly challenging the validity of a will or trust.

d. Next, Gabriella argues that she has standing in these proceedings because she was a contingent beneficiary of the Filip Rotheimer Revocable Trust at one point in time. At the time of his death, however, Filip's children, including Gabriella's mother Silvia, were still alive. If Filip had died intestate, Gabriella would not have inherited any share of his estate under the Illinois rules of descent and distribution, as she was not one of his heirs. Therefore, Gabriella's prior status as a contingent beneficiary does not qualify her as an interested person in these proceedings.

e. Gabriella also argues that she has standing in these proceedings because Filip gifted her fractional non-voting membership shares in several of his limited liability companies ("LLCs") and she received monetary distributions based on her respective interest in the LLCs when MB was acting as trustee. Gabriella specifically identifies the 1.46% membership interest in one of the LLCs and argues that because she is "a fractional shareholder to limited liability companies in Filip's trust," "[t]his fact, under Illinois law, is sufficient to give her standing in the underlying matter." However, she cites no authority to support this contention. Moreover, because any interest of Gabriella's is in the LLC, not the Filip Rotheimer Revocable Trust itself, her claim is too attenuated from the present dispute to give her standing. We do see how her fractional interest in these LLCs will be affected by a judgment in this matter, as these proceedings do not challenge the disbursements received by LLC members, charge MB with breaching its fiduciary duty to the LLCs, or seek to alter Gabriella's interest in the LLCs. Therefore, because Gabriella fails to show that she possesses an interest that will be affected by the trial court's decision in this proceeding, she lacks standing to challenge MB's final accounts of Filip's trust and estate.

f. Gabriella nevertheless argues that Florence should have been prevented from challenging her standing to participate in these proceedings under the doctrine of

laches, because she filed her pro se appearance in 2014, moved to join several of Silvia's objections to MB's accountings, and appeared in court multiple times over the years without any objection from Florence. The circuit court found the doctrine of laches inapplicable because Gabriella was not a party and because she possessed "no real interest in these guardianship proceedings." Gabriella has not cited a single case finding that the equitable doctrine of laches may bar a standing challenge. The doctrine of laches is inapplicable here. She was not named a party or served with a summons or complaint, and she never moved to intervene. Nonparties do not become parties by informally inserting themselves into a case.

P. *Shippert v. Shippert,* 717 S.W.3d 609 (Court of Appeals of Missouri, Western District, Division Three 2025). Beneficiary lacks standing to challenge trust where will incorporates trust terms if trust determined to be invalid and where will was not contested.

1. Cary Shippert ("Cary") brought this trust contest against Terry Shippert ("Terry"), Shari Pitts, Bryon Shippert, and Sarah Lawrence (collectively "Defendants") challenging the validity of the trust of Betty L. Shippert ("Decedent") on the basis of incapacity and undue influence.

2. On June 12, 2020, Decedent executed her Last Will and Testament ("Will"). She also executed the Betty L. Shippert Trust dated June 12, 2020 ("Trust"). The Trust names one of her sons, Terry, as successor trustee. It provides for distribution of the family farm in fee simple to Terry. It further provides that the balance of the Trust shall be divided into equal shares for each of the living children and each of the deceased children with living descendants. Under the Will, the residuary beneficiary of Decedent's estate is the currently serving trustee of the Trust.

3. Decedent died March 29, 2022. She was survived by three living children — two sons, Cary and Terry, and a daughter, Shari Pitts. Decedent was predeceased by her husband and one son, who had two living descendants — Sarah Lawrence and Bryon Shippert. On May 20, 2022, the Trust made a partial distribution to Cary in the amount of $25,000, and Cary accepted and acknowledged receipt of the partial distribution.

4. On July 5, 2022, Terry filed an application of letters testamentary along with the Will in the Probate Division of the Circuit Court of Clay County ("probate court"). The same day, the probate court entered a certificate and order of probate of last will and testament (self-proving) wherein it admitted the Will to probate. On July 6, 2022, the probate court issued letters testamentary appointing Terry as independent personal representative of Decedent's estate. Notice of letters testamentary granted was published in *The Courier-Tribune* on July 14, July 21, July 28, and August 8, 2022. On August 10, 2022, an affidavit of publication of said notice was filed with the probate court.

5. The six-month period following the first publication of the notice of letters testamentary granted expired on January 14, 2023. During the six-month period, no other will of Decedent was presented to probate. There was no verified statement setting forth that any will of Decedent was lost, destroyed, suppressed, or otherwise not available, the reason such will was not available, or the provisions of such will filed in probate during the period. There was no petition filed contesting the validity of the Will admitted to probate.

6. On October 24, 2022, Cary filed the instant action in the Circuit Court of Clay County. On March 9, 2023, he filed his amended petition contesting the validity of the Trust based

on allegations that Decedent lacked capacity and was unduly influenced to execute the Trust. Cary's petition (although filed within the six-month period following the first publication of the notice of letters testamentary granted) did not contest the validity of the Will.

7. Defendants filed a motion for summary judgment, which the trial court granted and dismissed the amended petition for lack of standing. Cary appealed.

8. The court of appeals affirmed on the following grounds:

a. Cary is correct that, under section 456.021(2), if an inter vivos trust is revoked or terminated before the death of the testator, a devise to the trustees of that trust lapses. Thus, if a trust is declared invalid, the residuary estate would generally pass to the testator's survivors under the laws of descent and distribution as an intestate estate.

b. Decedent's Will contains a pour-over clause providing that the remainder of Decedent's estate after certain bequests would be transferred to the Trust for disposition. The clause provides: "I give, devise and bequeath all of the rest, residue and remainder of my property and estate, real, personal and mixed, of whatsoever kind and wheresoever situated, of which I shall die seized or possessed, or of which I shall be entitled to dispose at the time of my death (all of such property being hereinafter referred to as my residuary estate) to TERRY G. SHIPPERT, as Successor Trustee, under that certain Trust Agreement dated June 12, 2020, between myself, as Grantor, and myself, as Trustee, and to the substitutes and successors under such agreement, to be added to and held, managed, invested, reinvested and distributed as a part of the trust estate created thereunder upon all the terms, trusts and conditions thereafter pertaining thereto including any amendments thereof made at any time prior to my death.

c. However, Decedent's Will also expressly provides for the creation of a testamentary trust to guard against possible partial intestacy resulting from invalidation of the Trust. The Will provides: "If for any reason the said trust shall not be in existence at the time of my death, or if for any reason a court of competent jurisdiction shall declare the foregoing testamentary disposition to the Trustees under such Trust Agreement as it exists at the time of my death to be invalid, then I give, devise and bequeath all of said rest, residue and remainder of my property and estate to TERRY G. SHIPPERT, as Trustee, and to their substitutes or successors under the Trust Agreement, described hereinabove, to be held, managed, invested and distributed by the Trustee upon the terms, trusts and conditions pertaining to the period beginning with the date of my death as are now contained in such Trust Agreement; and for that purpose I do hereby incorporate such instrument of trust by reference into this my Last Will and Testament."

d. This provision creates a separate testamentary trust with the same terms as the inter vivos Trust and incorporates the Trust by reference into the Will in the event that the Trust itself is no longer in existence at the time of Decedent's death or is invalidated. Even if the Trust is invalidated, all assets in the Trust would revert to Decedent individually and, thereafter, the assets would be administered according to her Will. As set forth above, the Will provides that if the Trust is

invalidated, the personal representative is directed to distribute the estate assets to the trustee of the invalidated Trust to hold, manage, invest, and distribute upon the terms, trusts, and conditions contained in the Trust, which is incorporated by reference into the Will. Thus, the beneficiaries of the Trust, including Cary, would receive the same distribution of assets under the Will if the Trust is invalidated.

e. While Cary sought to invalidate the Trust, he did not contest the validity of the Will. As of January 14, 2023, the end of the six-month period following the first publication of the notice of letters testamentary granted, no other will of Decedent was presented to probate, and no petition was filed contesting the validity of the Will admitted to probate. The Will is, therefore, binding and controlling for the purposes of administering Decedent's estate, and any assets subject to probate would be administered pursuant to the Will. Based on the language of the Will, Cary stands to receive the exact same distribution of assets whether the Trust is invalidated or not.

f. Next, Cary argues that the trial court's ruling that the provision of the Will incorporating the terms of the Trust controlled distribution of Decedent's estate even if the Trust were invalidated was against public policy. Specifically, he asserts that the ruling would lead to an unconscionable and repugnant scenario where Terry could be guilty of undue influence in procuring an uneven distribution under the Trust, avoid accountability, and still reap the benefits of his wrongful conduct. Cary argues that the terms of the Trust and the Will are required to be construed together to avoid repugnancy in their provisions and that a ruling that invalidates and voids a trust by reason of undue influence or fraud would also invalidate and void those provisions to the extent they are incorporated into a pour-over will.

g. Cary is correct that where a trust and will form parts of the same estate plan, the documents must be construed together. His argument, however, ignores the fact that he only contested the Trust and not the Will. Any interested party has six months from the date letters testamentary have been granted to file a petition to contest a will. Nobody, including Cary, filed a petition to contest the Will admitted to probate, and the Will became binding. Cary's argument that invalidation of the Trust would also result in invalidation of the trust provisions in the Will is an attempt to circumvent the validity of the terms of the probated Will. It is a collateral attack on the binding, probated Will, which cannot be maintained.

h. The trial court did not err in ruling that Cary would not derive any benefit from the invalidation of the Trust and thus lacked standing in this trust contest. It did not err in entering summary judgment in favor of Defendants and dismissing Cary's petition.

Q. *Wright Pride Fam. Tr. v. J.P. Morgan Chase Bank, N.A.*, 2025 U.S. Dist. LEXIS 177911 (United States District Court for the District of South Carolina, Charleston Division 2025). A trustee may not appear pro se on behalf of the trust.

1. The Wright Pride Family Trust (the "Trust") is not represented by counsel, but was initiated by "Samuel Wright, Trustee." On June 20, 2025, the Trust was advised by court order that the Trust could not proceed in this action represented by a pro se individual, the Trust was ordered to retain counsel, and the Trust was warned that without counsel

this action could not proceed further. The Trust's deadline to retain counsel and file a Notice of Appearance was July 21, 2025. Rather than retaining counsel, the Trust filed a Motion to Remand (ECF No. 9), Motion to Amend/Correct Complaint, and a Revised Motion to Remand.

2. The federal magistrate recommended dismissal of the action on the following grounds:

a. The Trust seeks leave to amend the complaint "for the sole purpose of removing the Trust as a named Plaintiff' and substituting "Samuel Wright, in judicial character as Trustee." In support, the Trust cites "*First Nat'l Bank of Chicago v. Dairymen, Inc.*, 771 F.2d 604, 608 (1st Cir. 1985)," representing that the First Circuit Court of Appeals there held, "A trustee may represent the trust pro se in an action to protect the res of the trust, so long as he does not attempt to appear as an attorney for the trust as a separate legal entity." However, no such case citation, caption, or quote exists within federal or state case law. Nor can the phrase "in judicial character as trustee" be found in any case law, federal or state.

b. The Trust also cites to the Restatement (Third) of Trusts § 85. However, the quote it attributes to the Restatement — "The trustee has the power to enforce rights held in the trust estate, including rights to recover possession of tangible trust property," — is not found in the section cited by the Trust.

c. The court has been unable to find any authority supporting the argument advanced by the Trust. To the extent the Trust is conflating a trustee's standing to sue on behalf of the Trust with his ability to appear pro se as a trustee, it is well established that a litigant may not appear pro se on behalf of any "artificial entity." Every court of appeals to have addressed this issue has applied this rule specifically to bar a trustee from appearing pro se, notwithstanding the standing of a trustee to sue on behalf of a trust.

d. The Trust fails to present any valid law supporting its attempt to circumvent the requirement to retain counsel by substituting "Samuel Wright, in judicial character as Trustee" as Plaintiff in this action. Regardless of how the caption is styled, this action involves property held in the Trust. As previously warned by the court, a trustee cannot represent a trust pro se in federal court.

e. It necessarily follows from jurisprudence prohibiting pro se representation that any pleading filed by the Trust must be disregarded as a nullity since counsel has not been retained. Likewise, all motions filed by the Trust are a nullity.

f. The court adopted the magistrate's recommendation and dismissed the claims without prejudice.

R. *Zero Point Mgmt. v. Chase Bank/JP Morgan Chase Co.,* 2025 U.S. Dist. LEXIS 231142 (United States District Court for the Southern District of New York 2025). The rule against a non-lawyer representing a trust may not be circumvented through the expedient of an assignment of the cause of action from the trust to the individual non-lawyer trust beneficiary and a temporary amendment of the trust.

1. This action, originally filed in New York state court on September 21, 2025, and removed on the basis of diversity of citizenship, is brought on behalf of Zero Point MGMT ("Plaintiff" or "Zero Point"). Zero Point claims that Defendant JP Morgan Chase Bank, N.A. ("Defendant" or "Chase"), wrongfully denied a credit application submitted by Zero

Point "seeking a $250,000 credit accommodation." Zero Point asserts causes of action for breach of contract, unjust enrichment, and commercial dishonor and estoppel, seeking damages and declaratory relief.

2. Zero Point is identified in the Complaint as "a private irrevocable trust organized under the laws of the State of New York." The action was commenced on Zero Point's behalf by Malcolm Blair Boyce, who is identified in the Complaint as Zero Point's "duly appointed Trustee." Mr. Boyce is not an attorney, and no attorney signed the Complaint or has appeared before this Court on Zero Point's behalf.

3. On October 20, 2025, Chase submitted a letter-motion contending that, as an artificial entity, Zero Point cannot proceed pro se and that Boyce, as a non-lawyer trustee, cannot represent it before this Court.

4. The court ordered Zero Point to retain counsel as a condition of pursuing the action on the following grounds:

a. It is black letter law that corporations, partnerships, limited liability companies, associations, and all other artificial entities must be represented by counsel and may not appear pro se in federal court. Parties may plead and conduct their own cases personally or by counsel, does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.

b. A trust is deemed an artificial entity for the purposes of the rule barring a nonlawyer trustee from representing the interests of the trust. Where an individual's position as a trustee casts him in a fiduciary role for others, he cannot as a non-attorney represent the trust.

c. Plaintiff does not dispute the well-established rule barring non-lawyers from representing artificial entities or its application to trusts.

d. Zero Point states that it has assigned all right, title, and interest in this action from Zero Point to Boyce, in his fiduciary capacity as trustee. The assignment was executed on October 20, 2025 (with Boyce signing on behalf of both the assignor and assignee) and proof of the assignment was filed on the docket on the same day shortly after Chase filed its letter raising this issue with the Court. The Second Circuit disapproved of this very tactic in *Jones v. Niagara Frontier Transp. Auth.* (1983). In light of the policy reasons for preventing a layperson from representing a corporation in litigation, the federal courts have, in cases governed by federal law, disapproved any circumvention of the rule by the procedural device of an assignment of the corporation's claims to the lay individual.

e. The rule in *Jones* that the bar on a non-lawyer's representation of the artificial entity may not be circumvented by assignment to a natural person ought to apply with equal force to an assignment by a trust. An individual trustee, who had assigned the trust's interests in the contract sued upon to himself, may not proceed with the claim unless represented by an attorney admitted to practice before this Court. Boyce's attempt to circumvent the bar on a non-lawyer's representation of a trust by assigning the trust's cause of action to himself must fail.

f. Plaintiff argues that Boyce is the "sole beneficiary" of Zero Point, as well as its sole trustee. Plaintiff cites two cases in support of this proposition: "*Weaver v.*

United States, 98 Fed. Cl. 680, 684 (2011); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1260 (3d Cir. 1994)." Unfortunately, the first cited case (*Weaver*) does not exist, so far as the Court's research discloses. While the second case (*Jordan*) does exist, it does not stand for the cited proposition and has nothing to do with the issue of whether and under what circumstances an entity may appear pro se.

g. The Court cannot find that Zero Point has adequately established that Boyce is, in fact, the sole beneficiary of Zero Point and the sole person whose interests will be affected by this case. The "Amendment to Declaration of Trust," dated October 11, 2025 ("Amendment"), recites that the original Declaration of Trust for Zero Point, executed on July 29, 2025, named Boyce as "Primary Beneficiary" (as well as Grantor and Trustee) and two other individuals (whose names have been redacted) as "future beneficiaries." Under the Amendment, Article IV of the Declaration of Trust — which had been titled "Beneficiaries" — was deleted and replaced with a new Article IV — now titled "Beneficiary" — that states: "The sole Beneficiary of this Trust shall be Malcolm Blair Boyce." The Amendment is signed solely by Boyce. Notably, the date the Amendment was executed — October 11, 2025 — is one day after Chase filed its Notice of Removal on October 10, 2025. The Notice of Removal previewed Chase's objection to Zero Point's proceeding in this case without counsel. It specifically noted that Boyce is not a licensed attorney in New York, according to the New York State Unified Court system lookup function, and cited the rule that "pro se, non-lawyer plaintiffs may not represent a trust or any other artificial entity." The natural inference, and one the Court draws, is that Boyce executed the Amendment only because of, and in response to, Chase's raising the pro se representation issue in its Notice of Removal.

h. At the time this suit was filed, there were beneficiaries of the Zero Point trust other than Boyce. It is apparent that Boyce amended the Declaration of Trust to remove those beneficiaries in order to facilitate his pro se representation of Zero Point. There is good reason to believe that he intends to add them back as beneficiaries once this lawsuit is over: The Amendment specifically recites that, "[p]ursuant to the Trustee's discretionary powers," the Trustee "desires to simplify administration by designating a single beneficiary while preserving the right to add beneficiaries in the future by amendment."

i. The record thus strongly suggests that, although Boyce has now appointed himself the "sole beneficiary" of Zero Point, that is true only as a matter of form. If the two other individuals are only being removed as beneficiaries temporarily while this lawsuit is pending, then in reality Boyce continues to represent their interests as well as his own. Alternatively, if those individuals are not restored as beneficiaries, then their interests in Zero Point — and in this lawsuit — will have been extinguished by Boyce in apparent disregard for his obligations as a fiduciary. The rule against a non-lawyer representing an artificial entity may not be circumvented through the expedient of an assignment of the cause of action from the entity to the individual non-lawyer. Boyce's stratagem of amending the Zero Point trust instrument to remove the other beneficiaries from the trust (whether temporarily or permanently) is simply another means of assigning the economic

interest in this lawsuit to himself in order to circumvent this rule, and is equally impermissible.

j. The policy reasons for the bar on non-lawyers representing the interests of others include the concern that the lay litigant lacks the professional skills of a lawyer and also lacks many of the attorney's ethical responsibilities. In the short time this case has been pending, that concern has manifested itself. Boyce's submissions have contained citations to nonexistent cases and misrepresented the holdings of cases. Such conduct is unacceptable and can be the basis for sanctions and (where engaged in by an attorney) professional discipline. Given Boyce's pro se status, the Court will not impose sanctions on Boyce in this instance. But his conduct highlights the importance of applying the rule barring non-lawyer representation of others in the absence of a satisfactory showing that the interests of others are not implicated. Such a showing has not been made here.

XXV. TORTS, SLAYERS, & BAD ACTORS

A. *Alexander v. Frakine*, 252 N.E.3d 967; 2025 Ind. App. LEXIS 39; 2025 LX 11244; 2025 WL 556024 (Court of Appeals of Indiana 2025). Foreign personal representative cannot file a wrongful-death action in state if an Indiana probate court has already appointed a different administrator for that purpose.

1. Terrence Simmons ("Decedent"), a resident of Georgia, died in January 2023 after a car accident in Indianapolis. The same month, Decedent's adult daughter who lives in Indianapolis, Terika Jackson ("Daughter"), petitioned the Marion County probate court to appoint her personal representative of his estate for the sole purpose of bringing a wrongful-death action against other drivers involved in the accident. Notice was given to three women who are mothers of minor children fathered by Decedent — Latoya Alexander and Shanika Harris, who live in Georgia, and Lakasha Thornton, who lives in Missouri ("Mothers"). Mothers objected to Daughter's petition and asked that they be appointed as co-personal representatives. They noted that, under Indiana's wrongful-death statute, Decedent's minor children (his "dependent children") would be beneficiaries of any damages but his nondependent children, including Daughter, would not. The probate court overruled Mothers' objection and appointed Daughter the sole personal representative of the wrongful-death estate, finding that she has an interest in maximizing the proceeds of any suit or settlement.

2. In the months that followed, one of the mothers, Alexander, opened an estate case in Georgia, and a Georgia court appointed her as the administrator. Citing those developments, Mothers asked the Marion County probate court to set aside its appointment of Daughter. The probate court denied Mothers' request. But the next day, Mothers filed this wrongful-death action in Marion Superior Court, citing Alexander's appointment by the Georgia court. A week later, Daughter filed her own wrongful-death action in a different Marion Superior Court, citing her appointment by the Marion County probate court.

3. With the dueling wrongful-death actions pending, Mothers filed a notice of appeal of the Marion County probate court's order confirming Daughter as personal representative. The same day Daughter filed her appellee's brief in that appeal, she moved to substitute herself as the plaintiff in this wrongful-death action filed by Mothers. The trial court stayed

the matter pending the outcome of the appeal in the estate case. A month later, the court dismissed that appeal as untimely, leaving in place the Marion County probate court's appointment of Daughter. Daughter immediately renewed her motion to be substituted as the plaintiff. Rather than substituting Daughter as plaintiff, the trial court dismissed the case, since Daughter had already filed her own wrongful-death action as personal representative.

4. Mothers appealed. On appeal, the court of appeals affirmed on the following grounds:

a. This is clearly an attempt by Mothers to revive their untimely appeal of the Marion County probate court's orders. In fact, Mothers' arguments about jurisdiction and full faith and credit are largely copied and pasted from their lead argument in the estate appeal. If Mothers disagreed with dismissal in that appeal, they should have petitioned for rehearing or for transfer to the Supreme Court. They did neither. The time for appealing the Marion County probate court's orders has passed, so the court will not consider Mothers' arguments on the issue.

b. In Indiana, the only proper plaintiff in a wrongful-death action is the personal representative of the decedent's estate. Indiana Code section 29-1-10-18 provides that when the decedent was not a resident of Indiana, an Indiana probate court may appoint a personal representative ("administrator") solely to bring a wrongful-death action: "Any court having probate jurisdiction in the state of Indiana may appoint an administrator for the estate of a nonresident for the sole purpose of bringing an action to recover damages for the wrongful death of such nonresident." The Marion County probate court cited this statute in rejecting Mothers' challenges to the appointment of Daughter.

c. The words "may appoint" mean the statute is permissive, not mandatory, and therefore a foreign personal representative may bring a wrongful death action in Indiana within two years of the deceased's death without the necessity of appointment as personal representative in Indiana. A foreign personal representative does not need to be separately appointed under Section 29-1-10-18 before filing a wrongful-death action in Indiana.

d. Here the issues is whether a foreign personal representative can file such an action when an Indiana probate court has already appointed a different personal representative for that exact purpose under Section 29-1-10-18. The answer is no. A holding to the contrary would invite confusion and chaos, with wrongful-death defendants forced to respond to duplicative suits and two judges left wondering who's in charge. Therefore, if a foreign personal representative wants to prosecute a wrongful-death action, but, before they file, an Indiana probate court appoints a different personal representative under Section 29-1-10-18, the foreign personal representative's remedy is to ask the probate court to set aside the appointment and, if unsuccessful, to appeal. They can't simply ignore the appointment and plow ahead with a wrongful-death action. Going forward, if Mothers have evidence that Daughter isn't diligently, competently, and honestly prosecuting her wrongful-death action, they can ask the probate court to revisit her appointment.

B. *Dewdney v. Duncan,* 2025 VT 26; 2025 Vt. LEXIS 62; 2025 LX 5764 (Supreme Court of Vermont 2025). Vermont recognized the tort of intentional interference with expectancy, along

with the probate exhaustion rule, and an IIEI claim is not available to a plaintiff who had the right to seek a remedy for the same claim in probate court ever where the claim involved an inter vivos trust and not the probate estate.

1. Anna Dewdney was an author and illustrator of a popular series of children's books. Plaintiffs Berol and Cordelia Dewdney are Anna's adult daughters from her first and only marriage, which ended when they were children. Defendant Ralph Duncan, IV was Anna's romantic partner, with whom she began a relationship in the late 1990s. Anna, defendant, and plaintiffs lived together for several years. From 2012 until Anna's death in 2016, Anna and defendant lived together in a house purchased by Anna. Defendant worked as Anna's employee between 2012 and 2016, helping to develop and run her book business.

2. In October 2011, Anna created a revocable inter vivos trust to receive the royalty income from her books. Anna designated plaintiffs and defendant as beneficiaries of the trust with 40% of the income assigned to each plaintiff and 20% assigned to defendant. At the same time, defendant executed his last will and testament in which he designated plaintiffs as his sole heirs if Anna predeceased defendant. In 2015, Anna was diagnosed with terminal glioblastoma. Defendant was her primary caregiver during the course of her illness.

3. Anna amended her trust four times between 2015 and 2016. In May 2015, Anna amended the trust to appoint defendant as a co-trustee. In August 2015, Anna amended the trust a second time to make the trust compatible with a new stand-alone literary trust not relevant to this appeal. During this time in 2015, Anna considered amending her trust again to avoid a large tax burden on the trust's beneficiaries, but she communicated to her attorney via email her doubts about changing the trust in defendant's favor. However, in March 2016, Anna stated that the previous year had made her feel differently about her estate planning and that she wished to increase defendant's percentage of the trust distribution. Thereafter, Anna made her third amendment to the trust and changed the distribution of the trust income to 25% for each plaintiff and 50% to defendant. The trust provided that if defendant predeceased plaintiffs, they would each receive 50% of the trust distributions. Anna alerted plaintiffs of the third amendment to her trust in June 2016 via email. In August 2016, Anna amended her trust for a fourth time in a manner irrelevant to this appeal and therefore need not be described here. Anna died in September 2016. Defendant became the sole trustee of the trust upon Anna's death.

4. Plaintiffs alleged that Anna and defendant had a fraught and unhappy relationship and that defendant pressured her to increase his royalty income distribution. Plaintiffs asserted that Anna had private conversations with plaintiffs during the summer of 2016 about changing the trust back to the original version and that Anna did not want defendant to know because he would be angry. Finally, plaintiffs alleged that defendant entered into an oral agreement with Anna to make plaintiffs his sole heirs under his will in exchange for increasing his distributions from the trust. They claim that defendant affirmed this agreement to plaintiffs in person. Defendant denies that such an agreement was ever made. It is undisputed that in November 2021, when plaintiffs attempted to confirm the agreement with defendant, defendant's attorney told them that "no such agreement exists" and that defendant was "under no legal obligation to bequeath plaintiffs any portion of his estate."

5. Plaintiffs filed a complaint in the civil division alleging intentional interference with expectation of inheritance ("IIEI"), breach of contract, promissory estoppel, unjust

enrichment, constructive fraud, and breach of fiduciary duty. Plaintiffs sought the creation of a constructive trust entitling them to all distributions exceeding defendant's original 20% share and restitution of any amounts previously distributed to defendant that exceeded 20%. In December 2023, defendant filed a motion for summary judgment on all counts. The court granted summary judgment to defendant. The court ruled that IIEI was a cognizable cause of action in Vermont but that plaintiffs were required to first seek a remedy in the probate division. The court determined that plaintiffs failed to establish breach of contract based on anticipatory repudiation, concluding that the doctrine of anticipatory breach did not apply where Anna had fully performed because there was no longer an "interdependency of obligations." It rejected plaintiffs' promissory estoppel claim, concluding that plaintiffs could not show detrimental reliance because defendant had not acted inconsistently with his alleged promise. The court likewise granted summary judgment on the unjust enrichment claim because plaintiffs were receiving the benefit of the trust and were named as defendant's heirs in defendant's will. The court ruled that plaintiffs' constructive fraud claim failed as a matter of law because plaintiffs asserted that defendant acted with bad faith and evil intent, which are elements that must be absent for a constructive fraud claim. Finally, the court concluded that it lacked jurisdiction over plaintiff's breach of fiduciary duty claim because probate courts have exclusive jurisdiction over the administration of trusts.

6. Plaintiffs and the Vermont Supreme Court, with one dissenting justice, affirmed on the following grounds:

a. Plaintiffs asserted that no remedy in probate court need be sought because the claim concerns an inter vivos trust rather than a will, and therefore does not interfere with the operation of probate law. The court had not previously recognized the tort of IIEI, nor is it codified in Vermont statutes. The Restatement (Second) of Torts defines IIEI as follows: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." This definition was significantly revised in the Third Restatement, which states that a defendant is liable for IIEI when: (a) the plaintiff had a reasonable expectation of receiving an inheritance or gift; (b) the defendant committed an intentional and independent legal wrong; (c) the defendant's purpose was to interfere with the plaintiff's expectancy; (d) the defendant's conduct caused the expectancy to fail; and (e) the plaintiff suffered economic loss as a result.

b. The Third Restatement, unlike the Second Restatement, also provides that an IIEI claim is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court, also known as the probate-exhaustion rule.

c. Vermont courts already recognize claims for similar torts such as tortious interference with a contractual relationship. The court has also recognized, from the Restatements, other new torts related to traditional tortious interference claims, such as tortious interference with performance of office. Tortious interference with contract contains similar elements to IIEI. Both involve an improper interference in which a defendant obstructs a benefit to a plaintiff and causes an economic loss as a result. IIEI is analogous to pre-established torts of

interference and is a natural extension of the state's tortious interference case law.

d. The Third Restatement definition of IIEI, with its probate-exhaustion requirement, is the appropriate definition to adopt for the following reasons. Adopting the probate-exhaustion rule will aid the efficiency of probate courts in deciding matters within their specialized knowledge in a timely manner. Similarly, the probate-exhaustion rule serves to limit tort claims to avoid interference with ongoing probate proceedings while also preventing parties from circumventing the probate courts and litigating what are clearly probate issues before the general trial courts. Finally, adopting the rule also respects the legislative decision to carve out probate-specific remedies and jurisdiction.

e. The Third Restatement states that "a probate court likewise is unable to provide a remedy for wrongful conduct in relation to a nonprobate transfer, such as a transfer by inter vivos trust," which on its face would appear to mean that any IIEI claims involving inter vivos trusts are exempt from probate. However, as the Third Restatement explains, "[t]he law of tort defers to the law of probate because probate is the creation of the legislature." Under Vermont law, the probate division is vested with exclusive jurisdiction over claims brought by a trustee or beneficiary concerning trust administration. The law of tort defers to this legislative grant of exclusive probate jurisdiction.

f. Cases from other jurisdictions do not support the claim that the court should distinguish between wills and inter vivos trusts for the probate-exhaustion rule. These cases are unpersuasive because these other jurisdictions do not have statutory mandates vesting the probate division with exclusive jurisdiction over the administration of trusts as in Vermont, and many of the cited cases do not contemplate trust administration. The court therefore adopts the approach taken by the Third Restatement and holds that an IIEI claim is not available to a plaintiff who had the right to seek a remedy for the same claim in probate court.

g. Plaintiffs argued that they did not have the right to make their claim in the probate division because their claim does not concern the administration of the trust, and that they are instead seeking a remedy for defendant's undue influence, duress, and fraud in inducing Anna to amend the trust. Despite plaintiffs' attempt to reframe their claim on appeal, their challenge to the trust amendment implicates the administration of the trust. Here, plaintiffs challenge whether Anna was unduly or fraudulently influenced to change the trust distributions between beneficiaries, a question that similarly involves the administration of the trust and therefore falls within the exclusive jurisdiction of the probate division.

h. Assuming that plaintiffs were unaware of defendant's alleged actions until December 2021, as they claim, the court was still correct in holding plaintiffs were barred from bringing their IIEI claim in the civil division because they had not first pursued it in the probate division.

i. The issue of whether the doctrine of anticipatory repudiation applies when one party has already fully performed its end of the contract and is merely awaiting payment is one of first impression in Vermont. The court need not reach this novel issue because, assuming that plaintiffs can proceed under a breach-of-contract

theory in these circumstances, the undisputed evidence shows that defendant did not repudiate the alleged contract. When a defendant repudiates an agreement before the time for performance, the defendant has committed an anticipatory breach of the agreement. A repudiation must be a "[p]ositive and unequivocal refusal to perform." The repudiation can be an explicit or implicit representation that the defendant cannot or will not perform and can be conveyed by either: (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or; (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

j. Here, by contrast, plaintiffs have failed to prove statements or acts by defendant that were sufficient for a reasonable jury to conclude that he had unequivocally repudiated the alleged contract between himself and Anna. The court resolves all doubts and construe the facts in favor of the nonmoving party, plaintiffs, and assumes the contract between defendant and Anna existed and that defendant's statement that he is under "no legal obligation" is false. However, the falsity of the statement is no matter because the single statement through his attorney did not have the cumulative effect required, nor did defendant directly state that he would not fulfill his obligation under the contract. Defendant's statement that he was "under no legal obligation" to bequeath plaintiffs his estate was not equivalent to a statement that he was going to breach the alleged contract or was removing plaintiffs as his heirs. Defendant may still act in accordance with the contract, even if he disputes its existence. A statement unequivocally saying that he will breach or multiple statements about such actions would be a sufficient repudiation. At the time of the decision below, defendant's will remained unchanged. Defendant's statement through his attorney, without more, is insufficient for a reasonable jury to find that he repudiated the contract. The court accordingly did not err in granting summary judgment to defendant on plaintiffs' breach-of-contract claim.

k. Promissory estoppel will not apply when the parties are governed by a contract, as they are here. In the alternative, should no contract exist, plaintiffs have not shown breach of a promise that was detrimentally relied upon by Anna. A party cannot claim promissory estoppel when the parties' relationship is governed by a contract. In this case, drawing all inferences and resolving all doubts in favor of the nonmoving party, plaintiffs, the court assumes a valid oral contract existed between Anna and defendant. Therefore, plaintiffs' promissory estoppel claim cannot stand. In the alternative, even without assuming a contract existed, plaintiffs failed to show a breach of a promise that was detrimentally relied upon by Anna, the promisee. The second element may be proven through a showing that the promisee was harmed by defendant's breach of the promise. Though we are not presented with an employment dispute in the present matter, the principle that promissory estoppel requires a breach of a promise that causes a detrimental reliance extends to plaintiffs' claim. Here, a reasonable jury could conclude from the evidence that defendant made a promise to Anna to make plaintiffs his sole heirs in exchange for an increased distribution from the trust. However, defendant did not break this promise. Instead, as the trial court explained, the central promise still stands because defendant has not positively and unequivocally revoked his

promise, nor has he removed plaintiffs from his will. Accordingly, plaintiffs cannot show detrimental reliance, because Anna was not harmed by any breach of the promise.

l. Plaintiffs were required to bring their unjust enrichment claim in the probate division. This claim challenges the administration of the trust because plaintiffs, the trust's beneficiaries, seek to challenge the amended distribution of the trust property, and the distribution of the trust is a main function of trust administration. Therefore, plaintiffs were required to bring their claim in the probate division. To hold otherwise would be to ignore the statutory scheme for trust administration and create the possibility of inconsistent judgments on the same issue between two divisions. Because plaintiffs did not bring their claim in the probate division, the trial court properly granted summary judgment for defendant on this claim.

m. The court correctly decided to grant summary judgment on this claim for defendant on the same ground as the unjust enrichment claim, which is that the probate division has exclusive jurisdiction over such a claim as pled. Plaintiffs' claim necessarily implicates the administration of the trust, which the Legislature has placed in the exclusive jurisdiction of the probate division.

n. The dissenting justice disagreed that defendant was entitled to summary judgment because the undisputed facts did not establish that plaintiffs had the right to seek a remedy for the same claim in a probate court, and would remand for additional proceedings.

C. *In re Est. of Ferrara,* 2025 NYLJ LEXIS 3163 (Surrogate's Court of New York, Ulster County 2025). Statements between executor and estate beneficiaries in the progress of estate administration protected from defamation claim by common interest qualified privilege.

1. Charles Ferrara ("decedent") died on November 20, 2022. His last will and testament (the "Will") nominated Rebeccah Heinlein ("defendant"), his niece, to serve as executor. The will provided for a specific bequest of decedent's home ("decedent's home") to Alphonse Ferrara ("plaintiff"), decedent's brother. There was no residuary clause in the Will, so the balance of decedent's estate, including the contents of his home and other personal property, passed by intestacy to his three surviving siblings and six issues of predeceased siblings. All distributees, including plaintiff, executed waivers and consents to probate and to the appointment of defendant. The Will was admitted to probate and letters testamentary were issued to defendant on May 12, 2023.

2. The objectionable statements at issue arose from interactions between plaintiff and defendant in the early days of the administration of the estate. The communications arose largely from plaintiff's conduct in removing a safe with cash and other personal property from decedent's home without permission beginning in the final weeks of decedent's life. Plaintiff then conducted a series of private sales and yard sales (the "Sales") of the property and retained the proceeds until he was compelled by this Court to turn them over to the estate.

3. Testimony was taken from plaintiff and defendant at two hearings, at which they were subject to cross-examination. The first, on March 1 and 18, 2024, arose from defendant's Article 19 petition to sell decedent's home to pay claims against the estate and expenses of administration. The second, on June 5, 2025, was on defendant's petition to hold plaintiff in civil contempt by reason of his failure to turn over personal property and Sales

proceeds. There is therefore a full record of the parties' interactions and the administration of the estate.

4. The surrogate granted defendant's motion for summary judgment on the claims of defamation and intentional infliction of emotional distress on the following grounds:

a. The statute of limitations for defamation and intentional infliction of emotional distress is one year. This action was commenced by delivery of the summons and verified complaint to the Ulster County Clerk on August 15, 2024. Communications by defendant before August 14, 2023, are therefore time-barred. Of the 13 communications cited by plaintiff in support of his claims, 10 are untimely because they were made more than one year prior to the commencement of this action on August 15, 2024. Remaining for the Court's consideration are defendant's communications dated September 20, 2023, November 2, 2023, and June 20, 2024. Letters testamentary were issued to defendant on May 12, 2023, so the relevant communications were made during her tenure as executor.

b. A prima facie of defamation is made by a showing that a defendant: made a false statement; and published it without privilege or authorization to a third party, which constituted fault as judged by, at a minimum, a negligence standard; and the statement either caused special damages or constituted defamation per se.

c. Plaintiff summarized the communications he claims to be actionable as defamatory, referencing them by date and exhibit number: (1) Defendant letter to "legal heirs" dated September 20, 2023, "claiming she had permission to sell the property if the Medicaid lien was not paid in full. [Defendant] also falsely claimed that '[decedent's] money was used by him and for him' and that she had spent thousands of dollars of her own money ... [defendant] also claimed that [plaintiff] had disrespected decedent's legacy"; (2) Defendant letter to legal heirs dated November 2, 2023, "falsely accused [plaintiff] of using estate funds to pay the Medicaid lien (despite having earlier advised him to do so) ... [and] falsely accused [plaintiff] of hindering the closure of the estate"; and (3) Defendant letter to Fred Ferrara (decedent's brother and distributee) dated June 20, 2024, reporting court decision "accused [plaintiff] of having wrongfully taken all personal belongings and thousands of dollars in cash belonging to the estate both prior to and post [decedent's] demise. [Defendant] referred to the items of personal property as stolen belongings and cash."

d. Special damages, which are founded in an economic or pecuniary loss, must generally be proved in an action for defamation. Damages are presumed, however, and thus need not be affirmatively alleged or proved, if the objectionable statements: (i) allege commission of a "serious crime"; or (ii) tend to injure another in his or her trade, business or profession; or (iii) assert that plaintiff has a loathsome disease; or (iv) impute unchastity to a woman.

e. Defendant's accusation that plaintiff committed the offense of larceny constitutes defamation per se and plaintiff is therefore relieved of the burden of proving damages arising from those statements. With damages presumed, plaintiff is charged with establishing a prima facie case for defamation by showing that the Exhibit N communications included false statements, whose publication

was neither authorized nor privileged. Since plaintiff has offered no evidence of special damages with regards to the communications in Exhibits L or M, the Court's inquiry into those communications could end here, with a finding that plaintiff has not made a prima facie case for defamation as to Exhibits L or M. In the interests of justice, however, the Court will review all of the objectionable statements for falsity and privilege.

f. Falsity is a material element of a defamation claim. Defamation actions must therefore be premised on statements or assertions of fact, not opinion: facts can be true or false, but opinions cannot. With one notable exception, defendant's allegations in Exhibits L, M, and N were not "false statements." The statements in Exhibits L and M that plaintiff "disrespected decedent's legacy" are opinion, as is her assertion that plaintiff had "hindered the administration of the estate." Plaintiff's allegations of theft found in Exhibit N are not "false": plaintiff himself testified on more than one occasion that he removed personal property and a safe from decedent's home without authorization by decedent or his fiduciary and then sold them, retaining the proceeds. Plaintiff's assertion in Exhibit L that she was empowered to sell decedent's home to satisfy a creditor's claim is also true. Truth is an absolute, unqualified defense to a civil defamation action. The statements in Exhibits L and N are factual in nature, and are not actionable in a suit for defamation. In contrast, the Court finds that the accusation in Exhibit M that plaintiff used the proceeds of the Sales to pay off the Medicaid lien on decedent's home, which is denied by plaintiff, can be proved to be false and is an actionable false statement for purposes of plaintiff's cause of action.

g. Public policy mandates that communications which are absolutely or qualifiedly privileged, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action. Among statements afforded a qualified privilege are those derived from a "common interest." A "common interest" qualified privilege arises when a good faith, bona fide communication upon a subject in which the communicant has an interest, or a legal interest to speak, and the communication is made to a person with a corresponding interest.

h. The objectionable statements were made in the context of a series of communications between defendant and the distributes intended to apprise the interested parties as to the progress of estate administration. The communications in Exhibits L, M, and N are therefore protected by a qualified privilege because the recipients of decedent's communications — parties with an interest in decedent's estate — shared a "common interest" with defendant in the efficient administration of the estate.

i. A presumption of common law malice or ill will is created by the making of a defamatory statement. Defendant's qualified privilege negates any such presumption, shifting the burden of proof as to malice to the plaintiff. Plaintiff's burden is to show that defendant's communications were motivated solely by "actual malice" or "personal spite." If the plaintiff can prove that the defendant acted solely out of actual malice, spite, or ill will, or that her statements were made in circumstances other than "good faith," defendant's statements will be denied a qualified privilege. In assessing the evidence offered for proof of common law malice, it matters not that plaintiff may have also disliked or even despised her

uncle: the issue is the motivation for the statements. If defendant's statements were made to further the interests protected by the qualified privilege, a triable issue of fact is raised only if a jury could reasonably conclude that malice was the one and only cause for the publication. The objectionable statements were made in the context of status updates on estate administration and were consistent with the performance of defendant's fiduciary duties. Given the prolonged dispute between the parties, it is not surprising that the reports would refer to the plaintiff's conduct.

j. A jury could not reasonably conclude that defendant was motivated solely by actual common law malice when she accused plaintiff of using the Sales proceeds for personal benefit. The communications in Exhibits L, M, and N were made by defendant in her capacity as executor and motivated by her duty to the residuary legatees. As a result, the otherwise actionable false statement in Exhibit M and the communications in Exhibits L and N are shielded by the "common interest" qualified privilege. The existence of the qualified privilege precludes any claim that the false statement was "published without privilege," a material element of plaintiff's prima facie case for defamation.

k. With the exception of the statements in Exhibit M, defendant's statements were either substantially true or opinion. The communications in Exhibit M as to plaintiff's use of the Sales proceeds were "false statements." Damages are presumed as to the false statements in Exhibit M. Special damages have not been demonstrated as arising from the statements in Exhibits L or N. The statements in Exhibits L, M, and N are protected by the common interest privilege. Plaintiff has offered no evidence in its pleadings or in defendant's extensive sworn testimony which would lead a reasonable jury to conclude that defendant's statements were motivated solely by common law malice. Plaintiff has failed to meet its burden of proof as to a prima facie case for defamation by reason of the common interest qualified privilege.

l. The tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element of "extreme and outrageous conduct" is established when the subject conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and be utterly intolerable in a civilized community." The conduct must be demonstrably part of a "campaign of intolerable conduct." Defendant's communications do not constitute conduct which is "utterly intolerable," nor is it demonstrably part of a campaign of such conduct. While plaintiff was undoubtedly distressed to read his niece's communications, the statements themselves — which plaintiff has not proved to be defamatory — cannot be characterized as "beyond all possible bounds of decency." In this respect, plaintiff fails to state a cause of action. Moreover, there is no proof that defendant acted with intent to cause plaintiff emotional distress or reckless disregard that such distress would be caused.

m. Plaintiff has not demonstrated the existence of material issues of fact. Plaintiff is barred from making a prima facie case for defamation by operation of the "common interest" qualified privilege.

D. *Inwood Nat'l Bank v. Fagin*, 706 S.W.3d 342; 2025 Tex. LEXIS 56; 68 Tex. Sup. J. 408; 2025 WL 34989 (Supreme Court of Texas 2025). Tortious interference with contract claim, with respect to bank not completing assignment of stock to trust, fails as a matter of law because the trust agreement created no contractual right to the shares in the beneficiary's favor with which the bank could interfere.

1. During her marriage to Kyle Fagin, Christy Fagin owned more than two million shares of Inwood Bancshares, Inc. common stock as her separate property. In 2015, the couple discussed creating new entities to hold Christy's shares, ostensibly for tax benefits and protection from creditors. Inwood National Bank (the issuer of the shares) informed Kyle that Inwood "require[d] prior notice and review of any anticipated change in ownership or transfer of stock." The terms of Inwood's shareholder agreement, which it required all shareholders (including Christy) to sign, bear this out. That agreement requires Inwood's approval before any share transfer and declares that "ANY ATTEMPTED TRANSFER OF SHARES NOT IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT SHALL BE NULL AND VOID."

2. Kyle retained an attorney, and Kyle and Christy ultimately decided to put Christy's Inwood shares into two trusts — one that named Kyle as sole beneficiary (the "Kyle Trust") and one that named Christy as sole beneficiary. The Kyle Trust was governed by a trust agreement titled "D. Kyle Fagin Qualified Subchapter S Trust" (the "KTA"). The KTA designated Christy and Kyle as trustees of the Kyle Trust and named Kyle as the trust's sole beneficiary. It contemplated two transfers into the trust's corpus. The KTA provides that Christy, as grantor, "hereby transfers and delivers to the Trustees the property described in Schedule A attached hereto . . . upon the express terms and conditions . . . hereinafter set forth." Schedule A, in turn, states: "$100.00 cash is the initial property transferred by the Grantor. Upon approval by Inwood Bancshares, Inc., the Grantor intends to transfer 581,658.21 Shares of common stock of Inwood Bancshares, Inc., a Texas corporation."

3. The KTA also contains the following irrevocability clause: "This Trust shall be irrevocable. The Grantor shall have no right or power, in whatever capacity and whether alone or in conjunction with others, to alter, amend, revoke, or terminate the Trust, or any of the terms of this Trust Agreement, in whole or in part, or to designate the persons who shall possess or enjoy the trust property or the income therefrom. By this instrument the Grantor intends to and does hereby relinquish absolutely and forever all possession and enjoyment of the trust property."

4. Kyle and Christy both signed the KTA in October 2015. Several weeks later, Inwood informed Kyle's attorney of the steps required to transfer the Inwood shares. Christy and Kyle would need to sign a "Shareholder Consent to Subchapter S Election" and a "Shareholder Subscription Agreement." In addition, Christy would need to send Inwood her existing stock certificate, endorsed for transfer, along with "her request for transfer and her transfer instructions." Inwood advised that, once these steps were completed, it would "(i) sign and date the documents requiring its signature, (ii) cancel the endorsed Certificate, and (iii) issue the new Certificate in the name of the Kyle Trust."

5. Christy and Kyle signed the two documents as requested, but Christy could not find her stock certificate. She therefore had to sign and notarize an "Affidavit of Facts Regarding Lost Share Certificates," which was delivered to Inwood in February 2016. Inwood then issued a replacement stock certificate in Christy's name only. Shortly thereafter, Inwood's attorney informed Kyle's attorney that he would "complete the transfer next week."

6. But Inwood never completed the transfer. According to Christy, she decided to revoke her consent to the proposed transfer in March 2016 after realizing that transferring her Inwood shares into the Kyle Trust would make those shares Kyle's separate property by gift, which she could never get back. Christy did not deliver her replacement stock certificate to Inwood. Instead, she asked Inwood not to proceed with the transfer, and Inwood did not countersign the agreement she and Kyle had signed.

7. Kyle, individually and as trustee and beneficiary of the Kyle Trust, sued Inwood. Kyle alleged that Christy irrevocably granted the Inwood shares to the Kyle Trust when he and Christy signed the KTA, and he sought a declaration that the Kyle Trust owns the Inwood shares. Kyle later added a claim for tortious interference, alleging that Inwood intentionally interfered with the KTA by convincing Christy to revoke her transfer of the Inwood shares to the Kyle Trust. Christy intervened, contesting Kyle's claim of ownership and asserting that the Inwood shares remain her separate property. After Christy intervened, Kyle amended his petition to assert several claims against Christy.

8. Kyle moved for traditional summary judgment on his breach of contract and declaratory judgment claims against Inwood and Christy. Inwood moved for traditional and no-evidence summary judgment on all Kyle's claims. The trial court granted Inwood's summary judgment motion (as well as Christy's) without specifying the grounds and ordered that Kyle take nothing on his claims. After judgment was rendered, Kyle and Christy settled, and Kyle appealed only as to his claims against Inwood. The court of appeals affirmed on all claims except tortious interference. In reversing the summary judgment on that claim, the court reasoned that the Texas Supreme Court had not recognized truth as an affirmative defense to tortious interference with an existing contract, so neither it nor the trial court could legitimately recognize, in the first instance, that defense.

9. Inwood petitioned for appeal, and the Texas Supreme Court reversed the portion of the appeals court's judgment allowing the tortious interference claim to proceed, and reinstated the trial court's judgment that the beneficiary take nothing on his claims against the bank, on the following grounds:

> a. The elements of a claim for tortious interference with an existing contract are: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) the willful and intentional interference caused damage; and (4) actual damage or loss occurred. With respect to the first element — the existence of a contract subject to interference — a party cannot recover for tortious interference unless it possesses legal rights under the contract with which the defendant could have interfered. Inducing a contract obligor to do what it has a right to do is not actionable interference.

b. With respect to a trust agreement, when no ambiguity exists, construction of a trust instrument is a question of law for the trial court. Whether a contract or other written instrument is ambiguous is a question of law for the court.

c. A party can transfer property through an inter vivos trust. One way to create an express trust is by a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person. The grantor can make the transfer of property to an inter vivos trust subject to a condition precedent that must occur before the transfer is effective.

d. To constitute an effective inter vivos gift under the common law, there must be a delivery of possession of the subject matter of the gift by the donor to the donee, and a purpose on the part of the donor to vest in the donee, unconditionally and immediately, the ownership of the property delivered. The burden of proving an effective gift is on the alleged recipient. To make a valid gift, the donor must, at the time she makes it, intend an immediate divestiture of the rights of ownership out of herself and a consequent immediate vesting of such rights in the donee.

e. The Texas Business and Commerce Code addresses certain requirements for effecting a transfer of securities. A person acquires a security or an interest therein if the person is a purchaser to whom a security is delivered. A purchaser takes by any voluntary transaction creating an interest in property, including by gift. A certificated security is delivered, effectuating a transfer, when the purchaser acquires possession of the security certificate or when the certificate is endorsed and delivered to a securities intermediary.

f. To recover on his claim for tortious interference with an existing contract, Kyle must establish that he possessed legal rights under the KTA with which Inwood interfered. The KTA unambiguously establishes that Christy had no present intent to transfer the shares upon signing but rather expressed an intent to transfer the shares at some future date, and only if approved by Inwood. The text — in particular, the different verb tenses used to describe each transfer — demonstrates that the KTA operated to immediately transfer $100 to the Kyle Trust, while the share transfer would take effect in the future, and only if approved by Inwood. Similarly, describing only the $100 as the initial property indicates that the $100 would be transferred first and the Inwood shares would be transferred at a later time, if Inwood approved. The KTA did not effect a transfer of the Inwood shares to the Kyle Trust. In contrast to Christy's unconditional transfer of the initial trust property of $100, the KTA unambiguously expressed Christy's intent to condition her transfer of the Inwood shares on Inwood's approval. Because that condition was never satisfied, the shares were never transferred to the Kyle Trust.

g. Nor can Kyle claim that he or the Kyle Trust acquired the Inwood shares by gift. The KTA's plain language contemplates only a future intention to transfer the shares, not a present gift. As the share transfer was contemplated to take effect in the future and conditioned on Inwood's approval, it lacks the immediate and unconditional characteristics of a valid gift.

h. Because the KTA did not immediately and unconditionally vest Kyle with any legal rights to retain the shares under either the common law or Section 8.104(a),

his claim that Inwood tortiously interfered with his rights to the shares under the KTA must fail.

i. Nothing in this irrevocability clause diminished Christy's power to decide against transferring the Inwood shares before they actually were transferred. As Christy retained the right not to transfer the shares up until the transfer was effected, Inwood cannot be liable for tortious interference because, even assuming Inwood suggested to Christy that she should not approve the transfer, merely inducing a contract obligor to do what it has a right to do is not actionable interference.

j. The conclusion would not change if the court viewed the KTA as a bilateral contract rather than a gift. The Inwood shares would not become trust property unless and until Inwood approved the transfer. Indeed, Christy was contractually prohibited via the shareholder agreement from consummating the transfer without Inwood's approval. Kyle acquired no contractual right to the Inwood shares because Inwood never approved their transfer. The sole evidence Kyle references to support his contention that Inwood approved the transfer is an email from Inwood's attorney indicating that he "will complete the transfer next week." But this is insufficient to create a fact issue. Indeed, it demonstrates that Inwood had not given its approval when Christy and Kyle signed the KTA because the email was sent months after the KTA's execution. The summary judgment evidence demonstrates that Christy never delivered her certificate for transfer to Inwood. It is further undisputed that Inwood did not countersign the shareholder subscription agreement authorizing the transfer. As Inwood did not approve, Christy's obligation to transfer did not arise, and Kyle never acquired a contractual right to the Inwood shares.

E. *Kucinski v. Wengler (In re Est. of Kucinski),* 2025 IL App (3d) 240328-U (Appellate Court of Illinois, Third District 2025). Person that would inherit intestate estate if slayer statute applied in a certain manner has standing to intervene in estate administration.

1. Noah A. Kucinski died intestate at the age of thirteen on December 18, 2022. He had no children and was never married. Noah was born to Amy Blobaum and Peter Kucinski. Peter died of a heroin overdose on August 10, 2014, and Amy was charged with causing Peter's death by delivering heroin to him. Amy pled guilty to drug-induced homicide on August 26, 2015, and she was sentenced to serve seven years in the Department of Corrections. Peter and Amy were never married, and Noah was Peter's sole heir at the time of Peter's death. While Amy was incarcerated, Noah's paternal grandmother, Dorothy Kucinski, was appointed to serve as Noah's guardian. Amy was released from incarceration in 2020, and she bore another child, Noah's half-brother, J.B.

2. Following Noah's death, Amy petitioned for the appointment of an independent administrator to administer Noah's estate. On December 22, 2022, the court appointed Colleen Wengler to administer the estate. On that same date, the court entered an order declaring Amy and J.B. Noah's sole legal heirs. On January 26, 2024, Dorothy petitioned to intervene in the administration of the estate. Dorothy petitioned to assert her rights as an heir of Peter Kucinski, and argued that the slayer statute precludes a person who intentionally and unjustifiably causes the death of another from inheriting the property of the decedent. Dorothy argued that it required the court to amend the heirship order to allow Peter's heirs at the time of his death in 2014 to receive a 1/3 share of the estate,

because, the share of Noah's estate Amy is to receive that would otherwise have gone to Peter should be given to Peter's heirs at law."

3. Amy moved to dismiss the petition to intervene. The court agreed that Dorothy lacked standing to intervene. The court did not directly address the applicability of the slayer statute. However, the court stated that if the slayer statute did apply, Dorothy would still not qualify as an heir under the laws of intestacy. The court therefore dismissed Dorothy's petition to intervene, and Dorothy appealed.

4. On appeal, the court of appeals reversed and remanded on the following grounds:

a. The "slayer statute" states in pertinent part that: "A person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death, whether as heir, legatee, beneficiary, joint tenant, survivor, appointee or in any other capacity and whether the property, benefit, or other interest passes pursuant to any form of title registration, testamentary or nontestamentary instrument, intestacy, renunciation, or any other circumstance. The property, benefit, or other interest shall pass as if the person causing the death died before the decedent, provided that with respect to joint tenancy property the interest possessed prior to the death by the person causing the death shall not be diminished by the application of this Section. A determination under this Section may be made by any court of competent jurisdiction separate and apart from any criminal proceeding arising from the death, provided [**5] that no such civil proceeding shall proceed to trial nor shall the person be required to submit to discovery in such civil proceeding until such time as any criminal proceeding has been finally determined by the trial court or, in the event no criminal charge has been brought, prior to one year after the date of death. A person convicted of first-degree murder or second-degree murder of the decedent is conclusively presumed to have caused the death intentionally and unjustifiably for purposes of this Section."

b. The laws of intestacy provide that if a decedent dies with "no surviving spouse but a parent, brother, sister or descendant of a brother or sister of the decedent," the estate passes to the parents, brothers and sisters of the decedent in equal parts, allowing that if one parent is dead then the other parent takes a double portion of the estate. If there is no surviving spouse, descendant, parent, brother, sister or descendant, then the estate passes in equal parts to the decedent's maternal and paternal grandparents, half to the decedent's maternal grandparents or their survivors and half to the decedent's paternal grandparents or their survivors.

c. Standing is required to bring suit or join suit as a party, and it assures that only those with a real interest in the outcome of the controversy are permitted to raise issues.

d. Intervention may be permissive or as a matter of right. Intervention as of right occurs "when a statute confers the unconditional right to intervene, when a party who will be bound by an order or judgment in the action will not be adequately represented by existing parties, or when a party will be adversely affected by the disposition of property subject to the control of the court." Permissive intervention occurs at the court's discretion and may be allowed when "an applicant's claim

and the main action concern a common question of law or fact." Dorothy claims intervention as a matter of right, which must be granted if: (1) the petition is timely filed; (2) the representation by the parties already in the suit is inadequate; and (3) the party seeking intervention has a sufficient interest in the suit.

e. Adequacy of representation is "a complex matter, not subject to hard and fast rules." However, the most important factor in determining adequacy of representation is how and whether the interests of the party seeking intervention compares with the interests of the present parties. According to Dorothy, the slayer statute should operate to prevent Amy from inheriting what would have been Peter's portion of Noah's estate and Dorothy should be allowed to intervene as an heir to enforce the slayer statute. Dorothy may be considered a potential heir, but for a different reason. The slayer statute's stated purpose is to preclude a person who unjustifiably causes the death of another from inheriting that person's property. It accomplishes that goal by causing the deceased person's property to "pass as if the person causing the death died before the decedent." Assuming, arguendo, the slayer statute applies, it would preclude Amy from inheriting any portion of Noah's estate that derives from Peter's estate. Moreover, a broad application of the statute would similarly preclude J.B. from inheriting any portion of Noah's estate derived from Peter's estate. If, as the slayer statute suggests, the court treats Amy as though she had predeceased Peter, she would not have borne any additional children, and, by the laws of intestacy, any portion of Peter's estate remaining in Noah's estate would pass to his maternal and paternal grandparents. Applying the slayer statute in this way, Dorothy would become an heir of Noah's estate since she is Noah's paternal grandmother.

f. Dorothy's interests are not adequately represented by the parties, since neither Amy nor J.B. seeks to apply the slayer statute and the court failed to list Dorothy as a potential heir at law, and Dorothy maintains an interest in the estate as a potential heir if the slayer statute applies. Dorothy must be permitted to intervene as a matter of right.

g. The circuit court correctly noted that it had not yet ruled on whether the slayer statute applies to Noah's estate. Although we review the dismissal of Dorothy's petition de novo, the court cannot rule on the applicability of the statute on the record before us, particularly since the circuit court failed to do so. The statute itself suggests a civil proceeding may be required to determine its application.

XXVI. SPENDTHRIFT TRUSTS & ASSET PROTECTION

A. *In the matter of the CES 2007 Trust,* C.A. No. 2023-0925-SEM (Delaware Chancery Court). Magistrate concludes that creditor of settlor cannot enforce judgment against third-party domestic asset protection trust funded by settlor before judgment even where settlor retained right to control trust investments, but court dismisses creditor's claims for lack of standing.

1. In 2014, Can IV Packard Square, LLC (the "Petitioner") loaned one of Craig Schubiner's (the "Respondent") companies the funds to finance a luxury retail and residential development project in Ann Arbor, Michigan. Petitioner sued the Respondent in Oakland County Circuit Court in Michigan (the "Michigan Court"), seeking repayment and additional relief. The Michigan Court entered a nearly $14 million judgment in favor of the Petitioner and against the Respondent (the "Judgment"). Soon after the Judgment, the

Petitioner moved to enjoin the Respondent from transferring property before the Judgment could be satisfied, arguing that there was strong evidence to suggest the Respondent was preparing to transfer assets to avoid satisfaction. The Michigan Court granted that motion and enjoined the Respondent from transferring assets outside of the normal course of business pending satisfaction of the final judgment and further ordered that any person or entity having knowledge of its order shall be enjoined from accepting any interest in property from the Respondent, individually or jointly (the "Injunction"). Since the Injunction, the Respondent maintained he has no personal assets to satisfy the Judgment, and it remained unpaid. Petitioner sought recovery in several jurisdictions not only from the Respondent, but from entities the Respondent owns or otherwise controls.

2. Petitioner sought to pierce into a trust established by the Respondent long before the Judgment and Injunction, and alleged Respondent is evading collection efforts through the CES 2007 Trust (the "Trust"). The Respondent established the Trust, as grantor, on April 30, 2007, with U.S. Trust Company of Delaware as trustee (the "Initial Trustee"). The Trust is irrevocable except for the power of the trustee(s) who are not related or subordinate to the Respondent, and who are not beneficiaries of the trust's income or principal, to amend its terms in a manner that would not alter any beneficial interest in the Trust. Respondent retained for himself as the "Advisor" the full power to manage the investments of the trusts in a fiduciary capacity, and gave to his brother as the initial "Trust Protector" the power to remove the trustee, appoint a successor trustee, appoint a successor advisor, and appoint co-trustees or co-advisors. The trustee retained sole and absolute discretion at any time to distribute the net income and the principal of the Trust as the trustee determines for the benefit of the beneficiaries, and the Respondent, as the grantor, barred himself from acting as trustee.

3. The beneficiaries were the Respondent's wife (if any), parents, and issue. Respondent is currently unmarried with one minor daughter, one living parent, and two brothers. The trustee bears sole responsibility and discretion regarding distribution to the beneficiaries.

4. The Trust's spendthrift provision provided as follows: "No beneficiary's interest in any trust hereunder, whether in income or in principal, shall be subject to anticipation, assignment, pledge, hypothecation, sale or transfer in any manner, and no beneficiary of any such trust or other person interested therein shall have the power to anticipate, assign, pledge, hypothecate, sell, transfer, encumber, or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities, or torts of any beneficiary of any such trust or other person interested therein; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of Section 2518 of the Code with respect to interests herein. This section constitutes a restriction on the transfer of the Grantor's beneficial interest in the trust estate that is enforceable under applicable non-bankruptcy laws within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.A. Section 541(c)(2)) or any other similar or successor statute."

5. The Trust's assets include a ninety-percent interest in three Delaware limited liability companies: 304 Associates LLC (the "304 LLC"), 305 Associates LLC (the "305 LLC"), and 306 Associates LLC (the "306 LLC" and collectively, the "LLCs"). The LLCs are each managed by the Respondent. The 305 LLC owns two properties located in Birmingham, Michigan (the "Birmingham Property"), and vacant land directly adjacent to the

Birmingham Property in Birmingham, Michigan (the "Linden Property"). The 306 LLC owns real property in Aspen, Colorado (the "Aspen Property"). The remaining ten-percent interest in the LLCs is held by two South Dakota trusts — the CES S.D. Trust, formed on December 15, 2009 ("CES S.D. Trust Agreement"), and the JDS S.D. Trust, formed on February 26, 2010 ("JDS S.D. Trust Agreement"). The Respondent is the grantor of the CES S.D. Trust and James Schubiner is the grantor of the JDS S.D. Trust.

6. The Initial Trustee served in its appointed capacity for over a decade. But on May 10, 2017, the Initial Trustee filed a petition to resign, have a successor trustee appointed, and receive past-due compensation for its services, alleging the Respondent and his brother (as advisor and trust protector) had ignored requests for payment and to resign. Shortly after the Initial Trustee served its petition both on the Respondent and Sondra, Kenneth, and James Schubiner, the Respondent notified the Initial Trustee that a successor had been located and, presumably, the fee request was resolved. The Initial Trustee filed a notice voluntarily dismissing its petition. The current trustee is First State Trust Company (the "Current Trustee"). The Petitioner claimed that the Respondent was the de facto trustee.

7. On June 30, 1999, the Respondent purchased the Birmingham Property for $450,000. To finance construction, the Respondent then procured a loan of approximately $1.3 million, secured by a mortgage on the Birmingham Property. After construction, the Respondent used, or claimed, the Birmingham Property as his primary residence from 2001 to 2018. Ownership of the Birmingham Property changed hands several times through transactions initiated at the whims of the Respondent. In 2004, the Respondent quitclaimed the Birmingham Property to a bonding agency for collateral related to a lawsuit. Then in 2006, the Respondent transferred ownership from himself (presumably having regained ownership after the 2004 quitclaim) to the 305 LLC for $1.00. That transfer did not last long, though, and on the same day, the Respondent transferred the Birmingham Property back to himself for the same de minimus price. He again transferred the Birmingham Property to the 305 LLC on March 19, 2007, and several years later, on March 4, 2014, shored up that conveyance. Finally, in early 2020, the Birmingham Property went through successive transfers out of the 305 LLC to the Respondent, personally, who pledged the property toward a personal indebtedness, before quitclaiming it back to the 305 LLC a few days later. It remains owned by the 305 LLC.

8. The Respondent and the 305 LLC purchased the Linden Property as joint tenants with rights of survivorship. On January 20, 2020, through the same deed used to convey the Birmingham Property, the Respondent conveyed his interest in the Linden Property to the 305 LLC for $1.00.

9. The Aspen Property was owned by 303 Associates, LLC, an entity the Respondent solely owned. On April 5, 2007, 303 Associates, LLC, through the Respondent as its agent, conveyed the Aspen Property to the 306 LLC for $10.00. Then, on March 30, 2016, the Respondent refinanced a lien on the Aspen Property by transferring the property to himself and, after obtaining the loan, transferred the property back to the 306 LLC. There was pending litigation regarding this transfer in the District Court of Piktin County, Colorado. There are also additional proceedings in Colorado and Michigan challenging property transfers and alleged avoidance of the Judgment.

10. Petitioner sued Respondent, and named as interested parties: the Current Trustee, Sondra Schubiner, James Schubiner, Kenneth Schubiner, and V.S. (a minor beneficiary).

The Current Trustee answered the Amended Petition and the remaining parties, including the Respondent (the "Moving Parties"), jointly moved to dismiss the suit. The chancellor recommended that the motion be granted and the petition dismissed on the following grounds:

> a. The Petitioner failed to plead a reasonably conceivable claim for avoidance of the protections afforded to the Trust, and its beneficiaries, as an "Asset Protection Trust." The Trust meets the statutory requirements for such protections, and the Petitioner failed to plead facts which would overcome that showing, or affirmatively demonstrate that the trustees were not qualified, the Respondent was somehow a de facto trustee, or the spendthrift provision should be invalidated.
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> b. In 1997, Delaware codified the ability to create Delaware self-settled asset protection, or qualified disposition, trusts ("Asset Protection Trusts"). The Qualified Dispositions in Trust Act (the "Act") permits someone to create an Asset Protection Trust, and irrevocably transfer assets to the trust, to protect those assets from claims against the grantor/former owner. For assets to be protected, however, the transfer must be a "qualified disposition" to a "qualified trustee." The trust agreement must also invoke Delaware law, include a spendthrift provision, and be irrevocable. The Trust contains each of these requirements.
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> c. A qualified disposition is defined in the Act as an irrevocable transfer, conveyance, or assignment of real or personal property (or the interests therein) to one or more trustees, at least one of which is a "qualified trustee." The transferor/grantor cannot be a "qualified trustee," which must be either a Delaware resident or an entity authorized to act as a trustee in Delaware; a "qualified trustee" must also be "subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, or the Comptroller of the Currency."
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> d. A qualified disposition, made to a qualified trustee, may only be attached or avoided in limited circumstances. For pre-transfer creditors, their avenue is fraudulent transfers; for post-transfer creditors, they must prove the qualified disposition was made with actual intent to defraud such creditor. Both avenues have time limits. The court will not conflate the real property, which is an asset of the LLCs, with the LLCs, which are assets of the Trust. The Respondent's retention and exercise of control over the real property does not undermine the role played by the trustees of the Trusts, rendering them not qualified and superfluous.
>
> e. The Trust's assets are the LLCs, for which the Trust has a ninety-percent interest. Under Delaware's LLC Act, a limited liability company interest is personal property. A member has no interest in specific limited liability company property. Thus, the Trust, through its membership interest in the LLCs, has no interest in the specific real estate owned (or no longer owned) thereby. It would be inappropriate, through this type of proceeding, to adjudge the real estate transactions at the LLC level under the guise of potential fraudulent transfer sufficient to void the Trust's spendthrift provision. There are, simply put, no transfers to/from the Trust which would give rise to such an inquiry, and the Petitioner has pled no basis on which the court should engage in veil piercing.

f. The Petitioner failed to plead a reasonably conceivable claim that the trustees of the Trust were not "qualified trustees." Both meet the statutory definition, and the Amended Petition does not provide any factual averments that would demonstrate that either of the trustees failed to maintain or arrange for custody of some or all of the property that is the subject of the qualified disposition, maintain records for the Trust on an exclusive or nonexclusive basis, prepare or arrange for the preparation of fiduciary income tax returns for the Trust, or otherwise materially participate in the administration of the Trust. The argument that the trustees were never intended to materially participate in the administration of the Trust is not, however, supported by the well-pleaded facts in the Amended Petition. At most, the Amended Petition reflects that little administration was necessary for the Trust; for a trust holding solely membership interests in the LLCs, it is not difficult to understand and appreciate such dormancy.

g. To some extent, the allegations in the earlier action are concerning but they were: (1) resolved, and (2) followed by the appointment of a successor trustee, the Current Trustee, who meets the definition of a Qualified Trustee, and continues to serve in such role. Absent any allegations regarding the stewardship of the Current Trustee, the resolved allegations in the 2017 action are insufficient to state a cognizable claim that the Current Trustee is not a qualified trustee.

h. The Respondent's retention of control under the Trust's agreement does not undermine the trustee's authority. As advisor, the Respondent has the power to manage investments and delegate authority in accordance with his fiduciary duties. The Act permits the settlor/grantor to appoint advisors and protectors with rights, including but not limited to: (1) removing the trustee and appointing a new qualified trustee, and (2) directing, consenting to, or disapproving distributions.

i. The right of a settlor to continue to manage, control, and operate a business owned by the Trust is not explicitly spelled out in the Act. But it does not need to be, given the layers of protection inherited in such a setup. The Trust owns a ninety-percent interest in the LLCs. That membership interest does not grant the Trust any right, claim, or title to the assets of the LLCs, but the LLC Act (and any LLC agreements) defines the Trust's rights, claims, and interests as a member. The Trust, through the Current Trustee, can invoke those rights as the trustee sees fit, subject to a beneficiary check on the Current Trustee's exercise of its duties. To grant the relief the Petitioner seeks would be to ignore these layers of protection.

j. The argument that the Respondent, regardless of the propriety of the rights retained in the Trust's agreement, exercises near-complete dominion and control over the Trust, disregarding and failing (or refusing) to recognize its separate existence, is unsupported by the allegations in the Amended Petition, which is scant with any factual averments regarding how the Respondent acted regarding the Trust and management of the Trust's assets. The Trust does not own or have a direct interest in the real estate at issue. It owns the LLCs, and its membership interests therein remain unchanged. To entertain the Petitioner's theory would require this court to disregard the layers of business entities and ignore the LLC Act's clear legislative intent.

k. To be treated as an Asset Protection Trust under the Act, the Trust's agreement also needed to incorporate Delaware law, include a spendthrift provision, and be irrevocable. It did, does, and is. Article Eight of the Trust's agreement provided: "this Trust Agreement shall be construed under, and all trusts created hereunder shall be governed by, the laws of Delaware. Any action or proceeding relating to this trust shall be brought and enforced in any state or federal court of competent jurisdiction in the State of Delaware." The Trust provides a valid spendthrift clause as required under the Act. The Trust also provides that the Trust is irrevocable, other than the power of the trustee(s) who are not related or subordinate to the Respondent, and who are not beneficiaries of the trust's income or principal, to amend its terms in a manner that would not alter any beneficial interest in the Trust.

l. Even if the Trust is an Asset Protection Trust, the Act still permits the court to invalidate the Trust or its spendthrift provision under common law. That common law, in the Asset Protection Trust realm, reflected a basic principle that the courts will not give effect to a spendthrift trust that has no economic reality and whose only function is to enable the settlor to control and enjoy the trust property without limitations or restraints, as was done before the trust was created.

m. Public policy will not permit someone to create a spendthrift trust solely for their own benefit because where the trustee controls the assets and income of the trust for his own benefit, unconstrained by any fiduciary duties owed to others, the purpose of a spendthrift trust — to protect the beneficiary from his or her own improvidence — is lost. Under the doctrine of merger, a trust becomes void where the interests of the beneficiaries and the interests of the settlors are identical. Neither doctrine supports the Petitioner's request for relief in this action. The Trust's assets are its membership interests in the LLCs, which a qualified trustee holds for the benefits of all the beneficiaries of the Trust. The court will not treat the LLCs as shams or alter egos of the Respondent and convert the Trust's membership interests therein to real property interests.

n. The Chancery Court dismissed the case on the following grounds:

> (1) The real problem with this case is the Lender's lack of standing to challenge the Trust's compliance with Delaware law. The court has an independent obligation to consider whether it can properly exercise jurisdiction over a matter, regardless of whether the issue has been raised by the parties. Here, the Lender lacks any type of injury that could support standing. The Lender did not loan money to the Trust; the Lender loaned money to one of Schubiner's entities. The Lender complains that Schubiner and the Companies transferred properties back and forth, but that did not affect the Trust, and the Trust's assets did not change. There is no connection between the Trust and any injury that may have resulted from the transfers. Nor is there any connection between the Lender and any of the supposed problems with the Trust that the Lender identifies.
>
> (2) According to the Lender, it brought this case to bring facts to the trustee's attention that could cause the trustee to evaluate whether it had

a fiduciary duty to exercise its rights as a majority owner of the Companies. When it comes to the Trust, the Lender is a classic intermeddler.

(3) Rather than addressing jurisdiction, the magistrate's report analyzed the Lender's claims and concluded that they failed to pass muster under Rule 12(b)(6). The Report's analysis appears correct, but with the Lender lacking standing, there was no basis to reach the merits. The Report's conclusions are technically advisory opinions.

B. *C.S. v. R.H.*, 2025 N.Y. Misc. LEXIS 7294; 2025 NY Slip Op 51426(U); 87 Misc. 3d 1201(A); 2025 LX 347997 (Supreme Court of New York, New York County 2025). Irrevocable trust funded during marriage with marital property included in calculating equitable distribution award.

1. C.S. ("Wife") and R.H. ("Husband") had a nearly twenty-four-year marriage, much of which, at least on the surface, had tones of a fairy-tale. They started out comfortably, with Husband earning $2 million a year as an equity partner in the investment firm ("Original Firm") and Wife earning $52,000 a year as a financial reporter. The marriage resulted in four daughters, all of whom are in good health and successful in their own right.

2. Early in the marriage, the parties' wealth went from comfortable to extravagant when the Original Firm was sold for $6.5 billion, and the family's net worth rocketed to approximately $120 million overnight. Their lifestyle went from Manhattan rich — Manhattan apartment, country home, and Hampton summer home rentals — to uber-rich — living in Europe for several years, several Manhattan apartments, a Hamptons estate with 7.5 acres of waterfront property, real estate investments worth $22 million, and the creation of an investment firm ("Investment Firm") that trades $5.5 billion in assets, among other assets.

3. Husband and Wife placed their vast wealth into irrevocable trusts in March 2001: the Family Trust ("the Family Trust"), for the benefit of their daughters who would receive their share of the assets when they reached age 30, and a generation-skipping trust ("the GST"), for the benefit of their grandchildren and which skips their daughters, who are not beneficiaries (collectively and intermittently referred to as "the Trusts"). They intended that the Trusts shelter from estate taxes the majority of their assets accrued during the marriage — valued at more than $181 million at the time of trial — while directly benefiting from their use on a daily basis to support the family lifestyle. Indeed, the parties resided in each of the homes owned by the Trusts throughout the marriage, and family expenses were and continue to be paid from the assets held by the Trusts. Husband is the Grantor of the Trusts, with power to remove and replace the Trustee, as well as the Investment Advisor for each of the LLCs owned by the Trusts and which hold the marital assets. As such, and since the outset, he has and continues to actively manage and control the trust assets.

4. Something went wrong in the marriage and extreme wealth could not fix it. Wife filed for divorce in May 2018. The parties resolved their custody and parental access issues in somewhat short order by stipulation ("the Custody Agreements"). The parties have joint legal custody with an equal parental access schedule (for the two youngest daughters). After Wife commenced the lawsuit, Husband took unilateral actions to systematically cut her out of any involvement in the Trusts and destroy her interest in their assets, and evicted her from the marital homes owned by the Trusts. She has not enjoyed the use or benefit of any trust assets since 2020. In 2023, mid-trial, and without Court approval or

notice to and consent of Wife, Husband decanted the Trusts into two new trusts formed under Delaware law.

5. Wife testified clearly and convincingly that Husband assured her that the Trusts were "tax shelters," that she had a role in the Trusts and their assets, and that the parties would use and enjoy the Trust assets to their benefit. She was equally credible as to how and when she learned about the Trusts and the LLCs, what she knew about the Trusts and LLCs, and what she did not know about them. Her testimony that she took care of the four children and various homes and completely trusted Husband with the family finances was straightforward, consistent, and unrefuted. Similarly, Wife's testimony that she did not have separate legal counsel in the formation of the Trusts and LLCs and was not advised that she needed separate legal counsel was highly credible and unassailed.

6. The court found that Husband lacked credibility on the core financial issues, specifically as to the critical matter of his control over the Trusts, and that documentary proof on this issue flatly contradicted much of his testimony, which was also internally inconsistent. Husband did not offer the Trustee, his close personal friend T.S., as a witness to corroborate and support Husband's trial testimony. Husband's adamant denial that the Trusts do not fund the family expenses was contradicted by the legion of proof in the record that the Trusts funded, and continue to fund, the family expenses and lifestyle. Husband admitted that he has not worked outside the home since 2002 and does not draw a salary from his company that trades $5.5 billion in assets. Husband did not adequately explain why he did not seek court approval for his post-commencement conduct with respect to Trust assets, including, inter alia, removing Wife from the LLCs and evicting her from the Trust homes; paying "distributions"; and, ultimately, decanting the Trusts into two new Trusts formed under Delaware law. He could not explain why, although the parties have joint decision making for their daughters, he alone signed trust documents on behalf of the younger daughters without notice to, or the consent of, Wife.

7. The parties met in 1992, Wife was 24 and Husband was 32, and both were college educated and gainfully employed. Wife, a graduate of Cornell, worked as a financial reporter with earnings of approximately $52,000 per year. Husband, a graduate of Villanova, was an equity partner and financial professional and earned approximately $2 million per year. They moved in together in 1993 and were married on September 18, 1994.

8. At the time of the marriage, Husband owned the 200-acre property in Hampton, New York, which he purchased in 1986 with a friend (who he subsequently bought out) ("the Upstate Home"). During the marriage, the parties expanded the house significantly. Soon after their wedding, the parties' relocated to London for about one year for Husband's work. Although Wife loved and was thriving at her job in New York, she gave it up to follow him. In 1998, after the birth of their first daughter, they purchased an apartment on Central Park West in Manhattan. Wife continued to work and take care of the family homes and child. The parties had a joint bank account from which Husband would pay the family expenses. Wife had her own account but also had access to the joint account. They also had several investment accounts, some held in Husband's name and some in joint names, and college savings plans for their nieces and nephews. Husband managed all of the family investments.

9. An experienced trusts and estates attorney handled the estate matters for Husband. In 1995, counsel prepared wills and health care proxies for the parties, created revocable

trusts for each party, and set up a private foundation ("the Foundation"). He also prepared trusts for each of the parties' daughters when they were born.

10. In September 2000, another firm purchased the Original Firm for $6.5 billion. Overnight, the parties' wealth skyrocketed to in excess of $120 million, consisting of cash and stock in the acquiring company. Husband conceded at trial that these funds were marital property. Both parties realized an unanticipated financial windfall to their marital assets as a result of the buy-out. Husband was required to work for the acquiring firm for a period of two years. When he completed this employment in 2002, he "retired" at the age of 42.

11. Husband, a self-described hands-on guy, actively manages the family wealth and set up a highly sophisticated estate plan with the assistance of counsel. The plan involved the placement of a substantial majority of the marital assets into the GST and the Family Trust, which were created simultaneously in March 2001. The Trusts were formed to enable the parties to avoid estate taxes upon their demise while allowing them to continue to utilize and benefit from trust assets during their lifetimes, which they did. The parties lived in the real estate owned by the Trusts, rent free for many years. The family expenses and lifestyle was funded (and continues to be funded) by the Trusts.

12. Counsel met with both parties twice about the GST. However, Husband was counsel's main point of contact. Husband would "toss ideas around" with counsel in person or on the phone, then discuss the idea with Wife (at times on ski lifts or over dinner), before getting together with counsel to settle on a concept. Wife testified credibly that she first saw documents when the parties went into counsel's office to sign them; she was not provided any documents prior to the meetings. Wife received no independent legal or financial advice about the creation of the Trusts and was not advised to obtain independent counsel; she was not informed as to what would happen to the marital assets held in trust in the event of divorce. Wife testified, credibly and consistently, that she trusted her husband and his assurances that the Trusts were meant to protect their vast marital assets while permitting them to enjoy their use and benefit, that he would manage the assets, and that she had a "role" in the Trusts. Husband did not refute Wife's testimony in this regard.

13. Husband is the Grantor under the Trusts, with the exclusive power to remove and replace the Trustee and Successor Trustee at any time and for any reason. He initially appointed Wife as Trustee, and her brother-in-law, a successful financial professional, as Successor Trustee. As Grantor, Husband also retained the right to substitute non-trust assets for trust assets, making it an "intentionally defective grantor trust." In addition, as Grantor, he is the "owner" of the GST assets under federal tax law. Thus, the marital assets transferred into the Trusts were treated as gifts from the parties, and they each used their lifetime gift exemptions — a non-renewable asset — to reduce and defray the taxes on the gift transfers. The GST issued promissory notes to the parties in exchange for the gifts and the parties did not pay taxes on the GST's interest payments on the notes. However, they did pay taxes on the income generated by the GST throughout the marriage, which reduced the value of the other marital assets and increased the value of the GST.

14. As noted, the Trusts were funded with marital assets — the cash and stock from the buy-out. Husband initially funded the GST with approximately $1,275,000. In addition, he created an LLC (the "Family LLC"), which he funded with cash in the amount of

$1,194,738 and 208,667 shares of acquiring company stock worth approximately $18,621,443, for a combined total of just under $20 million. He then sold 99% of the Family LLC to the GST in exchange for a promissory note in the sum of $11,633,041, representing a 41.5% discount of the market value of the stock due to restrictions thereon at the time of the transfer. Though advantageous from an estate tax planning standpoint, the discounted sales price resulted in the parties taking a promissory note worth substantially less than the assets they transferred to the GST. In addition, Husband forgave portions of the promissory note at various times throughout the marriage. By 2001, Husband had transferred $20 million into the GST.

15. Husband formed two Grantor-Retained Annuity Trusts ("GRATs") to facilitate transfer of marital assets into the GST over the course of time. He created the 2001 GRAT, named himself trustee, and funded it with 86,228 shares of stock worth $6,167,255. He created the 2002 GRAT, named himself trustee, and funded it with 45,157 shares of stock worth $3,255,820. The GRATs each had two-year terms and, upon their expirations in 2003 and 2004, respectively, the assets were transferred to the Family Trust. By 2004, Husband had transferred at least approximately $30 million into the GST: the initial $20 million in 2001, and an additional $10 million from the GRATs. Wife testified credibly that she did not know what a GRAT is and the record is devoid of proof that she was involved in their formation.

16. Husband also formed a series of limited liability companies to hold marital assets and permit him to conduct business and financial transactions. As interests in LLCs can be transferred for an amount less than the value of the assets held by the LLC, Husband utilized the LLC structure as a means to place the parties' marital assets into the GST for a discount. During the period from 2004 through 2016, Husband created five LLCs: M.B. Holdings LLC ("M.B."); A.D. LLC ("A.D."); C. Holdings LLC ("C.H."); P.A. LLC ("P.A."); and H.H. LLC ("H.H."). Husband named Wife as the Managing Director for each LLC, except C.H., but retained for himself, in the operating agreements, the authority to remove the Managing Director in his sole discretion. Wife did not receive a salary for her purported work as Managing Director. Husband also had Wife appoint him as the Investment Advisor for each of the LLCs. In this capacity, Husband has the ability to buy, sell, and invest the assets as he chooses and has consistently done so. He does not receive a salary for his work as Investment Advisor.

17. Because Wife could not act as the Trustee of the Trusts and, at the same time, the Managing Director of the LLCs owned by the Trusts, Husband removed her as Trustee before appointing her as Managing Director. Wife was not consulted or involved in the creation of any of the LLCs, did not know what her duties and responsibilities as Managing Director were, and was not advised to seek independent counsel with respect to her removal as Trustee and appointment as Managing Director. She testified, credibly and consistently, that she trusted Husband's representations that, notwithstanding these changes, her interest in the marital assets were protected. In Wife's place, Husband appointed her sister, M.S., as Trustee. Husband acknowledged that he appointed M.S, who had experience in the financial sector, to provide Wife with a sense of security.

18. On May 6, 2004, Husband, with the assistance of his attorney, formed M.B. and appointed Wife as Managing Director, who appointed him Investment Advisor. Husband initially funded M.B. with marital assets totaling $52,764,747 in cash, money market funds, marketable securities, and other investments. Over time, he funded M.B. with

additional marital assets, including the parties' interests in the other LLCs. As of trial, M.B. functions as the parent company to: (a) A.D., which owns the parties' grand 7.5-acre waterfront estate on Shelter Island near the Hamptons; (b) P.A., which owns the parties' investment real estate on Shelter Island worth $22 million; (c) C.H., which owns ETC; and (d) H.H., which owns the Upstate Home.

19. As of December 31, 2004, the GST owned 83% of M.B., Husband owned 10%, the Family Trust owned 1.4%, and Wife owned 5%. Over time, Husband transferred the parties' ownership interest in M.B. into the GST, which, by 2012, owned 97.6% of M.B. with the Family Trust owning 1.4% and Husband owning 1% — Husband had transferred all of Wife's 5% interest to the GST. By the time of trial, the GST owned 100% of M.B. Each party included assets held by M.B. on their personal sworn statements of net worth. In April 2018, Husband valued M.B. at $109,395,848.00.

20. On June 28, 2006, Husband formed A.D., which, two years later, purchased the Shelter Island home for $8 million. As with M.B., Wife was appointed Managing Director and Husband named Investment Advisor. The parties were living in Geneva at the time the property came up for sale and Wife signed the purchase documents on the table at the family's home in Geneva; she did not know where the purchase money came from and presumed each party had a 50/50 interest in the property. The parties extensively renovated the property. It became the family summer home. In 2019, the property appraised at $13 million. It is currently owned 100% by M.B. From 2008 – 2016, and consistent with the parties' unfettered use of marital assets in the Trusts, the family lived in and utilized Shorewood Court during the summer and on weekends and holidays during the year rent-free, without a lease or other written agreement. In 2016, for estate planning purposes only, Husband caused the parties to enter into a formal lease to rent the entire property from A.D. for $12,000 per month. Husband alone — and not Wife as Managing Director or M.S. as Trustee — created the lease and set the rent. He calculated the monthly rent based upon a letter from a broker opining that the property would have yearly rent of $375,000 and summer rent of $275,000. Notwithstanding the family's exclusive use and occupancy year-round, Husband calculated rent at $12,000 per month based upon the summer rate, with a five percent increase for use during the remainder of the year, and then applied a 50% discount because the children, who are the beneficiaries of the Trust that owns the property, use the and enjoy the property. The lease requires the landlord, A.D., to pay utilities and the GST pays the cost of the caretaker and ground maintenance, all of which amounts to about $57,000 per year or $4,750 per month.

21. One of Wife's real estate experts testified credibly that Husband's methodology did not result in a fair market value rent and that the combined rent for the two residences — the main home and the guest house — should be $54,166 per month. Counsel testified credibly that he advises his clients to set the rent of trust property at the middle-to-high end of a fair market value assessment provided by a real estate professional. Husband did not follow the advice of his attorney in setting the rent.

22. In or about 2011, Husband acquired an interest in the Investment Firm, owned as follows: as to preferred shares, the GST owns 99% and Husband's Revocable Trust owns 1%; as to common shares, the GST and Husband's Revocable Trust combined own 80% and an unrelated individual owns the remaining 20%. In addition, Husband is Managing

Director. The Investment Firm issues, manages, and markets electronically traded funds ("ETFs"), a lucrative field with which Husband had experience.

23. Husband, however, does not, by his own choice, draw a salary. Yet, he remains actively engaged in its management and operations. He sits on the Executive Committee, is on the Board of Trustees — composed of people he proudly recruited and hired — and serves as the liaison between the Committee and the Board. He was present to ring the bell at the New York Stock Exchange when it began trading. In addition, as Investment Advisor of C.H., which owns at least two thirds of the Investment Firm, Husband is able to exert considerable control over it. As of 2018, the Investment Firm platform was trading $5.5 billion in assets and had net profits of $704,000 on revenue of $3.3 million, which represented a 57% year-over-year gain. Husband believed in the tremendous financial potential of the Investment Firm. As of April 2018, the appraised value of C.H.'s interest in the Investment Firm was $3,000,000.

24. On October 27, 2014, Husband formed P.A. for the purpose of acquiring 26 acres of waterfront property on Shelter Island. With a $15 million purchase price, he intended to divide the property into subplots for development and sale, with two lots for "family and friends." As of June 30, 2019, P.A. consisted of seven vacant plots valued at $21,230,000. As with M.B. and A.D., Wife was Managing Director and Husband Investment Advisor. M.B. owned 100% of P.A. at all times since its formation. However, Husband did not seek input from Wife, the Managing Director of M.B., before directing counsel to create P.A. Husband "was very involved" in obtaining required approvals for the plot division, including those needed for demolition, and controlled the development process. He made decisions about the property based upon his own personal interest in conservation and not based on purely financial considerations. Husband decided to divide the property into five parcels instead of the allowable 21 parcels. During the marriage, the parties used the P.A. property as their own: they stored vehicles and boats, entertained at the community center, and used the dock. Indeed, both parties included P.A. as a personal asset in their respective net worth statements. As of the time of trial, Husband sold three of five of the P.A. lots for $3.3 million, $3.775 million, and $1.995 million, respectively, without notice to, or consent of, Wife or court approval.

25. On March 16, 2016, Husband formed H.H., which took title to the Upstate Home then transferred H.H. into the GST in exchange for $935,000. Consistent with the LLC structure, Husband appointed Wife as the Managing Director of H.H., and he became the Investment Advisor. In 2019, the property was appraised at $1,830,000, two times the value of its transfer price to the GST. Notwithstanding the family's use of the Upstate Home throughout the marriage, rent-free and without a lease, in 2016, Husband — not the Trustee or Wife as Managing Director — drafted a formal lease pursuant to which the parties rented the home from H.H. for $3,000 per month. According to Husband, the lease was for estate planning only and did not impact, in any way, the parties' continued use and enjoyment of the property. Indeed, both parties included the property on their net worth statements and Husband identified it as a personal residence. Like the Shorewood Court lease, the Upstate Home lease contained an under-market rent calculated by Husband and required the LLC landlord to pay utilities. Husband based the rent upon listings that he found on VRBO and Airbnb, which set rates at $200 per night, albeit for smaller homes. He then multiplied $1,000 by 36 days per year, the amount of time the family averaged at the home, and set the rent at $36,000 per year or $3,000 per month. Wife's other real estate expert issued a report opining that the fair market monthly rent

for the Upstate Home is $11,400. In addition, a market lease would require the tenant, not the landlord, to pay heating, electricity, plowing the driveway, and cutting the lawn.

26. They purchased additional real estate, collectively valued at more than $40 million. They hired a bespoke travel agent and traveled extensively by first class across the world: Morocco, Turkey, Greece, Rome, Sicily, South Africa. They hosted family during these vacations, some of which cost upwards of $200,000. They lived abroad for several years. They acquired various pieces of art. During this time, three of their daughters were born.

27. In addition to the various Trust properties, in 2001, the parties purchased a one-bedroom apartment on the second floor of 353 Central Park West for $495,000 in cash, which appraised at $1.6 million in August of 2019. Wife's mother resided in that apartment until 2004, after which the parties used it on their return trips from Europe. This apartment is not owned by the Trust, but its expenses are paid by it.

28. On a helicopter skiing adventure in February 2004, Husband had a terrible accident and sustained several serious injuries, including an unattached knee, broken hand and clavicle, requiring surgeries in France and New York. Wife took Husband to his doctor and therapists' appointments, nursed him back together, and walked with him on his long journey of recovery. All the while, Wife was a full-time mother. Wife continued to work outside of the home but took a job in the nonprofit sector, which gave her flexibility to be primary caretaker of the children.

29. The parties returned to New York in 2008 and moved back into the four-bedroom apartment on Central Park West. They soon outgrew the apartment — with the birth of their youngest daughter in 2009, the home housed four children, two adults, and their live-in help. In 2010, the parties purchased a Park Avenue apartment ("the Park Avenue Home") for $8 million. The appraised value of the Park Avenue Home at trial was $11,600,000. However, in or about April 2025, the parties entered into a contract of sale for the Park Avenue Home, with a sales price of $9,850,000. The closing has not taken place and the anticipated net sales proceeds are $9.4 million. The Park Avenue Home is not owned by the GST.

30. From 2002 through the time of trial, Husband paid all of the family expenses and managed all of the parties' assets and investments in his role as Investment Advisor of the various LLCs. Wife recalled receiving quarterly and annual reports for the LLCs from Husband, but the record is devoid of meeting minutes of other corporate documents showing Wife's active, affirmative involvement in the LLCs, as Managing Director or otherwise. As to the parties' tax return, those were handled by Husband and Wife would sign without reading.

31. At times between 2001 and 2018, Husband gifted marital assets directly to the GST. He also created LLCs that used marital assets to purchase real property and other assets; these LLCs are held by M.B., which is in turn owned 100% by the GST. By end of 2004, Husband transferred approximately $83 million of marital assets into the GST. Over the following years, he formed the LLCs through which he used other marital funds to purchase and improve additional assets.

32. The parties filed joint tax returns for each year from 1994 through 2018 and used their lifetime gift exemptions — a non-renewable asset — for every transfer of marital assets into the GST. They also paid income taxes on the GST income, depleting their marital assets in favor of the GST assets.

33. As of April 2018, M.B. was valued in excess of $109,000,000. Husband, as Investment Advisor, actively managed and controlled assets owned by M.B. and the other LLCs. Throughout the marriage, the parties had a joint bank account into which Husband would deposit money for Wife to pay certain small, ancillary family expenses. Husband paid the larger expenses for the parties' homes and other investments. The family expenses were (and continue to be) funded by the marital assets in the Trusts, either directly or indirectly by way of loans taken by Husband, which were approved by the Trustee, his close friend T.S.

34. The parties intermittently had difficulties around parenting issues for their younger daughters — the youngest daughter, specifically, who had medical and emotional issues. In 2001, Husband accused Wife of adultery. He was somewhat correct: Wife, admittedly, had an emotional (not physical) affair with another man at the time. Wife also suffers from alcohol abuse disorder for which she has and continues to receive treatment. Husband, admittedly, started seeing another woman. By the end of the marriage, each lost trust in the other. Wife wanted to work it out and her hope in that regard was restored after she helped nurse Husband during his cancer fight in 2015 – 2016. Husband, however, apparently did not want to work on the marriage and moved out of the marital home on Park Avenue in February 2018, removing substantial marital assets such as artwork in the doing.

35. Wife commenced divorce proceedings on May 16, 2018. The parties resolved their custody and parental access issues by the Custody Agreements, pursuant to which they have joint legal custody with equal shared parental access schedule and substance abuse monitoring for Wife. The oldest two daughters are emancipated, the youngest two daughters are not. The third daughter attends boarding school in Sun Valley, Idaho, where Husband relocated in 2024. At the time of the trial, the youngest daughter attended school in Manhattan and spent 50% of her time with Wife. Husband, over Wife's vigorous objection, sought to enroll the youngest daughter in school in Sun Valley, which would effectively destroy Wife's 50% parenting time.

36. When the parties' initially split, Wife continued to reside in the Park Avenue Home. She also used the guest house at Shorewood Court, and the parties each separately used the Upstate Home in order to co-parent. In June 2019, Husband commenced a systematic effort to totally remove her from the Trusts, cut her off from the marital assets and out of the family wealth, and evict her from her homes without court approval or any notice. Among other things, he cut her out of decisions about the parties' Foundation.

37. On June 6, 2019, Husband removed M.S. as Trustee of the Trusts and replaced her with his close friend, T.S. Simultaneously, he removed Wife as Managing Director of each of the LLCs, and replaced her with his friend, B.H., and then his own sister, N.O. According to Husband, the removal was required because Wife and M.S. refused to direct distributions from the LLC to pay the GST's taxes. According to Wife, she no longer trusted Husband and she was not willing to rubber-stamp his actions as she had done throughout the marriage. Husband admitted that the GST itself could sell assets to pay its taxes and had actually done so in the previous three years, and that, other than a financial penalty, the GST would not have suffered any negative consequences for delay in payment of the taxes.

38. On November 25, 2019, T.S. decanted the assets in the Family Trust into the GST. Husband admitted that he asked T.S. to consider taking this action. The Family Trust

required the Trustee to distribute to each of the four daughters their fair share of the Trust when they reach age 30. However, the parties' daughters do not share in the assets of the GST, which remain in trust for their own beneficiaries. Thus, by decanting assets from the Family Trust into the GST, Husband potentially secured financial influence and power over the children indefinitely. Wife had no notice of, and did not consent to, the decanting of the Family Trust into the GST. The Court did not approve the decanting. Husband did not have the power to consent to the decanting on behalf of his minor daughters — given the clear mandate of the Custody Agreements that require the parties to confer about major parenting decisions, but he did anyway. He also did not inform, or seek the consent of the attorney appointed by the Court for the youngest daughters prior to consenting to the transaction on their behalf. The oldest daughter, then 22 years old, consented based on Husband's input alone without any consultation with counsel or Wife. Husband did not have the authority to consent to the decanting of the Family Trust assets into the GST on behalf of the parties' charitable foundation, a marital asset, without notice to and the consent of Wife.

39. On that same November 25, 2019 day, and again without notice to or consent from Wife, and without leave of Court, Husband executed a Renunciation of Power of Substitution Under Section 675(4) of the Internal Revenue Code (the "Renunciation of Grantor Status") for the GST. By executing the Renunciation of Grantor Status, Husband ceased to be the owner of the assets held in the GST for the purpose of applicable income tax law, and the GST then became a separate and self-contained taxable entity with assets worth in excess of $109 million, which is required to pay taxes on the income generated by the assets. The parties were no longer required to pay taxes on the GST income, although Husband continued (and continues) to maintain control over and enjoy the benefit of the GST assets. The GST 2020 tax return shows reported income of $2.3 million, and its 2021 return shows reported income of $4.9 million (Exhibits 165, 166).

40. In November 2023, right in the middle of the financial trial, and without any notice to Wife or the Court, Husband caused the GST to be decanted into two new GSTs formed in Delaware: (a) the "Property Trust," which holds all assets that have a nexus to New York, including M.B. and the LLCs it owns for which Husband remains the Investment Advisor; and (b) the "Investment Trust," which holds marketable securities and cash but for which Husband is not the Investment Advisor. Husband testified that he made the change for tax purposes because he moved from New York to Idaho and that he created the new trusts, statements which undermine any finding that T.S. made this financial decision independently and without any influence by Husband. Second, T.S. did not testify at trial to corroborate or support Husband's testimony about any of the decisions he purportedly made of his own volition and any actions he took in his capacity as Trustee. T.S.'s absence from the trial was particularly notable given Husband's testimony that he would "probably love" to testify.

41. The Property Trust provides Husband with more power than he had under the GST. He is an Investment Advisor for the Property Trust, and as such he has "broad, uncontrolled discretion that is not subject to review except for willful neglect, willful misconduct, or bad faith" and the "Trustees and the Administrative Trustee shall not have any duty or liability for monitoring the performance of an investment directed by the Investment Advisor." In addition, he can also direct the Trustees with respect to the investment and management of the assets within the trusts. He also has the ability to remove and replace the Trustee of the new trusts.

42. Husband is not the Investment Advisor of the Investment Trust, the assets of which are far less substantial than the Property Trust. A financial institution is the Investment Advisor for the Investment Trust, and his emancipated daughters are developing their own relationships with the representatives of that institution.

43. As of May 2018, the parties owned a share of M.B. in their own names, outside of the GST. In November 2019, without Court approval or Wife's knowledge and consent, Husband unilaterally transferred the entirety of M.B. into the GST. Intermittently throughout this litigation, Husband made distributions of marital assets to himself and Wife, without leave of court and despite court order denying his request to divide marital assets pendente lite. Wife objected to many of the distributions, to no end; Husband made them anyway. As of October 17, 2022, he distributed $21,800,000 in marital assets — $10,950,000 to himself and $10,850,000 to Wife — without any accounting as to the non-trust assets or investments that funded those distributions. Husband also did not demonstrate how the distributions were required to fund legitimate household or living expenses for either party. As far as the record shows, the post-commencement family expenses were funded by the GST.

44. In 2024, without court approval or consent of Wife, Husband closed on the purchase of a home in Sun Valley, Idaho (the "Sun Valley Home"), for $4,150,000 and has formally relocated there. He did not demonstrate that he used separate property to purchase the Sun Valley Home, or his own post-commencement earnings from employment. Also without court approval, Husband purchased a boat for $185,000 in 2022 (the "2022 Boat") with funds from his revocable trust account, a marital asset.

45. Right at the beginning of the pandemic, on March 9, 2020, T.S., as Trustee, notified the parties that their joint lease for Shorewood Court would be terminated effective June 12, 2020. At that time, the parties and their children were living on the property full-time: Husband principally occupying the main house and Wife primarily residing in the guest house. Husband admitted that he knew about the lease termination in advance but denied directing T.S. to effectuate the termination. T.S. immediately issued a new lease for Shorewood Court in Husband's name alone at a rent of $15,000, which he then renewed in June 2021 for three years at the same rent. The market rental rate for Shorewood Court is $54,166 per month. The Trustee did not offer Wife a similar lease, in her own name, for any part of Shorewood Court, although he could have — there are two homes on the 7.5-acre property. In order to enjoy her parenting time, Wife had to rent a three-bedroom, two-bathroom home in the Hamptons for $30,000 per month plus utilities while Husband enjoyed the seven-bedroom main home on Shorewood Court. Also on March 9, 2020, T.S. terminated the parties' joint lease on the Upstate Home effective June 12, 2020 and, on June 13, 2020, entered into a new lease solely in Husband's name as tenant. Husband drafted the lease for himself, which sets rent of $3,000 per month, with the landlord covering utilities, and which the Trustee renewed for another three years commencing on June 13, 2021. Again, the Trustee did not offer Wife a similar lease, in her own name, for any of the remaining 329 days that Husband is not at the Upstate Home (as he is only there for 36 days out of the year).

46. Husband engaged in a campaign to erase her imprint and influence at the family homes and to hurt her. At the Upstate Home, he emptied Wife's closet of all of her clothing and left a picture of his new girlfriend in plain view. This incident led Wife to relapse for which she entered a rehabilitation facility from December 2021 until January

2022. Husband removed Wife's name from Shorewood Court. In February 2020, he changed the alarm code and took the keys out of their usual location, causing her to break into her own home and then explain to the police that she was not an intruder. He changed the locks on the guest house, and, in October 2021, he bulldozed and removed the vegetable garden that she and her daughters cultivated and loved.

47. By trial subpoena, Wife sought communications, annual and financial reports, and other financial documents related to the Trusts and their purchase of property and payment of expenses. Husband failed to respond in full to the trial subpoena.

48. The competent admissible proof established the parties' assets, the total value of which amounts to $181,469,321.

49. Wife asked the Court to include in its equitable distribution award the value of the assets in the Trusts and non-trust marital assets, amounting in all to $181,469,321, and award her 65% of that value, or $117,995,059. Husband asked the Court to distribute only non-trust marital assets, amounting in all to $70,243,473, and award each party 50% of those non-trust assets.

50. Wife reported a loss of $37,923 from teaching yoga and conducting sound meditation on her 2021 tax return. As far as the record shows, she also expended her lifetime gift exemption for the transfer of marital assets into the GST — a personal asset which is gone forever once used.

51. Wife did not request, and Husband did not pay, any pendente lite maintenance. She sought an award of $2 million per year (or $166,666 per month) for a period of 15 years, retroactive to the May 16, 2018 date of commencement. Her request is based upon imputed income to Husband of $4.5 million and application of the statutory maintenance factors. Husband denied that Wife has an inhibited earning capacity or ability to maintain meaningful employment and that her equitable distribution award will more than adequately meet her needs. In the alternative, he asked that the Court credit him with the $10,850,000 interim distributions he made to her toward any maintenance award. Wife did not request, and Husband did not pay, any pendente lite child support. She sought $10,000 per month in child support, for the two unemancipated daughters — retroactive to the commencement date, based upon $4.5 million of imputed income to Husband and the children's needs. Both parties sought an award of attorney's fees.

52. The question presented was whether, in fashioning an equitable distribution award, the Court can consider the value of marital assets placed into the Trusts, without distributing such assets or dissolving the Trusts (which, even if possible, would have catastrophic results). The trial court held that the Trusts could be considered in the equitable distribution award on the following grounds:

> a. Families may choose to place marital assets into trusts to shelter them from estate taxes and to protect them for future generations. Notwithstanding this practice, the relevant authorities guiding the court's approach to equitable distribution of trust assets are quite few. A handful of cases reveal that courts will not divide irrevocable trusts that are set up during the marriage and funded with marital assets, provided the trust is created as a legitimate vehicle for gifting marital property to a third party. However, other cases reveal that, consistent with the statute's purpose of honoring the parties' interest in marital property and economic partnership in the marriage, the court will indeed exercise its broad

discretion to consider the value of, and possibly even distribute, marital assets held in trusts, under certain circumstances. Thus, marital assets in a revocable trust will be distributed where one spouse retains control over the trust. Assets held in trust will also be distributed where the trust is a "sham" and intended to defraud the other spouse or smuggle assets out of the marital estate.

b. Even where the trust is irrevocable and there is no proof of economic fault, the court may consider the value of the marital assets placed in such trust in formulating a distributive award, although it cannot direct distribution of those assets. Similarly, the placement of a marital home into a qualified personal residence trust ("QPRT"), a type of irrevocable trust, does not necessarily remove the residence from its inclusion in a distributive award.

c. The principles apparent and applied in the foregoing cases are (1) marital property is sacrosanct, regardless of its form, title, or how maintained, and the court will protect the parties' respective equitable interests therein and (2) in furtherance of its mandate, the court must consider the parties' conduct vis-à-vis marital property held in trusts in determining whether it should be included in the marital estate.

d. The natural application of these synthesized principles here compels the Court to consider the value of the marital assets in the Trusts in fashioning its equitable distribution award because: (1) the majority of the parties' assets are contained in the Trusts, they used those assets to fund and support their lifestyle, and Wife reasonably expected to enjoy the use and benefit of the Trust assets in the future; and (2) Husband never relinquished control over the Trust assets. This approach honors the parties' economic decisions to shelter their vast marital assets while using them to fund the marital lifestyle, and equitably distributes the assets now that the marriage is at an end. Indeed, this approach is required by the precedents on this record because equity treats that as done which ought to be done.

e. The ample, undisputed proof establishes that the majority of the marital assets were placed in the Trusts to protect the family's wealth for future generations while also funding every aspect of the family's present life. Husband's career and the family homes, expenses, and lifestyle were supported by, indeed, embedded in, the Trusts and Trust assets. The Trusts employed — and continue to employ — Husband. The Trusts pay expenses for the Shorewood Court and the Upstate Home; the Central Park West apartment (one of Husband's "offices"); the family cars, auto insurance, garage, and related expenses; family health and dental insurance; and cellphones. The Trusts own the parties' $13 million Sherwood Court summer compound and the Upstate Home — properties listed by each party as their residence on their respective net worth statements, and which Husband acknowledged were the family homes. The family lived rent-free in these homes until 2016, and then at a well-below market rent, and the Trusts pay for the expenses of these properties.

f. Wife agreed to place virtually all of the family wealth into trusts, and give up other marital assets to benefit the Trusts, because she understood it to be a "tax haven" that would not impede the parties' ability to use and enjoy their assets for their expenses and lifestyle, and the record amply supports this conclusion. The entire family, including Wife, directly benefitted from trust assets and the income

generated therefrom on a day-to-day, year-to-year basis. Husband consistently assured Wife that Trusts were the source of the family's income and she blindly trusted him with the payment of bills and management of the assets. Indeed, the Trusts must have been the sole source of income as Husband "retired" in 2002 and has not drawn a salary from outside employment since then. As noted, he has worked exclusively as the Investment Advisor for M.B. and each of the LLCs in full-time capacity at his offices on Central Park West and at Shorewood Court. He had not yet given up active management of Trust assets in April of 2024. The family lived off the Trusts; the entire family life is structured around them.

g. On foregoing facts, the rule that assets placed in an irrevocable trust are not subject to equitable distribution does not control the outcome here. Husband alone decided when and how to create the LLCs, which marital assets to invest and when, which LLCs would hold which assets, and when the LLCs would be transferred to the Trusts. Husband told Wife about his ideas after the fact, sometimes on the ski lift or at dinner, or not at all. Wife relied, completely and unwaveringly, on her husband's assurances, went along with his ideas and signed papers where she was told to sign. Wife did not know the details of any of the financial assets and transactions, real property purchases, or tax matters.

h. Wife served as Trustee from 2001 until 2004, when Husband removed her so that she could take the title of Managing Director of the LLCs. T.S., Husband's close personal friend who served as Trustee from 2019 until 2023 (and, by the same token, M.S., the Trustee from 2004 – 2019), was nothing more than a straw man who rubber-stamped each of Husband's decisions. The record lacks any credible proof of T.S.'s actual, active involvement in any of the financial and business transactions taken by Husband on behalf of trust assets. Husband never relinquished control over the trust assets, not even for a moment. As Investment Advisor, he is the primary decision maker for M.B., and each of the LLCs, as to assets purchased, transferred, or exchanged, and the development of the real estate investment properties. His power to remove and replace the Trustees and the LLC Managing Directors, coupled with his unfettered authority as Investment Advisor and his consistent exercise of those powers, resulted in his total control of Trust assets. Everyone else is a figurehead that he could remove and replace. Indeed, he cut Wife out of the Foundation they both owned. He moved for permission to distribute assets in this action, the court denied his request, but he did it anyway. He did not seek approval or consent to the decanting of trust assets and creation of new trusts and proudly testified that he had no obligation to do so. Wife was never on equal footing with Husband; she served as Trustee and Managing Director of the LLCs at his will and was removed as soon as he decided to do so, when she no longer acquiesced in his demands.

i. The Trusts are not a "sham" or a fraud upon the Court, created during the divorce proceedings to secret away assets. Rather, they were created during the marriage as legitimate vehicles to protect the parties' wealth for future generations. However, that fact alone does not prevent the Court from considering the value of trust assets in fashioning an equitable distribution award.

j. It is more than fair to conclude that had Wife known that she was forever giving up her right to marital assets, she would not have blindly signed off on the

establishment of the Trusts, or the transfer of virtually all of the marital assets into the Trusts, or the relinquishment of her rights as Trustee, or any of the other actions taken by Husband of which she was informed.

k. The court recognized that it is, somewhat, writing into a gap in the law, but concluded that the value of the Trust assets are marital property.

l. The court awarded Wife 50% of the value of the entire $181,469,321 marital estate, payable by transfer to Wife of all the non-trust assets, except the Sun Valley Home, and a distributive payment of $35,776,187.

m. The Court cannot dissolve the Trusts, and even if it could, dissolution would have catastrophic impact in the form of, inter alia, significant tax liabilities, loss of creditor protection, and other possible legal ramifications. In this regard, there is an interest in retaining and maintaining the Trusts as is but including the value of their assets in the marital estate. The equitable distribution award to Wife of all of the non-trust assets and a distributive payment in the sum of $35,776,187 takes into consideration that the majority of the assets are illiquid, as they are held in the Trusts and cannot be distributed. In order to make the $35,776,187 distributive payment (which will be made over time), if needed, Husband can borrow against trust assets to provide funds for himself under his expanded powers over the Property Trust. He can pay back any loan from income he earns as Investment Advisor and partner in the Investment Firm.

n. The court declined to find that Husband wastefully dissipated marital assets. To the contrary, the record shows that the marital estate increased in value by about $60 million — from $120 million in 2002 to $180 million in 2018 — under Husband's management and control as Investment Advisor to the LLCs. Similarly, the court declined to find that Husband transferred assets without fair consideration because the value of the assets within the GST will be considered in the marital estate and distributed equitably; in other words, Wife will receive fair consideration for her share of the Trust assets by this award.

o. On this record, an award of counsel fees to Wife in the total sum of $1,676,594.25, or 75% of the $2,235,459 she seeks in fees incurred through January 2023, is appropriate as Wife is the non-monied spouse, and considering the lack of merit to Husband's position on equitable distribution of Trust assets, as well as his cavalier and controlling conduct over marital assets, including violations of the Automatic Orders. It also takes into consideration that Wife is not seeking attorney's fees incurred post-January 2023, which are likely substantial.

C. ***Snow Covered Cap., LLC v. Fonfa,*** **2025 U.S. Dist. LEXIS 90642; 2025 LX 42350; 2025 WL 1381459 (United States District Court for the District of Nevada 2025).** Third-party settled trust is not a spendthrift trust because beneficiary was also trustee with broad power to distribute to himself.

1. Andrew Fonfa, now deceased, established the Evan Fonfa Trust. The trust appoints Evan Fonfa, Andrew's son, as the sole trustee and beneficiary. It also contains spendthrift provisions. The complaint alleges that Evan, as the sole trustee, has control over the Evan Trust assets, including an unrestrained ability to reach the property within the trust. The complaint further alleges that since Evan can have the trust assets distributed to himself, the Evan Trust is not a spendthrift trust and cannot enjoy any spendthrift protections.

2. The terms provided as follows: "Evan may, but shall not be required to, distribute to any one or more of Evan and Evan's descendants as much of the net income and principal of the trust as Evan may at any time and from time to time determine, in such amounts or proportions as Evan may from time to time select for the recipient's health, education, maintenance, or support in his or her accustomed manner of living. Without limiting Evan's discretion, Evan may consider the needs of Evan as more important than the needs of Evan's descendants or of any other beneficiary."

3. The complaint challenges multiple alleged transfers that Andrew made to the Evan Trust. These transfers include: (1) one half of Andrew's interest in Indian Springs Holdings, LLC; and (2) Andrew's rights to the income streams flowing from that interest in those holdings in the Evan Trust. The complaint alleges that Andrew, his wife Jodi Fonfa, and Evan have acted to conceal the Evan transfers and, further, that since Andrew's death, Jodi and Evan have acted to conceal the Evan transfers and the details thereof. On August 28, 2024, the district court denied Evan's motion to dismiss and found that the Evan Trust was not a valid spendthrift trust.

4. Evan moved for reconsideration, which the district court denied on the following grounds:

a. In Nevada, a spendthrift trust is defined as "a trust in which by the terms thereof a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." Therefore, the question is not whether Evan has an enforceable right to a distribution, but whether the spendthrift trust contains a valid restraint. *In re Frei* holds that "[o]nce a beneficiary is entitled to have the trust principal conveyed to him or her, however, any spendthrift protection becomes invalid." The beneficiary does not need to actually exercise the right of distribution, only possess it. Although Evan is correct that the facts of *In re Frei* are distinguishable from the facts here, that does not make it clearly erroneous. Although Evan does not have a mandatory distribution and therefore cannot demand a distribution as the beneficiary, Evan is also the trustee and the language of the Evan Trust allows Evan, as the sole trustee, broad permission to provide Evan, as the beneficiary, a distribution for almost any reason.

b. While it appears there are restraints on the funds, the restraints are broadly defined and permit distribution for almost any reason. Indeed, the plain language of the Evan Trust allows Evan to distribute funds to himself at "his discretion," for "his needs," and "without limitation." *Frei* does hold that a spendthrift trust will maintain its spendthrift protection, even when a trustee is a beneficiary, when the trust restrains the trustee's discretion to distribute funds. Once a beneficiary is entitled to have the trust principal conveyed to him or her, however, any spendthrift protection becomes invalid. That is precisely the situation with the Evan Trust.

c. Evan also argued that the order denying the motion to dismiss was clearly erroneous because it relies on case law from outside the district of Nevada. Considering Evan's motion for reconsideration also references and relies on case law from outside the district of Nevada, this argument is unpersuasive. The court did not rely on this out-of-district case law when analyzing whether the Evan Trust was a spendthrift trust. Rather, the court cited these two cases for the general proposition that courts are consistent on valid spendthrift trusts containing

restraints on both voluntary or involuntary attachments or distributions of the trust. Because the court relied on Nevada law when finding that the Evan Trust was an invalid spendthrift trust, Evan failed to meet his burden demonstrating my decision was clearly erroneous and Evan provides no other argument compelling enough to meet the high bar to succeed on a motion for reconsideration.

XXVII. POWERS OF ATTORNEY

A. *Thompson v. Barrow,* 2025 Del. Ch. LEXIS 103; 2025 LX 90626 (2025). Agent under power of attorney breached fiduciary duties by failing to account, transferring a low-digit Delaware license plate to himself, using his father's vehicles for personal use, and for using funds to pay for groceries and alcohol for personal consumption.

1. Ralph W. Barrow ("Decedent") and his wife, Anna Lee Barrow (hereinafter, "Ms. Barrow"), had four children, who were all active in the long and difficult process of providing end-of-life care for each of their aging parents. Ms. Barrow predeceased her husband, after being diagnosed with lymphoma and leukemia. A little over a year later, Ralph died, testate, by Alzheimer's dementia, and was survived by his four children: Barbara Thompson ("Petitioner"), William E. Barrow ("Respondent"), Rob Barrow, and Deborah Corrado ("Ms. Corrado").

2. The Decedent started exhibiting signs of a mental decline in 2017 and stopped driving by the end of 2018. The Decedent was diagnosed with Lewy body dementia between October 31, 2017 and January 18, 2018. Sometime after his diagnosis, the Decedent's daughters signed the Decedent up for a memory class at the Newark Senior Center, which he attended through the end of 2018. The Decedent's wife, Ms. Barrow, was caring for her husband in their home until her own health declined and she herself was no longer able to live without assistance. Ms. Barrow subsequently moved into Petitioner's house on September 26, 2019, where she was taken care of until she passed away. Ms. Barrow's physical decline and her husband's mental and physical decline prompted their children to have the Decedent admitted to a memory care unit in an assisted living facility in October 2019.

3. In 1992, Decedent and Ms. Barrow, with the assistance of an estate planning attorney, executed their respective wills and trusts. The Decedent and his wife had functionally the same estate planning documents leaving the entirety of their property to their spouse and then thereafter in equal shares to each of their four children. Petitioner and Respondent are named Co-Executors of each of their parents' estates. Petitioner and Respondent were also named as Co-Trustees. Article 4 of Decedent's Trust directs that the corpus "upon the death of his wife" shall be distributed outright and free of trust, to his surviving issue, per stirpes. After the death of their mother, the Petitioner and Respondent acted as the Co-Executors of their mother's estate because their father was not capable of doing so at the time of her death. Ms. Barrow's Estate was opened on May 4, 2020, and was closed on March 26, 2021.

4. Approximately seventeen years after executing his will and trust documents, on June 4, 2009, the Decedent executed a durable power of attorney (the "2009 Power of Attorney"), first nominating his wife, then Ms. Corrado, then Rob Barrow, as his agents. Respondent, Ms. Corrado, and Rob Barrow were all unaware of the original 2009 Power of Attorney until a family meeting with their parent's estate attorney, after the Decedent had executed his new power of attorney in 2018. Through the end of 2017 and into the

beginning of 2018, all four siblings had begun discussing with one another the need for their father to execute a power of attorney due to his dementia. The siblings all seemed to agree or expect that the Respondent should be named Agent. Unaware of the 2009 Power of Attorney, and feeling a sense of urgency with their father's declining health, the siblings agreed it was important to make sure a Power of Attorney was put into place.

5. In 2018, Decedent executed a new durable power of attorney (the "2018 Power of Attorney") which nominated the Respondent as his sole agent. Respondent, the Decedent, and Ms. Barrow gathered at the Petitioner's husband's veterinary office, and each executed new powers of attorney. The Petitioner was not present. The documents were notarized by a notary that worked with the Petitioner at the veterinary hospital. The Petitioner was under the impression that her parents were signing banking documents and was not aware at the time that the 2018 Power of Attorney was among the documents that were being notarized, but did organize her mother, father, and brother coming and using the notary at her husband's office.

6. The 2018 Power of Attorney designated the Respondent as the Decedent's Agent and granted him broad power over his father's finances, while also mandating that the Respondent prepare written, semi-annual reports to the Petitioner on all income received and expenses incurred during each six-month period in which the Respondent was acting as Agent of the Decedent. The Respondent, who served as his father's Agent for a little over three years, never sent any formal periodic reports to the Petitioner as directed in the 2018 Power of Attorney.

7. By September 2019, the Respondent was managing all of his father's finances. The Respondent's parents had two vehicles, a 2010 Dodge caravan and a 1998 Ford Ranger. The Respondent would drive the 2010 Dodge for the benefit of the Decedent and for sporadic personal use. The Respondent also used his father's funds to pay for repairs on the vehicles. Both cars were sold to CarMax, the 2010 Dodge in March 2021 and the 1998 Ranger soon after that.

8. The Respondent, by signing on his father's behalf, transferred to himself the Decedent's black tag low-digit Delaware license plate, PC 1145, from the 2010 Dodge Caravan to himself when he sold the car in March 2021. There was a third vehicle, jointly owned by the Decedent and Ms. Barrow, with a low-digit Delaware license plate number that was sold in relation to the handling of Ms. Barrow's estate, and this low-digit tag was given to Rob Barrow by Respondent who again signed on his father's behalf.

9. The Decedent had two IRA investment accounts. One was a larger investment account that was originally managed by a company called First Financial, until Respondent moved the investment account to Creative Financial because the company was more local, which would make it easier to pay for the Decedent's healthcare and living expenses. The other IRA account was one the Decedent opened originally with USAA that was later transferred to Victory Capital Management (VCM). The Decedent had two life insurance policies, one was managed by Prudential and the other was managed by MetLife.

10. The Respondent used his parent's two houses, located in Newark and Ocean View, Delaware, in 2020 after his mother had died and while his father was in the care facility, as his bases of operation to manage his father's affairs. The Respondent was using his time at the properties for the general upkeep of the houses such as mowing the grass, getting the mail, and other general maintenance. When the Respondent was traveling to

and from each of these properties, he was driving his father's car and was using his father's account to keep the homes stocked with groceries and alcohol.

11. For approximately 13-14 months, the Respondent's son, Brian, temporarily lived at the Decedent's home. The Decedent also received rental payments from Brian because he was living in the Decedent's home and driving the Decedent's truck with the Respondent's permission. The Respondent's son was paying $600 a month in rent for his time living in the home. Ms. Corrado and Respondent were primarily managing the rental agreement for Respondent's son living in the home and both claimed that they felt it was beneficial to have someone living at the property to maintain it. The Respondent seemed unsure of where the rental payments for the 13- or 14-month period when his son was living there were being deposited, with some testimony claiming the rent had been deposited into his Mother's joint account she had with his father and Petitioner, and other evidence presented indicating some of the rental payments had been deposited into the joint M&T Bank account the Respondent had with his father.

12. The Respondent opened a joint bank account for himself and his father with M&T Bank on July 23, 2019 (hereinafter, "Joint Account"). The Joint Account was not designated as a power of attorney account. The Respondent testified that he told M&T Bank when the account was opened that he needed an account that he could use for his father and M&T Bank did not recommend a power of attorney account. The reasoning for opening the Joint Account was for the Respondent to manage his father's finances separately from his mother's finances, which at that time were comingled in another M&T Bank joint account with his parents and the Petitioner (hereinafter, "Mother's Account"). The Mother's Account was originally where all of Decedent's Social Security funds were being deposited but these funds were later changed to be deposited into the Joint Account after it was opened. After the Respondent opened the Joint Account, the Mother's Account was intended to primarily be used to manage their mother's assets.

13. The Petitioner was added as a co-account holder on the Joint Account in January 2021. Both Petitioner and Respondent had access to the account information on the Joint Account and Mother's account, which was evidenced by testimony that they have both been using the same online login information to respectively manage and view both the Joint Account and Mother's Account. Eventually all but $100 of the funds from the Mother's Account were transferred to the Joint Account and remain there as of the time of the litigation.

14. On October 22, 2020, the Respondent executed a disclaimer on the Decedent's behalf of his rights to Ms. Barrow's home located in Newark, Delaware. This home was the Decedent and his wife's primary residence but was solely in the name of Ms. Barrow. The property would have passed to the Decedent according to the terms of Ms. Barrow's will at her death, however, the effect of the disclaimer resulted in the property passing to the Petitioner and her siblings. The Respondent claims to have approved of this disclaimer on his father's behalf with the consultation of his siblings and at the direction of his parents' estate attorney. The Newark property was eventually sold in early 2022, after a lengthy process through 2020 and into 2021 of cleaning out the home. The proceeds from the sale of the house were equally distributed among all four siblings.

15. The Decedent owned a beach house in Ocean View, Delaware, which in the 1990s he had rented out and then was used by the family on a shared basis until it was sold to

the Petitioner in 2022. The Property was appraised and sold to the Petitioner for $640,000 with the proceeds split equally among the siblings.

16. Ms. Barrow had an IRA account with USAA and named the Decedent as the beneficiary. On January 27, 2021, the Respondent managed the transfer of those funds to the Joint Account, depositing $37,000, which was the amount remaining after taxes were withheld from the original $43,000. In February 2021, the Respondent, acting on his father's behalf, renounced his father's interest in the funds and then wrote four checks, one for each sibling including himself, to be paid from the Joint Account, amounting to $9,250 each.

17. The Decedent had a life insurance policy with Prudential Insurance Company. In February 2021, the Respondent, using the authority granted to him to act on his father's behalf by the 2018 Power of Attorney, named himself as the sole beneficiary of the Decedent's Prudential life insurance. The Respondent claimed his reasoning for doing this was to streamline the process of distributing the funds from the life insurance account into the Joint Account so that when the time came, the funds could be distributed equally by check to each of the four siblings. In November 2021, the Prudential life insurance funds, amounting to $8,200, were deposited into the Respondent's personal bank account, and then the Respondent wrote three checks for $2,045 to each of his siblings from his personal account. The Petitioner received her purported share from her father's Prudential account but never received the Prudential documentation from the Respondent that revealed the amount of the disbursement.

18. The Decedent's VCM Account was an IRA account that was originally opened with USAA but was then transferred to a different servicer, Victory Capital Management, sometime during 2020 with access to the account through VCM beginning on November 9, 2020. The Respondent claims that when he logged in to view the account, while it was still being serviced by USAA, he learned that he was named as secondary beneficiary, with his mother being named as primary beneficiary. The Respondent claims to have immediately informed his siblings at a family meeting in July 2020 that he was named beneficiary on the VCM Account. Ms. Corrado claims to have learned of this fact at the same family meeting, however, both the Petitioner and Rob Barrow claim to have been unaware of this fact until the Respondent filed his answer in this action. The Respondent and Ms. Corrado claim that at the family meeting when the Respondent informed his siblings, he explained that it was his plan to distribute the funds from the account equally among all four siblings but changed his mind when his sister filed this action. The Respondent, because he needed to do so, created a new online account with VCM in November 2020. The Respondent claims that when he first logged onto the new online account through VCM he was prompted to identify the primary beneficiary designation on the account, which he reflected as himself since his mother had passed. Presently, the Respondent is listed as both the primary and secondary beneficiary on the VCM Account. Neither the Respondent nor the Petitioner were able to provide any of the original USAA documentation that identified who the original beneficiary designations were. The VCM Account funds were distributed to the Respondent with the original distribution amounting to $43,147.82. The Respondent reinvested the funds into a beneficiary IRA under his own name with Creative Financial where the investment has grown to an estimated $48,000.

19. The Petitioner sued, alleging mismanagement, self-dealing, and a breach of fiduciary duties by her brother while he served as their father's power of attorney. Although Ralph Barrow had since passed away, his estate remained open while Petitioner sought transparency and potential accountability into her brother's actions. The magistrate held that the Respondent must provide to the estate a full accounting of all assets under his control during his time as agent, entered judgment in favor of the estate for all unaccounted-for assets, and held Respondent liable to the estate for all expenses related to conduct in which he was found to be both unjustly enriched and in breach of his fiduciary duties as agent, on the following grounds:

a. Respondent breached his fiduciary duty owed under his father's power of attorney for failure to provide regular accountings to Petitioner, for using his status as agent to transfer his father's low-digit Delaware license plate to himself, for using his father's vehicles for personal use, and for using funds from the Joint Account to pay for groceries and alcohol for his personal consumption.

b. A fiduciary duty existed because it is undisputed that the Respondent was acting as Agent of his father under the 2018 Power of Attorney.

c. The Petitioner's allegation that the Respondent used his status as Agent to designate himself as beneficiary of the VCM Account on behalf of his father, if proven by the Petitioner by a preponderance of the evidence, would be considered a self-dealing transaction. Petitioner was unable to prove by a preponderance of the evidence that the Respondent's conduct when first logging onto the new servicer's website was a self-dealing transaction in which he unlawfully designated himself a beneficiary, and was not merely his informing the new servicer of his already established status as beneficiary when prompted. The Petitioner, as the bearer of the burden, is tasked with proving that Respondent was not named the secondary beneficiary on the VCM Account when it was under the control of USAA, not after it had been transferred to VCM. Neither the Petitioner nor the Respondent have been able to provide sufficient evidence that is conclusive as to the original beneficiary designations. A lack of information available on the original beneficiary designations is insufficient to determine whether the Respondent was listed as a secondary beneficiary already but is sufficient for the Court to find that the Petitioner has failed to meet her burden of proof. Petitioner has failed to meet her burden of proving that Respondent ever designated himself as the sole beneficiary of the Decedent's VCM Account. The Petitioner is therefore not entitled to requested relief of entering judgment in favor of the estate for the value of the VCM Account because the Court is unable to declare the Respondent's status as beneficiary to be invalid. The Respondent is also entitled as named beneficiary to the entirety of the funds in the Decedent's VCM Account.

d. The Respondent, while acting on the Decedent's behalf under the 2018 Power of Attorney, used the Decedent's funds to buy groceries, alcohol, and gas for his own personal benefit. The Respondent used his father's vehicles and allowed for his son to use his father's vehicles for matters unrelated to benefiting the Decedent and without the Decedent's consent. The Respondent, acting in his role as Agent, transferred the Decedent's low-digit Delaware license plate to himself for no consideration. All of these instances constitute self-dealing transactions that

the Respondent provides no proof were approved by his father after full disclosure. The Respondent breached his fiduciary duty when he used his status as Agent to transfer his father's license plate to himself without consideration and for using his father's assets for personal use.

e. The 2018 Power of Attorney provides in its terms that the Respondent is to prepare written, semi-annual reports regarding the Decedent's finances, including "income received and expenses incurred by my agent for me during the previous six-month period." These reports shall be mailed within 30 days of the end of each six-month period to the Petitioner. The Respondent implied through his testimony that he has fulfilled all accounting obligations by virtue of being available to answer questions from the beneficiaries of the Decedent's estate regarding his actions taken as Agent and due to the Respondent having access to all the relevant account information that would be used to compile the formal accounting that she requests. The Respondent admitted to not providing a formal accounting upon formal request of the Petitioner. The Petitioner, both under the 2018 Power of Attorney and as a beneficiary of the Decedent's estate, has standing to request a formal accounting of all of Decedent's assets within the Respondent's control as Agent of the Decedent. The Respondent's limited and vague answers to the Petitioner's request for financial information regarding their father's assets and the fact that the Petitioner had the online account login information of most of the relevant accounts being managed by the Respondent in his role as agent does not relieve him of his obligations under the 2018 Power of Attorney and under state law to provide the Petitioner with a formal accounting of all of the assets within his control pursuant to the 2018 Power of Attorney. Respondent breached his fiduciary duties by not providing a regular formal accounting to the Petitioner in compliance with the terms of the 2018 Power of Attorney and for then failing to provide an accounting upon the Petitioner's request when she was within her rights to do so as a successor in interest and co-executor of the Decedent's estate.

f. Petitioner brought claims for unjust enrichment against Respondent for misuse of his father's assets for personal use and through the alleged designation of himself as beneficiary of his father's VCM Account. Petitioner has failed to provide sufficient evidence to make a showing by a preponderance of the evidence that the Respondent was not the original secondary beneficiary on the VCM Account when it was created, and failed to meet the burden of proof on their claim for unjust enrichment relevant to Respondent's beneficiary status on the Decedent's VCM Account.

g. As for the unjust enrichment claims related to the Respondent using the Decedent's funds to buy groceries, gas for personal use, use of the Decedent's vehicles by him and his son for personal use, and the transfer of the low-digit license plate to himself, Petitioner has successfully proved the Respondent has been unjustly enriched. The Respondent was unjustly enriched when he engaged in the self-interested transactions of transferring the Decedent's license plate to himself, using Decedent's funds for personal use, and using the Decedent's vehicles for personal use.

h. Because claims of unjust enrichment are duplicative of claims for breach of fiduciary duty, Decedent's estate is only able to recover once for the Respondent's

conduct. The transactions are to be found void, and the Respondent is liable to the Estate in the amount in which he was enriched by his conduct in relation to his breach of fiduciary duty.

i. The Respondent must provide a formal accounting of all of Decedent's assets within his control during the time he was acting as Power of Attorney and is liable to Decedent's estate for all unaccounted-for assets and any damages suffered because of the Respondent's breaches of fiduciary duty.

j. In Delaware, the Courts typically follow the general American rule that holds litigants responsible for their own fees and an exception to this general rule exists in instances where the Court finds that the losing party acted in bad faith. Respondent did not act in bad faith such that the Petitioner should not have to bear her own fees in pursuing this litigation.

XXVIII. MARRIAGE

A. *Gregory W. v. Bisignano,* 2025 U.S. Dist. LEXIS 202500 (United States District Court for the District of Columbia 2025). Probate proceedings that did not address claims of common law spouse are not binding on Social Security Administration and claimed spouse denied survivor benefits.

1. Mr. W and Ms. L began their relationship in the early 1990s. From that time until Ms. L's death, they lived together continuously — first in Atlanta, Georgia, then in Suitland, Maryland, and ultimately in Washington, D.C., where they signed an apartment lease together in December 2013. Mr. W and Ms. L never officially married, but they reportedly held themselves out as common-law spouses to family and friends.

2. Ms. L passed away in June 2015 in the District of Columbia. She was survived by Mr. W, as well as several siblings. Ms. L did not leave a will, and neither did she designate a beneficiary for her life insurance policy. Following her death, Mr. W submitted a claim for Ms. L's life insurance benefits as her "[c]ommon law husband," and the insurance company ultimately determined that Ms. L's "siblings not the appropriate payees" and issued a check to Mr. W in October 2015 for the proceeds of the policy.

3. A few months later, Mr. W initiated probate proceedings in D.C. Superior Court. He petitioned for his appointment as the personal representative for Ms. L's estate, indicating that as the "spouse of the decedent," he had priority to serve as the personal representative and there were "no other parties in higher priority." The petition made no mention that Mr. W's spousal status was premised on common-law marriage. The probate court originally denied the petition without prejudice, reasoning that although "the petitioning spouse ha[d] priority to serve ... he [was] ineligible to do so" due to a prior criminal conviction. Instead, the probate court suggested that one of Ms. L's brothers had priority to serve. Mr. W then filed an amended petition in April 2017 accompanied by a criminal-history report that seems to have been intended to assuage the probate court's original concerns. Mr. W again identified himself as the "surviving spouse of the decedent," but again without any reference to common-law marriage. Moreover, although the petition listed one of Ms. L's siblings as an "interested person" and "brother," when asked to indicate the decedent's survivors earlier in the same form, Mr. W only checked the box for "Spouse/Domestic Partner" and not for "Brothers and/or Sisters."

4. In July 2017, the probate court issued its final order, wherein it appointed Mr. W as the personal representative of the estate and directed that Mr. W would inherit Ms. L's property as "the surviving spouse of the decedent, in accordance with law." The full contents of order spanned barely a page, and the order did not include any reference to Mr. W's claim of common-law marriage or a single sentence of reasoning to support the statement that Mr. W was the "surviving spouse," whether by common-law marriage or otherwise. It is this probate order that Mr. W argues was binding on the ALJ for purposes of his claim to widower's benefits.

5. About a year before her passing, Ms. L had applied for — and was granted — retirement insurance benefits from the SSA. The Social Security Act allows for surviving spouses to essentially inherit those benefits upon a showing that the claimant is the decedent's legal partner under state law and that the relationship lasted longer than nine months at the time of the decedent's passing. So, while Mr. W was going through the probate process, he applied for widower's benefits on the attestation that he and Ms. L were in a common-law marriage.

6. On May 16, 2017, the SSA originally granted his application, finding Mr. W eligible for widower's benefits starting on April 2017. But because Mr. W had applied for benefits in December 2016, he submitted a request for reconsideration asking for that earlier date as the starting clock for his benefits entitlement. Mr. W's submission apparently prompted a closer review of the original application, and the SSA reassessed its determination. In May 2018, the SSA sent Mr. W a notice of change in benefits that explained his "widower claim has been reopened to a denial" because "there [was] not enough evidence to support a finding of common-law marriage." Given that new determination, the notice further advised Mr. W that he owed about $8,500 back to the SSA as overpayment fees on those benefits.

7. From there, represented and supported by legal counsel, Mr. W unsuccessfully sought reconsideration. The matter proceeded to an administrative hearing before an ALJ in September 2021. At the hearing, and in response to arguments from Mr. W's counsel, the ALJ acknowledged that the SSA "didn't consider" the probate court's order originally. So, after the hearing, the ALJ requested additional evidence, seeking all submissions to the probate court, Ms. L's death certificate, tax records, any statements from Ms. L's siblings, and any documents regarding prior marriages or divorces.

8. In January 2022, the ALJ concluded that the preponderance of the evidence demonstrated that Mr. W and Ms. L were not married under the common law of Washington, D.C.

9. Mr. W timely sought judicial review and the federal district court affirmed on the following grounds:

> a. To qualify for widower's benefits under the SSA, the claimant must establish he was validly married to the decedent. This determination is based on the law of the state where the decedent "had a permanent home" at death. Here, that is the District of Columbia.
>
> b. The D.C. Circuit has not directly addressed the weight owed to state-court judgments in the Social Security context. But other courts recognize that the SSA generally has no constitutional compulsion to give full faith and credit to a state court judgment, nor is it bound by the judgment under principles of res judicata.

The SSA must adhere to a state-court decision as binding on a particular issue when four elements are met: (1) an issue in a claim for Social Security benefits previously has been determined by a State court of competent jurisdiction; (2) this issue was genuinely contested before the State court by parties with opposing interests; (3) the issue falls within the general category of domestic relations law; and (4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State.

c. The validity of the common-law marriage between Mr. W and Ms. L was not genuinely contested, in adversarial terms, in the probate court. There is nothing in the record to show that any adversary or opposing party appeared in the probate court to contest Mr. W's eligibility as personal representative of the estate, let alone his status as Ms. L's common-law husband. While the probate court initially noted that one of Ms. L's brothers had "priority" to serve as personal representative because of Mr. W's prior conviction, there is no indication that the brother ever appeared in the proceedings to challenge Mr. W's claim. Beyond that, Mr. W's suggestion that the probate court itself interrogated his status as Ms. L's surviving spouse — whether based on common-law marriage or otherwise — likewise finds no support in the record. The fact that the probate court initially denied his eligibility as personal representative on an entirely separate basis (his criminal record) — a basis that is not at all inconsistent with Mr. W being Ms. L's surviving spouse — does not show otherwise. More, the probate court's final order does not reflect in any sense that the court engaged with or was even aware of the common-law marriage question in the proceedings. There are no findings to that effect or even any mention of the issue. On this record, then, Mr. W fails to show that the validity of his common-law marriage with Ms. L was "genuinely contested" for purposes of the probate court's order identifying him as a "surviving spouse."

d. Next, even assuming arguendo that the validity of Mr. W's marriage to Ms. L had been genuinely contested in the probate proceedings, the court would still conclude that the ALJ was not bound by the probate order because that order does not set forth any reasoning or findings to show that its characterization of Mr. W as a surviving spouse is "consistent with the law." Under D.C. law, the elements of common-law marriage are cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage. Proof of cohabitation alone will not suffice to prove the existence of a common law marriage. And, importantly here, the D.C. Court of Appeals has cautioned that claims of common-law marriage should be closely scrutinized, especially where one of the purported spouses is deceased and the survivor is asserting such a claim to promote his financial interest.

e. The record does not reflect in any way that the probate court ever applied the governing D.C. law on common-law marriage before identifying Mr. W as a "surviving spouse," or that the probate court was even attuned to the issue of common-law marriage at all. The one-page order does not make any mention of Mr. W's claim to common-law marriage, and it certainly does not contain any legal reasoning or factual findings to reflect that the court applied D.C. law to conclude

that Mr. W established a valid common-law marriage that rendered him a "surviving spouse."

f. In some ways, this is understandable because it is not clear that Mr. W ever put that issue in front of the probate court. Neither of his petitions mentioned common-law marriage, and none of the accompanying documents (at least not the ones in the record before this Court) referenced that point either. Instead, the probate court appears to have taken Mr. W's surviving spouse claim at face value. In any case, the absence of any findings or analysis on the issue of common-law marriage in the probate order — or any other probate court records — precludes Mr. W from demonstrating that the probate court decided the common-law marriage issue in his favor "consistent with the law enunciated by" the D.C. Court of Appeals.

g. Mr. W faults the ALJ for failing to expressly engage with the *Gray* factors in denying his claim for benefits. Even though he was represented by counsel during the hearing, the record does not show that Mr. W ever squarely argued to the ALJ that the Commissioner was bound by the probate court's determination on the surviving spouse question. Instead, it appears that Mr. W — again, through counsel — surfaced that theory for the first time in his appeal of the ALJ's decision to the SSA Appeals Council. Even if not strictly an instance of forfeiture or waiver, it is somewhat disingenuous for Mr. W to fault the ALJ so heavy-handedly for not addressing an issue that was never presented to him. In any case, the record shows regardless that Mr. W did not — and could not — satisfy the second and fourth elements of the test.

h. Because the ALJ was not determinatively bound by the probate order's "surviving spouse" language to resolve the question of whether Mr. W established a valid common-law marriage with Ms. L under D.C. law, that means the ALJ was simply expected to treat the probate order as one piece of probative evidence relevant to Mr. W's claim, alongside the other evidence in the record. The substance of the ALJ's decision reflects that he did so. This would leave Mr. W with the prospect of a "substantial evidence" challenge to the ALJ's analysis of the common-law marriage issue, at most. But he does not press such a challenge. To the contrary, Mr. W expressly indicates that "is not the relevant issue in this appeal" and acknowledges that there was "substantial evidence on both sides." In other words, the Court's resolution of the legal import of the probate order is sufficient to resolve Mr. W's appeal.

B. *In re Marriage of Benavides,* 2025 Tex. LEXIS 327 (Supreme Court of Texas 2024). The ward's death did not moot the appeal from the divorce decree because whether the marriage ended by divorce or death substantially affects the wife's asserted property interests under the will; guardianship and divorce courts to expressly find that the divorce would promote the ward's well-being and protect his best interests; due to the ward's death divorce decree must be vacated.

1. Carlos "C.Y." Benavides, Jr. was the patriarch of one of Laredo's oldest and most powerful clans. A descendant of Laredo's founder, Carlos had substantial assets, including as a beneficiary of the Benavides Family Mineral Trust. Carlos married his fourth wife, Leticia Russo, on September 11, 2004. They each signed a pre-marital agreement and a post-marital agreement in which they stipulated that no community property would

ever be created during the marriage and that each spouse's separate property and any income it produced would belong solely to that spouse, or to his or her estate, unless one transferred the property to the other "by will or other written instrument."

2. About seven months after Carlos and Leticia married, Carlos filed for divorce (the "First Divorce Proceeding"). About five months later (a year after they married, and while the divorce proceeding was pending), a physician diagnosed Carlos with dementia. Carlos did not pursue the divorce, and the trial court dismissed the First Divorce Proceeding for want of prosecution in February 2007. Leticia asserts that Carlos changed his mind about wanting a divorce. Carlos's adult daughter from a prior marriage — Linda Cristina Benavides Alexander — contends that Carlos wanted the divorce but was unable to pursue it because of his quickly worsening dementia.

3. By the end of 2007, Carlos had signed documents adding Leticia's name to his bank accounts, designating the accounts as joint accounts with a right of survivorship, conveying an office building to Leticia, and identifying both spouses as borrowers on a loan to refinance their residence. Leticia asserts that Carlos gave her "full authority" over his accounts and repeatedly told her that "todo lo mio es tuyo" — "all that I have is yours." Linda contends that, to the extent Carlos in fact did or said any of these things, he did so only because Leticia took advantage of his mental incapacity. The ensuing disputes between Linda and Leticia have led to numerous lawsuits and appeals, which we will refer to as the Guardianship Proceeding, the Trust-Distribution Proceeding, the Interpleader Proceeding, the Second Divorce Proceeding, the Third Divorce Proceeding, and the Will-Contest Proceeding.

4. On September 2, 2011, Linda and her brothers filed an application for appointment of a guardian over Carlos's person and estate (the "Guardianship Proceeding"). About two weeks later, Carlos signed a new will and related documents (the "2011 Will") that named Leticia as his executor, left his entire estate to Leticia, expressly disqualified his children from serving as his guardian, named Leticia as his preferred guardian, and granted Leticia his financial and medical powers of attorney. Leticia and Carlos filed these documents in the Guardianship Proceeding, objected to the appointment of a guardian, and moved to dismiss Linda's application. On October 14, 2011, the guardianship court appointed Shirley Hale Mathis as temporary guardian of Carlos's person and estate and appointed an attorney ad litem to represent Carlos's interests.

5. Acting as Carlos's temporary guardian, Mathis notified the co-trustees of the Benavides Family Mineral Trust of her appointment and requested that they send Carlos's trust distributions to her. She also notified certain banks that she had the exclusive right to access Carlos's accounts. Leticia objected to both actions and instructed the co-trustees and banks that she was entitled to all or half of the distributions and accounts. When the co-trustees refused to honor her demands, Leticia sued Mathis for tortious interference and the trustees for breach of fiduciary duties (the "Trust-Distribution Proceeding"). Around the same time, the banks filed an interpleader action to resolve Leticia's and Mathis's competing claims to Carlos's bank accounts (the "Interpleader Proceeding"). Leticia filed crossclaims in the Interpleader Proceeding against Mathis and Linda, who in turn asserted counterclaims against Leticia. Leticia claimed in this proceeding that Carlos had orally gifted all his property to her.

6. Meanwhile, in the Guardianship Proceeding, Linda objected to Leticia and Carlos's appearance and to their filing of the 2011 Will, asserting that Leticia lacked standing to

appear because she had asserted interests adverse to Carlos and that Carlos lacked capacity to sign the documents or to hire an attorney in 2011. On May 21, 2012, the guardianship court agreed and found that Carlos was totally incapacitated in 2011 and was thus incompetent to determine his own residence, to make decisions regarding his marriage, to sign the 2011 Will, or to hire the attorney who appeared on his behalf in the Guardianship Proceeding. The court also dismissed Leticia from the suit, ruling that she lacked standing to contest the guardianship or the appointment of a guardian because she had asserted interests adverse to Carlos's interests in the Trust-Distribution Proceeding and the Interpleader Proceeding.

7. On October 12, 2012, Mathis, as temporary guardian of Carlos's person and estate, filed for divorce on Carlos's behalf (the "Second Divorce Proceeding"). Leticia filed a plea in abatement in July 2013, arguing that the court hearing the Interpleader Proceeding had dominant jurisdiction over the claims involving the marital property and concurrent jurisdiction over the divorce claim. The divorce court denied Leticia's plea, but the court of appeals granted Leticia's mandamus petition, holding that the Interpleader Proceeding court had dominant jurisdiction because that case was filed first, involved all the parties to the divorce proceeding, and either includes or could be amended to include all of the issues to be determined in the divorce. In 2017, Mathis nonsuited her claims in the Second Divorce Proceeding.

8. Meanwhile, on March 6, 2013, the guardianship court appointed Mathis as the permanent guardian of Carlos's estate and appointed Linda as the permanent guardian of his person. This order explicitly granted Mathis the "power to file, prosecute or defend any litigation, including divorce proceedings on Carlos's behalf." Later that month, the court granted Linda the power to prosecute, defend and otherwise participate in the divorce action. Neither order expressly found, however, that the divorce proceeding would be in Carlos's best interests or promote his well-being. A few weeks later, with the guardianship court's approval, Linda moved Carlos from the home he shared with Leticia into a house on Linda's property.

9. On October 19, 2016, Mathis resigned as guardian of Carlos's estate and the guardianship court appointed Linda as permanent guardian of his person and estate. In March 2018, after Mathis had nonsuited the Second Divorce Proceeding, Linda filed the Third Divorce Proceeding. Leticia filed a plea to the jurisdiction, arguing that Linda lacked standing to file for divorce and that she had conflicts of interest that disqualified her from serving as Carlos's guardian. The trial court denied Leticia's plea.

10. In August 2020, Linda filed partial summary judgment motions to enforce the pre-marital and post-marital agreements, to confirm the status of Carlos's separate property, and to obtain a final judgment of divorce. The trial court granted Linda's motions, rendering divorce and holding that the pre-marital and post-marital agreements are valid, that no community property was created by the marriage, and that Carlos's separate property was not subject to division in the divorce. The court then denied or overruled all of Leticia's motions for reconsideration and for a new trial, as well as her objections to the final divorce decree. Leticia appealed from the divorce decree, but Carlos died two weeks later. On December 24, 2020, the day after Carlos died, Linda filed an application to probate a will Carlos signed in 1996, which left all his assets to Linda and her brothers (the "Will-Contest Proceeding"). Leticia then filed a competing application to probate the

2011 Will, which left everything to Leticia. Both parties contested the other party's proposed will.

11. The trial court rendered judgment for Linda, and Leticia appealed. The court of appeals abated Leticia's appeals from the judgments in the Will-Contest Proceeding and the Guardianship Proceeding, pending resolution of this appeal from the judgment in the Third Divorce Proceeding. Linda moved to dismiss on the ground that Carlos's death rendered the appeal moot. The court of appeals agreed and dismissed the appeal, but it nevertheless affirmed the divorce decree.

12. Leticia's petitioned for review, and the Texas Supreme Court reversed and remanded on the following grounds:

a. Under Texas law, a marriage may be terminated only by death or a court decree. Because a divorce decree is purely personal to the parties, a suit for divorce becomes moot if a spouse dies before the court renders judgment granting the divorce. When that occurs, the marriage necessarily ends by death, rather than by decree.

b. But when a spouse dies after a trial court has rendered a valid divorce decree, the marriage ends by decree rather than by death. Yet this is true only if the divorce decree is valid, and an appeal may be required to resolve a party's challenge to its validity. In some cases, the decree's validity is legally irrelevant because how the marriage ended does not affect either party's rights. But in other cases, the property rights of the parties would be significantly affected depending upon whether the marriage was held to have been terminated by divorce decree or by death. When the way the marriage ended significantly affects a spouse's property rights, a live controversy remains between the parties and the parties retain the opportunity to challenge the decree's validity on appeal. In that circumstance, the spouse's death does not moot the appeal.

c. No court has yet issued a final, non-appealable judgment that both declares the 2011 Will invalid and binds Leticia. The Will-Contest Proceeding has not been finally decided and remains abated until after a final decision is rendered in this divorce action.

d. The appellate court affirmed the dismissal of Leticia's claims in the Guardianship Proceeding for lack of standing based on her adverse interests, not on the merits of her challenge to the orders voiding the 2011 Will. Because Leticia lacked standing, she was not a party to the Guardianship Proceeding and the orders in that case are not binding on her. No court has yet issued a final, non-appealable judgment that is both binding on Leticia and declares that the 2011 Will is invalid. For now, at least, Leticia possesses a legal claim to Carlos's assets under the 2011 Will, which is pending on appeal. Because that claim is automatically destroyed if the marriage ended by decree but not if it ended by death, Carlos's death did not moot Leticia's appeal from the decree.

e. A guardian ad litem or next friend can exercise the right of a mentally ill person to obtain a divorce. Historically, and even recently, most American courts have declined to authorize guardians to initiate a divorce action on their wards' behalf absent clear legislation to the contrary, reasoning that the marriage relationship is "exclusively personal" and may be dissolved only by the voluntary consent and

the comprehending exercise of the will of an injured spouse. These courts have typically expressed the concern that guardians should not have such authority because a spouse's decision to divorce (or not) is highly personal and imbued with considerations which may not necessarily serve the spouse's best interests or seem reasonable to other people. One rationale for the majority rule is that marriage is such a personal commitment that only one of the spouses can make a determination to end the marriage. Courts have expressed the concern that the wishes of the disabled spouse not be overridden by the values and judgments of a third party to this intimate relationship. Because there are no offenses which, in and of themselves, effect an end to the marriage, aggrieved spouses may elect to remain in marriages that seem to be against their best interests for personal, religious, moral, or economic reasons. As a practical matter, majority jurisdictions choose an absolute bar as the lesser of two evils, protecting the possibility that the incompetent spouse might elect to remain married if competent, even if it effectively prevents the incompetent spouse from ending the marriage while under the adjudication of incompetency.

f. Consistent with this reasoning, some courts have held that a guardian may maintain a divorce action if the ward initiated the action — or at least expressed a clear desire to initiate the action — before he was declared incompetent. And others have held that a guardian may initiate and maintain a divorce on the ward's behalf if the guardian establishes that the ward — despite whatever disabilities may justify the guardianship — remains capable of making a reasoned decision to obtain a divorce and has personally expressed that intent.

g. The more recent and growing trend among American courts, however, is to permit a guardian to initiate and maintain a divorce action on the ward's behalf even in the absence of some indication of the ward's personal intent. These courts have observed that a guardian's suit for divorce, although certainly a very personal decision, is not qualitatively different from any other deeply personal decision that guardians routinely make for their wards, such as the decision to refuse life-support treatment or the decision to undergo involuntary sterilization.

h. More importantly, these courts have explained that denying a guardian the authority to initiate a divorce on the ward's behalf completely deprives the ward of equal access to the courts based solely on his disability and inequitably grants the competent spouse absolute, final control over the marriage, even when the incompetent spouse is at great risk of exploitation and abuse. As one court summarized this concern, denying guardians the ability to pursue a divorce on their wards' behalf allows the law to unfairly treat incompetent spouses, leaving them at the complete mercy of the competent spouse without consideration of their best interests, even if the ward was in danger as a result of being in the marriage which could result in physical or emotional abuse, financial exploitation, or neglect of the incompetent spouse by the competent partner.

i. Despite these judicial descriptions of the competing policy concerns, however, most courts have acknowledged that state legislatures, and not the courts, possess the power to decide the policy issue and address the guardian's authority by statute. Thus, even the "majority rule" has long provided that, absent statutory

authorization, a guardian cannot maintain an action on behalf of a mentally incompetent for the dissolution of the incompetent's marriage.

j. The courts have not been unanimous, however, in the way they construe such statutes. Some courts, motivated by their concerns about the "purely personal" nature of marriage and divorce, have construed the relevant statutes strictly, holding that a statute does not grant a guardian authority to initiate a divorce simply by granting the general authority to file suits on the ward's behalf. Under this approach, guardians lack authority to sue for divorce unless a statute expressly and specifically grants that power.

k. Most courts have disagreed with this construction, however, and have held that a statutory grant of broad authority to "file suit" or "bring an action" on the ward's behalf includes the authority to file suit for divorce, even if the statute does not expressly mention divorce. The result may be different, of course, if the statute contains other language that limits the broad authority as applied to divorce actions or imposes particular requirements for divorce actions. But in the absence of such limiting language, most courts have construed statutes that broadly authorize guardians to "file suit" or "bring a civil action" to include a divorce action because, after all, an action for dissolution of marriage is a civil action.

l. These competing concerns require, as one court described it, a policy choice between the lesser of two evils." Should the law permit a guardian to pursue a divorce the ward might not have chosen to pursue, or should it permit a competent spouse to have complete and total control over the marriage, even when the ward is at risk of neglect, exploitation, or abuse? This is the very type of policy choice on which we consistently defer to the Legislature, as the duly elected policy-making branch of government. Unfortunately, the Texas Legislature has not made that choice clear in the Texas Estates Code. The Code contains two separate provisions that address a guardian's power to file suit on the ward's behalf. The first broadly expresses that "the guardian of the estate of a ward is entitled to . . . bring and defend suits by or against the ward." The second is more specific, providing that "[t]he guardian of the estate of a ward appointed in this state may commence a suit for: (1) the recovery of personal property, debts, or damages; or (2) title to or possession of land, any right attached to or arising from that land, or injury or damage done."

m. The Family Code acknowledges that guardians possess the authority to file suit for annulment of a marriage on a ward's behalf. On the one hand, if the Estates Code only authorized guardians to commence the two types of suits described, a guardian could never file a suit for annulment as the Family Code contemplates. On the other hand, it may be true that if the Legislature wanted to acknowledge that guardians possess the authority to file suit for divorce on a ward's behalf, it would have done so.

n. In light of this lack of clarity, the Legislature may wish to consider amending the Estates Code or the Family Code to plainly express its policy choice on this issue. In the meantime, however, we need not definitively construe the current statutes to resolve this case. If the Estates Code empowers courts to authorize guardians to initiate a suit for divorce on a ward's behalf, it also imposes two limitations on that authority. First, the guardian must obtain a court order that expressly

authorizes the guardian to pursue the divorce on the ward's behalf. Although Section 1151.102, which lists actions a guardian may take only "if authorized by court order," does not include filing divorce suits in its list, this requirement in the language of Sections 1151.001 and 1151.351.

o. Section 1151.001 provides that an "incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian." Similarly, Section 1151.351(a) provides that a "ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted." And Section 1151.351(b) provides, "[u]nless limited by a court or otherwise restricted by law, a ward is authorized . . . to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court." Although these sections do not expressly mention the right to sue for divorce, a divorce (as explained above) is a matter that is "purely personal to the parties," and a matter of "individual autonomy." Because the Family Code expressly grants the right to divorce based on specified grounds, that right is one of the "legal rights" a ward himself retains unless it is specifically granted to the guardian by court order. Therefore, whatever extent the Estates Code may permit a guardian to initiate a suit for divorce on the ward's behalf, it requires the guardianship court to expressly grant the guardian that authority.

p. Second, if the Estates Code authorizes a guardian to obtain a divorce on the ward's behalf, the filing of the divorce action and the later granting of the divorce must be in the ward's best interest and promote and protect the ward's well-being. To the extent a court can authorize a guardian to pursue a divorce on the ward's behalf, the guardianship court must expressly find that granting such authority is in the ward's best interest. But because the question of whether a divorce sought by a guardian is ultimately in the ward's best interest can only be answered based on the evidence submitted in the divorce proceeding, the court that grants the divorce must also make the ultimate finding that the divorce sought by the guardian is in the ward's best interest and will promote and protect the ward's well-being.

q. The parties here disputed both whether the guardianship court expressly granted Linda the authority to pursue this divorce on Carlos's behalf and whether the divorce would promote Carlos's best interests and well-being. But regardless of those disputes, neither the guardianship court nor the divorce court ever expressly found that pursuing or granting the divorce would be in Carlos's best interest and promote his well-being. We must therefore vacate the trial court's divorce decree.

r. It may be true that a divorce was in Carlos's best interest at the time the trial court granted it. Linda did in fact present the trial court with some evidence of marital friction, or worse, during Carlos's final years with Leticia. Were Carlos still living, the court could definitively decide whether the Estates Code permits guardians to pursue a divorce for the ward and, if so, could remand this cause to the divorce court so that Linda could obtain the finding that a grant of divorce is in

Carlos's best interest and would promote and protect his well-being. But because he has passed, Linda can no longer demonstrate these requirements. We therefore decline to definitively decide the authority issue and must dismiss the suit. We do so not because the way the marriage ended will not affect Leticia's interests under Dunn but because the courts can no longer make the findings necessary to authorize the divorce.

C. *Tidd v. Tidd,* 257 N.E.3d 846 (Court of Appeals of Indiana 2025). Abandonment that extinguishes elective share claim requires physical separation of the married couple without their mutual consent and without cause.

1. Emily Tidd and Gary Tidd, Sr., who both had children from prior relationships, married in 2007. Gary either retired at that point or retired shortly after. In 2010, Emily relocated to the Chicago area to work at another of her employer's facilities when her local plant closed. But Emily returned to live with Gary in Hancock County on the weekends.

2. After retiring in December 2014, Emily lived with her son in Alabama for a year and then with her daughter in Indiana for three years. Despite their time living apart, neither Emily nor Gary — who had been divorced twice before — ever filed for legal separation or divorce. When Emily returned to Indiana in 2017 or 2018, Gary and Emily began "dating again" while living in separate residences. Gary was seriously injured, breaking his neck in three places, when a semi-truck hit his vehicle in January 2020. He spent several months first in a hospital and then a rehabilitation facility. Shortly before his release, Emily and Gary agreed that she would move back into Gary's home to help care for him. Then in May 2020, Gary's daughter, Tonya Reynolds, drove Gary to a lawyer's office where he executed a Last Will and Testament ("Will") that disinherited Emily and granted Tonya all his assets at his death. The Will provided: "I am not unmindful of my wife, Emily Tidd, but under the facts and circumstances as I know them to be, it is my will and desire that she take no part of my estate and that the same be distributed as hereinabove set forth."

3. The Will named Tonya as personal representative and Gary's son as the successor personal representative if Tonya did not qualify. Gary's son otherwise was not mentioned in the will. Around the same time, Gary executed a transfer on death deed in favor of Tonya for the marital home and adjoining property, which together apparently constituted the only significant assets that Gary owned at his death.

4. Gary and Emily continued living together for the next three years until Gary's COVID-19-related death. During this period, Gary was hospitalized many times. He suffered a series of mini-strokes and was diagnosed with dementia. Throughout the marriage and until his death, Gary received health insurance coverage through Emily's employer, either as his primary insurance or as a supplement to his Medicare benefits. The insurance premiums were deducted from Emily's monthly retirement check.

5. Throughout Emily's marriage to Gary, and particularly around the time of Gary's death, Emily had a contentious relationship with Tonya. For instance, Tonya sought to file criminal charges against Emily for allegedly slapping her while Gary was still in the rehabilitation center. Tonya lived nearby and had frequent contact with Gary, who had executed a power of attorney in favor of Tonya. Yet when Tonya provided information for Gary's death certificate, she stated she did not know if Emily and Gary, who wed 17 years earlier and had been living together for years at his death, were still married.

6. After Gary's death, Emily petitioned to open a supervised estate, alleging that Gary died intestate. She also sought and obtained her appointment as personal representative. Tonya objected, alleging that Emily misrepresented Gary's intestacy and that Tonya was Gary's sole heir under the May 2020 Will, which Tonya attached to her filing. Tonya also alleged that "there are no probate assets to be administered under such will and the estate is insolvent." Tonya requested the Will be admitted to probate, that letters testamentary be granted to her, and that she, as Gary's daughter, be named personal representative. Emily objected, alleging that Tonya could not fulfill a fiduciary duty as personal representative due to her animosity for Emily. Attached to Emily's objection was a purported text message from Tonya in which Tonya said she would "lose everything before Emily gets anything."

7. Emily also petitioned to take against the Will as the surviving spouse and for a spousal allowance of $25,000. Tonya objected, claiming Emily had abandoned Gary and therefore forfeited her interest in his estate under Indiana Code § 29-1-2-15 (Disinheritance Statute), which provides: "If a person shall abandon his or her spouse without just cause, he or she shall take no part of his or her estate or trust." The probate court ordered Emily removed as personal representative and named Tonya as her successor. When Tonya failed to act on Emily's claim for a spousal allowance, Emily requested a court hearing.

8. During the hearing, Tonya and her husband, Richard Reynolds, who also is Emily's brother, testified that Emily and Gary had a miserable relationship throughout their marriage. They reported that Emily repeatedly made disparaging comments about Gary and expressed her hatred for him. Tonya acknowledged Emily later apologized for and retracted some of her disparaging statements. Tonya and Richard also testified that although Gary was in terrible health in the last months of his life, Emily did not assist Gary. They claimed she failed to help him with meals and did not call for an ambulance when he needed one.

9. Emily, on the other hand, testified that she and Gary had a good relationship in the three years prior to his death and that she took him grocery shopping when he wanted to go. When he did not accompany her, she would buy items for him if he asked. The couple never had joint bank accounts, according to Emily. Although she did not contribute to household expenses after Gary's hospitalization, she paid several household bills for the marital home when she was working in Chicago.

10. The probate court ruled that although Emily and Gary were legally married at the time of his death, the presence of a marital relationship between Emily and Gary was absent. The court concluded that Emily and Gary "lived as roommates but maintained separate lives" and that Emily had failed to provide support one would customarily find in a marital relationship such as sharing household duties, preparing meals, shopping for groceries, and attending doctor visits. The court also noted that Emily had at times stated she "loathed" and hated Gary.

11. The trial court viewed the parties' co-habitation as essentially irrelevant to whether Emily "abandoned" Gary for purposes of the Disinheritance Statute. The trial court did not make any explicit finding that Emily's alleged abandonment of Gary was "without just cause," as required by the Disinheritance Statute. Instead, it appears to have merely assumed Emily's alleged abandonment of Gary was without just cause because, in the trial court's view, Emily had relinquished duties customarily present in a marriage relationship. Based on this analysis, the probate court determined Emily had abandoned

Gary under the Disinheritance Statute. The court therefore denied Emily's request for the spousal allowance. Emily appealed.

12. The court of appeals reversed on the following grounds:

a. The trial court applied the wrong burden of proof and that "abandon," as used in the Disinheritance Statute, requires physical separation of the married couple without their mutual consent. The undisputed facts establish Emily never physically separated from Gary during the three years before his death.

b. The appropriate burden of proof in this context is clear and convincing evidence. The probate court erroneously held the Estate to a lesser burden of proof. It applied a preponderance of the evidence standard when it determined that Emily was barred by the Disinheritance Statute from any share of Gary's estate.

c. The probate court's ruling that physical separation is not required for abandonment directly contradicts precedent over the last century. The "abandon" language in the Disinheritance Statute appears to have been in place since at least 1853. Abandonment, as used in the Disinheritance Statute, meant the act of a husband or wife who leaves his or her consort willfully, without justification either in the consent or wrongful conduct of the other, and with an intention of causing a perpetual separation of the parties. Although physical separation is a requirement of the Disinheritance Statute, physical separation alone is not enough to trigger the Statute's application. The refusal by a husband to follow his wife to a new residence does not constitute abandonment, and neither does separation by mutual consent. This is because "separation by mutual consent" does not involve desertion by either party.

d. Although the language of the Disinheritance Statute has changed somewhat over the past century, the Statute's requirement of an abandonment by the surviving spouse remains. Abandonment, at a minimum, requires a physical separation of the spouses. Abandonment as requiring a non-consensual physical separation has not changed since the Disinheritance Statute became gender neutral. The Statute requires a non-consensual physical separation of the spouses without just cause. To prove application of the Disinheritance Statute, the party seeking to apply the Statute must establish by clear and convincing evidence two requirements: (1) that the surviving spouse abandoned the other spouse — they physically separated without mutually consenting to the separation; and (2) the separation was without just cause. If either of these requirements is not met, the Disinheritance Statute does not apply.

e. The manner in which a married couple chooses to live together within their shared home — including the couple's treatment of and comments about each other and the manner in which they divide financial and domestic responsibilities — is of no moment in determining the Disinheritance Statute's application. By requiring that abandonment include physical separation without mutual consent, the Disinheritance Statute creates a bright line that eliminates any need to intrude into the intimate details of the marital lives of spouses who choose to remain living together without filing for legal separation or divorce. Whatever Emily's or Gary's reasons for staying together and no matter the level of disrespect or apathy that Emily allegedly displayed as a spouse, it is undisputed that they were legally

married and living together continuously for the three years before Gary's death. That is enough under existing precedent to render the Disinheritance Statute inapplicable.

If Emily and Gary had, in fact, divorced, Emily would have shared in the marital estate, including all or part of Gary's separately owned property. Emily instead stayed married to Gary for 17 years, and for many years earned much of the marital income and contributed to marital expenses.

D. *Ells v. Fiese (In re Est. of Ells),* 2025 Mich. App. LEXIS 7825 (Court of Appeals of Michigan 2025). Parties were willfully absent from each other, and initiation of divorce proceedings did not revive or renew the marital relationship for elective share claim purposes.

1. Donald J. Ells, Andrea Ells' husband, passed away on December 22, 2023. On December 27, 2023, his daughter, Deanna Enos, submitted his pour-over will to the trial court, i.e., the probate court, for informal probate. The will was signed by Donald on February 16, 2022, and it essentially provided that his property would be given to the Donald J. Ells Revocable Living Trust, with three beneficiaries of that trust: Deanna Enos, Tanya Ells, and Victoria Feise, his daughters. In addition, the will specifically disinherited his wife, Andrea, and his daughter, Christina Cross: "I intentionally make no provision for gifts to any child or children of mine, or to any other heir, other than those set out in this will. For reasons best known to me, I intentionally make no provision for gifts to ANDREA L. ELLS or CHRISTINA CROSS. ANDREA L. ELLS is my spouse; however, we have been separated for many years and have agreed to make no claims on the estate of the other. CHRISTINA CROSS is a biological child of mine and I do not want her to have any claim as a child in my estate."

2. The same day, the trial court appointed Deanna and Victoria as representatives of the estate. Deanna and Victoria petitioned the trial court to disallow Andrea the rights of a surviving spouse as an individual who was "willfully absent from the decedent spouse" for a period of "1 year or more before the death of the deceased person." The petition alleged, in relevant part: Andrea Ells has been willfully absent from the decedent spouse ever since she left the decedent spouse in 2020; Andrea Ells deserted the decedent spouse and purchased a home in Flint, Michigan [*3] in 2021, establishing her own separate residence in Genesee County, Michigan; Andrea Ells did not financially contribute to the decedent nor did she provide any support for the decedent spouse after she left in 2020; the decedent in 2022 filed for divorce from Andrea Ells more than two years after she left the decedent in 2020; and the decedent died 1 month before a hearing and judgment of divorce could be granted.

3. Andrea countered with her own petition seeking to obtain the rights of a surviving spouse, alleging, in relevant part: Decedent was an abusive husband, and that the Petitioner was subject to abusive relationship perpetrated by the deceased; the police were called to the parties' home on multiple occasions throughout the course of the marriage; the Parties had separated briefly in 2020. However, they reconciled and in the spring of 2021 the Decedent told his spouse that he was filing for divorce and that she needed to move from the home; the Petitioner purchased a condo and moved out in late April of 2021 contemplating that the Decedent would file for divorce as promised; the parties continued contact even after the separation and had an ongoing relationship even though the parties were separated; the parties had ongoing talks about the separation of marital property and even about reconciliation; and the Petitioner lived alone and never

had another party living in her home, although both parties did date other people after the divorce was filed.

4. Deanna testified that in January 2018, Andrea informed Deanna and Victoria that she filed for divorce from Donald and that there was no chance of reconciling. She said sometime shortly thereafter, Donald received an inheritance from the death of his mother, which he used to purchase a "Newaygo property up north," a boat, and apparently to help finance an RV. She continued that Donald and Andrea reconciled after the 2018 divorce filing. In April 2020, Andrea left the home that she shared with Donald, and she returned in late 2020. Andrea returned to the home "because she needed a place where she can have internet, she needed a place for her and her son to live because she had no place to live." In April 2021, Donald told Deanna that Andrea had bought a condominium unit and consequently moved out of his home. Andrea never returned to Donald's home after that point.

5. Deanna testified that in June 2021, Donald told her that "he's broke and that Andrea took his money and he basically paid for . . . her condo." Donald explained that he suspected that Andrea removed his money from his sole bank account because she was regularly in possession of his driver's license and his "bank cards." At about this time, Deanna had to help Donald pay his bills because his income was insufficient to do so.

6. Andrea wanted to ensure that she would not personally be responsible for the trailer payments, i.e., "as long as it's paid off and out of her name." Ultimately, Donald filed for divorce from Andrea in August 2022, notwithstanding that he received the paperwork for the divorce in about March 2022.

7. The trial court concluded that Andrea was not a "surviving spouse" because she left Donald's home in April 2021 on her own accord, and stated "it seems contrary both to the intent of the statute and to the equity for the decedent that after minimally 17 months of complete estrangement that he cannot rid himself of a spouse who is no longer part of his life and has moved on in every physical, financial, and emotional way and that he has to keep his life in limbo at the risk of affirming the absent spouse's right to elect her share against his estate." Andrea appealed.

8. The court of appeals affirmed on the following grounds:

> a. For purposes of the spousal election against the will, a surviving spouse does not include an individual who was willfully absent from the decedent spouse for one year or more before the death of the deceased person.
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> b. The phrase "willfully absent" requires that the surviving spouse act with the intent to be away from his or her spouse for a continuous period of one year immediately preceding the death. The term willfully absent cannot be defined exclusively by physical separation. Simply put, there must be something more than a mere physical distance. Willful absence requires consideration of the totality of the circumstances. It presents a factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage. The burden is on the party challenging a legal spouse's status to show that the spouse was in fact willfully absent for the year or more leading up to the decedent's death.

c. In order to establish that a decedent's spouse is not entitled to the benefits of a "surviving spouse," the challenging party must show, under the totality of the circumstances: (1) that the surviving spouse was completely absent from the decedent spouse, (2) that this absence persisted for a continuous period of at least one year before the decedent's death, and (3) that the surviving spouse acted with a specific intent to be absent from the decedent spouse. A spouse is only "absent" if they interact with their spouse in a manner that is inconsistent with the very existence of a legal marriage. When one spouse unilaterally and without any consideration of the other spouse's desires cuts off all direct or indirect contact with their spouse for over a year, they have taken action inconsistent with the very existence of a legal marriage. However, when there are communications between the spouses, whether directly or indirectly, the trial court must assess the totality of the circumstances to determine whether these communications are consistent with a recognition that the legal marriage still exists.

d. Generally, when a spouse is "emotionally absent" from the decedent spouse, they have taken action inconsistent with the very existence of a legal marriage. But a divorce action is different. By its nature, filing a complaint for divorce tends to recognize the existence of a legal marriage — if the marriage did not exist, why would one need to seek a divorce? Thus, in the context of a divorce action, a court should presume that the surviving spouse was not willfully absent. Divorce is a final act that is legally and practically understood to mean that the parties are married until the final act is completed. Divorce actions can easily last more than one year, especially when the marriage is lengthy, there are children involved, or the parties' assets are complex. It is also common, and sometimes necessary, for divorcing spouses to live separately and cease all direct contact while a divorce is pending. This reality supports a holding that filing for divorce creates a rebuttable presumption that one is not willfully absent.

e. However, it is possible, under rare circumstances, that a challenging party could show that the spouse who filed for divorce nevertheless did not behave in a manner consistent with a recognition of the continued existence of the legal marriage for a year prior to the spouse's death.

f. Deanna's testimony that Donald said that Andrea had stolen money from him does not reflect his "then-existing state of mind or emotional, sensory, or physical condition." Rather, it is testimony "to prove the fact . . . believed," which is prohibited by the rule. Similarly, Reynolds's testimony that Donald "told me he paid all the bills, all the bills came from his account" does not concern Donald's statement of mind or condition but, instead, is testimony to prove the happening of the underlying event. Further, Victoria's testimony that Donald said that the parties had agreed to only keep what they had in their respective possession at the time of the divorce and to not seek assets owned by the other party might have been admissible as a "plan" to the extent that the statement concerned Donald's own understanding, but to the extent that the statement concerned Andrea's understanding, it arguably was inadmissible as testimony to prove the happening of the underlying event.

g. Nonetheless, even if the trial court erred by admitting the challenged hearsay statements, any error was harmless. The trial court did not apply a lookback period

from April 2021, when Andrea permanently moved out of Donald's home, to August 2022, when the divorce proceedings were initiated. Rather, the trial court reasoned that because Andrea and Donald had essentially ceased contact between April 2021 and August 2022, the fact that divorce proceedings were initiated in August 2022 did not revive the relationship for the purposes of that statutory provision. Thus, we assume that the trial court correctly understood that the relevant lookback period at issue in this case is from December 2022 to December 2023.

h. It is undisputed that in April 2021, Andrea moved to her own condominium unit with her personal belongings and ceased contributing to Donald's bills or other debts accumulated during the marriage. This suggests complete physical absence. Moreover, the record indicates that Andrea and Donald had minimal and insignificant contact after April 2021. While Andrea briefly testified to having "continual divorce talks" during some unspecified time period after April 2021, those "talks" could not have been substantial, as Andrea and Donald apparently had a fundamental misunderstanding or failure to communicate regarding disposal of his property following his death. This suggests, for all practical purposes, complete emotional absence as well. Overall, these circumstances may be fairly characterized as "exhibiting inattentiveness toward another," and acting "in a manner that is inconsistent with the very existence of a legal marriage."

i. In this case, the parties were willfully absent from each other from April 2021 to August 2022 without even filing for divorce. That is, the parties did not even recognize the existence of a legal marriage by filing for divorce during that substantial 16-month time period. Because Andrea was willfully absent from Donald from April 2021 to August 2022, the August 2022 initiation of divorce proceedings did not revive or renew the marital relationship.

j. For these reasons, defendants rebutted the presumption that Andrea was not "willfully absent" from Donald between December 2022 and December 2023 notwithstanding that divorce proceedings were ongoing during that time. To the contrary, the totality of the circumstances shows that Andrea was completely absent from Donald for a continuous period of at least one year before his death, with the specific intent to be absent.

E. *Blankenship v. Blankenship,* 2025 Tenn. App. LEXIS 287 (Court of Appeals of Tennessee, at Jackson 2025). Factors of love, affection, or trust do not have any bearing on the legal status of a couple as husband and wife, and proceeds from sale of tenants by the entireties properties during divorce proceedings passed to wife upon death of spouse prior to divorce order.

1. Charles Gary Blankenship Sr. ("Husband") and Shirley Jean Cupples Blankenship ("Wife") were married on August 22, 1981, in Jackson, Tennessee. One child was born of the marriage, Charles Gary Blankenship II ("Son"). Son is serving as the administrator of Husband's estate and is one of the appellants in this matter. During the marriage, the spouses obtained the following pieces of real property in Humboldt, Tennessee (collectively "the Properties"). The spouses owned the Properties as tenants by the entirety.

2. Wife filed a complaint for divorce in the Madison County Chancery Court. Litigation ensued, and Husband filed a motion requesting that a guardian ad litem be appointed on

his behalf. The motion was granted. The guardian ad litem subsequently submitted a report explaining that Husband had experienced several health issues and recommended that Son be appointed as conservator over Husband's person and that a certified public accountant be appointed as conservator over his property. An "Agreed Order" was entered in which the spouses agreed that the proceeds derived from the sale of any marital property would be paid to the Clerk and Master of the Chancery Court of Gibson County. Although it is unclear from the record when this occurred, the spouses subsequently sold the Properties. The proceeds derived from the sale of the Properties were deposited with the Gibson County Clerk and Master.

3. On August 15, 2023, Husband died prior to a final decree of divorce having been entered. Wife filed a "Motion to Dismiss and for Distribution of Funds" in which she asserted that Husband's death abated the divorce proceedings. Wife also claimed that the proceeds derived from the sale of the Properties had been owned by the spouses as tenants by the entirety and thus the proceeds had "vested" in her upon Husband's death as the surviving tenant by the entirety. Son filed a verified complaint in his capacity as the administrator of Husband's estate in the Chancery Court of Hamilton County, Tennessee. The complaint alleged that the funds being held by the Gibson County Clerk and Master were assets of Husband's estate.

4. The chancery court granted Wife's motion. Probate Advance, LLC made an oral motion to intervene in the case. Probate Advance, LLC provided Son with several cash advances in exchange for an assignment of a portion of his rights to the distribution of Husband's estate. The motion to intervene was granted. However, the chancery court also entered an order denying Son's motion to alter or amend the judgment that same day. Subsequently, Son and Probate Advance, LLC filed this appeal.

5. The court of appeals affirmed on the following grounds:

> a. A tenancy by the entirety is a form of property ownership unique to married persons. In a tenancy by the entirety, the co-tenants are each seised of the whole in fee simple, and as a result, upon the death of one spouse, the survivor continues to own the whole in fee simple. The laws of descent and distribution do not apply and no part of the property passes to the deceased spouse's estate.
>
> b. Severance is the termination of a tenancy by any act which is inconsistent with its continued existence, or which operates to destroy its essential unities or one or some of them. Once a tenancy by the entirety is created, it can be terminated only when both convey, when one spouse dies and the survivor becomes owner of the whole, or when the survivorship is dissolved by divorce and the parties become tenants in common in the property. Funds withdrawn from a joint bank account held as tenants by the entirety cease to be held by the entirety. However, if property held as tenants by the entirety is conveyed, the proceeds of the property are held in the same manner, absent any agreement or understanding to the contrary.
>
> c. The proceeds of the sale of property held as tenants by the entirety retain this style of concurrent ownership absent an agreement or understanding to the contrary. Thus, the spouses were presumed to maintain the tenancy by the entirety in the proceeds, despite the real property having been sold. Additionally, the subsequent deposit of the proceeds with the Clerk and Master did nothing to

transfer title to the proceeds as the spouses remained the legal owners. The property was merely held in contemplation of the divorce proceedings in accordance with the agreed order. Further, that agreed order did not state any intention of the spouses to alter their joint ownership of said proceeds. The appellants have not made any cogent argument demonstrating that legal title of the proceeds was transferred to the Clerk and Master upon deposit.

d. Appellants have not demonstrated how the deposit of the funds with the Gibson County Clerk and Master would have affected the unity of possession. While it is true that the spouses were unable to reach the proceeds absent a court order, they maintained equal rights to the whole of the proceeds. Neither spouse had any greater right to the proceeds than the other, and the spouses agreed to the arrangement. The appellants have not submitted any argument or case law explaining why the deposit of the funds with the Clerk and Master severed this unity but have only made a bare assertion that the unity was severed.

e. The appellants have not provided any case law to stand for the proposition that tenancy by the entirety is severed when the spouses no longer have any love, affection, or trust. There is no common law divorce in Tennessee. It would be contradictory to these principles for us to determine that the marital relationship was severed based on a subjective finding of "the love, affection, and trust" having been destroyed, rather than a decree of divorce having been entered. It would not be proper to assess subjective factors of love, affection, or trust because those factors do not have any bearing on the legal status of a couple as husband and wife.

F. *Farmer v. No. 25-Ica-30 Cir. Ct. Mercer Cnty. C Jeremiah Edward Farmer,* 2025 W. Va. App. LEXIS 351 (Intermediate Court of Appeals of West Virginia 2025). Spouse that does not file elective share claim is not entitled to elective share.

1. William Farmer, Sr., died testate on March 28, 2022, and at the time of his death was married to Ms. Teresa Farmer. William Farmer, Sr., and Ms. Farmer had lived apart for several months immediately prior to his death. William Farmer, Sr.'s will named his son, Jeremiah Farmer, as executor and directed that his estate be divided between his two sons, Jeremiah Farmer and William Farmer, Jr. Willam Farmer, Sr.'s will was entered into probate on March 29, 2022. The will was executed in 2000, prior to his marriage to Ms. Farmer, and she was not named in the will.

2. Within days of Jeremiah Farmer's appointment as executor, Ms. Farmer sued asserting claims of fraud, theft, and self-dealing against Jeremiah Farmer, individually and as the executor of the estate, and against William Farmer, Jr. Subsequently, Ms. Farmer sought Jeremiah Farmer's removal as executor. In a June 13, 2023, order, the Mercer County Commission denied her request to remove Jeremiah Farmer as executor.

3. Jeremiah Farmer filed an appraisement for the estate. The Clerk of the Mercer County Commission published notice of the estate and the claims bar date was set for September 12, 2022. On August 18, 2022, Ms. Farmer filed a claim against the estate alleging money owed for certain items of personal property and for the funeral and other expenses in the amount of $77,485.00. The claim does not contain any language indicating that Ms. Farmer was making a claim for an elective share pursuant to West Virginia Code § 42-3-1 (1995).

4. On December 20, 2024, the circuit court entered an order denying Ms. Farmer's request to remove Jeremiah Farmer as executor of the estate, determining that Ms. Farmer failed to prove Jeremiah Farmer's actions were improper or amounted to a breach of his fiduciary duties.

5. Ms. Farmer filed a motion for relief. The court of appeals remanded the matter for the circuit court, and the circuit court entered an order denying the motion.

6. Ms. Farmer appealed and the court of appeals affirmed on the following grounds:

a. Ms. Farmer claims that after seeking reimbursement for funeral expenses, Jeremiah Farmer should have amended the appraisement forms to identify Ms. Farmer as a beneficiary and to include her funeral expenses as an estate debt. However, this example does not establish improper conduct because Ms. Farmer was not named as a beneficiary under the will and the circuit court ultimately awarded her the funeral expenses.

b. Next, Ms. Farmer asserts that Jeremiah Farmer acted improperly by not providing her notice of the estate filing. Nevertheless, she clearly had actual notice of the estate as evidenced by the filing of this lawsuit shortly after the will was submitted for probate, by the filing of her request with the Mercer County Commission for Jeremiah Farmer's removal as executor shortly after the appraisement was filed, and by the timely filing of her claim against the estate. Further, Ms. Farmer contends that Jeremiah Farmer took carloads of estate assets to North Carolina, but such conduct does not establish impropriety or breach of fiduciary duties because an executor has a duty to gather and protect estate assets. Ms. Farmer has not established Jeremiah Farmer's incompetence or that he failed or refused to perform his duties as executor pursuant to *Haines*.

c. Ms. Farmer argued that she should have been relieved of the statutory requirements to claim an elective share because Jeremiah Farmer failed to list her as a beneficiary on the appraisement form and did not properly notify her of the estate filing. Ms. Farmer was aware of William Farmer, Sr.'s death and the estate filing, so failing to list her as a beneficiary or to properly notify her did not prevent Ms. Farmer from filing an elective share petition.

d. Ms. Farmer did not comply with the requirements of West Virginia Code § 42-3-4(a). She did not file an elective share petition, she did not provide notice to interested parties, and the matter was never set for hearing. Ms. Farmer argues that even if the statutory elective share requirements were not met, she should be excused from the requirements due to the actions of Jeremiah Farmer as executor. However, Ms. Farmer does not cite to any legal authority providing an exception to the statutory requirements for filing an elective share petition. In addition, Jeremiah Farmer's actions did not prevent her from properly filing an elective share petition. She had actual knowledge of the estate filing, had already filed her funeral expenses claim, and had ample opportunity to comply. Ms. Farmer simply failed to do so within the prescribed time frame.

G. *Furtsch v. O'Dell,* 2025 Tenn. App. LEXIS 65 (Court of Appeals of Tennessee, at Nashville 2025). Marital dissolution agreement alone cannot effectuate a change in beneficiary designation of a life insurance policy, retirement account, or annuity, and revocation-upon-divorce doctrine does not apply.

1. Michael Edward Birdwell and Tammy Ann O'Dell were divorced by decree in 2015. At that time, Mr. Birdwell had a retirement account resulting from his employment with Tennessee Tech, and Ms. O'Dell was designated as the beneficiary. The final decree incorporated and adopted a marital dissolution agreement executed by the parties, which provided in part: "Husband has a retirement account with TIAA-CREF which shall be the sole and absolute property of the Husband. Any marital interest either party has in and to said accounts is hereby divested out of them and vested in the party receiving the account as their sole separate property. … It is understood and agreed between the parties, as part of the consideration for the execution of this Agreement, that each party shall willingly execute and deliver any and all instruments necessary or required in order to implement the terms of this Agreement. … It is understood and agreed between the parties that this Agreement is intended to be a final [*4] settlement of all property rights of the respective parties hereto and is a discharge from all of the claims arising out of their marital relationship, and that each hereby waives and relinquishes to the other all rights or claims which each may have or hereafter acquire under the law of any jurisdiction of the other's property, including without limitation, dower, curtsey, statutory allowance, homestead rights, right to take against the will of the other, inheritance, descent or distribution or right to as Administrator or Executor of the other's estate, and this Agreement applies to all property now owned by the Wife and Husband, or any property that either of them may acquire in the future."

2. Mr. Birdwell was represented by counsel during the divorce proceedings, while Ms. O'Dell was not. Six years later, in February 2022, Mr. Birdwell executed a power of attorney naming Dr. Jeff Roberts and another individual as his co-attorneys in fact. At that time, Mr. Birdwell was physically ill but mentally competent. According to Dr. Roberts, Mr. Birdwell asked him to change the beneficiary designation on his retirement account from his ex-wife to his estate. In his capacity as attorney-in-fact, Dr. Roberts submitted documents attempting to change the beneficiary designation on Mr. Birdwell's retirement account from Ms. O'Dell to Mr. Birdwell's estate. Despite multiple attempts, however, the companies maintaining the retirement account refused to change the beneficiary designation. In the event that the account owner had a duly executed power of attorney, in order for the attorney-in-fact to change the beneficiary, TIAA required the power of attorney to include language permitting the attorney-in-fact to make changes to beneficiary designations on accounts.

3. Mr. Birdwell died on March 20, 2022. He left a will dated February 2022. Ms. O'Dell was not a beneficiary of Mr. Birdwell's estate under any provision of his will. However, Ms. O'Dell remained the named beneficiary on Mr. Birdwell's retirement account as of the date of his death. TIAA sent correspondence to Ms. Odell, requesting documents in order to begin the process of transferring the benefits of the retirement account to her. After Ms. O'Dell completed the necessary documents to claim the benefits, including a beneficiary acceptance form, she received the proceeds of the retirement account, which totaled $269,851.64. The residual beneficiaries under Mr. Birdwell's will were the Dr. Michael Birdwell Travel Fund of the History Department at Tennessee Technological University and WCTE, Inc.

4. The personal representative of Mr. Birdwell's Estate filed this lawsuit against Ms. O'Dell in January 2023 for breach of contract, unjust enrichment, and conversion. The Estate filed a motion for summary judgment. The trial court granted summary judgment to the Estate. Ms. O'Dell appealed.

5. The court of appeals reversed and remanded on the following grounds:

a. It is well settled that divorce itself does not create a presumption that a former spouse is removed as a beneficiary. A property settlement agreement also does not affect a designation of beneficiary, and there is no relevant distinction between an insurance contract and an annuity contract.

b. It is settled law in Tennessee that the designation of beneficiaries on life insurance policies and the death benefits in annuity agreements are matters of contract between the participant and the company or organization issuing the policy of life insurance or funding the annuity agreement. Analytically, there would seem to be no practical distinction between a death benefit in an annuity agreement and the death benefit in a retirement plan.

c. Here, the MDA specifically addressed the divestment of Wife's interest in the retirement account at issue. An MDA incorporated into a final decree of divorce is a contract which is binding on the parties. Generally, once a contract is formed, it cannot be modified without consent and additional consideration for the new terms. While Husband failed to remove Wife as the named beneficiary, his failure does not evidence intent to modify when Wife possessed continuing obligations to waive any right she may have held in the account and to execute any documents reasonably required for the purpose of effectuating the provisions in the MDA. The record is simply devoid of any evidence establishing a modification of the MDA.

d. In this context, we draw no distinction between annuity contracts, retirement plans, and life insurance policies. Tennessee courts have consistently, in cases involving marital dissolution agreements and their impact on beneficiary designations, drawn no distinction between retirement plans, annuity contracts, and life insurance policies.

e. The marital dissolution agreement in this case only mentioned the retirement account itself. It provided that each party would "receive their own" retirement accounts, and Mr. Birdwell's retirement account would be his "sole and absolute property." Because the MDA clearly awarded the annuities themselves to the husband, he was free to name any beneficiary he chose, including his ex-wife, whether they were married or not. The retirement provision in the MDA did not revoke the beneficiary designation in the retirement plan.

f. The Estate's argument that this marital dissolution agreement placed a continuing contractual obligation on Ms. O'Dell that would bind her to waive any current or future right she may have in the retirement account is rejected.

g. Climbing divorce rates led almost all States by the 1980s to adopt a certain kind of automatic-revocation law. So-called revocation-on-divorce statutes treat an individual's divorce as voiding a testamentary bequest to a former spouse. Like the old common-law rule, those laws rest on a judgment about the typical testator's probable intent. They presume, in other words, that the average Joe does not want his ex inheriting what he leaves behind.

h. Over time, many States extended their revocation-on-divorce statutes from wills to "will substitutes," such as revocable trusts, pension accounts, and life

insurance policies. In doing so, States followed the lead of the Uniform Probate Code, a model statute amended in 1990 to include a provision revoking on divorce not just testamentary bequests but also beneficiary designations to a former spouse. The new section, the drafters wrote, aimed to unify the law of probate and nonprobate transfers. The underlying idea was that the typical decedent would no more want his former spouse to benefit from his pension plan or life insurance than to inherit under his will. A wealth transfer was a wealth transfer — and a former spouse (as compared with, say, a current spouse or child) was not likely to be its desired recipient. So a decedent's failure to change his beneficiary probably resulted from "inattention," not "intention." Agreeing with that assumption, 26 States have by now adopted revocation-on-divorce laws substantially similar to the Code's. Although this expanded form of the revocation-upon-divorce doctrine has been in existence for a number of years now, Tennessee has been slow to join the movement toward expanding the revocation-upon-divorce doctrine and instead retains the doctrine largely in its original form. Unlike the UPC, Tennessee law fails to extend the revocation-upon-divorce doctrine to will substitutes such as life insurance policies, retirement plans, or annuities, though it does apply the doctrine to trusts.

i. The Tennessee opinions surrounding the treatment of life insurance, retirement accounts, annuities, and trusts consistently use the same analysis and reasoning implied in one seminal case, *Bowers v. Bowers*, in which the Tennessee Supreme Court held that the revocation-upon-divorce doctrine did not apply to insurance policies.

XXIX. WILLS, PROBATE, & ESTATE ADMINISTRATION

A. *Chimento v. Schwark (In re Harvey),* 399 So. 3d 186 (Court of Appeals of Mississippi 2025). Probate of lost will affirmed.

1. Ernest Jenkins and Leonard Harvey were friends for more than fifty years. They met at a Buick dealership in Biloxi, where Jenkins worked as a mechanic. Jenkins also worked at a body shop where Harvey spent a lot of time. The two shared a common interest and appreciation for cars. Jenkins' daughter, Nina Schwark, had also been very close to Harvey. Since she was a young girl, Harvey would stop by their home to visit with her father. Harvey did not have a wife or children, so Jenkins would also invite Harvey over for dinner, family gatherings, and holidays. Schwark testified that even as she got older and started her own family, she would continue to visit and check on Harvey.

2. Schwark was a registered oncology nurse at the VA in Biloxi. In September 2014, she transferred to the Houston VA for "retirement benefits and an increase in pay." Schwark testified that before she moved, she often helped Harvey because he had a lot of health problems, and his physical condition began deteriorating. Harvey had congestive heart failure, diabetes, schizophrenia, neuropathy in his feet, and back issues that required him to wear a back brace. Schwark often stayed on Harvey about taking his heart medicine to prevent fluid buildup and swelling. She testified that she would pick up his medicine and accompany him to some of his appointments at the VA. She also helped him run errands and assisted him whenever he needed help. Schwark's husband Charles and Harvey's next-door neighbor Mitchell Parker would also check on Harvey, take him to appointments, do work around Harvey's house, and run errands for him.

3. Parker testified that he often worried about Harvey because he was getting older. He urged Harvey several times to hire an attorney to get his affairs and estate in order. Harvey added Schwark to his bank account. Harvey also began looking for someone to prepare a will for him. He asked Schwark's daughter, Christine Herring, if she had any recommendations because he knew she was a paralegal at a law firm. At trial, she revealed that she gave him a recommendation and told him which attorneys to avoid.

4. On January 17, 2015, Harvey executed his last will and testament at the Jenkins' home. Harvey asked Herring if she could come to her grandparents' house and notarize the will. Mark Jalanivich was visiting with the Jenkins when Herring was there. She asked Jalanivich to serve as the second witness, and he agreed.

5. In the will, Harvey gave his estate to Schwark. He directed that his remains be cremated and that his ashes be given to Schwark. Also, he appointed Schwark as executrix of his will. Schwark was in Houston when the will was executed. She represented that she knew nothing about the will until she came home to handle Harvey's funeral arrangements. She said that when she arrived at her parents' home, her father gave her an envelope that Harvey had dropped off for her. The envelope contained a copy of Harvey's will.

6. On February 21, 2015, deputies were dispatched to Harvey's home for a wellness check. They found Harvey deceased in his recliner in his living room. The investigative report stated, "Harvey appeared to have been deceased for several days or weeks and was severely decomposed." Deputy Coroner Jason Moody contacted Charles to inform him that they found Harvey's body, and Charles subsequently broke the news to Schwark. At trial, Schwark testified, "as soon as my husband called me and told me that they had found him, I packed my bags and headed home."

7. Schwark handled the funeral arrangements. She had his body sent to Southern Funeral Home to be cremated. She testified that she did not notify anyone because she believed that Harvey had no family members. She testified that the only family he ever mentioned was his older brother, but that brother predeceased him. She retrieved Harvey's cell phone to see if anyone would call; however, she maintained that there were no phone calls. Schwark also claimed that she searched for documents in his home that might confirm any existing family. She testified, "I looked through a few papers at his house, but the condition of all of the papers in there, it was full of roaches and I stopped at some point."

8. Schwark filed a petition for probate, issuance of letters testamentary, and determination of heir-at-law. On April 16, 2015, the court admitted the will to probate and granted the letters testamentary. On July 20, 2015, the court entered an order declaring that there were no heirs-at-law. Months later, it was revealed that Harvey was actually survived by several nieces and nephews, including Robin Chimento, Patricia Lukosavich, Robert Lester Harvey, Pamela Kenik, Daria Shirley, Jane Harvey, and Wendy Medley. Chimento contacted Schwark and informed her that she was Harvey's niece. Chimento testified that she became aware that Harvey had passed away because her nephew, Robert Lukosavich, received a letter from the Department of Veterans Affairs indicating that he was the beneficiary of one of Harvey's life insurance policies.

9. Chimento, Patricia, Robert, Pamela, Shirley, and Wendy filed a motion to set aside the order establishing the heirs-at-law. In response, Schwark claimed she was not aware they

existed until Chimento made her aware of them. Schwark did not contest the motion and requested that a new publication be completed. The petitioners filed a caveat objecting to the probate of Harvey's will, claiming that Harvey lacked testamentary capacity and that Schwark exercised undue influence over Harvey. The court granted the petitioner's motion to set aside the probate order after finding that the will was not properly authenticated before being admitted to probate. That same day, an agreed order enjoining Schwark from altering or disposing of the estate assets was entered.

10. Chimento filed a motion to produce the original will. Schwark revealed that this prompted her to go search Harvey's home for the original will; however, she was unable to locate it due to the condition of Harvey's home. Schwark testified that she discovered mold and critters all over his home. There was evidence and testimony that Harvey was a hoarder. Pictures of his house were introduced into evidence showing trash and boxes stacked to the ceiling. She recalled two occasions where she tried to locate the original will in Harvey's home. On the first visit, Schwark fell through a rotted floor and had to seek medical treatment. On the second visit, she found several papers tucked in the side of the recliner in which Harvey died. She revealed that his bodily fluids had seeped into the papers: "Everything was kind of mashed together. Like paper had dissolved together. It was all around where he was sitting."

11. Schwark filed a motion for summary judgment, arguing that she established a prima facie case that Harvey's will was valid and that the petitioners failed to offer any evidence of testamentary incapacity or undue influence. The court denied the motion. The petitioners subsequently filed a motion for summary judgment. They argued that Schwark had failed to produce the original will, so therefore the will could not be admitted to probate. The court denied the motion.

12. Following trial, the court entered the judgment and order establishing the will's validity. The court held that Schwark had "overcome and rebutted the presumption of revocation based on clear and convincing evidence" and that the will was valid. Chimento appealed.

13. The court of appeals affirmed on the following grounds:

> a. Chimento failed to come forward with evidence "to overcome the prima facie case" of testamentary capacity. She asserted that Harvey must have lacked testamentary capacity because he would not have left all his property to someone that was not in the family. However, the record reveals that the nieces and nephews seldom visited Harvey and spent very little time with him. Schwark, on the other hand, was one of the few individuals who often checked on Harvey and helped him when he needed assistance. Chimento also alleged that Harvey had paranoid schizophrenia; however, no medical records were offered during trial to confirm that Harvey suffered from this condition. Chimento even admitted that she felt like Harvey was in his right mind before he died. The record contains ample deposition and trial testimony confirming that Harvey possessed testamentary capacity at the time he executed his will.
>
> b. The testimony of subscribing witnesses receives greater weight than the testimony of witnesses who were not present at the will's execution. Both Herring and Jalanivich certified that on the day in question, Harvey was "of sound and disposing mind and memory, mentally alert, and possessed of all his mental

faculties." A few days after the will was executed, they again asserted that Harvey was mentally competent in their individual affidavits. All the individuals who had a relationship with Harvey and had actually interacted with Harvey not long before his passing testified that he was in his right mind, that he understood that he was leaving his property to Schwark, and that he was clear that he only wanted her to receive.

c. Harvey was of advanced age and poor health. Due to his increasing health problems, Harvey did receive some assistance from Schwark, Charles, and Parker. However, they did not take care of him on a regular basis. There was evidence that Harvey mainly took care of himself. Although Harvey had health problems, he was not physically or mentally weak. Several people testified that Harvey was highly intelligent, still active, able to do work on cars and his house, and still driving himself at the age of eighty-four. He only needed transportation when he was having car problems or medical emergencies. Although Schwark testified that she took Harvey to some of his doctor appointments and the hospital, it could not be said that she provided for Harvey's medical care. There was evidence that Harvey maintained a joint account with Schwark. There was also evidence that Harvey and Schwark had a close relationship. He was close friends with Schwark's father for over fifty years and had known her since she was a child. Lastly, Chimento alleged that Schwark had power of attorney over Harvey; however, the record confirms this was not the case.

d. Although it can be argued that a confidential relationship existed between Harvey and Schwark, it cannot be said that Schwark used that relationship for her personal gain or to thwart Harvey's intent. Furthermore, she was certainly not involved in preparing or executing Harvey's will. Schwark's uncontradicted testimony was that she was working in Houston when Harvey had his will prepared and did not see a copy of the will until she came home to handle his funeral arrangements. Also, the fact that Herring was involved in executing the will does not necessarily mean that Schwark was somehow involved. Harvey knew that Herring was a notary, and he simply asked her to come and notarize the will. While reading the document, she saw that he needed two witnesses, and since she was already there, she served as one. Nothing in the record suggests that something nefarious was going on.

e. Here, due execution of the will was proven by the subscribing witnesses. Herring and Jalanivich signed the will and provided their addresses in the attestation clause. The affidavit was annexed to the will. Herring and Jalanivich also completed separate affidavits a few days after the will was executed. Both affidavits confirmed that they served as witnesses and signed the will "at the same time and in the presence of each other." They also asserted that Harvey "was over the age of twenty-one (21) years and of sound and disposing mind and memory, mentally alert, and possessed of all his mental faculties." Additionally, Herring confirmed through testimony at trial that she and Jalanivich witnessed Harvey sign the will. She testified that Harvey contacted her about notarizing the will at her grandparent's house. When she arrived, Jalanivich was visiting with Harvey and grandparents. She asked Jalanivich to serve as the additional witness so that her grandparents would not have to get out of their recliners. She testified, "He came to the kitchen table, Mr. Harvey signed, [Jalanivich] signed and then he

wrote his address down." The court even confirmed with Herring that they all three were present at the kitchen table and witnessed each other sign.

f. The evidence is uncontradicted that (a) Harvey made a will on January 17, 2015; (b) after the will was executed, Harvey left the place of execution with the original will in his possession; and (c) the will was not found after his death, despite a diligent search by Schwark. Schwark testified that she made two attempts to locate the original will. She knew that he often put important papers in his recliner, so she looked there hoping to find the original will: "The only place that I could think that he would have put any other paperwork was in the recliner that he stayed in. And it had — it had papers tucked down in the side. But that is the — that's the chair that he died in, and anything that was in that chair was destroyed."

g. Nothing in the record suggests that Harvey intended to destroy his will. Instead, the evidence suggests that the will was accidentally destroyed. Also, no evidence in the record suggests that Schwark destroyed the original will. In fact, she was not even aware that Harvey had executed a will and left all his property to her until after his death. Herring testified that she never informed her mother about the execution or the contents of the will. Schwark also revealed that her father never informed her about the will. He simply gave her the sealed envelope that Harvey had dropped off at his house for her.

B. *Davies v. Kittinger (In re Est. of Harman),* 2025 Utah LEXIS 118 (Supreme Court of Utah 2025). Savings statute that generally permits a party to commence an otherwise untimely action within one year of a prior case's non-merits dismissal does not apply to probate code limitation period to probate a will.

1. Beverly Davies died on December 1, 2015. On November 27, 2018, Jodi Kittinger ("Granddaughter") filed a petition in the district court to probate Davies's will. By her petition, Granddaughter sought an order appointing herself as the personal representative of Davies's estate and an order declaring the will valid and accepted for informal probate. After nearly three years had passed with no activity in the case, the court issued an order to show cause why the case should not be dismissed for lack of prosecution. When the court's notice went unanswered, it dismissed the case without prejudice on October 15, 2021.

2. On October 14, 2022, just one day shy of the first anniversary of her petition's dismissal, Granddaughter filed another petition to probate Davies's will. The second petition largely mirrored the first. But the second differed in that it included an assertion that the second filing was timely under Utah's Savings Statute, which permits a party to commence a new action within one year of an action's dismissal if the original action was timely filed, the dismissal was not on the merits, and the time for bringing the action has otherwise expired.

3. After appearing and objecting to Granddaughter's appointment as the personal representative of Davies's estate, Grandchildren moved for partial summary judgment, asserting that the probate proceeding must be dismissed as untimely under section 75-3-107 of Utah's Probate Code ("Timing Statute").

4. The district court sided with Granddaughter and denied Grandchildren's motion, and concluded that "statutory tolling could be enforced" on the Timing Statute. And on this basis, the court denied Grandchildren's motion and allowed the proceeding to continue.

5. Grandchildren sought interlocutory review of the district court's decision, which the Utah Supreme Court granted and reversed on the following grounds:

a. The Court must interpret the intersection of two statutes: the Savings Statute, UTAH CODE § 78B-2-111, and the Timing Statute, id. § 75-3-107. The Savings Statute is a remedial statute of general applicability housed in Utah's Judicial Code. It provides, in relevant part, "If any action is timely filed and . . . the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited . . . by law . . . for commencing the action has expired, the plaintiff . . . may commence a new action within one year after the . . . failure."

b. The Timing Statute, meanwhile, is part of the Probate Code and provides that, with certain enumerated exceptions, "[a]n informal probate proceeding or formal testacy proceeding . . . may not be commenced more than three years after the decedent's death." It also states that "[i]f no will is probated within three years from death, the presumption of intestacy is final and the court shall upon filing a proper petition enter an order to that effect."

c. It is immaterial whether the Timing Statute is properly labeled a statute of limitations or a statute of repose. Instead, the relevant question is whether the legislature intended the Savings Statute to apply to the Timing Statute, and the court can resolve that question not by affixing a label to the Timing Statute but by employing our ordinary tools of statutory interpretation. The district court erred in denying Grandchildren's motion for partial summary judgment because the Savings Statute does not apply to petitions filed under the Timing Statute.

d. Statutes of repose are different from statutes of limitations, although to some extent they serve the same ends. Both establish deadlines for the filing of legal actions, but we have distinguished between them by looking to the event that triggers the start of the statutory timeframe. If the trigger is the accrual of a cause of action, it is a statute of limitation. If the trigger is some other event, it is a statute of repose. While statutes of limitations are focused on plaintiffs and are designed to prevent them from sleeping on their legal rights to the detriment of defendants, statutes of repose emphasize the need for certainty and finality for defendants, and are generally enacted for specific reasons, such as to curb rising insurance rates and to reduce the risk and uncertainty of liability for manufacturers.

e. The Timing Statute does not fit neatly into either category. When distinguishing between the two, courts often speak in terms of injuries and causes of action. But those terms don't translate well to the Timing Statute in the Probate Code — a statute that governs the filing of a petition to probate a will. And ultimately the court need not label the Timing Statute either a statute of repose or a statute of limitations. The better course is to analyze whether the Savings Statute applies to a particular statute based on legislative intent — regardless of whether that statute is labeled a statute of limitations or a statute of repose.

f. To the extent the two statutes are complementary, both apply. But if the words of the Timing Statute appear to foreclose the applicability of the Savings Statute, then the court must give effect to those words even if they are at best implicit.

g. Many statutes that include a deadline for the filing of an action simply identify the time period in which a particular action may be brought. Even the statute of

repose in the Utah Health Care Malpractice Act uses similar language. But the Timing Statute is different. It doesn't state that an informal probate or formal testacy proceeding may or even shall be brought within three years. Instead, it speaks in prohibitory terms, stating that such an action "may not be commenced more than three years after the decedent's death." And that command directly conflicts with the Savings Statute, which states that a new action "may commence" beyond that timeline if the original action was timely filed and dismissed for a non-merits reason. Unlike the other statutes of limitations or repose noted above, the Timing Statute does more than just "limit" the time for commencing the probate proceeding. It affirmatively states that such an action "may not" be commenced if the three-year time limitation has passed. That directive, at the very least, strongly implies an intent by the legislature that the Savings Statute not apply to filings governed by the Timing Statute.

h. Here, the legislature didn't use the word "barred" in the Timing Statute. Yet by stating that the proceeding "may not" be commenced if not filed within three years of the decedent's death, it suggested a similar intent foreclosing application of the Savings Statute. Subsection (3) of the Timing Statute provides that the presumption of intestacy will be final if a decedent's will is not probated within the three-year time limit. That operation, which is automatic upon the passage of time, also conflicts with the application of the Savings Statute. Here, for example, with the dismissal of Granddaughter's petition, the three-year statutory time period passed without the will being probated, and thus the final presumption of intestacy kicked in. If the Savings Statute allowed for a refiling of the petition, the new petition would seek resolution of an issue that, by operation of law and the passage of time, had already been deemed finally resolved. In light of this conflict, the court cannot apply the general Savings Statute to matters governed by the more specific statutory scheme described in the Timing Statute. After all, a statute dealing specifically with a particular issue prevails over a more general statute that arguably also deals with the same issue.

i. The section appears to strike a balance between what are two potentially conflicting purposes and policies animating the Probate Code: to discover and effectuate a decedent's intent and to promote the speedy and efficient administration of a decedent's estate. If discovering and effectuating a decedent's intent were the only (or even primary) purpose of the Probate Code, the legislature could have allowed the filing of probate actions at any time. After all, wills reflecting a decedent's intent could be discovered years after death. Conversely, if ensuring the speedy and efficient administration of a decedent's estate were the only (or even primary) purpose of the Probate Code, the legislature could have shortened by months, or even years, the time for filing an informal probate or formal testacy proceeding. But, instead, the legislature appears to have carefully balanced these two competing concerns in setting a three-year time limit for the filing of a proceeding to probate a will. Were we to interpret the Savings Statute as applying here, we would disrupt that balance.

C. *Estate of Boyajian,* 2025 Cal. App. LEXIS 429 (Court of Appeal of California 2025). California law requires a physical alteration of a will to effect a revocation by cancellation, and a stand-alone revocation does not constitute a subsequent will unless it also transfers property upon death.

1. The decedent, Layla Boyajian, was married to her ex-husband, Mike Boyajian, for 50 years. They had four children, including Robert, Anush, and two other daughters. Layla and Mike began divorce proceedings in 2004. Layla perceived Robert as taking her husband's side. In 2006, when she was 71 years old, Layla signed a two-page holographic will that bequeathed all of her estate to Anush, who lived with Layla at the time. The will's authenticity and formalities are not disputed.

2. Layla signed a second document in 2018. The document was prepared by Robert. Layla signed it before a notary public, but it was not otherwise witnessed. The 2018 document purported to revoke all of Layla's prior estate planning documents. After Layla's death in 2020, Anush petitioned to probate the 2006 will, which she possessed since its creation. Robert contested the petition, claiming Layla had revoked the will by cancellation through the 2018 document. The trial court conducted a bench trial that included dozens of exhibits and both expert and percipient witnesses, including the notary who witnessed Layla sign the 2018 document.

3. Anush testified she found the will in 2006 while cleaning a room in Layla's house. She denied procuring the will in any way. In a detailed statement of decision, the court found Layla had died intestate because the 2018 document had validly revoked the 2006 will. The court found by clear and convincing evidence that the document expressed Layla's specific intent to revoke the will. The court reasoned that the document constituted a cancellation under, even if no physical act was inflicted or applied directly on the will.

4. The court of appeals reversed and remanded on the following grounds:

> a. A will or any part thereof is revoked by any of the following: (a) a subsequent will which revokes the prior will or part expressly or by inconsistency; or (b) being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.
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> b. The trial court held the 2018 document "canceled" the 2006 will pursuant to section 6120(b), finding Layla specifically intended the document to revoke the will. While revocation may well have been Layla's intention, the Probate Code requires more to effect a revocation by cancellation.
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> c. The word "canceled" is reasonably susceptible to both broad and narrow interpretations. Broadly, "cancel" might mean to invalidate by any means. One might cancel a subscription online or by phone call. One might cancel a contract by giving separate written notice. But back in the Gilded Age, our high court gave "cancel" a narrow, hypertechnical sense. It construed a predecessor statute of section 6120 and explained that, "[i]n its primal significance," to cancel a will required a "lattice work" or "criss-cross" drawn on top of preexisting text. While this 127-year-old case is still good law, even if we found "canceled" to be ambiguous, extrinsic aids confirm the Legislature intended it to be used in a narrow sense.
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> d. The official comments to Uniform Probate Code section 2-507 note that revocation by act requires something be "done to the" will: "Revocation of a will may be by either a subsequent will or an authorized act done to the document." Requiring an act "done to the" will is consistent with England's 1677 Statute of Frauds, which allowed revocation by "a 'revocatory act'" such as "burning,

canceling, tearing, or obliterating the will. …" And it is consistent with section 6120(b), which allows revocation when a will is "burned, torn, canceled, obliterated, or destroyed. …" As a statutory word "literally 'is known by its associates,'" the word "canceled" is still best construed to require a physical act akin to burning, tearing, obliterating, or destroying.

e. Requiring a physical alteration to the will to find a revocation is an ancient concept, perhaps in need of revisiting. But Robert presents no recent California authority expanding the concept of cancellation beyond its historically narrow sense of a "lattice work" or "criss-cross" drawn over text. As a stand-alone document, the 2018 revocation could not and did not cancel the 2006 will.

f. Robert relies on the Probate Code's definition of "will," which at first blush might be parsed to include a stand-alone revocation. Section 88 provides: "'Will' includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will." There is no dispute the 2018 document merely revokes a will. Nonetheless, there are three hurdles to applying this definition of "will" to the 2018 document.

g. First, the 2018 document is not a "testamentary instrument." The Probate Code defines "instrument" to require a beneficiary designation or property transfer: "'Instrument' means a will, a document establishing or modifying a trust, a deed, or any other writing that designates a beneficiary or makes a donative transfer of property." And what makes a document "testamentary" is the revocable disposition of property upon death: "Before an instrument may be probated as a will it must appear from its terms … that it was executed with testamentary intent. The testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his property to take effect upon his death."

h. The 2018 document meets neither the Probate Code's definition of "instrument" nor the Supreme Court's conception of "testamentary intent." It names no beneficiary. It does not transfer or dispose of any property upon Layla's death.

i. Second, the 2018 document was not witnessed by two persons. The Probate Code requires that a "will shall be witnessed by being signed, during the testator's lifetime, by at least two persons. …"

j. Section 6110, subdivision (c)(2), which was added in 2008, gives effect to an unwitnessed will "if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will." But critically, the 2008 amendment stops short of adopting the full harmless error provision of the Uniform Probate Code. Omitted from section 6110, subdivision (c)(2) is the portion of the Uniform Probate Code that would give effect to the decedent's intent concerning "a partial or complete revocation of the will." The omission was intentional, reflecting the Legislature's judgment that witness formalities are still required to turn a stand-alone revocation into a will.

k. Robert cites no California case giving effect to a stand-alone revocation that did not also make a donative transfer or revocable disposition upon death. Robert cites

no California practice guide instructing practitioners to advise their clients they may revoke wills with stand-alone revocations.

l. The court acknowledges probate law trends towards flexibility. For example, "formalities should not be allowed to defeat the testator's intent when clear and convincing evidence satisfies the evidentiary concerns underlying the formalities of the statute of wills." A respected wills and trusts professor laments that "revocation doctrine has never received sustained attention," yet "consists of tripwires and traps for the unwary." He notes the Uniform Probate Code's "harmless error rule … spills over into the realm of revocation" and criticizes the "handful of jurisdictions" with "'narrow' revocation legislation that limit written revocations to full-fledged 'will[s] which revoke[] the prior will.'" California remains among this handful of states, having declined to enact the Uniform Probate Code's harmless error rule for "a partial or complete revocation of the will." The Legislature has set the limit to which it is willing to incorporate harmless error analysis into our revocation rules. Perhaps this too deserves revisiting.

D. *In re Bice,* 2025 Tex. App. LEXIS 9005 (Court of Appeals of Texas, Tenth District, Waco 2025). Trial court cannot substitute its determinations about validity of will for those of jury where there were grounds for jury to reject probate.

1. At the time of Lois Kathlyn Bice's ("Decedent") death on November 14, 2009, she was survived by her husband Donald Gene Bice ("Mr. Bice") and the three children shared by Decedent and Mr. Bice: Donna Bice Read, Diane Bice Hightower, and Darbie Bice Bowman (collectively the "Daughters"). Following Decedent's death, no will was located or probated. On August 27, 2010, Mr. Bice and the Daughters signed a notarized heirship affidavit stating that the Decedent died intestate and listing Mr. Bice as the Decedent's legal heir and next of kin. The heirship affidavit was recorded with the Bosque County Clerk on September 9, 2010.

2. Following Decedent's death, Mr. Bice continued to reside at a 170-acre tract of land where he and the Decedent resided prior to her death, understanding himself to be the sole owner of that tract of land and houses on the land (the "Property"). Two of the daughters, Diane Bice Hightower ("Hightower") and Donna Bice Read ("Read"), were living on the Property when the Daughters learned on or about September 2023 that Mr. Bice intended to sell the Property. Hightower received a notice of eviction addressed to Hightower and Read, dated March 21, 2024, and signed by Mr. Bice. On June 16, 2024, Mr. Bice entered a contract to sell the Property then subsequently filed a petition for eviction, naming Hightower and Read, on July 2, 2024.

3. On or about June 26, 2024 and June 28, 2024, Darbie Bice Bowman ("Bowman") and Read (collectively the "Applicants") respectively filed an application to probate a purported will of the Decedent, filed the purported will of the Decedent, and filed a notice of lis pendens listing the Property. The purported will of the Decedent is dated January 2001 and includes a self-proving affidavit. This will contest ensued and was tried before a jury on April 22, 2025 through April 24, 2025.

4. At trial, Bowman represented the Applicants, consisting of herself and her sister Read. Mr. Bice, Hightower, and Read were the only three witnesses that testified at trial. Hightower testified that she found the purported will of the Decedent around January or February of 2024. She testified that she did not tell Read or Bowman that she found the

purported will until approximately four months later on or about June 2024. No pictures were offered showing where the purported will was found. Hightower testified that she prepared both the purported 2001 will of the Decedent and an heirship affidavit following Decedent's death declaring that the Decedent died intestate.

5. At the conclusion of the trial, both the Applicants and contestant ("Mr. Bice") submitted proposed jury charges to the court that included a jury question about whether the Decedent signed the purported will. The applicants did not object to the inclusion of Question No. 1 on the jury charge which read: "Did Decedent sign the Purported Will?" Because the jury answered "No" to Question No. 1, the jury returned the verdict answering no further questions.

6. Applicants moved for a judgment notwithstanding verdict and new trial, arguing in part that there was insufficient evidence to support the jury's finding as to Question No. 1 and that Mr. Bice did not prove that Decedent did not sign the purported will and attached self-proving affidavit. The trial court entered its Order Granting Proponents' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial ("Order"). Mr. Bice filed his petition for writ of mandamus challenging the Order.

7. The court of appeals granted the writ of mandamus on the following grounds:

> a. Here, the challenged Order lists roughly four explanations for the trial court's granting of a new trial: (1) the purported will with the attached self-proving affidavit was admitted into evidence; (2) Bice did not object to the admission of the purported will and attached self-proving affidavit; (3) Mr. Bice produced no evidence that the signature on the purported will was not the Decedent's signature; and (4) Question No. 1 should not have been submitted to the jury because Mr. Bice offered no evidence that the Decedent did not sign the purported will.
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> b. Upon a merits-based review of the record as a whole, there is legally and factually sufficient evidence to support the jury's finding that the Decedent did not sign the purported will.
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> c. Applicants had the burden of proving valid execution. The burden of proof and persuasion rests on the will's proponent. Without objection, the instruction that the burden of proof is on the proponent (the Applicants) to establish the elements required for a valid will, even though the will has a self-proving affidavit, was explicitly listed in the jury charge. Here, the Applicants had the burden to prove that the purported 2001 will was validly executed, a fact contested by Mr. Bice.
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> d. While a self-proved will may serve as prima facie evidence that the will was properly executed, when a dispute exists, a self-proved will cannot otherwise be treated differently than a will that is not self-proved, and may be contested in the same manner as a will that is not self-proved.
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> e. A self-proving affidavit alone does not establish that a will is valid as a matter of law, especially when, like here, evidence was presented rebutting and countering the prima facie presumption of validity. It is within the jury's purview to weigh the credibility of testimony, including those sworn statements contained in affidavits. When evidence conflicts, the jury's role is to evaluate the credibility of the witnesses and reconcile any inconsistencies, and as a general proposition, the jury

may believe all or any part of the testimony of any witness and disregard all or any part of the testimony of any witness.

f. At trial, Mr. Bice elicited testimony and evidence that attacked the credibility of the purported will and the attached self-proving affidavit as well as the credibility of the Applicants' witnesses. Mr. Bice argued and pointed to suspicions surrounding the purported will to show that Decedent did not sign the will and that the will was invalid, contradicting and raising a fact issue regarding the execution and validity of the purported will.

g. The jury's verdict will be set aside only if the evidence that supports the finding is so weak as to be clearly wrong and manifestly unjust. Review of the record shows that the evidence in support of the jury's verdict was neither weak nor so slight to allow us to conclude that the purported will was signed by the Decedent as a matter of law. The jury heard evidence that Hightower had no record of preparing the purported will, that none of the Daughters were able to locate the purported will for fourteen years, that Hightower had no photos of where the purported will was discovered, and that all the Daughters signed an heirship affidavit asserting that the Decedent died without a will. Mr. Bice also presented evidence to the jury regarding the timing and potential monetary motive of probating the purported will. Specifically, the purported will was first filed after Mr. Bice entered a sales contract for the Property valued at over a million dollars, and the Daughters would be entitled to some portion of the Property or proceeds from the sale of the Property under the purported will.

h. The above-listed, non-exhaustive recitation of evidence makes clear that there is sufficient evidence for the jury to conclude that the will was not signed. Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. Not only is it unnecessary to have testimony from both parties, but also juries may choose to believe one witness and disbelieve another, even if the testimony is uncontradicted. A reviewing court may assume a jury disregarded some testimony in favor of their verdict, and reviewing courts cannot impose their own opinions to the contrary when a jury acted reasonably within their discretion.

E. *In re Est. of Blum*, 2025 NYLJ LEXIS 2293 (Surrogate's Court of New York, Richmond County). Ink dating examination and analysis of ancient will ordered and costs determined to be an administrative expense of estate.

1. The decedent, Roman Blum, died a resident of Richmond County. At the time of his death, it was unknown if Blum, a successful businessperson, was survived by heirs. The Public Administration of Richmond County filed a petition seeking letters of administration and, in the interim, temporary letters of administration. A decree and letters of administration were issued.

2. Thereafter, a probate petition was filed by Anthony J. Allegrino II, as the nominated alternate executor and sole beneficiary under an instrument purported to be the decedent's Last Will and Testament (hereinafter, "will"), dated May 22, 2006. However, the purported will dated May 22, 2006, was denied probate.

3. On May 29, 2014, the instant petition was filed for probate of an additional purported will dated January 20, 1987. The subject instrument is on graph paper, is handwritten, and is alleged to have been executed by decedent Roman Blum in Staten Island, New

York. The instrument is alleged to also have been witnesses by two individuals who have both deceased. The instrument is also written in the Polish language and is alleged to have been found in a shoebox in Poland.

4. This petition was filed by Teresa Musial, the fiduciary appointed for the alleged deceased's sole beneficiary, Helena Pietrucha Marczak. Teresa Musial, a citizen of Poland, was joined in the probate petition by co-petitioner, an attorney admitted to practice in the state of New York. The court directed service of citation by personal delivery upon known interested parties and service by publication upon unknown distributees. The court also appointed a guardian ad litem on behalf of those persons whose names and places of residence were unknown.

5. An "amended notice of appearance" was filed on behalf of alleged sole distributee Maxim Shimnyuk. The petition was amended, including the relief that letters of administration c.t.a. be issued to petitioner Teresa Musial, and co-petitioner Monika Ellacott, Esq. Subsequently, several authorizations to appear and notices of appearance were filed on behalf of petitioner Teresa Musial and respondent Maxim Shimnyuk.

6. A motion was made seeking to authorize the inspection and ink testing of the decedent's purported Last Will and Testament, dated January 20, 1987.

7. The guardian ad litem, Thomas P. Anselmo, contended that the requested testing and ink dating analysis is an invaluable resource to aid in the determination of the age of the purported will. Erich J. Speckin, an ink dating specialist at Speckin Forensics, LLC, an international forensic firm specializing in ink dating examination and analysis, stated that the examination and analysis consists of various non-destructive procedures that will not impact the integrity of the purported will, including but not limited to the legibility of the documents, the value of the writing or the ability of any other party to duplicate the testing or confirm the findings.

8. Speckin described the examination and analysis as consisting of the following procedures: a visual examination — including photography; microscopic examinations, which may involve digital capture of images and evidence noted; an "ESDA examination," which includes an instrument designed to detect impressed writing in paper and will have no effect on the documents; a "VSC examination," which is an infrared instrument that shows similarities and differences in inks using wavelengths of light; and, lastly, selected entries will be sampled for ink comparison and/or ink dating analysis, which involves taking samples of ink that are approximately the size of a "printed period." According to Speckin, the examination and analysis can be performed on laminated documents, excluding the aforementioned methodology of taking samples of ink, which may not be available depending on the laminate used on the document.

9. Speckin further alleged that the examination and analysis can be performed at the courthouse and will take approximately four (4) hours to complete. The anticipated cost of the subject analysis is $8,500, inclusive of travel costs.

10. Counsel to Musial and Zawisny contended that the ink testing would be unnecessary, unduly expensive, speculative, and beyond the scope of the current issue before the court. Counsel also contends that the age of the propounded instrument is a determination for the trier of fact and that the proposed ink testing would not assist in that determination.

11. The court ordered the inspection and ink testing of the decedent's purported Last Will and Testament on the following grounds:

a. The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements. However, the quantum of proof ordinarily required is modified where the will proffered is more than thirty years old and is denominated as an ancient will. Pursuant to the ancient document doctrine, a will may be admitted to probate where it is more than 30 years old, taken from a natural place of custody and is unsuspicious in nature. The requisite thirty-year period is measured from the date of will's execution to the date it is offered for probate.

b. It is incumbent upon the court to examine all circumstances and to ascertain the validity of an instrument offered to probate. In determining the validity of a purported will, courts have considered the ink on the instrument, the condition of the instrument, as well as handwriting. In addition, it has long been held that where the validity of an instrument offered for probate is contested, courts have the power to require that it be subjected to chemical tests to disclose the nature of the composition of the ink and what processes it may have been subject to.

c. Here, the request to authorize ink dating examination and analysis is reasonable, as the ink dating analysis and examination will be conducted at the courthouse and will not impact the integrity of the purported will. Further, as the ink dating analysis and examination relate to the probate proceeding and the question of the validity of the purported will, the court deems the cost for the examination an administrative expense.

F. *In re Est. of Youngblood,* 2025 Tex. App. LEXIS 7468 (Court of Appeals of Texas, Seventh District, Amarillo 2025). There is no requirement that the witness must know the document which is being signed is the testator's will, nor is there a requirement the testator make a declaration he is signing his will and revoking his prior wills.

1. The opinion opened with this statement: "This case has all the makings of a legal riddle: two Debras, two wills, and one key question — does a witness to a will need to know it's a will to validly witness the signing of it? The trial court thought so and tossed the 2016 Will aside. We disagree. The law requires witnesses to observe a signature — not to understand the legal significance behind it. Because the statutory requirements were otherwise satisfied, we hold the 2016 Will is valid and reverse the trial court's judgment."

2. In 2016, Chester Freeman Youngblood, a 90-year-old World War II veteran and former Amarillo resident, died in Tulsa, Oklahoma, under the care of his daughter, Debra Ann Youngblood, and granddaughter, Tyra Harris Youngblood. Chester was married to Debby Kay Youngblood at the time of his death. Debra Ann is a daughter of Chester's former wife and is not related to Debby Kay by blood.

3. In March 2017, Debby Kay filed an application to probate Chester's will as a muniment of title in Randall County, Texas, where the couple resided prior to his death. The will presented by Debby Kay was executed by Chester in 2009 (the "2009 Will"). A year later, Debra Ann and her daughter, Tyra, contested the Will presented by Debby Kay. Debra Ann and Tyra alleged Chester executed a new will in 2016 (the "2016 Will") which revoked the 2009 Will. Apparently, due to some family issues, including COVID restrictions, they were unable to file a copy of the 2016 Will until 2023. The parties

engaged in discovery in preparation for a trial on the merits, and Debby Kay moved for and obtained copies of correspondence between Chester and the Veterans Administration (the "VA").

4. The litigants did not request a jury, and the will contest was submitted to a bench trial. During the trial, over the objections of Tyra and her mother, Debby Kay introduced VA correspondence showing Chester was required to appoint a fiduciary to manage his financial affairs. Additionally, Gary Pastwa, one of the witnesses to the 2016 Will, testified he did not know he was witnessing the signing of a will. At the conclusion of the trial, the trial court found the 2016 Will was not properly executed and therefore was invalid. The court also found Debby Kay's 2009 Will had not been revoked by Chester and admitted the Will to probate. Debra Ann and Tyra appealed.

5. The court of appeals reversed, rendered, and remanded on the following grounds:

a. Gary Pastwa, the next-door neighbor, was asked to come over and he was asked to witness Mr. Youngblood's signature on this document. Gary Pastwa testified the decedent never acknowledged that he was revoking his prior will. He never acknowledged the new document as a will. And Mr. Pastwa said he didn't even know he was witnessing a will.

b. The trial court clearly based its rejection of the 2016 Will based upon the fact Pastwa, the only witness with a clear recollection of the signing of the 2016 Will, could not testify Chester knew he was signing his will and was also revoking his 2009 Will. The court also placed an emphasis on the fact Pastwa stated he did not know at the time of the signing what kind of document Chester was placing his signature upon.

c. There is no requirement under the law the witness must know the document which is being signed is the testator's will, nor is there a requirement the testator make a declaration he is signing his will and revoking his prior wills.

d. The Estates Code does not require witnesses to read a will or be familiar with its contents in order to make it valid.

e. Pastwa's testimony confirmed the 2016 Will was the document he witnessed by testifying about who was there, confirming the signatures and notary, and confirming Chester signed the document. Whether Pastwa himself understood the document signed at the time of the execution is immaterial. In addition, the credible testimony of only one subscribing witness is sufficient to prove the attestation of a will.

f. The trial court, having found Pastwa's testimony credible, could only reach the legal conclusion the 2016 Will was executed with all the required formalities and solemnities. Because the 2016 Will contains a provision revoking all prior wills and codicils, the 2009 Will should not have been admitted to probate.

G. *Moore v. McClendon (In re Est. of Cunningham),* 2025 OK 72 (Supreme Court of Oklahoma 2025). Presence for the sole purpose of receiving medical care does not establish probate residence, and a subsequent will containing a clause revoking an earlier will must be admitted to probate before the clause of revocation can have any effect.

1. In January of 2022, Jimmy Fred Cunningham's journey to Oklahoma County began when he was found very ill and having difficulty breathing at his home in Johnston County, Oklahoma. Because of his condition, Decedent was taken to a hospital in Tishomingo, Oklahoma, for medical treatment. After being evaluated by the hospital in Tishomingo, Decedent was transported to Mercy Hospital in Oklahoma City. After Decedent's condition stabilized at Mercy, he was transferred to a skilled nursing facility in Oklahoma City, where he continued to receive medical treatment and physical therapy. Once Decedent's condition improved, he was moved to an assisted living facility in Oklahoma County. Decedent remained at the assisted living center for approximately two months until his health took a turn for the worse on May 24, 2022, when he required immediate surgery, again at Mercy. Decedent died.

2. At the time of his death, Decedent owned both real and personal property in Johnston County, Oklahoma. Until his health problems in 2022, Decedent had lived exclusively on his farm in Johnston County for approximately four years. Prior to moving to Johnston County in 2018, Decedent owned and resided in a home in Oklahoma City, Oklahoma County, for approximately thirty-seven years. During the time Decedent lived in Oklahoma City, he would occasionally visit his property in Johnston County and stay on his farm while he visited.

3. During the Decedent's many years of living in Oklahoma City, he came to know Appellant Cheryl Moore. Initially, Decedent was Moore's hairdresser, while Moore helped Decedent with his tax returns and estate planning. Over their forty-year working relationship, they became close friends. In 2014, Decedent asked his long-time attorney to prepare a will for him, which White did. Four years later, in 2018, Decedent moved from Oklahoma City to Johnston County to live on his farm. Lisa and Benny McClendon were Decedent's neighbors in Johnston County. Mr. McClendon helped Decedent with the upkeep on his farm in exchange for Decedent letting McClendon keep his horses on the property.

4. In May of 2018, Decedent suffered a stroke and Mrs. McClendon scheduled an appointment for Decedent with the Little Law Firm in Madill, Oklahoma. The McClendons drove Decedent to this appointment on May 15, 2018. A lawyer at the Little Law Firm drafted the 2018 Will for Decedent, which Decedent executed on the same day. The 2018 Will names Moore as the Personal Representative and devises the entire estate to Mr. and Mrs. McClendon. Mr. and Mrs. McClendon were not present during Decedent's meeting with the lawyer or when Decedent executed the 2018 Will.

5. On March 27, 2019, Decedent met with his previous lawyer, and created a revocable trust, titled the Jimmy F. Cunningham Revocable Living Trust, dated March 27, 2019 (the "Trust"). In addition to creating the Trust, Decedent executed the 2019 Will. The 2019 Will contained a provision which expressly revoked all prior wills of Decedent. The 2019 Will names Moore as the personal representative of Decedent's estate and left the residue of Decedent's assets to the Trust. Pursuant to the Trust Agreement, Appellant Oklahoma City Community Foundation, Inc. ("OCCF") would receive the residuary of assets in the Trust, then hold, administer, and disburse them for the benefit of Murray State College in Tishomingo, Oklahoma.

6. On October 18, 2023, Mrs. McClendon filed a petition for probate of Decedent's 2018 Will. On November 6, 2023, Appellants Moore and OCCF filed an objection to the petition for probate of the 2018 Will, which they later amended, and argued that Decedent's 2019

Will revoked the 2018 Will. Further, they asserted that the 2019 Will should be admitted to probate in Oklahoma County, not Johnston County, because Decedent resided in Oklahoma County at an assisted living center at the time of his death.

7. The district court: (1) found venue was proper in Johnston County because Decedent resided there at the time of his death; (2) determined that Moore had renounced her right to an appointment as personal representative under the 2018 Will because Moore failed to file Decedent's 2018 Will for probate within thirty days of Decedent's death; and (3) admitted the 2018 Will to probate.

8. Moore and OCCF appealed, and the Oklahoma Supreme Court affirmed in part and reversed in part on the following grounds:

> a. Venue for probate actions in Oklahoma looks first to the Decedent's residency. In this case, both parties agree that Decedent was a resident of this state. Under Oklahoma law, residence is defined as the place where one's habitation is fixed without the present purpose of removing therefrom. It is synonymous with domicile. An individual can only have one residence at a time, and an individual must have a residence somewhere. As a general principle, Oklahoma domicile, once established, is presumed to continue until a new one is established elsewhere. Decedent did not abandon his residence in Johnston County when he came to Oklahoma County. All of the late-life moves made by the Decedent were medically driven decisions, not housing choices. Ultimately, Decedent was transferred to an assisted living facility in Oklahoma County where he continued to receive medical treatment for approximately two months. The entirety of Decedent's medical treatment in Oklahoma County lasted approximately five months. Decedent was a patient when he was transported to Oklahoma County via ambulance. He was a patient at the hospital, a patient at the skilled nursing facility, a patient at the assisted living center, and a patient once again at the hospital in Oklahoma County where he ultimately passed away. Although Decedent was present in Oklahoma County for about five months receiving medical care, which is clearly longer than the twelve days decedent was present in Love County in James, the record establishes that Decedent was present in Oklahoma City for the sole purpose of receiving medical care and thus, he did not legally abandon his residence in Johnston County with the intent to remain in Oklahoma County. As such, we hold these facts, standing alone, are not sufficient to warrant abandonment of Decedent's residency in Johnston County under Oklahoma law.
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> b. The conflicting evidence in this case was not sufficient to prove abandonment of Decedent's residence. Nor was speculative evidence as to where the Decedent wanted to live in the future (should Decedent have been well enough to have been discharged from the hospital/medical facility and been well enough to establish actual residency) sufficient to prove abandonment of his original residence. Decedent was in Oklahoma County for the purpose of receiving medical care, and all other evidence was in conflict. The conclusion by the district court that Johnston County was the County of Decedent's residence at the time of his death, although disputed by Moore's testimony, is not contrary to the clear weight of the evidence as reflected by the whole record, and that part of the order is affirmed.

c. Here, there is no allegation that Decedent was incompetent to make a will, or that the 2019 Will was the product of undue influence, fraud, or duress. The copy of the 2019 Will was deficient: it lacked the notary seal, was undated, and was signed by only one witness. There was testimony at trial that the original 2019 Will was properly executed but that the whereabouts of said Will was unknown. A photocopy of the partially completed instrument was thus offered for probate.

d. The district court was correct in ruling that the photocopy of the 2019 Will should not be admitted to probate as Decedent's Last Will and Testament. There is also a statutory procedure available, however, whereby a copy of a will may be admitted in place of the original. Appellants presented witnesses who identified the copy of the 2019 Will. However, they failed to provide evidence that the 2019 Will was ". . . in existence at the time of death of the testator" or else show that the original was ". . . fraudulently destroyed in the lifetime of the testator. . . ." There are two requisites which must both be met in proving a lost will: (1) the lost will must be proved to have been in existence at the time of the death of the testator; and (2) its provisions must be clearly and distinctly proved by at least two credible witnesses. The burden was on the proponents to prove the 2019 Will was in existence at the time of the death of the Decedent. Appellants failed to produce evidence to support the proposition that the 2019 Will was in existence at the time of Decedent's death, and there was no allegation of fraudulent destruction.

e. If the 2019 Will was insufficient to earn admission to probate, did it nevertheless suffice to revoke the 2018 Will? It did not. The 2019 Will did not revoke the 2018 Will because the copy of the 2019 Will failed to comply with the execution statute. A subsequent will containing a clause revoking an earlier will must be admitted to probate before the clause of revocation can have any effect, and the same kind, quality, and method of proof is required for the establishment of the subsequent will as was required for the establishment of the former will. If such subsequent will is defectively executed, the revocatory clause will not take effect.

f. No fully executed 2019 Will was presented. The partially executed unnotarized instrument was testified to by two witnesses, but the trial court did not find that the 2019 Will was sufficiently proven for any purpose, including revocation of the 2018 Will.

g. Both the 2018 Will and the 2019 Will name Moore as the personal representative of Decedent's estate. Despite both Wills clearly naming Moore as the Personal Representative, McClendon sought to be named Personal Representative based on her claim that Moore had renounced her right to appointment by failing to timely file a probate petition within thirty days of Decedent's death. Title 58 O.S.2011, Section 108 provides: "If the person named in a will as executor, for thirty (30) days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown."

h. It is undisputed that the Decedent passed away on June 6, 2022, and that Moore did not file a petition for probate until October 18, 2023, well beyond thirty days after his death. The sole factor apparently relied upon by the district court in

making its determination that Moore had renounced herself as person representative was the passage of thirty days.

i. Moore alleges that she did not know she had been nominated as the personal representative of Decedent's Estate until well after thirty days had passed following the Decedent's death. The mere establishment of the passage of thirty days since decedent's death does not create an automatic renunciation of the named personal representative. Additionally, even though Moore objected to probate of the 2018 Will, and objected to McClendon being named personal representative of the Decedent's Estate, these objections do not automatically extinguish her right to be named personal representative of Decedent's Estate under said 2018 Will. The record did not establish that the nominated personal representative was unfit or incompetent to serve. The record discussed above reveals that Moore showed good cause for her delay in petitioning the trial court for probate of the Decedent's Will in that she was unaware that she was the named representative. There is no evidence that she had possession of the 2018 Will. The mere disagreement with McClendon as to the proper Will to probate, by itself, likewise does not disqualify Moore as serving as representative. The district court finding that Moore renounced her right to be appointed personal representative of Decedent's Estate was clearly contrary to the weight of the evidence.

H. *Schilling v. Kilburn*, 2025 Tex. App. LEXIS 4715 (Court of Appeals of Texas, Third District, Austin 2025). Use of phrases "all property" and "is to go to" are enough to create issue of fact whether writing intended as will.

1. Steven Ray Kilburn and Cynthia Schilling married in 2003 and were married for fifteen years. Steven had two children from a previous relationship, his daughter Megan and his son Remington, both of whom lived in the Austin area. According to Cynthia, Megan and Remington would rarely visit. Remington was in prison at one time. When they would visit, they frequently asked for money. They also called to ask for money. Sometimes Steve would give them money. Other times, Steve would hire them to do something for their business but neither Megan nor Remington were reliable and when they would stop showing up, Steve would stop paying them.

2. In 2016, Cynthia suffered three strokes and was diagnosed with cancer. Cynthia explained that her health problems created difficulties in her marriage and that she and Steven eventually divorced as a result. However, Steven and Cynthia remained close friends and continued to live together. Cynthia averred that "Steven mentioned a few times that he did not want his children to receive an inheritance from him because they would waste it and he wanted the money to go for my caregiving needs. He discussed leaving his estate to my brother Dennis, so my brother could take care of me."

3. On November 7, 2021, Steven began experiencing chest pains. He told Cynthia that he had previously had a heart attack and believed that he was having another. Steven called Megan and asked for her help because she lived nearby, but Megan told her father that she could not help him. Steven then called his friends Alan and Angela Vassar and asked them to drive him to the hospital, as he did not want to use an ambulance. They agreed. Steven and Cynthia also called Dennis and asked if he could come and care for Cynthia in case Steven had to stay at the hospital. Dennis agreed.

4. At some point while Steven and Cynthia were waiting for the Vassars to arrive, Steven wrote on a yellow legal pad, "all property is to go to Denny Schilling," along with the date and his signature.

5. Nothing else was written on the document.

6. Cynthia, Alan, and Angela each averred that Steven showed them the document and discussed with them that he wanted his property to go to Dennis. Cynthia averred that while they were waiting for the Vassars to arrive, "Steve continued discussing what he wanted to happen with his estate if he should die before me. He said that he thought it best to leave his estate to my brother, Dennis Schilling, so that there would be someone to care for me." Alan attested that during the drive to the hospital, Steven "mentioned that he might die and wanted his former brother-in-law, 'Denny,' to receive his property because he knew that Denny would take care of his wife, Cindy." Angela recounted that before they went to the hospital, Steven "stated that he wanted everything to go to his former brother-in-law Dennis Schilling, Cindy's brother, so that he could take care of Cindy, the decedent's ex-wife." Angela further stated that "[d]uring the entire drive to the hospital he discussed with me and my husband that he wanted Dennis Schilling to receive his estate so that he could take care of Cindy. He repeated this three to five times."

7. Steven checked into the hospital that night and left two days later against medical advice. He died shortly thereafter, on November 10, 2021.

8. Megan later filed an application for letters of independent administration and to determine heirship, representing that Steven had died intestate. Dennis filed an objection to the application, representing that Steven had executed a valid will before his death and asking that it be admitted to probate. Megan contested the will and later filed a motion for partial summary judgment, asserting that there was no evidence that Steven had executed the document with testamentary intent. Following a hearing, the district court took the matter under advisement and later granted the motion. Dennis appealed.

9. The court of appeals reversed and remanded on the following grounds:

> a. Testamentary intent is the intent to create a revocable disposition of property that will take effect after death. The focus is on the drafter's intent rather than the specific words used in the document. The animus testandi does not depend upon the maker's realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death. It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate. Informal language used by a layman who drafted a will without an attorney's aid will be interpreted liberally, rather than technically, to effectuate the drafter's intent. A court's first duty in a proceeding to admit a writing offered for probate is to determine whether the writing is testamentary in character. If the document is not of testamentary character, it is not a will and cannot be admitted to probate. Generally, to be testamentary in character, a writing must possess certain essential characteristics, including that it must operate to transfer, convey, or dispose of the testator's property upon death.
>
> b. In some cases, testamentary intent (or the lack thereof) can be conclusively established as a matter of law from the document itself. However, in other cases, the document itself is ambiguous, i.e., reasonably susceptible to more than one

meaning, and extrinsic evidence may be considered to determine whether the drafter created the document with testamentary intent.

c. The document recites that "all property is to go to Denny Schilling." Although the document does not expressly state that Steven intended the property to pass "upon his death," it contains two phrases that would support a finding that Steven intended that result. First, the phrase "all property" often appears in testamentary documents to indicate that the testator intended the complete disposition of his estate upon death. Second, the phrase "is to go to" indicates that Steven intended the transfer of property to occur at some point in the future, which could have meant upon his death. As for the additional words in the document mentioning insurance and "Cook Waldin," their mere presence in the document does not conclusively negate Steven's testamentary intent. At most, the words create a fact issue regarding the testamentary nature of the document. The document itself is ambiguous regarding testamentary intent and that, accordingly, extrinsic evidence may be considered to resolve the ambiguity. Dennis presented more than a scintilla of evidence that Steven created the document with testamentary intent.

XXX. ISSUE, BENEFICIARIES, PATERNITY, & ADOPTION

A. *In re Est. of Lucas,* 2025 Haw. App. LEXIS 24; 155 Haw. 290; 562 P.3d 966; 2025 LX 91725; 2025 WL 252626 (Intermediate Court of Appeals of Hawai'i 2025). Term "lawful issue" in trust is ambiguous concerning whether class of beneficiaries includes children born out of wedlock.

1. The Last Will and Testament of Mary N. Lucas ("Will") was executed on July 2, 1954, and later amended by First Codicil on July 23, 1956. The Will was admitted to probate in April 1965. In August 1969, the residue of the estate was distributed to the two daughters of Mary N. Lucas ("Lucas"): Harriet Lucas Cassiday and Mary Lucas Pflueger.

2. The Will created a trust ("Trust"). The Trust used the terms "lawful issue" and "surviving issue." Article Fifth of the Will provides that income generated prior to the Trust's termination shall be paid to, as relevant here, the "lawful issue of any deceased children" of Lucas' daughters: "My Trustee shall pay one-half (1/2) of the net income to or use and apply the same for the benefit and account of my daughter, MARY PFLUEGER, and her children . . . [and] pay the other one-half (1/2) of the net income to or use and apply the same for the benefit and account of my daughter, HARRIET CASSIDAY, and her children . . . for and during her lifetime, and from and after her death in equal shares to her children who shall be from time to time surviving and the lawful issue of any deceased children, said issue to take per stirpes and not per capita. If all of the children and their surviving issue of either daughter shall die before the trust termination, then from and after the death of such last survivor of such children and issue my Trustee shall pay all of the net income in equal shares to the surviving children and the lawful issue of any deceased children, said issue to take per stirpes and not per capita."

3. The Trust also provides that, upon termination, the Trust estate shall be distributed to the "surviving issue" of Lucas' daughters: "This trust shall cease and determine upon the death of the last survivor of the children of my daughters, HARRIET CASSIDAY and MARY PFLUEGER, who shall be living at the date of my death, and the property then comprising the trust estate, together with the accumulated, accrued and undistributed income, shall

at that time vest in and shall be transferred, conveyed and delivered by my Trustee, absolutely and in fee simple, free and clear of any trusts, to the then surviving issue of said children, per stirpes and not per capita."

4. Carol Cassiday Orr ("Orr") and Orr's brother, Benjamin B. Cassiday III ("Trip"), are great-grandchildren of Lucas, and beneficiaries of the Trust through their grandmother, Harriet Lucas Cassiday, and their father, General Benjamin B. Cassiday, Jr. Trip is the father of Casey Cassiday ("Casey") and Alanna Cassiday ("Alanna"). The acting successor co-trustees of the Trust petitioned for instructions regarding the rights and interests of Trip's children, and, specifically, whether Casey and Alanna were "issue" and "lawful issue" pursuant to the Trust. Orr responded to the petition, contending that Casey and Alanna should not be treated as "issue" or "lawful issue," as doing so would violate Lucas' intent and the Trust's terms. Casey and Alanna were born in the Philippines in 2001 and 2002, respectively. Trip was not married to Casey and Alanna's mother. In May 2008, shortly before Trip passed away in June 2008, Trip filed a Verified Petition for Paternity ("Verified Petition"), in which he acknowledged his paternity of Casey and Alanna, and requested formal recognition as their legal and natural father. A genetic test report, included in the Verified Petition, confirmed that Trip is Casey and Alanna's biological father.

5. Trip passed away in June 2008. Trip's Verified Petition was never adjudicated prior to his passing, and no formal court order was issued to judicially resolve the issue of Trip's paternity. Trip's Last Will and Testament acknowledges Casey and Alanna as being his "two children."

6. The Probate Court found that Casey and Alanna are for all purposes under the Will the "issue," "lawful issue," and "surviving issue" of General Cassiday by his predeceased son Trip, and as such, are entitled to share in the net income of the Trust and, if they survive to Trust termination, in the final distribution of the Trust. Orr timely appealed.

7. On appeal, the court of appeals vacated the judgment, affirmed in part and vacated in part the order, and remanded on the following grounds:

> a. The Probate Court was right in determining that Casey and Alanna are "surviving issue," but that it was wrong in summarily concluding, without sufficient findings of fact, that Casey and Alanna are "lawful issue."
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> b. Hawai'i courts must look to Lucas' intent at the time she created the Trust. When construing a will, the intention of the testator controls and must be given effect unless it be contrary to some positive rule of law or against public policy.
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> c. Courts must determine the testator's intent based on a sound and reasonable construction of the words that were used, and not by speculation or conjecture as to what the testator may have intended. Courts may, however, consider extrinsic evidence with respect to the circumstances surrounding the execution of the will and the testator's conception of any ambiguous words for the purpose of aiding the court in construing the instrument to determine the testator's intent.
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> d. The plain language of the Trust reflects that Lucas used "lawful issue" to specify beneficiaries of the Trust income, and "surviving issue" to specify beneficiaries of the final Trust distributions. Lucas' use of these two separate

terms, to designate two different sets of beneficiaries, was purposeful. Lucas could have, but did not, use the same term in both provisions.

e. "Issue," "surviving issue," and "lawful issue" are not defined in the Trust. However, the Hawai'i Supreme Court has long held that the term "issue," shorn of any and all judicial constructions and taken in its ordinary and popular sense, is definitely a general term synonymous with children, progeny, offspring, descendants, etc. The term "issue," has generally been understood to include both marital and nonmarital children. The record contains a genetic test report, indicating a 99.99%+ probability that Trip is Casey and Alanna's biological father. The Probate Court was therefore not wrong in finding that Casey and Alanna, who have survived Trip, were shown to be the natural children of Trip, and therefore "surviving issue."

f. Unlike the word "issue," the phrase "lawful issue" does not appear to have a plain and unambiguous meaning. Ambiguities exist where there is any doubt or controversy as to the meaning of the language used in a trust. The court will only turn to rules of construction when the intention of the testator cannot be fairly and reasonably ascertained due to the ambiguity of the language. The Probate Court's finding that Trip "acknowledged that he was the father" of Casey and Alanna does not, without more, support the Probate Court's conclusion that Casey and Alanna were "lawful issue." The Probate Court, for example, references Trip's unadjudicated Verified Petition, but does not make any findings or articulate its reasoning as to how the Verified Petition establishes the legal conclusion that Casey and Alanna are "lawful issue."

g. In the absence of sufficient findings, this court cannot discern whether the Probate Court was right or wrong in concluding that Casey and Alanna are "lawful issue."

B. *In re Est. of M.A.C.,* 2025 MT 23; 420 Mont. 259; 563 P.3d 284; 2025 Mont. LEXIS 79; 2025 LX 22196 (Supreme Court of Montana 2025). Mother's refusal to support minor child bars mother from inheriting from deceased child's estate.

1. On March 13, 2020, eleven-year-old M.A.C. tragically died in a car accident that severely injured her fifteen-year-old brother, Mythias Cole, and took the life of their adult half-sister, Samara Yanny. At the time of the accident, M.A.C. and Mythias resided with Samara in Bozeman and had lived with her for approximately six months. Lisa Cole is the natural mother of M.A.C. and Mythias, as well as their five adult half-siblings, including Samara. Mythias and M.A.C.'s father died in 2017.

2. Bristol West Insurance Company, represented by attorney Shawn Cosgrove, insured the vehicle in which M.A.C. was a passenger and sought to convey a policy-limits settlement of $100,000 to her estate (the "Estate"). Discovering that no estate had been opened, Cosgrove attempted to contact Lisa by phone and mail to inform her of the funds and the necessity of probate. His attempts went unanswered. On June 1, 2020, Cosgrove drove to the address where he believed Lisa lived in Miles City and spoke to her in person. Cosgrove explained his role as the attorney representing the insurance company, and he informed Lisa that before he could distribute the policy funds, a probate proceeding had to be filed and a personal representative had to be appointed for the Estate. Cosgrove stated in an affidavit that he came away from his conversation with Lisa with the

impression that she "did not parent her children, nor wanted to be involved in the . . . estate matter." Cosgrove gave Lisa his business card, but Lisa neither contacted nor spoke with him again.

3. At some point after meeting Lisa, Cosgrove consulted with the Gallatin County Public Administrator — who also serves as the county's Clerk of District Court — to seek appointment of a personal representative for the Estate. The Public Administrator referred Cosgrove to Sunny Yocom, a professional fiduciary. On October 21, 2020, Yocom filed an Application for Informal Appointment of Personal Representative in Intestacy. An unopposed motion for a hearing concerning the appointment accompanied the application. On November 23, 2020, Cosgrove questioned Yocom before the District Court about her professional qualifications and willingness to serve. At the end of the hearing, the District Court issued an order opening the Estate and appointing Yocom as the personal representative.

4. The Estate petitioned the District Court to preclude Lisa from inheriting and approve distribution of the Estate to M.A.C.'s half-siblings and Mythias in accordance with the intestate succession statutes (the "Petition"). Lisa's counsel noticed his appearance in the case on her behalf. Over the next year, Lisa filed numerous motions seeking to remove Yocom as the personal representative and opposing the Petition, but she did not file any verified pleadings. During this period, the Estate amended the Petition without objection from Lisa.

5. The District Court set an evidentiary hearing. Lisa moved to appear remotely, which the Estate opposed on the grounds that Lisa's identity and credibility were critical to the case, and her examination would require the use of documentary evidence. The District Court denied the motion, requiring Lisa's in-person attendance if she wished to testify at the hearing. The District Court held the hearing. Lisa did not appear, but she was represented by her attorney. The District Court admitted without objection an affidavit submitted by Cosgrove in lieu of his live testimony. The District Court heard testimony from Bozeman school personnel familiar with M.A.C.'s enrollment; Jennifer Hoerauf, an administrator for the Department of Health and Human Services, Child and Family Services Division (the "Department"); Yocom; Mythias; and two of Mythias and M.A.C.'s adult half-siblings: Phoenix Nivens and Sierra Yanny.

6. Mythias testified that in early September 2019, Phoenix retrieved M.A.C. and Mythias from Colorado at Mythias's request and with Lisa's consent. At the time, M.A.C. and Mythias were living in a minivan with Lisa, Lisa's partner, his two children, two dogs, and two cats. Mythias testified about their housing instability over the previous several years, Lisa's drug use, and Lisa's refusal to provide basic necessities to M.A.C. and him, such as medical care and a safe environment. Phoenix's testimony confirmed Mythias's account. Phoenix described Lisa as an addict and testified to the neglect he experienced growing up in her household. All three siblings testified about their personal knowledge of Lisa's actions or inactions pertaining to her parenting of M.A.C.

7. At the time of their deaths, Samara was pursuing legal guardianship of M.A.C. Yocom testified about and offered into evidence several letters from the Social Security Administration ("SSA") addressed to Samara concerning Mythias and M.A.C.'s benefits. After their father died in 2017, SSA sent monthly survivor payments for the children's benefit to Lisa as their representative payee. Yocom obtained the letters from SSA after requesting M.A.C.'s Social Security number and information related to her benefits for

the purposes of opening and valuing the Estate. The February 18, 2020 letter informed Samara that SSA determined the "former representative payee Lisa misused $1,569.00 of M.A.C.'s benefits," and it would replace the funds if Lisa did not pay back the money.

8. The District Court granted the Petition to preclude Lisa from inheriting and directed the distribution of the Estate to M.A.C.'s half-siblings and Mythias. Lisa appealed and the Montana Supreme Court affirmed on the following grounds:

a. The Montana Code provides that inheritance from or through a child by either natural parent is precluded unless that natural parent has openly treated the child as the parent's and has not refused to support the child.

b. The admission of the Department's reports does not provide a basis for reversal under the circumstances of this case. Disregarding the Department's reports, the District Court's findings are still supported by substantial testimony and evidence admitted without objection at the evidentiary hearing. Regarding the findings concerning Lisa's withheld consent for M.A.C.'s medical and dental care, Sierra testified that M.A.C. could not get treatment for cavities or make medical appointments because Lisa refused to consent, and Samara lacked legal guardianship over M.A.C. at the time. Mythias testified that they received no medical care in the year prior to M.A.C.'s and his move to Bozeman. Regarding the findings concerning Lisa's retention of M.A.C.'s survivor benefits and refusal to provide financial support, Sierra testified that although M.A.C. and Lisa would occasionally speak on the phone, neither Samara nor M.A.C. received any funds from Lisa. Samara's guardianship affidavit stated that since September 2019, M.A.C. had not lived with Lisa, and Lisa "had not paid any form of financial support" towards M.A.C.'s care during the time M.A.C. resided with Samara. The February 18, 2020 SSA letter confirms that Lisa misused M.A.C.'s benefits and that SSA would replace the benefits if Lisa did not pay them back. Regarding the findings concerning Lisa's abandonment of M.A.C., Sierra described a pattern of Lisa "hardly being there," making it "difficult to get any sort of resources from Lisa." Both Mythias and Phoenix testified that Lisa consented to Mythias and M.A.C.'s removal from her care. After their removal, Mythias testified he never heard Lisa express any desire to retrieve him or M.A.C., nor was he aware of any plan for them to return to her care.

c. The District Court had ample evidence to support its determination that Lisa refused to support M.A.C. Notwithstanding her own hearsay argument that the Department's reports should not be considered, Lisa asks us to consider statements in the reports she contends provide evidence of her desire to care for M.A.C. Even if Lisa's contradictory position on the Department's reports had merit, in reviewing a district court's findings, the court does not consider whether the evidence could support a different finding, nor does the court substitute its judgment for that of the district court regarding the weight given to the evidence.

The District Court's findings were not clearly erroneous, and it correctly determined that Lisa refused to support M.A.C.

d. Lisa argues that the District Court erred when it appointed Yocom on the grounds that she did not receive proper notice of the initial application for informal probate, nor notice of the November 23, 2020 hearing at which the court appointed Yocom to administer the Estate. She also averred to a violation of her constitutional right to due process after being "denied" an opportunity to be heard at the appointment and evidentiary hearings, and she alleges Yocom had a conflict of interest. Lisa does not contend she demanded notice. Lisa cites no supporting authority for her contention that the notice requirements apply despite the express language excepting from the rule specific notice provisions imposed by the statutes governing informal proceedings. She does not offer any legal analysis placing the proceeding below outside the ambit of an informal proceeding. Her claims concerning due process and Yocom's alleged conflict of interest are similarly unsupported.

e. As to the denial of her motion to appear remotely, the Estate correctly observes that the case Lisa cites in support has no bearing on the issue of remote appearances. The discussion relates to a district court's findings of fact and discretion to terminate parental rights; it does not even mention remote testimony. Lisa cites no other authority supporting this claim. The court is not obligated to develop legal analysis supporting a party's position, to guess at the party's precise position, or to conduct legal research on the party's behalf.

C. *In re Estate of Schappell,* 489 Md. 654; 331 A.3d 471; 2025 Md. LEXIS 51; 2025 LX 54793; 2025 WL 453174 (Supreme Court of Maryland 2025). Where a decedent dies intestate, leaving no surviving spouse or registered domestic partner, biological or legally adopted children, parents, siblings, or grandparents, a person claiming equitable adoption must, first, by clear and convincing evidence, demonstrate proof of the decedent's intent to adopt the person, and must demonstrate by clear and convincing evidence that the decedent acted in accordance with the intent to adopt.

1. Michael Gerard Schappell (the "Decedent") died intestate in 2021, leaving no close relatives as he had no spouse or domestic partner, siblings, or biological or legally adopted children, and his parents and grandparents had predeceased him. The Decedent had a stepdaughter, Karen Ellis, Respondent, whom he had known since he married Ms. Ellis's mother when Ms. Ellis was four years old. Ms. Ellis petitioned the Orphans' Court for Montgomery County to be named, under the doctrine of equitable adoption, the sole heir to the Decedent's estate. Ms. Ellis petitioned for a jury to determine whether she had been equitably adopted by the Decedent.

2. Ms. Ellis lived with her biological father, Kenneth Klenk, until she was fourteen years old, at which point she split her time between Mr. Klenk's and the Schappells' homes until reaching the age of majority. Mr. Klenk is currently alive. Mrs. Schappell died in 2019. The Decedent never remarried, had no biological children or siblings, and both his parents and grandparents predeceased him. The Decedent is survived by aunts and uncles, as well as the children of deceased aunts and uncles.

3. Ms. Ellis alleged that she and the Decedent had a father-daughter relationship. According to Ms. Ellis, the Decedent was very involved with her education and molded her character during her formative years. Ms. Ellis alleged that the Decedent attended her graduations, her wedding, and her children's baptisms, and that her husband asked the Decedent for permission to marry her. Ms. Ellis stated that the Decedent referred to her as his daughter when introducing her, and the Decedent referred to her children as his grandchildren and her husband as his son-in-law. Ms. Ellis alleged that the Decedent gave his vehicle to her husband and wrote in a letter to a bank that he needed a payoff letter so he could move forward with giving the vehicle "to [his] son-in-law." In the bill of sale for the vehicle, the Decedent stated that he was giving the vehicle, "as a gift, to [his] son-in-law[.]" Ms. Ellis stated that when the Decedent's father died, the Decedent wrote in the obituary that his father was survived by a granddaughter, Ms. Ellis. According to Ms. Ellis, she assisted the Decedent with filing an insurance claim following a fire in the Decedent's home and remained the point of contact with the insurance adjuster after the Decedent's death. Ms. Ellis alleged that when the Decedent was hospitalized in 2020, she and her husband traveled to Maryland from their home in North Carolina to take care of the Decedent's home and his dog. Ms. Ellis stated that she made all of the Decedent's funeral arrangements and paid for the funeral.

4. Ms. Ellis advised that when Mrs. Schappell died, her entire estate passed to her husband, the Decedent, as everything she owned was jointly held with the Decedent or the Decedent was named the primary beneficiary. Ms. Ellis asserted that, during the span of her relationship with the Decedent, he would make statements to Ms. Ellis such as "when we're gone, all of this will be yours" or "one day, all of this will be yours[.]" Ms. Ellis recalled that the Decedent mentioned his desire to have an estate plan prepared after Mrs. Schappell's death, but Ms. Ellis was unaware of whether the Decedent actually did so. According to Ms. Ellis, the Decedent requested her Social Security number so that he could name her as the beneficiary of his life insurance policy.

5. Karen Schappell Daniel, Paul Schappell, and Anne O'Boyle Vlahos, Petitioners, who are or were intestate heirs of the Decedent, filed a motion for summary judgment on the issues raised by Ms. Ellis. Ms. Daniel, a cousin of the Decedent, had been named the personal representative of the Decedent's estate and moved for summary judgment individually and in that capacity. Petitioners sought summary judgment in their favor on the ground that Ms. Ellis could not be named the heir because the Decedent never intended to adopt Ms. Ellis and, as such, the doctrine of equitable adoption did not apply. Petitioners also opposed the request to transmit issues to the circuit court. The orphans' court denied without prejudice Petitioners' motion for summary judgment, granted the petition to transmit issues, and issued an order transmitting seven issues (questions) to the circuit court for decision.

6. Petitioners appealed. The Appellate Court of Maryland held that if a person seeks to establish that they are an intestate decedent's equitable child and heir, the person must prove that they and the decedent, objectively and subjectively, intended to and did live as child and parent. The Appellate Court concluded that a claimant must prove that the decedent intended to treat the claimant as the decedent's own child and that the intent element is not necessarily an intent to adopt pursuant to the adoption statute, but rather an intent that the child be regarded and treated as a natural or legally adopted child. The Appellate Court determined that applying the doctrine of equitable adoption involves a mixed question of fact and law and that the orphans' court did not err in transmitting one

of the seven questions to the circuit court, which the Appellate Court described as a mixed question of fact and law concerning whether Ms. Ellis had been equitably adopted by the Decedent. The Appellate Court concluded that the other six questions should not have been transmitted to the circuit court because they were questions of fact and it is the orphans' court's responsibility to determine the facts of a case, and that, in this instance, the first-level facts were not in dispute. The Appellate Court vacated the orphans' court's order and remanded the case to the orphans' court for proceedings consistent with its opinion.

7. On appeal, the Maryland Supreme Court reversed and remanded on the following grounds:

a. In Maryland, adoption and inheritance are governed by statutes. Under Maryland law, if a person dies without a will, under a hierarchy of succession set forth by statute, stepchildren do not share in the decedent's estate if the decedent is survived by any biological relatives or formally adopted children. This, however, may not be the end of the inquiry. When an individual dies without a will, a person may claim an inheritance right to the decedent's estate based on the theory that the decedent equitably, though not legally, adopted the person. This has sometimes been called a claim of "adoption by estoppel," "virtual adoption," "de facto adoption," or a claim under the doctrine of equitable adoption. If the claim is successful, the claimant may be allowed to inherit without having undergone a formal statutory adoption procedure. Although the scope and parameters of the doctrine of equitable adoption have not been clearly defined by case law, Maryland is among the jurisdictions that have recognized the principle. Currently, though, the requirements for establishing equitable adoption are neither completely clear in Maryland nor uniformly applied in other jurisdictions.

b. Maryland case law and that from other jurisdictions suggests three non-exclusive methods for establishing equitable adoption. The first method is contract based and involves an inquiry into whether the decedent and claimant entered into a contract for which there should be specific performance. The second method relies on principles of equitable estoppel and concerns, in part, whether a claimant has relied on a relationship with the decedent. The third method is intent based and looks to whether a decedent had the intent to adopt.

c. Instructive is the standard set forth by the Supreme Court of California, which held that a claimant alleging equitable adoption must prove by clear and convincing evidence the decedent's intent to adopt the claimant by demonstrating the existence of some direct expression, on the decedent's part, of an intent to adopt the claimant. This intent may be shown, of course, by proof of an unperformed express agreement or promise to adopt. But it may also be demonstrated by proof of other acts or statements directly showing that the decedent intended the child to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt the child, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child.

d. Differing from that standard, a claimant seeking to establish equitable adoption must demonstrate a decedent's intent to adopt under a two-step test, which

requires proof of both the decedent's intent to adopt the claimant and that the decedent acted in accordance with the intent. We hold that where a decedent dies intestate, leaving no surviving spouse or registered domestic partner, biological or legally adopted children, parents, siblings, or grandparents, a person claiming equitable adoption must, first, by clear and convincing evidence, demonstrate proof of the decedent's intent to adopt the person, which may be established by proof of a direct expression, on the decedent's part, of an intent to adopt the claimant, such as an unperformed express agreement or promise to adopt. The requisite intent may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt or the decedent's statement of an intent to adopt the child. Second, a claimant must demonstrate by clear and convincing evidence that the decedent acted in accordance with the intent to adopt by manifesting to the public or community at large that the claimant was considered to be the decedent's natural or legally adopted child and treating the claimant as the decedent's natural or legally adopted child.

e. A decedent representing to the claimant or to the public or community at large that the claimant was considered or treated as a natural or adoptive child is not sufficient alone to demonstrate the decedent's intent to adopt the claimant. This results from recognition that a decedent may have held out to a claimant or to the public or the community at large that a claimant was considered to be or treated as a natural or adoptive child but have had no intent either to adopt the claimant or for the claimant to inherit.

f. The "intent-to-adopt" approach does not rest on contract principles or those of equitable estoppel, but rather on the considerations of fairness and intent that the child should have been adopted absent the decedent's inadvertence or fault. There are multiple concerns with basing proof of equitable adoption on a contract theory. A contract-based approach to equitable adoption essentially involves identifying whether an unperformed contract exists between the decedent and a claimant, which is capable of being enforced after the decedent's death. A claimant would have been unable to bring a claim for specific performance against the decedent during the decedent's lifetime due to the lack of an available remedy and because services performed by a child would be involved. In Maryland, adoption is not a contract alone between the parties. It requires judicial determination of the advisability of permitting such action. A contract-based approach may involve issues with respect to a minor's capacity to contract and the enforceability of contracts where the claimant is a minor when the contract to adopt is formed. Another problem with adopting a strict contract-based approach to establishing equitable adoption is the circumstance that there may be sufficient evidence that, at one time, a contract existed, i.e., that at one point the decedent had the intent to adopt, but the decedent may later have experienced a change of heart and desired to withdraw from or rescind the contract, leaving the contract unperformed. In the event of a claim for equitable adoption, because the decedent would not be available to testify as to the reasons the contract was not performed, it would be difficult, if not impossible, for a court to determine the status of the

contract or the decedent's intent based solely on the existence of an unperformed contract and to conclude that a valid contract continued to exist.

Like the contract-based approach, the estoppel approach has been subject to criticism. With the estoppel approach, the analysis centers on the relationship between a claimant and decedent and a claimant's performance and reliance on the relationship rather than on the intent of a decedent to adopt. One of the drawbacks with an estoppel approach is that it would be unlikely that a claimant, especially a claimant who is taken in as a baby by a decedent, would have changed behavior or performance based on an expectation of inheritance, i.e., it is unlikely that there would be detrimental reliance. The equitable interest embodied in the principle of equitable adoption is in ensuring that the decedent's wishes regarding the disposition of her property are realized, not the claimant's inheritance right or reliance.

g. The two-step test that we adopt today differs from the test that the Appellate Court used in this case, which focused on the decedent's intent to treat the claimant as a natural or legally adopted child and not on the decedent's intent to adopt the claimant. Because the purpose of the doctrine of equitable adoption is to effectuate equitable inheritance where an individual dies intestate, it makes sense that a decedent's intent to adopt should govern the analysis. The intestacy statute's purpose is to make such a will for an intestate as he would have been most likely to make for himself. An analysis of the decedent's intent to adopt examines whether the decedent intended to adopt a claimant, and as a result, attempts to achieve the outcome as to inheritance that the decedent would most probably have wanted to achieve.

h. The holding is limited to the circumstance of this case — inheritance from an intestate decedent who died with no surviving spouse, registered domestic partner, surviving issue, parents, siblings, or grandparents — where a claimant, such as a stepchild, can satisfy the two-part test adopted. An equitably adopted child cannot inherit through an adoptive parent from relatives of the parent, and cannot benefit from better inheritance tax rates for direct lineal descendants. These holdings help to ensure that the doctrine of equitable adoption does not infringe on the importance and impact of statutory adoption.

i. Ms. Ellis must prove by clear and convincing evidence, in the manner prescribed, the Decedent's intent to adopt her and that the Decedent acted in a manner consistent with that intent. The standard sets a high bar, and for good reason. A claim for equitable adoption is based on a relationship with a person who can no longer testify as to intent, and because the claim rests on the principle of inherent justice, the need for justice should appear clearly and unequivocally from the facts. Although the standard of proof is high, given the nature of the intent and relationship being asserted, the standard should not pose too great an obstacle to valid claims of equitable adoption.

D. *Matter of McGuire,* 2025 N.Y. App. Div. LEXIS 4459; 2025 NY Slip Op 04398; 2025 LX 243115 (Supreme Court of New York, Appellate Division, Fourth Department 2025). Surrogate's courts have the power to compel a DNA test for the purpose of determining a person's parentage, even in cases that do not involve intestate succession, and surrogate can compel a sibling to undergo a DNA test.

1. Francis J. McGuire ("decedent") died on July 7, 2020. He was survived by, inter alia, seven known children, six of whom — respondents in this proceeding — are biologically related to him. At the time of his death, decedent had a will. The will contained no specific bequests to his children. Instead of any specific bequests, decedent left respondents the family business, inter alia, which passed outside of the will. In March 2021, Surrogate's Court issued a decree granting probate of decedent's will and issued letters testamentary to the executors of the estate. All respondents except for one waived process and consented to probate of the will.

2. In January 2023, petitioner filed a notice of claim with the Surrogate, alleging that she was one of decedent's biological children and, consequently, that she was a distributee and beneficiary of decedent's estate. As a result, she asserted a right, as a possible distributee and beneficiary, to participate in and object to the underlying probate proceeding and to request a construction hearing with respect to decedent's will. Petitioner alleged that she was decedent's biological child on the basis that her mother had an affair with decedent around the time petitioner was conceived. Petitioner first discovered that decedent might be her biological father when, in 2021, she submitted her own biological samples to an online ancestry company while researching her family background. Although petitioner's mother initially denied that decedent was petitioner's biological father, she eventually admitted her prior affair with decedent to petitioner, and suggested that it was possible that he could be her biological father.

3. When decedent's estate failed to acknowledge petitioner's notice of claim, petitioner sought, by order to show cause, to compel, a known child of decedent's — i.e., one of the respondents — to submit to DNA testing to confirm petitioner's parentage. All respondents, except respondent Kelly McGuire, opposed the relief requested by petitioner, arguing, among other things, that the Surrogate lacked the authority to issue the requested relief, that DNA testing was unnecessary where, as here, there was essentially no way for petitioner to inherit from decedent's estate, and that the requested relief was not appropriate inasmuch as respondents' privacy interests outweighed petitioner's interest in ascertaining her true parentage.

4. Respondents — except for respondent Michael J. McGuire — appealed from an order granting petitioner's application to the extent it sought to compel nonconsensual DNA testing of one of respondents to confirm whether decedent is petitioner's biological father. Subsequently, all respondents moved to preclude any of the DNA testing requested by petitioner, and for leave to reargue and renew the Surrogate's order granting petitioner's application for DNA testing. Petitioner opposed respondents' motions. Respondents appealed from an order that granted their motions insofar as they sought leave to renew and reargue petitioner's application for DNA testing and, upon renewal and reargument, adhered to the prior determination granting petitioner's request, and denied respondents' motions insofar as they sought to preclude any DNA testing of them.

5. On appeal, the appellate division affirmed on the following grounds:

> a. The Surrogate relied on EPTL former 4-1.2 (a) (2) (C) — i.e., the version of that section of the statute applicable at the time of decedent's death in 2020 — to authorize the nonconsensual testing of respondents' DNA to confirm petitioner's parentage. That provision, governing inheritance by nonmarital children, provided, in relevant part, that "[a] nonmarital child is the legitimate child of [their] father so that [they] and [their] issue inherit from [their] father and [their] paternal kindred if

. . . paternity has been established by clear and convincing evidence, which may include, but is not limited to . . . evidence derived from a genetic marker test, or . . . evidence that the father openly and notoriously acknowledged the child as [their] own."

b. On its face, the plain language of that provision supports the assertion that petitioner here could seek to establish her parentage through resort to DNA testing. There is no dispute that decedent did not know that petitioner was his child, and therefore there can be no evidence of decedent openly and notoriously acknowledging her as one of his children.

c. Thus, resort to DNA testing was effectively the only way petitioner could establish that she was a nonmarital child of decedent. If petitioner could establish that she was decedent's biological child and, consequently, that she had a right to inherit from him as a nonmarital child, then she would be a distributee and a necessary party to the probate proceeding, and would also have standing to challenge the will.

d. EPTL 4-1.2, in both its former and current forms, is found in the article of the EPTL that governs intestate succession. Several other provisions of the EPTL, including many that operate outside of the context of intestate succession, expressly import the definition of a nonmarital child set forth in EPTL 4-1.2 to help ascertain parentage of a child. The very text of the EPTL itself presupposes that the definition of nonmarital children contained in section 4-1.2 applies in the context of decedents who die with a will. The relevant practice commentaries also express the understanding that EPTL 4-1.2, to the extent it permits a surrogate's court to compel a DNA test, applies without regard to whether a decedent died intestate or not. In short, various EPTL provisions, and the manner in which they are structured and cross-referenced, support the conclusion that the EPTL's grant of power to permit a surrogate's court to compel a DNA test is not limited solely to cases involving intestate succession.

e. Although the statute did not expressly state that surrogate's courts have the power to compel a DNA test for the purpose of determining a person's parentage, they do have the jurisdiction to grant such relief pursuant to that provision based on their unique placement in the constitutional structure of the judiciary of New York State. The New York State Constitution provides, among other things, that "[t]he surrogate's court shall have jurisdiction over all actions and proceedings relating to the . . . administration of estates and actions and proceedings arising thereunder or pertaining thereto." It further provides that "[t]he surrogate's court shall exercise such equity jurisdiction as may be provided by law." The grant of equity jurisdiction to surrogate's courts also extends to the shaping of relief by such a court. Consequently, consistent with the fact that EPTL former 4-1.2 (a) (2) (C) allowed for parentage to be established through a genetic marker test, it follows that, in shaping the relief available to petitioner, the Surrogate here has the authority, via her aforementioned equity jurisdiction, to compel the performance of such a test in a case such as this one.

f. The Surrogate here did not lack the power to compel a sibling to undergo a DNA test under the circumstances. Although there is no express statutory authority permitting a surrogate's court to compel DNA testing of a sibling, by the same

token there is no statutory language expressly prohibiting such compulsory testing. When it amended the statute in 2010, however, the legislature removed the language limiting DNA testing to material recovered from the putative father during his lifetime, and replaced it with unrestricted language allowing parentage to be established by any genetic marker test. That alteration demonstrated the legislature's intent to broaden the scope of permissible persons from whom DNA could be collected to establish the parentage of a nonmarital child. The legislative history confirms that point. The Surrogate properly determined that the DNA testing authorized by EPTL former 4-1.2 extends to DNA samples from purported siblings to establish the parentage of a nonmarital child, such as petitioner here. Indeed, we note that there have been several cases where courts have granted the application of a movant seeking genetic testing of siblings to ascertain parentage. To the extent respondents contend that the Surrogate lacks the power to compel them to undergo DNA testing on the basis that they are nonparties in the underlying probate proceeding and have not placed their genetic condition in issue, that contention is unpreserved for review.

g. Based on the record before us, the Surrogate did not abuse her discretion in granting the limited relief requested by petitioner — i.e., DNA testing of one of respondents for the sole purpose of establishing whether decedent is petitioner's biological father. In making such a determination, courts have considered whether a request for DNA testing in an inheritance case is practicable and reasonable under the totality of the circumstances. Factors considered by the courts in making that determination include: (1) whether evidence presented demonstrates a reasonable possibility that the genetic testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of conducting the genetic testing, including whether the sample is readily available; (3) whether there is a need to exhume the decedent's body or obtain the sample from a nonparty; (4) whether appropriate safeguards were, or will be, taken to ensure the reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and or their family members.

h. Here, although the Surrogate did not expressly identify the factors on which she relied, in granting petitioner's application for DNA testing, she properly considered the aforementioned factors relevant to that determination. With respect to the first factor, petitioner's submissions amply raised a reasonable possibility that genetic testing of respondents would establish that decedent was petitioner's biological father. Specifically, in addition to her own affidavit setting forth the basis for her allegation that she is decedent's biological daughter, petitioner submitted an affidavit from her mother, who was able to substantiate specific averred facts to establish the strong possibility that decedent is petitioner's biological father — i.e., by affirming that she had a sexual relationship with decedent around the time petitioner was conceived. Additionally, petitioner produced evidence from the online ancestry website to which she submitted her own DNA samples, which also supported her assertions that she is biologically related to decedent. In other words, in support of her application, petitioner did more than simply assert, without corroboration of her self-serving assertions, that decedent was her biological father. Indeed, this is not a case where evidentiary support for such an application is lacking. Here, the Surrogate was careful to grant

the relief in question only after determining that, while petitioner's evidence did not, of course, conclusively establish parentage, there is at least a reasonable possibility based on the evidence presented that the requested DNA testing will in fact establish parentage.

i. There is nothing to suggest that petitioner could obtain a biological sample from decedent, rendering it necessary to obtain a sample from respondents, the putative biological siblings. There is no evidence that any of decedent's tissue was preserved, and petitioner would not likely succeed in any attempt to exhume his remains for such testing. Additionally, in granting petitioner's application, the Surrogate noted that obtaining a saliva sample from one of respondents would be a simple, noninvasive method of obtaining a DNA sample to establish petitioner's parentage.

j. The Surrogate properly considered the privacy concerns of decedent and his family members when it granted petitioner the requested relief. The Surrogate specifically considered respondents' privacy rights, and balanced them against petitioner's interest in ascertaining her parentage. The Surrogate noted that petitioner's other submissions — i.e., the affidavits and results from the online ancestry website — had already lifted the veil of privacy on the subject of whether decedent had an affair with petitioner's mother, resulting in petitioner's birth. Moreover, with respect to respondents' privacy interests, the Surrogate considered the privacy factors relevant to the specific relief sought by petitioner in her application — i.e., compelling a DNA test for the sole purpose of confirming whether decedent was petitioner's biological father.

k. Contrary to the assertion of respondents, petitioner does not seek broad, unspecified DNA testing of respondents. Rather, she sought the DNA testing of respondents for the sole purposes of identification. Genetic testing of identity only has been described as "ubiquitous," scientifically accepted, and reliable, and is not considered to be extreme or intrusive. In contrast, unspecified genetic testing implicates different privacy concerns due to the risk that it could reveal a "vast amount of personal and private information" ranging from "familial relationships . . . to the potential discovery of genetic diseases, conditions, and predispositions." Here, inasmuch as petitioner only requested DNA testing of respondents for purposes of establishing whether decedent was her biological father — i.e., for identity purposes — many of respondents' asserted privacy concerns, which they contend were not considered by the Surrogate, simply do not obtain here.

l. Once petitioner has obtained a DNA sample from one of respondents for purposes of determining whether decedent is her biological father, the Surrogate must take the necessary steps of ensuring that respondents' privacy concerns remain protected, and that any court-ordered genetic marker testing does not exceed the scope of relief granted to petitioner. It is true enough that, generally, no person shall perform a genetic test on a biological sample taken from an individual without the prior written informed consent of such individual. Nonetheless, such genetic tests may be performed without the consent of the person who is the subject of the tests pursuant to an order of a court of competent jurisdiction.

E. *Bullock v. Swan*, 2025 Ark. App. LEXIS 621 (Court of Appeals of Arkansas, Division Two 2025). If testator mentioned children, specifically or as a class, the pretermitted heir statute does not apply.

1. Richard Lee Bullock, Ecil Swan, and Marita Jane Swan are among the natural children of Alice M. Byrd. Alice executed a will in 2015 that devised all her property to Ecil and Marita. After Alice's death, Richard petitioned to take an intestate share of her estate as a pretermitted child.

2. Alice bore six children. She gave her daughter Janet up for adoption at birth. One son had three children that Alice legally adopted. Another son, Logan, predeceased her, leaving three children behind. Alice named all these children and grandchildren in her will. Most names are not important; in the following excerpt from Alice's will, the court replaced Janet with "GIVEN UP," each adopted grandchild with "ADOPTED," and each of Logan's children with "GRANDCHILD" for ease of communication: "I declare that I have eight children now living whose names are Richard Lee Bullock, Marita Jane Swan, Randi Scot Swan, Ecil E. Swan, GIVEN UP, ADOPTED, ADOPTED, and ADOPTED. I have one deceased child, Logan Swan. All references in this Will to "my child or children" includes only the above referenced children. I specifically leave nothing to GRANDCHILD, GRANDCHILD, GIVEN UP, and GRANDCHILD in this Last Will and Testament."

3. The will then provides that either Ecil or Marita would take six specific categories of property and split the residue of the estate.

4. Richard conceded he is "mentioned" in the will excerpt above. But Alice did not devise anything to him (as she did for Ecil and Marita) or specifically devise nothing to him (as she did for Janet and the grandchildren). He argues she thus "omit[ted] to . . . provide for" him by expressing what he would take, which he argues was a second requirement to avoid the pretermitted-child statute, which reads as follows: "If, at the time of the execution of a will, there is a living child of the testator whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child."

5. The trial court denied his claim and the court of appeals affirmed on the following grounds:

a. Richard's efforts on appeal are nothing short of heroic. But he needed more: His argument would invert the construction the state supreme court has given the pretermitted-child statute for more than a century.

b. From 1837 to 1949, a predecessor statute applied, by its terms, "[w]hen any person shall make his last will and testament, and omit to mention the name of a child, if living." Then, at least, it imposed just one requirement: to mention the child in the will — and not necessarily by name, despite that "mention the name" language. The supreme court held that "[a]ny allusion to the child" that showed the testator had not forgotten him was enough to avoid the statute. So virtually any reference would do. What was intended by the statute was to declare intestacy as to children of a testator, and thus provide compulsory provisions for them, unless the testator expresses a contrary intention in the will toward the children. Such an intention may be expressed by the testator in his will by providing for them as a class without naming them separately, or by naming them

without providing for them. Even if mentioning a child's name was not necessary to avoid the old statute, it was sufficient.

c. In 1949, the General Assembly consolidated the pretermitted-child statute with a neighboring one, which provided that a testator would be deemed intestate as to children born after he made a will if he died leaving them "neither provided for nor in any way mentioned" in it. In the new statute, the General Assembly used the mention-or-provide-for language from the old afterborn-child statute in the pretermitted-child part too: "If, at the time of the execution of a will, there is a living child of the testator, or living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child or issue."

d. Richard argued a change in statutory language must import a change in meaning. Often so. But this was just one of hundreds of statutes enacted and repealed as part of the modern Probate Code. The General Assembly was just making the new pretermitted-child statute read as the supreme court had interpreted the old one. By then, there was not much daylight between what the afterborn-child statute and the pretermitted-child statute required to avoid intestacy. The afterborn-child statute had never purported to require a testator to "mention the name" of a child. (For a good practical reason: that statute applied to children who had not been born when the will was made, and presumably did not yet have names.) Also, despite the words "mention the name" in the pretermitted-child statute, the name of an existing child was not needed either.

e. The consequence of intestacy is introduced by the condition that there is a living child "whom the testator shall omit to mention or provide for, either specifically or as a member of a class" in the will. Richard argues that the word "or" means the condition is triggered if the testator shall "omit to mention" or "omit to provide for" the child; if one is missing, the condition is met. That would make the words "mention or provide for" mean "mention and provide for" — which would have been the straightforward [way] to express that both were required. More importantly, that is not the end of the condition: the testator must omit to mention or provide for the child "either specifically or as a member of a class."

f. Whatever merit Richard's argument might have in the abstract, for two generic verbs in this construction, falls to the surplusage problem created by applying it to the verbs used. If to "provide for" a child in a will means saying what (if anything) he takes, we fail to see how a testator could "provide for" the child — particularly, "specifically" — without "mention[ing]" him in the process. If to "mention" a child is not an alternative way to avoid intestacy, in other words, what role could the word "mention" play in the section?

g. The statutory language simply cannot bear the interpretation Richard gives it. The statute does not permit children to take against the will simply because the testator failed to make provision for them in the will; if the testator mentioned the children, specifically or as a class, the statute does not apply and the children are not pretermitted.

XXXI. CONSTRUCTION & CONDITIONS

A. *In re Est. of Vuong,* 2025 N.J. Super. Unpub. LEXIS 1145; 2025 LX 157010 (Superior Court of New Jersey 2025). A will may be construed to create a testamentary trust even if the word "trust" does not appear within its four corners so long as the evidence reveals that to be the testator's probable intent.

1. Quy Dinh Vuong ("Peter") and his wife, Nghia Thi Le, and most of their six children made their way to this country in 1975 shortly before the fall of Saigon that April. They passed on prior opportunities for some to leave because no one would go unless all could go. Only when arrangements were made to get everyone out did the entire family finally depart their homeland; most eventually settled in Red Bank. So, it's tragic that the two disputants — the decedents' oldest child, defendant Thu M. Ngo, and her third younger brother, plaintiff Chinh Minh Vuong — once very close, are now so much at odds. Indeed, it is not only tragic but ironic that, while motivated by family unity, loose language in Peter's Will — the meaning of which has been so forcefully debated throughout this litigation and during the recent three-day bench trial — has been the chief cause for this sad rift in a once-close family.

2. On May 2, 1984, Peter and Nghia executed Wills drafted by a now-deceased Red Bank attorney. They never made newer Wills by the time Peter died on May 20, 2011. Nghia died eight months later, on January 15, 2012. Some — indeed, most — of the facts relevant to the meaning of their Wills and Thu's management of the estates aren't disputed to the point the court agrees with the statement in Thu's written summation: "For a heavily litigated matter, there are, surprisingly, few significant disputes of fact."

3. Peter's Will, like Nghia's, named Thu executrix. Peter directed in his Will's third article that, after the payment of all debts, "the rest, residue and remainder" of his property should pass to Chinh. The provision's very next sentence states that Peter "kn[e]w" Chinh "will carry out my instructions for the care of [Chinh's] mother, brothers and sisters." Chinh argues this sentence "constitutes mere ethereal musings," while Thu argues this sentence reveals the testators' probable intent to place the residuary estate into a trust.

4. Peter and Nghia died in 2011 and 2012, respectively, yet Thu only conveyed to Chinh part — albeit a large part, approximately two-thirds — of Peter's residuary estate, holding back the lesser remainder, but without any posing claim that Chinh had the duty to create a trust that she now claims was suggested by the "instruction" language of Peter's Will. Chinh commenced these actions seeking accountings from Thu regarding her handling of both estates in July 2019, in response to which Thu filed her counterclaims seeking a determination that Chinh hold the property passing through both Wills in trust.

5. A judge granted a partial summary judgment in Chinh's favor, essentially concluding that the carry-out-my-instructions language in Peter's Will imposed only a moral obligation. The judge denied Thu's motion to file an amended counterclaim and ordered her to provide an accounting; the judge also then held that Thu had considerable discretion about the timing of the distribution of all or part of the remaining residuary estate. In addition, the judge denied Chinh's motion for summary judgment on his claims of fraud, conversion, unjust enrichment, and breach of fiduciary duties.

6. After the judge retired, both parties sought reconsideration. The court granted reconsideration and held that, contrary to the prior judge's determination, the true or probable intent underlying the carry-out-my-instructions language in Peter's Will required

submission of extrinsic evidence. At trial, Chinh provided his own testimony as well as that of an expert to support his challenges to Thu's accounting. Thu testified, as did her husband, Fred Ngo, a certified public accountant who prepared the accounting in question. The court also received the videotaped de bene esse depositions of the parties' youngest sibling, Ngoc, as well as Chinh's son William, and Stephen Oppenheim, Esq., who provided to Peter a rough draft of a new Will that was never executed because Peter died the day the draft was mailed to him, and who provided advice to Thu during her administration of the estates.

7. The court held that Peter's Will created a trust on the following grounds:

a. The construction of wills is governed by the doctrine of probable intent. To ascertain that intent, courts are required to consider more than a Will's isolated sentences or phrases. A testator's probable intent may, in fact, be divined by inserting omitted words, by altering the collocation of sentences, or even by reading the Will directly contrary to its primary signification. The so-called "plain meaning" doctrine is not a controlling principle in New Jersey in the construction of wills. Instead, courts must effectuate the testator's probable intent to accomplish what would have been done had the testator envisioned the present inquiry, and, may, in undertaking that task, look beyond the words and phrases in the Will and consider extrinsic evidence about the surrounding circumstances, including the testator's own expressions of intent outside the Will, to give life to the testator's probable intent rather than simply fall back on a literal reading of the instrument.

b. A will may be construed to create a testamentary trust even if the word "trust" does not appear within its four corners so long as the evidence reveals that to be the testator's probable intent.

c. Ascertaining Peter's and Nghia's probable intentions requires some appreciation of Vietnamese culture (or, more accurately, Peter's understanding of Vietnamese culture). The elder male in the family is in charge; women are subservient. Thu acknowledged this and explained in her testimony that a Vietnamese woman is raised with an understanding that she must be obedient to her father, to her husband, and to her son, in that order. For that reason, no one has argued that the court should seek out Nghia's intentions when she also left her property to Chinh because she expressed her knowledge that she "knew" Chinh would follow Peter's instructions. Her intentions were Peter's. Chinh similarly testified — and credibly in this regard — that his father's word was final and that he would never question his father's decision about subjects like the disposition of the residuary estate.

d. Chinh testified, for example, how on January 1, 2011, when hospitalized, Peter sent others out of the room and dictated instructions to Chinh. Thu's role was to go home and cook for the family while Chinh heard his father's thoughts and wishes about how to proceed. When Chinh returned to his father's home after the hospital visit, he turned over his handwritten notes to Thu, who created a typed version.

e. Peter's view of the subservience of women — whether enlightened or not, or whether consistent with Vietnamese customs or not or, for that matter, whether

it is even fair to generalize about Vietnamese customs any more than anyone else's customs — is something about which all the witnesses agreed. With that, Peter's probable intentions come into even sharper focus. The court is completely convinced that Peter intended, by way of article third of his Will, that the residuary estate he was leaving to Chinh was not for Chinh to do as he pleased but for the benefit of his existing family and those yet to come. The reason he directed this distribution to Chinh was because he came to view Chinh, even though he wasn't the oldest, as the next male leader of the family and the person best equipped to appreciate his intentions and instructions and to carry them out. At the same time, he equally trusted Thu, whose role in the family as the oldest child led to her nickname "Ma Thu," to assist in this regard by naming her executrix and imbuing her with broad powers. Little did Peter know that this arrangement would cause the friction that has led to this bitter struggle.

f. The court's finding about Peter's probable intentions is further supported by other evidence and circumstances. Soon after Peter's death, Chinh went to Peter's safe deposit box, looked in, and found within it a box that contained the Will and — he claimed — a note to him that all inside was his (Chinh's). As was this family's custom — that Thu was the family factotum — Chinh turned over the box with the Will, jewelry, and other things of value to Thu not as if it were hers but only in the sense that it was for her to care for pending further instruction.

g. In keeping with this dynamic, as well as the advice of counsel, Thu probated Peter's Will, and later Nghia's Will, and was appointed executrix of both. Thu, in large part, later transferred a large percentage of Peter's probate assets to Chinh, as well as what would appear to be the only probate asset in Nghia's estate: Peter and Nghia's marital home on Chestnut Street in Red Bank. But she didn't transfer everything, and years went on without any disturbance in this status quo.

h. It was only later in May 2019, when Thu utilized estate funds to repair a bathroom in the Chestnut Street home, about which Chinh was apparently disturbed — perhaps because this served to benefit his younger brother for whom Chinh had low regard and who was living there, or perhaps because it had been done without his knowledge, or both — Chinh felt compelled to seek the court's intervention and obtain a turnover of the remaining assets to him. This prompted Thu to respond and to assert, apparently for the first time, that Chinh's claim to outright ownership of Peter's residuary estate and the property that passed pursuant to Nghia's Will was mistaken and that there were limitations on the use of all that property.

i. So, despite the length of time that elapsed from the dates of their parents' deaths in 2011 and 2012, until the commencement of litigation in 2019 — long but explicable through an understanding of the closeness of the family at the time and the dysfunctional impact caused by Peter's unartful Will — the court was called on to alter the impasse that constitutes the status quo and determine what Peter probably meant to accomplish by way of his 1986 Will. In pursuing his probable intent, the court has both the Will itself, as well as Peter's 2000 written instructions, which were found with his Will in the safe deposit box referred to above, the way he viewed family relations as also explained above, and his later discussions with Stephen Oppenheim, Esq., who Peter retained late in his life for

the purpose of preparing a new Will that would include a trust for the perpetuation of the Vuong family. All this reveals Peter's original and probable intention to create a trust.

j. The critical sentence was not a suggestion or a recommendation. It was long ago established by and understood in our jurisprudence that even less forceful wording than Peter's would be sufficient to support a finding of Peter's desire to create a trust. Here, Peter stated in his Will that he "knew" Chinh would follow his instructions; that has the sufficient imperativeness that makes the decision far easier than a statement that a testator "hoped" someone would heed a suggestion.

k. To accept Chinh's position would require this court to assume Peter intended to disinherit his wife of more than 60 years as well as his other five children. There is nothing in the record that could possibly lead this court to that conclusion. Peter intended that his wife and his children would all reap the benefit of what he had left behind. The very language of Peter's Will — that he knew Chinh would do what's best for his mother and siblings — as well as everything the extrinsic evidence revealed — there being absolutely no evidence that Peter wanted to benefit Chinh alone — confirms the natural human tendency of providing for one's family that should not be ignored in ascertaining Peter's probable intent. If all the court had was the Will's language, and the natural tendencies of testators to provide for the immediate family being left behind — a particularly strong interest that motivated Peter — the court would still reach the conclusion urged by Thu about the limitations imposed on Chinh's claim to outright ownership.

l. For example, Peter provided written instructions about how Chinh was to go about fulfilling the obligation imposed. Peter was conveying his intentions about the Will through the Chi Thi document. The two documents were kept together in a safe deposit box. It seems odd, if the Chi Thi document merely contained Peter's musings or hopes for the future as Chinh argues, that these instructions would have been kept together with the Will in a safe place. In the Chi Thi document, Peter expressed an intent to create a "family trust fund" for the purpose of encouraging ancestral worship, good education, marriage, and progeny, as well as "building unity among family members at large." Because of where these instructions were kept, Peter intended, in that way, to make known to Chinh how he was to utilize the residuary estate. This is further suggested by Peter's communications with a Wells Fargo broker in 2011, shortly before his death, about the formation of a trust. And this was revealed again when Peter met with Stephen Oppenheim, Esq., to prepare a new Will that would clarify his desire to turn the Chestnut Street property into a lasting shrine and meeting place for Vuong family members. Those discussions got to the point where attorney Oppenheim drafted and sent a Will for Peter to consider; sadly, this draft was forwarded to Peter on May 20, 2011, the day Peter died, and no further action could be taken. But all this extrinsic evidence provides insight into Peter's state of mind and what he probably intended in his 1986 Will and guides this court's finding that the residuary estate was to go not to Chinh alone but to Chinh in trust for the purposes broadly suggested in the Chi Thi document.

m. Chinh's position that he alone is the beneficiary of all his parents' probate assets with no strings attached focuses almost exclusively on an August 11, 2011 letter written by attorney Oppenheim to Thu about the meaning of the provision in question; he wrote: "[Peter] intended to impose a moral obligation on [Chinh] to carry out those instructions, not an enforceable legal obligation, perhaps because [Peter] wanted [Chinh] to exercise his judgment about the use of the estate for [Nghia] and the others instead of creating enforceable rights."

n. To be sure, this opinion comes from a well-respected maven in the field, and his opinion that the Will imposed only a moral obligation is not easily discarded. But the conclusion reached here is supported by what the attorney went on to observe when he said that the Will's language suggested Peter "wanted" Chinh "to exercise his judgment about the use of the estate" for the family. So this opinion — if accepted at face value — lends support to Thu's position that the residuary estate was for the benefit of the family, not Chinh alone.

o. Peter intended that his residuary estate — and likewise, albeit derivatively, Nghia intended that her estate — be used for the benefit of the family and the other purposes loosely suggested by the 2000 instructions. This is, in fact, further buttressed by the draft 2011 Will that Peter was never able to further pursue. What Peter may have been trying to do during his last days — even if it never reached a final stage of the Will's execution — reveals his intention to have the assets passing through the Will to go into a trust to be used for family-related purposes.

p. Having reached the conclusion that Peter's probable intention was that Chinh would hold the residuary estate in trust and that Nghia's probable intention, derivative of Peter's, was that the Chestnut Street home would also be held in trust, the court must next determine whether Chinh should be the steward of this trust. That poses a difficult question because, without a doubt, Peter intended via his 1986 Will that Chinh be the trustee. But Chinh's utter unwillingness to recognize that he was to hold the property in trust — that it was not his personal property alone — to the point of generating hostility among himself and the trust's beneficiaries, has convinced the court that he should be disqualified from taking on that role. The record is replete with Chinh's statements that the property was his alone, and his intentions with regard to his family members were not even worthy of discussion. He proved to be the very picture of intractability. No impartial viewer or listener of the parties' testimony would doubt that Chinh's imperiousness and his inability to consider that his parents imposed limitations on his use of the property, eliminate him as an appropriate trustee of the trust that Peter and Nghia intended to create. They both made Thu the executrix of their estates; she is the oldest sibling, and all her siblings had — at least until these suits were filed — placed great trust in her. The court's only hesitancy in this regard is, once again, the emphasis in this family, and their view of what their culture requires, that a male should run things. Nevertheless, their probable intentions clearly would favor a family member over a non-family member, and no other male sibling would appear to be as suitable as Thu, whose husband Frank Ngo, is also available to her to help her with any accounting issues. As a result, the court's judgment will appoint Thu as the trustee of the trust to be created for the purposes generally outlined in Peter's 2000 instructions.

q. In light of the court's findings and conclusions, an instrument must be created identifying the intended trust's purposes as well as other provisions normally included in such a document. It should be prepared as soon as practicable. Thu shall either utilize present counsel or retain other counsel for the purpose of creating such an instrument as the means of guiding her handling of the trust property. If the consent of all intended beneficiaries cannot be obtained, Thu may seek, in a separate action, the court's approval of a proposed trust instrument.

r. Much of the estates' assets, which the court has now held should have been held in trust, were turned over to Chinh. The Chestnut Street property was deeded to him and much of the other liquid assets were also turned over to him. Today's judgment obligates Chinh to (a) transfer the Chestnut Street property to Thu, who will hold it in trust, (b) transfer all other property that he received in prior distributions, and (c) provide an accounting of what was turned over to him from the time of his receipt until now.

B. *In re Townson,* 231 N.Y.S.3d 786 (Surrogate's Court of New York, Monroe County 2025). The failure in a will or trust to specifically refer to the QTIP trusts, or the Internal Revenue Code or state statutes, leaves the fiduciary of the estate the authority to seek contribution from the trusts for the payment of estate taxes.

1. Petitioners Lisa C. Townson ("Lisa") and Winslow W. Townson ("Winslow") are the biological children of Schuyler C. Townson ("Schuyler"). They are remainder beneficiaries of two Qualified Terminable Property ("QTIP") trusts established pursuant to their father's Will. The Respondents are James S. Reed as the executor of the estate of his mother Ann Townson, Schuyler's wife. Schuyler died in 1994, survived by his wife Ann and by his children Lisa and Winslow. Ann was not the mother of Lisa and Winslow. JPMorgan Chase is also a respondent, as co-trustee of the QTIP trusts.

2. Schuyler's Will provided that the two trusts were to be established for the benefit of his wife Ann, and for the benefit of his children Lisa and Winslow, and partially for the benefit of Ann's four biological children. Of the two QTIP trusts, both established after Schuyler's death by an election on the estate's federal estate tax return, one was a "GST-Exempt" QTIP trust and was funded with $1,000,000.00. The remainder beneficiaries of that trust are Lisa and Winslow, in equal shares.

3. The second trust, a "non-GST" QTIP trust, was funded with $8,782,465.11. The remainder beneficiaries of the non-GST QTIP trust are Lisa Townson (one-third), Winslow Townson (one-third), and Ann's four biological children (collectively one-third).

4. Schuyler's Will named his wife Ann and Chase Lincoln Bank N.A. (predecessor to JP Morgan Bank) as co-trustees of both QTIP trusts. From 1994 to September 2023, she collected all income from the trusts.

5. In 2022, an attorney drafted Ann an updated Will, which she executed on September 2, 2023. She included in the Will a clause apportioning the taxes to be paid upon her death as between her estate and the QTIP trusts. It reads as follows: "I direct that my Executor pay out my residuary estate, without apportionment, all estate inheritance and like taxes imposed by the government of the United States, or any state or territory thereof, or by any foreign government or political subdivision thereof, in respect to all property required to be included in my gross estate for estate or like tax purposes by any such governments,

whether the property passes under this Will or otherwise, without contribution by any recipient of any such property."

6. Ann died in September 2023. She was survived by son James S. Reed (the executor of her estate) and his siblings, all Ann's biological children from a prior marriage. James, as executor of the estate, retained the drafting attorney to represent the estate. In December 2023, counsel sent a memorandum directing the trustee of the QTIP trusts to pay more than $4 million in federal and state taxes then due, notwithstanding the language in the Will regarding tax apportionment. This will construction proceeding followed. The children of Schuyler sought to have Ann's biological children, the beneficiaries of her residuary estate, pay the entire tax burden incurred by the estate and the trusts.

7. The surrogate held the QTIP trusts were subject to payment of estate taxes on the following grounds:

a. Apportionment of an estate's state and federal tax burden as between the residuary estate and marital deduction trusts is the favored outcome and the preferred policy choice. The estate is "entitled" to apportion the state tax burden between the residuary estate and the marital deduction trusts ("QTIP" trusts), but not "if the decedent specifically directs otherwise by will."

b. Similarly, the Internal Revenue Code ("IRC") § 2207A (a) (1) provides that the "decedent's estate shall be entitled to recover" from the QTIP trusts taxes attributable to the assets in the trusts but "may otherwise direct" if the decedent in his Will "specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property."

c. The House of Representatives Report accompanying the amendment of IRC § 2207A in 1997 states that "The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by a specific reference to QTIP, the QTIP trust, section 2044, or section 2207A)" and that " . . . a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery.

d. "Specifically" has been held to mean an express reference to the QTIP trusts or to the provisions of the Code and/or the EPTL referenced below.

e. Prior to August 5, 1997, Internal Revenue Code § 2207A (a) (2) provided for apportionment unless "the decedent otherwise directs by will." Cases decided under this decidedly less-specific language also held that reference to the QTIP trusts of the statutory provisions was required to waive tax apportionment. The basis for requiring express mention of a QTIP trust is the presumption that most testators do not intend to apply a general tax exoneration clause to QTIP property. The amendment of EPTL 2-1.8 is a similar attempt to protect the testator's presumed intent and prevent inadvertent alterations of tax apportionment clauses.

f. The issue here then is whether the language in Decedent's Will regarding tax apportionment is "specific" enough to comply with the statutory requirement of a specific direction found in EPTL § 2-1.8 (d-1) (1) (A), and a specific "indication of intent" (Internal Revenue Code § 2207A (a) (1)).

g. It is not. Where a waiver of apportionment against a QTIP trust is sought, EPTL § 2-1.8(d-1) (1) (A) and Internal Revenue Code § 2207A (a) (2) govern the result and mandate strict compliance with the direction to "specifically direct otherwise." The failure in a will or trust to specifically refer to the QTIP trusts (and/or the Code and/or EPTL sections) leaves the fiduciary of the estate the authority and the right — the entitlement, to use the statutory language — to seek contribution from the trusts for the payment of taxes. The language in decedent Ann Townson's Will is one of the formbook examples of tax exoneration clauses that evolved before there were QTIPs. The post-ERTA draftsman, on the other hand, is advised to use totally different language to apportion QTIP taxes. Where the will or trust lacks the language (perhaps not explicitly but certainly as implicitly as can be) required by the statutes, the intent of the testator is not the primary issue. The determinative factor is whether the tax exoneration clause references the QTIP trusts and/or the statutory language by which the QTIP trusts were created.

h. To the extent that intent is an issue at all, courts have considered whether directing that the residuary estate pay the entire tax would result in an obvious inequity. Here, if the trusts were exonerated from paying any of the tax, Ann's biological children, the beneficiaries of the residual estate, would have to pay an increased amount of tax, thus negatively impacting the natural objects of her bounty, something she was not likely to do. Exactly how much the record does not state. Ann's children would still receive something, because collectively, they are one-third beneficiaries of the QTIP trusts. However, the $4 million tax, should it come out of the residuary estate (to which all of Ann's children are entitled), would likely be a large financial hit.

i. Of course, it is an axiom of estate and trust practice that will construction prioritizes the testator's intent and that the primary objective in construing a will, of course, is to ascertain the decedent's intent so that the will's purpose may be effectuated. Intent should be discerned, if possible, from a reading of the will itself as an entirety. Here, however, federal law created the tax-planning entities known as QTIP trusts, and federal law has dictated the circumstances under which tax apportionment can be exercised or waived, a scheme New York adopted. When the federal and New York statutes require words of specific indication of intent and (in the case of the Code) a reference to the subchapter, "magic words" referencing the QTIP trusts and/or the Code provisions are exactly what is required.

C. *McCurry v. Kimmel,* 2025 Conn. Super. LEXIS 2449 (Superior Court of Connecticut, Judicial District of Ansonia-Milford, at Derby 2025). The phrase "survivor to take all" is redundant survivorship language that does not negate Connecticut's antilapse statute.

1. The plaintiffs, Alexander McCurry, Kathleen Broad, and Susan Asplin, filed a one-count Complaint, dated January 30, 2024, against the defendant, Eugene Kimmel ("Kimmel" or "defendant"), for the purpose of appealing an Order of the Probate Court contesting the decision rendered for the distribution of the Estate of Janet E. Moultis ("Decedent"). The Decedent was of Milford, Connecticut, and passed away on November 29, 2022. The Decedent passed away with a will executed in 1974. The Decedent's will bequeathed the

whole of her estate and residuary to her spouse, Robert Moultis. The will also described how her estate would be distributed in the event of her spouse predeceasing her.

2. The will provided as follows with regard to the Decedent's personalty: "Should my dearly beloved Husband, ROBERT MUCHAWL MOULTIS, and myself meet death in a common disaster or simultaneously or where there shall be no evidence to indicate the priority of death, or should my husband predecease me, then I direct that all my person household items be devised and bequeathed to my dearly beloved parents, MARS McCURRY . . . in their entirety, survivor take all. In the event that my dearly beloved Parents, MARS McCURRY and KATHLEEN McCURRY predecease me, then all of my personal household possessions as recited above, I give, devise and bequeath to my brothers and sister who survive me, share and share alike, survivor to take all."

3. Additionally, the will provided for the disposition of the Decedent's residuary estate as follows: "one-half (1/2) to my dearly beloved parents MARS McCURRY and KATHLEEN McCURRY ... survivor to take all. In the event that my dearly beloved parents, MARS and KATHLEEN McCURRY do not survive me, then I give, devise and bequeath one-half (1/2) of my estate to my dearly beloved brothers and sisters who survive me, survivor to take all."

4. Both the Decedent's husband and parents predeceased the Decedent. As for her siblings, at the time of the drafting of her will, the Decedent had seven siblings. The Decedent had no children of her own and sixteen nieces and nephews while only six nieces and nephews were alive at the time the will was drafted. At the time of the Decedent's passing, three of her siblings had predeceased her — Brian McCurry, Mars McCurry, and Diane Jean Worwood. The other siblings are still alive.

5. Kimmel was appointed attorney of the Decedent's estate on May 17, 2023. On June 8, 2023, Kimmel filed a Memorandum of Law for Proposed Distribution. That memorandum stated that, pursuant to the Decedent's will, the Decedent's personalty is to be divided between her four surviving siblings while the residuary estate will be divided between the four surviving siblings and the seven children of the Decedent's predeceased siblings. However, Kimmel filed an addendum to the memorandum stating that his position has changed and argued that, based on Connecticut's antilapse statute, the entirety of the Decedent's estate should be divided between the Decedent's surviving siblings and the children of the Decedent's predeceased siblings.

6. The plaintiffs objected. The Probate Court concluded that the antilapse statute applied and refused to allow the plaintiffs to support their arguments with additional extrinsic evidence as it relates to the Decedent's intent. The Probate Court, in deciding that the antilapse statute applied, determined that the beneficiaries of the estate include both the Decedent's surviving siblings and the children of her predeceased siblings.

7. The plaintiffs appealed. Kimmel filed a Motion for Summary Judgment. On appeal, the court granted Kimmel's motion and applied the antilapse statute on the following grounds:

> a. The Probate Court decided that the will's language contains only "words of survivorship" which are insufficient to negate Connecticut's antilapse statute. The Probate Court, therefore, decided the distribution of the Decedent's property must go to her predeceased siblings' issue.

b. Connecticut General Statutes § 45a-441 states "[w]hen a devisee or legatee, being a child, stepchild, grandchild, brother or sister of the testator, dies before him, and no provision has been made in the will for such contingency, the issue of such devisee or legatee shall take the estate so devised or bequeathed." It is not disputed that the contingency referenced in § 45a-441 is the death of a devisee or legatee prior to that of the testator. Connecticut conditioned operation of the antilapse statute on the intent of the testator as expressed in the will.

c. Antilapse statutes will apply unless testator's intention to exclude its operation is shown with reasonable certainty. Antilapse statutes establish a strong rule of construction, designed to carry out presumed intention. They are based on the constructional preference against disinheriting a line of descent. Consequently, these statutes should be given the widest possible sphere of operation and should be defeated only when the trier of fact determines that the testator wanted to disinherit the line of descent headed by the deceased devisee. Hence, the burden is on those who seek to deny the statutory protection rather than on those who assert it. Moreover, Connecticut's antilapse statute was enacted to prevent operation of the rule of lapse, and the statute is remedial in nature and must be liberally construed.

d. Mere words of survivorship alone do not help to discern the intent of the testator and thus, do not negate Connecticut's antilapse statute. Inclusion of words of survivorship provides neither objective evidence that a conversation about § 45a-441 took place nor objective evidence that the testator considered seriously the possibility of nonsurvival or inquired about the meaning of expressions such as lapsed bequest and the protections of the antilapse statute.

e. Because such a survival provision is often boilerplate formbook language, the testator may not understand that such language could disinherit the line of descent headed by the deceased devisee. When the testator is older than the devisee and hence does not expect the devisee to die first it seems especially unlikely that a provision requiring the devisee to survive the testator was intended to disinherit the devisee's descendants. In other words, the court will not speculate on whether words of survivorship disinherit a devisee's issue, and instead looks for a specific and forthright, contrary intent that overrides the antilapse statute.

f. The language at issue in the Decedent's will, provided by the defendant in Exhibit B, states "I give, devise and bequeath to my brothers and sister who survive me, share and share alike, survivor to take all." It is clear that "my brother and sister who survive me" are mere words of survivorship that would not negate the operation of the antilapse statute. The language stating "survivor to take all" is separate and needs its own interpretation.

g. At first glance, the phrase "survivor to take all" looks like mere words of survivorship. The phrase uses the word "survivor" and has no meaning that would be separate from the other portion of the sentence stating, "who survive me." One could argue that the sentence is redundant, expresses words of survivorship twice, and does not augment the meaning of the sentence in a way that creates a contingency negating the antilapse statute. On the other hand, the phrase does not seem to be common parlance within will structure or language, nor are there

other reported cases within the Connecticut jurisdiction dealing with wills that contain such language, let alone interpreting such language. The infrequent use of this language offends the Appellate Court's underpinning analysis for its decision to conclude that words of survivorship alone do not negate the antilapse statute — namely that survivorship language is typically "boilerplate formbook language" that may stem from a drafter inserting inconsequential legal jargon within a will instead of added language that resulted from a comprehensive discussion between the drafter of the will and the testator. Thus, the addition of this language, "survivor to take all," because of its rare nature in terms of its use, this phrase may be evidence to show the Decedent's intent to go beyond words of survivorship and only grant the residuary estate to her surviving siblings.

h. However, if the testator intended to make an alternative devise that indicated contrary intent, they could have written out that language explicitly in the will. Additionally, when actually intended to call for result contrary to antilapse statute, words of survivorship are likely to be accompanied by additional language. If we must presume that the testator was aware of the antilapse statute, we must also equally presume that he was aware that it is remedial in nature and provided a liberal construction in Connecticut. In that event, the testator would have known that any ambiguity arising from the probate of his will, absent an express indication to the contrary, would be resolved in favor of operation of the statute. Therefore, because the antilapse statute is interpreted liberally, if the will language does not explicitly direct the court to disinherit specific people, the court will not disinherit and the antilapse statute will apply.

i. The language "survivor to take all" is redundant survivorship language that does not add a contingency disinheriting the Decedent's siblings' issue. There is no specificity in this language that would properly negate the antilapse statute.

j. "Survivor to take all" is not enough to go beyond mere words of survivorship on its face. Although it is true that "survivor to take all" is not common parlance seen within wills, nor is it typical boilerplate language that will drafters use for words of survivorship, the phrase is still effectively another way to say "who survive me," which does not negate the antilapse statute. The plaintiffs provide no case law or statutes that distinguish between these two phrases and instead argues in conclusory fashion as to how "survivor to take all" reapportions the shares of the estate differently than "who survive me" when placed within a will. Additionally, the plaintiffs admit in argument that the Decedent does not mention the nieces or nephews in the will and, thus, wants the court to assume that this is because the Decedent wants to disinherit such nieces and nephews. This assumption is not based on anything concrete in the will's language and a more explicit contingency is required to negate the antilapse statute.

k. When the will was constructed, the Decedent had six nieces and nephews alive at that time, as admitted by the plaintiffs. Therefore, the Decedent would have known that some of her estate could be given to her nieces and nephews, especially since she devised some of the estate to her siblings. Thus, if the Decedent did not want any of these nieces and nephews, who were alive during the execution of the will, or potentially any other nieces and nephews that may have been born after the executed will, to not receive a portion of her estate, one

can assume that she could have explicitly disinherited those nieces and nephews when the will was executed. The Decedent, however, did not do so and provided no other context as to what should be done if her siblings predecease her.

l. Decedent was unhappy with her nieces and nephews before she had passed, did not want to give them anything from her estate, and was frustrated with the way her mother's estate was distributed. Thus, the Decedent had previous experience with estate distribution issues and the potential problems that may arise in its distribution. Even with this unpleasant previous experience, the Decedent, for whatever reason, did not explicitly remove the possibility of allowing part of her estate to go to her nieces and nephews even though she was allegedly unhappy with them. The Decedent could have changed the language to ensure she disinherited her nieces and nephews or at least looked through the will language again to potentially update its words to ensure it met her wishes, especially if she was so unhappy with her nieces and nephews and was concerned that her will could have similar distribution issues that occurred with her mother's will. Thus, the phrase "survivor to take all" does not create a contingency that disinherits these nieces and nephews. If the Decedent wanted to disinherit, more explicit language could have been placed within the will.

m. Evidence of the intention of a testator is inadmissible where it does not find expression in the will or where it consists of declarations of the testator as to the meaning of the words used, or where it seeks to give to the words used a meaning which goes beyond any reasonable construction which they can bear or where it gives them significance different from their usual and ordinary meaning, unless, on reading the will in the light of surrounding circumstances, a latent ambiguity appears. When looking solely at the Decedent's will, and studying the phrase "survivor to take all," in addition to the other provisions within the will, it is clear and unambiguous that this phrasing is mere survivorship language. Considering the court must first look at the language of the will, and the will, in the court's eyes, is clear and unambiguous, evidence provided by the plaintiffs trying to show the Decedent's intent effectively seeks to change the plain language of the will. The plaintiffs are effectively seeking to give the words in the Decedent's will a meaning which goes beyond a reasonable construction — namely that the phrase "survivor to take all" means something more than survivorship language and allows for the Decedent's nieces and nephews to be disinherited. The will language, however, does not state that intention to disinherit.

n. The court is unable to consider available evidence that allegedly shows the testator's different intent when the will is clear as to the Decedent's intent, unless there is a latent ambiguity, which does not occur here. The purported intent the affidavits and the deposition testimony provided cannot override the intent garnered from the plain language of the will because it would effectively change the Decedent's intent. Thus, external evidence of intent cannot be read into this will.

o. The affidavits make no statements related to a scrivener's error by the defendant, nor how an error could have come about, and the deposition testimony does not provide clear and convincing evidence that a scrivener's error occurred. More specifically, when looking at the deposition testimony of defendant and the

language the plaintiffs have highlighted, those questions point toward the defendant's intent. The questions, however, do not clearly and convincingly show that the Decedent intended for the language to be written a different way or how the language the defendant wrote had an effect on the Decedent's intent. Thus, the plaintiffs' scrivener's error argument is conclusory.

D. *Robinson v. Nunley,* 2025 Ind. App. LEXIS 399 (Court of Appeals of Indiana 2025). Termination of life insurance trust renders inoperative revocable trust term that adjusted residuary shares.

1. Dennis Robinson and Sandra Papszycki are the surviving children (and hereafter referred to as the "Children") of Janet L. Robinson. Janet had a third child, Trudie Riegle, who predeceased Janet. However, before her death, Trudie had three children of her own: Dana Nunley, Amber Riegle, and Andrew Feldhaus (the "Grandchildren").

2. In 2000, Janet established the Janet L. Robinson Revocable Living Trust Agreement ("the Revocable Trust") as well as a Life Insurance Trust. At least one purpose of the Revocable Trust was to distribute Janet's assets upon her death. The purpose of the Life Insurance Trust, meanwhile, was to pay Janet's estate taxes. The Life Insurance Trust held a single asset, namely, a life insurance policy ("the policy") in which the Life Insurance Trust was the named beneficiary. The Children were the named beneficiaries of the Life Insurance Trust.

3. In August 2004, Janet executed the First Amendment to the Revocable Trust ("the First Amendment"). As relevant here, Section 2 of the First Amendment amended the Revocable Trust to state: "After the death of the Grantor, and after complying with the provision of the preceding paragraph . . ., the Trustee shall determine whether the previous and separate [Life Insurance Trust] . . . is sufficient to pay all Federal and State estate taxes. In the event [the Life Insurance Trust] is not sufficient . . ., the Trustee shall pay the remaining balance in full from the residuary trust estate. In the event there is a surplus after Federal and State taxes are paid from the [Life Insurance Trust], the Trustee shall pay a separate payment from the residuary trust estate to the three [G]randchildren . . . such that the three [G]randchildren receive an equal one-third (1/3) payment to [sic] any surplus after taxes are paid received by [sic] my son, Dennis W. Robinson and my daughter, Sandra Papszycki, such that each group receives an equal one-third (1/3) share. After complying with the above-referenced provisions, the Trustee shall distribute the residuary trust estate . . . to my children as follows: (a) One-third (1/3) to my son, Dennis; (b) One-third (1/3) to my daughter, Sandra; and (c) One-third (1/3) to my [G]randchildren.

4. Thereafter, changes in state and federal law rendered the Life Insurance Trust unnecessary. Accordingly, in 2016, Janet petitioned the Pulaski Circuit Court to terminate the Life Insurance Trust. She and the Trustee, the Edward Jones Trust Company, then entered into a stipulation to terminate the Life Insurance Trust and to have the Trustee assign any payments under the policy to the Children "in equal proportions." The Pulaski Circuit Court accepted the parties' stipulation and terminated the Life Insurance Trust accordingly.

5. Janet died in October 2023. The Children, as the assignees of the policy payment, each received $170,993.01 following Janet's death. The Children, who were co-trustees of the Revocable Trust, did not make any policy-related payment to the Grandchildren under the First Amendment.

6. The Grandchildren petitioned to determine the scope and effect of the First Amendment and whether they were entitled to a policy-related payment under that amendment prior to the final distribution of the residuary of the Revocable Trust. The trial court, relying on extrinsic evidence, concluded that Janet's intent under the Revocable Trust was to have the Grandchildren share a $170,993.01 payment out of the residuary of the Revocable Trust prior to the final distribution of the residuary. The Children appealed.

7. The court of appeals reversed on the following grounds:

a. The trial court relied on extrinsic evidence in discerning Janet's intent under the First Amendment to the Revocable Trust. On appeal, both the Children and the Grandchildren agree that the amendment is ambiguous. In particular, the Children assert that the amendment contains a "latent" ambiguity, that is, an ambiguity that reveals itself only after considering "extrinsic evidence" outside of a written instrument's four corners. The trial court, without explicitly saying so, appears to have relied on that same position.

b. However, the state Supreme Court has abandoned the distinction between patent and latent ambiguities. Accordingly, where a trust is capable of clear and unambiguous construction, under this doctrine, the court must give effect to the trust's clear meaning without resort to extrinsic evidence. Only if a written instrument's four corners reveal an ambiguity — a reading of the document susceptible to more than one reasonable interpretation — may extrinsic evidence then be considered to resolve the ambiguity.

c. Section 2 of the amendment plainly states that the Life Insurance Trust is to be used to pay any estate taxes. If there are funds from the Life Insurance Trust left over after any such payment, each of the Children is to receive half of those funds. And, in that event, the Grandchildren are to receive an equivalent payment, to be shared among them, from the residuary of the Revocable Trust. From there, the residuary of the Revocable Trust is to be distributed in one-third shares between the Children and the Grandchildren.

d. That language speaks for itself and is the judiciary's best evidence of Janet's intent. As the Life Insurance Trust was canceled and no longer in existence at the time of Janet's death, the language regarding a surplus from the Life Insurance Trust became inoperative. However, inoperative language is not automatically ambiguous language. In other words, the plain language of the First Amendment to the Revocable Trust speaks only to the Life Insurance Trust, which was a clear and unambiguous legal entity, and not to the assets held in that trust.

e. Grandchildren's reliance on Indiana Code section 30-4-2.1-11.1 (2025) is a nonstarter. That statute generally provides that, "if a trust refers to a writing of any kind, the referenced writing, whether subsequently amended or revoked, as it existed at the time of the execution of the trust, shall be given the same effect as if set forth at length in the trust. ..." But that language simply allows us to read the Revocable Trust and the Life Insurance Trust together; contrary to the Grandchildren's argument, it does not allow us to disregard "the subsequent . . . revocation of the Life Insurance Trust." Reading the two documents together, a pre-final-distribution payment to the Grandchildren out of the residuary of the

Revocable Trust turns on the existence of a surplus from the Life Insurance Trust. As the Life Insurance Trust had no corpus at the time of Janet's death, Indiana Code section 30-4-2.1-11.1 does not countenance any such payment.

f. There was always a risk that the residuary of the Revocable Trust would have insufficient assets to distribute to the Grandchildren for an equalization payment.

E. *Rosenstein v. Gardner (In re Estate of Renee H. Rapaporte),* 2025 R.I. Super. LEXIS 42; 2025 LX 33249 (Superior Court of Rhode Island, Providence 2025). The term "significant other" is unambiguous and means an important person with whom one shares a close, spouse-like, or similar romantic relationship.

1. Renee H. Rapaporte ("Ms. Rapaporte") died on November 2, 2023. Prior to Ms. Rapaporte's passing, on February 25, 2015, she executed the Seventh Amendment and Restatement of the Renee H. Rapaporte Revocable Trust ("Rapaporte Trust"). The executor of the Rapaporte Trust is Jay Rosenstein ("Mr. Rosenstein" or "Trustee").

2. Article III of the Rapaporte Trust provides for specific dispositions upon Ms. Rapaporte's death. This dispute arises out of one disposition in particular: "(4) One million dollars ($1,000,000) to my dear friend, Karl Gardner, of Burlington, Massachusetts, if he survives me by thirty (30) days, AND if at my death he is my significant other."

3. Ms. Rapaporte and Forrest Karl Gardner ("Mr. Gardner") met in the 1990s and began dating in 2002. In 2005, Mr. Gardner moved into Ms. Rapaporte's home, where he lived with her until she moved to Grand Oaks Assisted Living Facility ("Grand Oaks") in 2017. Prior to 2013, Ms. Rapaporte and Mr. Gardner enjoyed together the many pleasantries offered by life. The couple attended concerts and vacationed together, and supported each other emotionally. In 2013, however, Ms. Rapaporte began showing signs of mental decline and was diagnosed with Alzheimer's disease. In 2014, Ms. Rapaporte's doctor diagnosed her with dementia. In 2015, Ms. Rapaporte's condition further declined, and Mr. Gardner hired nurse aides to help care for her. From 2015 to 2017, Mr. Gardner supervised Ms. Rapaporte's medical care and assisted Ms. Rapaporte in her daily activities.

4. In late 2016, the decision was made to move Ms. Rapaporte to a skilled living facility in Washington, D.C., closer to her family. On January 12, 2017, Mr. Gardner accompanied Ms. Rapaporte to Washington, D.C., where Trustman Senger ("Ms. Senger") moved Ms. Rapaporte into Grand Oaks. Mr. Gardner had some initial difficulty coordinating a visit with Ms. Rapaporte, but he did visit her at Grand Oaks a number of times. In 2017, Mr. Gardner visited Ms. Rapaporte in the facility thirty-three times. In 2018 and 2019, Mr. Gardner visited Ms. Rapaporte eleven and seven times, respectively. In 2020, before COVID restrictions took effect, Mr. Gardner was able to visit Ms. Rapaporte once in February 2020. In 2019, Mr. Gardner was diagnosed with an illness that caused him to be immunocompromised and unable to travel to visit Ms. Rapaporte.

5. Mr. Gardner's last in-person visit with Ms. Rapaporte was in February of 2020. Thereafter, Mr. Gardner arranged Zoom or FaceTime calls with Ms. Rapaporte, facilitated by Grand Oaks employees. Mr. Gardner virtually visited Ms. Rapaporte more than one hundred times between February of 2020 and her death, despite her fluctuating participation in these calls. In May of 2022, during a video call with Ms. Rapaporte, a hospice worker informed Mr. Gardner that Ms. Rapaporte was "nearing the final phase of her life." Subsequently, Mr. Gardner informed the Trustee of Ms. Rapaporte's

condition and reported that he would be unable to visit her in person due to his traveling to Europe for the following three weeks.

6. Approximately eighteen months later, on November 2, 2023, Ms. Rapaporte passed away. Mr. Gardner did not learn of Ms. Rapaporte's passing until approximately six weeks later, when he was told by his hair stylist, who was also Ms. Rapaporte's hair stylist for a time. Upon Ms. Rapaporte's death, Mr. Gardner made a demand on the Trustee for his disposition. The Trustee concluded that Mr. Gardner was not Ms. Rapaporte's "significant other" at the time of her death and declined to distribute money to Mr. Gardner. On August 12, 2024, Mr. Gardner's counsel made a formal demand that the Trustee pay Mr. Gardner the one million dollars ($1,000,000) pursuant to the terms of the Trust. The Trustee then filed a Request for Instructions with the Court, asking the Court to declare that Mr. Gardner was not Ms. Rapaporte's "significant other" and thus Mr. Gardner is not entitled to receive the contingent disposition. Ms. Senger, Ms. Rapaporte's daughter, filed the instant Motion for Judgment on the Pleadings and Stay of Discovery. Ms. Senger supports the Trustee's conclusion that Mr. Gardner was not the "significant other" of Ms. Rapaporte at the time of her death and asked this Court to stay discovery until the Motion on the Pleadings is resolved.

7. The court denied Ms. Senger's Motion for Judgment on the Pleadings on the following grounds:

a. No one disagrees that Mr. Gardner was Ms. Rapaporte's significant other during the time in which they lived together from 2005 to 2017.

b. Massachusetts law governing interpretation of trusts is similar to that of Rhode Island. It is a question of law whether the language of a trust is ambiguous, and courts will first examine the plain language of a trust to determine whether ambiguity exists. Under Massachusetts law, language of a trust is ambiguous where the phraseology can support a reasonable difference of opinion as to the meaning of the words employed. When interpreting a trust, Massachusetts courts do not read words in isolation and out of context. Rather, the court will discern the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed. It is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution.

c. To interpret or define a term, the Rhode Island Supreme Court has repeatedly relied on dictionary definitions to provide a common, ordinary meaning of the term. The American Heritage Dictionary of the English Language defines "significant other" as "a person, such as a spouse or lover, with whom one shares a long-term sexual relationship" or "a person, such as a family member or close friend, who is important or influential in one's life." The Random House Dictionary of the English Language 1779 defines "significant other" as "a person, as a parent or peer, who has great influence on one's behavior and self-esteem" or "a spouse or cohabitating lover."

d. Because ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate, the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning

when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner. Any word will produce multiple dictionary definitions; the test is not whether there exist alternate meanings but whether there exist reasonable alternate meanings. Parties need not choose phraseology that invariably excludes every possible interpretation other than the one which they intend it is sufficient if the language employed is such that a reasonable person, reading the document as a whole and in realistic context, clearly points toward a readily ascertainable meaning.

e. Viewing the Rapaporte Trust agreement as a whole and the context of "significant other" as included in the Rapaporte Trust, the term "significant other" is unambiguous as written in the Rapaporte Trust. Article III(A)(4) of the Rapaporte Trust refers to Mr. Gardner both as Ms. Rapaporte's "dear friend" and as Ms. Rapaporte's "significant other." As demonstrated by dictionary definitions, the plain meaning of "significant other" includes close relationships between people, both platonic and romantic. However, the inclusion of both "dear friend" and "significant other" in Article III of the Rapaporte Trust leads the Court to the inescapable conclusion that Ms. Rapaporte intended to define "significant other" as something more than a relationship between "dear friends." If Ms. Rapaporte intended "significant other" to mean a relationship between close friends, the earlier description of Mr. Gardner as Ms. Rapaporte's "dear friend" would be superfluous. Therefore, the only reasonable definition of "significant other" within the context of the Rapaporte Trust is an important person with whom one shares a close, spouse-like or similar romantic relationship.

f. However, despite the fact that the term "significant other" is unambiguous within the context of the Rapaporte Trust, the Court cannot determine, as a matter of law, whether Mr. Gardner was Ms. Rapaporte's "significant other" at the time of her death on November 2, 2023. This is a question of fact reserved for the factfinder after the pleadings stage. Based on the pleadings alone, it cannot be said beyond a reasonable doubt that, under any set of conceivable facts, Mr. Gardner was not Ms. Rapaporte's significant other at the time of her death on November 2, 2023.

XXXII. CAPACITY, UNDUE INFLUENCE, & CONTESTS

A. *In re Est. of Kapila,* 2025 N.J. Super. Unpub. LEXIS 805; 2025 LX 69869; 2025 WL 1430418 (Superior Court of New Jersey, Appellate Division 2025). Marital relationship alone does not create presumption of undue influence where children had limited, and only adversarial, contact with testator for 10 years prior to death.

1. Throughout his professional life and until his death, Dr. Rajendra Kapila was employed as a physician. Plaintiffs Vikrant and Gitanjali "Gita" Kapila are Rajendra's adult children from his prior marriage to Bina, which ended when Rajendra and Bina divorced in 2008. The couple had been separated for more than 20 years. Rajendra married Deepti Saxena in India on February 14, 2009. Plaintiffs did not attend the wedding. Both were vocally opposed to the marriage because Rajendra began his relationship with Saxena while still married to Bina.

2. Prior to the marriage, Rajendra visited Gita and her children in the summers of 2006, 2007, and 2008. However, the visits ceased immediately after Rajendra married Saxena.

Gita's relationship with Rajendra was reduced to a series of vitriolic emails over the span of several years. On June 29, 2015, Gita emailed Rajendra, instructing him to "stay away from [her] children" and stating her daughter viewed him "as a creepy[,] scary ghost." On August 9, 2017, Gita wrote, "I have left you alone for [thirteen] years. I don't want anything to do with you. . . . You don't have a relationship with [your granddaughters] and no matter what you do, you never will. . . . I will never forgive this treachery. This is forever." The next day, she wrote the following: "I was talking to [Vikrant] on the phone[,] and I told him that I had had only one thought about you in the past [thirteen] years and it was this: The only way I attend you[r] funeral is if your ashes get thrown into the duck pond in South Orange. Isn't that funny?!!!! Omg, [Vikrant] and I laughed so hard together on the phone over that."

3. The same day, Gita sent another email, which read: "Stories for the future after you are dead: Do you know I th[a]nk my lucky stars every day that I don't have to sit across from a table looking at both [of] your stupid faces? Omg, what f[***]ing torture that was! But, I'm out! I celebrate that every day! All the ways in which you lied, you pretended, for what? Thinking that your children wouldn't see through it. The rot in your lives, the rot in your minds. I want you bot[h] . . . to go to your graves knowing that I hate you. I will have it written for our generations to come that [Rajendra] was an adulterer. . . . That will be th[e] story that gets passed down through eternity."

4. On November 21, 2019, Gita drafted another email, which she sent to Rajendra's work email address, but addressed it to Saxena. She expressed amusement at the fact that since there was an age difference between Saxena and Rajendra, he would die soon, leaving her a widow for "[thirty] years" and she "will be forgotten." The email further stated plaintiffs were "the inheritors of [the family] name. And, just because you don't know us, do not think for one second we do not lay claim to what is ours by birth and by blood. . . . You are [Rajendra's] sex maid. You cook, clean, do laundry[,] and spread your legs. . . . That's all you are and all you will ever be." There were no attempts at contact between Gita and Rajendra, other than through email, until his death.

5. Similarly, Vikrant had not spoken with Rajendra since 2007. The limited communication he had was not indicative of a warm relationship. On February 8, 2009, Vikrant emailed his paternal aunt inquiring whether Rajendra was getting married. He could not ask Rajendra himself, as "[i]t seem[ed] rather pathetic for a son to make a telephone call searching for his father in another country with the question 'are you getting married[?]'" The only communication Vikrant and Rajendra had after 2007 was in 2019 and 2021. In 2019, Vikrant emailed birthday wishes to Rajendra. When Rajendra replied to the email and signed it "Deepti and Raj," Vikrant replied the email "signoff" was "quite painful and hurtful" and concluded his email with "[h]ave a good life." Vikrant's 2021 communication was a letter he sent requesting money for his daughter's tuition.

6. In 2020, Rajendra decided to create an updated will. After seeking advice from friends, he chose LegalZoom rather than retaining an attorney "to save on the cost." Rajendra drafted three wills using LegalZoom on January 26, February 4, and 20, 2020. He reviewed and initialed each page of the final will. His review was also evidenced by a handwritten correction to a typographical error on the first page. At Rajendra's request, two longtime family friends, Rajender and Swaran Pruthi, witnessed his will.

7. At the time of the will execution, Rajendra was employed as a professor of medicine specializing in infectious diseases at University Hospital in Newark. He commuted to work

daily by driving himself and performed clinical and rotational duties. The hospital described Rajendra's work as follows: "During rounds, he provided medical care to patients and educated/mentored fellows, residents, and medical students. He completed all medical records and billed third-party payors for medical visits. He provided didactic lectures to the fellows approximately [four] sessions per year and participated in [continuing medical education] lectures and conferences."

8. However, because Rajendra was over 80 years of age and suffered from diabetes, heart disease, and other ailments, he had a high risk of contracting and dying of COVID-19. Thus, once the pandemic began, he requested medical leave from the hospital on March 17, 2020. Rajendra continued to work remotely while on leave. He attended conferences, worked with colleagues, published scholarship, and continued mentoring his students. Rajendra also maintained an active social life.

9. In March 2021, Rajendra was vaccinated against COVID-19. Afterwards, he and Saxena traveled to India to visit family and sell property. During the visit, he contracted COVID-19 and ultimately passed away from related complications on April 28, 2021. When Rajendra's body was returned stateside, Vikrant hosted a memorial service but did not invite Saxena. Rajendra died testate.

10. Plaintiffs sued Rajendra's estate and named Saxena, alleging: undue influence, improper execution of Rajendra's will, a third-party beneficiary claim, and misrepresentation. The trial judge dismissed the undue influence, improper execution, and misrepresentation counts. As regards the undue influence claim, the trial judge found plaintiffs did not meet their burden of proof to establish undue influence because although Rajendra and Saxena were married, Saxena did not exert mental or physical dominance over Rajendra to establish a confidential relationship showing an imbalance of power when the will was made.

11. The trial judge denied plaintiffs' application for fees because plaintiffs' lawsuit was not predicated on a valid will contest and "often felt like we were in a therapy session, because the reasons that were provided had much to do with the years[-]long, . . . pain and disappointment that the plaintiffs felt." Their "claim was as hollow as it had been at the beginning." The judge concluded it would be inequitable to award plaintiffs counsel fees because plaintiffs had not established good cause to contest the will and doing so would deplete the estate or compel the legatees to accede to unreasonable terms of settlement.

12. Plaintiffs appealed and the appellate division affirmed on the following grounds:

> a. To establish the presumption of undue influence, a proponent must first prove the existence of a confidential relationship between the decedent and the beneficiary. The mere existence of family ties does not create a confidential relationship. There simply was no evidence establishing Rajendra and Saxena dealt with one another on unequal terms. Plaintiffs did not show Saxena had superior knowledge than Rajendra or that he was dependent upon her to the degree she had "over-mastering influence" on his estate planning designs. Indeed, affording plaintiffs every reasonable inference, neither the narrative that Rajendra was unduly controlled by his passions for Saxena nor that she controlled him through coercion, unilateral action, or calculation was supported by the evidence.

b. Rajendra and Saxena were partners in a marriage. Each had independent careers in medicine. There was no evidence of a confidential relationship and only evidence showing plaintiffs lacked a meaningful relationship with their father and him planning his estate accordingly by not including his children in the will and instead naming his grandchildren as contingent beneficiaries. The disinheritance of a child is difficult to that child, and in search of an explanation, it's understandable that the children may contend the act was a product of undue influence. However, the lack of a relationship for over a decade combined with the tenor of the actual limited interaction makes it hardly surprising or suspicious that Rajendra chose not to provide for plaintiffs.

c. Plaintiffs did not present evidence of a confidential relationship or other proof of an undue relationship related to the drafting of Rajendra's will.

d. Plaintiffs' evidence fell woefully short of showing a confidential relationship. The involuntary dismissal of their undue influence claim supported the judge's finding there was no reasonable cause to award counsel fees.

B. *In re In the Est. of,* 2025 Tex. App. LEXIS 6338; 2025 LX 330140 (Court of Appeals of Texas, Fifth District, Dallas 2025). Texts speculating about "chemo fog" do not create an issue of fact about incapacity, and undue influence cannot be inferred by opportunity alone — there must be if it was in fact exerted.

1. Danny Lee Rubey ("Decedent") was diagnosed with pancreatic and lung cancer in early April 2021. On April 14, 2021, Decedent consulted with an estate attorney to prepare his last will and testament (the "Will"). Brenda Cantrell, Decedent's girlfriend of ten years and appellee here, accompanied him to the meeting. On April 23, Decedent began chemotherapy treatment for his cancer. On May 25, three days before his fourth chemotherapy session, Decedent went to his attorney's office to execute the Will. Decedent named Cantrell as the sole primary beneficiary of his estate and Cantrell's daughters from a prior marriage as secondary beneficiaries. Decedent passed away in January 2022, survived by his biological mother, Ruby Mize, and brother.

2. In June 2022, Mize petitioned to determine heirship in the trial court. Later that month, Cantrell filed a copy of the Will and an original petition for declaratory judgment construing the Will. Cantrell contended that there was no need for an heirship determination because Decedent did not die intestate, and she sought declaratory judgment that the Will was valid. In response, Mize counterclaimed for undue influence, lack of testamentary capacity, fraud, and unjust enrichment.

3. Cantrell filed a traditional and no-evidence motion for summary judgment challenging each of Mize's counterclaims. Cantrell attached the Will, the Affidavit of the attorney who prepared the Will, and the affidavits of the two witnesses to the execution of the Will. On the morning of the hearing, Cantrell filed a reply brief attaching medical records that she claimed rebutted Mize's evidence. Mize objected to the medical records on the ground that she did not receive 21 days' notice as required by the summary judgment rules. Cantrell filed an amended motion for summary judgment. The only difference between the original motion and the amended motion was the addition of the medical records previously attached to Cantrell's reply. Mize did not file an amended response. The trial court held a hearing and entered an order granting Cantrell's amended motion for summary judgment. Cantrell then filed a brief in support of her petition for declaratory

judgment and requested a ruling. On June 20, the trial court entered final declaratory judgment declaring that the Will was "valid and enforceable under Texas law."

4. Mize appealed and the court of appeals affirmed on the following grounds:

a. A testator has testamentary capacity when he has sufficient mental ability to understand he is making a will, the effect of making a will, and the general nature and extent of his property. He must also know the natural objects of his bounty and the claims upon them, and he must have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them. In a will contest, the pivotal issue is whether the testator had testamentary capacity on the day the will was executed, but evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed, provided that the evidence demonstrates that a condition affecting his testamentary capacity was persistent and likely present at the time the will was executed.

b. Cantrell testified that she and Decedent were living together at the time of his diagnosis. She stated her belief that she and Decedent were married at common law. She and Decedent consulted with an attorney "to discuss [their] estate planning goals and objectives" after Decedent was diagnosed with cancer. While Decedent was undergoing chemotherapy, Cantrell sent regular updates to Mize via text message regarding Decedent's health and treatment, including, in relevant part, the following: "I think that maybe the best time to go visit friends may be while he's sleeping Sunday and Mondays. He doesn't eat food and is in a 'chemo fog.' There's nothing I can do to help during this time. I actually need to be with him when he's alert, possibly hungry and we can talk. It's going to be an ever-changing process so I really need to be extremely flexible. Thank goodness, we talk extensively between treatments so I'm not having to guess what he wants, is thinking or needs. … He really can't handle communication while he's in his chemo fog, which is Sunday through Thursday. We have no visitors nor do we go out for fun. He has no energy for excess."

c. Even assuming arguendo that being in a "chemo fog" would amount to more than a scintilla of evidence on Decedent's testamentary capacity, there is no evidence in the record that Decedent was in such a state when he executed the Will on May 25, 2021. Cantrell's text messages state that Decedent would suffer from the "chemo fog" from Sunday through Thursday following a chemotherapy session. But there is no evidence, only unsupported supposition, that Decedent underwent a chemotherapy session on May 21, the Friday before he executed the Will. Although Cantrell's April 23 text could be interpreted to mean that Decedent was going to undergo chemotherapy treatment "every 7 days" from that point forward, there is no evidence that Decedent did in fact follow that regimen through the next four weeks and the record specifically negates a treatment on May 21 or that Decedent was in a chemo fog on May 25.

d. Cantrell's deposition testimony offers no support for the proposition that Decedent had a chemotherapy session on May 21, 2021. This record testimony supports Cantrell stating that when Decedent would have chemotherapy sessions on Friday, his chemo fog would start the following Sunday. However, while the last question premises Decedent's mental state on an assumed chemotherapy

session on May 21, such that his mental state was affected on May 25, there is no affirmation to the premise or mental state, and the answer thus provides no evidence of testamentary capacity or purported lack thereof.

e. Cantrell's text messages and deposition testimony constitute no more than a mere suspicion or surmise of the vital fact they are claimed to support — i.e., that Decedent had a chemotherapy session on May 21 that would have caused a chemo fog that lasted until May 25 when he executed the Will.

f. This conclusion is further bolstered by Cantrell's own evidence, including affidavits from Decedent's estate attorney and witnesses to the Will signing and Decedent's medical records. Decedent executed the Will on May 25, 2021. The Affidavit from Decedent's estate attorney explains that, on that date, Decedent was "always oriented as to time, place, and person — he clearly knew who he was, and what he was doing, including that he was present at my firm's offices to execute his Will." The witnesses to the execution of the Will attested to the same. The attorney also testified that "Decedent knew the identity of his family members, and could express his understanding of what he was doing by signing a Will and other related documents, including a Revocable Transfer on Death Deed, and Decedent could hold those thoughts for an extended period of time."

g. Decedent's medical records establish that Decedent's first four sessions took place on April 23, April 30, May 14, and May 28. The medical records do not support treatment every seven days. Specifically, there is no medical record that treatment was performed on, or scheduled for, May 7 or May 21.

h. Thus, although Cantrell's April 23 text message states that Decedent was going to undergo chemotherapy "every 7 days," the medical records provided are not consistent with Cantrell's early understanding of the treatment plan. The medical records reflect treatment other than every seven days and are the only evidence of his actual treatment. To reiterate, the May 14 medical records provide the next treatment or "perform date" will be May 28. Mize's text message evidence does not raise a fact issue as to whether the Decedent had treatment on May 21.

i. Based on this record, the court cannot conclude that there is more than a scintilla of evidence that Decedent underwent chemotherapy on May 21, 2021. As a result, there is no evidence that Decedent was in a chemo fog on May 25, 2021, when he executed the Will. Besides her chemo-fog theory, Mize offers no other explanation and provides no other evidence that Decedent lacked testamentary capacity when he executed the Will.

j. Evidence that Cantrell, who was not married to Decedent, selected her law firm to complete the purported will, accompanied Decedent to the purported will execution, lived in Decedent's home, served as his primary caretaker during treatment, and worked to limit access to his next of kin amounts to no more than an opportunity to exert undue influence. The text messages between Mize and Cantrell showed that they had a good relationship, with Cantrell providing regular updates to Mize about Decedent's health and Mize thanking Cantrell for keeping her informed. Further, although Cantrell chose the law firm that would prepare the will and accompanied Decedent to the meetings with his attorneys, there is no evidence that that law firm was biased in favor of Cantrell or that Cantrell did

unduly influence Decedent's decisions. Nor is there any evidence of fraudulent motive on Cantrell's part, and the court rejects Mize's contention that Cantrell's deposition statement "it was important to [Decedent] that [Cantrell] be taken care of" was evidence of fraudulent motive. Further, there is no evidence relative to the drafting and execution of the Will that supports undue influence. Decedent had not yet begun chemotherapy when he visited with his attorneys regarding his wishes for his estate, and there is no evidence that the executed Will deviated from those wishes.

k. The exertion of undue influence cannot be inferred by opportunity alone. There must be some evidence to show that the influence was not only present, but in fact exerted with respect to the making of the testament itself. Although evidence of age and the common maladies of age may be considered as establishing the testator's physical incapacity to resist or the susceptibility of his mind to an influence exerted, such evidence does not establish that her mind was in fact subverted or overpowered at the time of the execution of the instrument in question. Mize's evidence on this issue shows only that Cantrell had the opportunity to exert undue influence over Decedent. There is no evidence, however, that she did in fact exert such influence. Because there is no evidence as to the first element, the trial court did not err in granting summary judgment against Mize on her claim for undue influence.

l. Even if the Will were invalid, the mere filing of the Will cannot amount to fraud in part because there is no evidence of reliance. There is no evidence that Mize relied on the validity of the Will to her own detriment. In fact, rather than relying on the Will, Mize filed counterclaims in the lawsuit challenging it. As such, the evidence conclusively establishes the opposite of the vital fact. Mize's theory of unjust enrichment is predicated on her claim for fraud.

C. *Kelley v. Procino-Wells & Woodland, LLC,* 2025 Del. Ch. LEXIS 200 (Court of Chancery of Delaware 2025). Testimony of disinterested and experienced estate planning attorney given consideration weight concerning testator's competency and freedom from undue influence, and ordinary relationship between an attorney and her client does not shift burden of proof of undue influence.

1. Plaintiff Charles B. Kelley, Jr. is the only surviving child of decedent Charles B. Kelley ("Kelley"), who passed away on April 7, 2021 at age 88. Kelley had a long-standing revocable trust — established in 1993 and updated over the years — designating Plaintiff the primary beneficiary. In February 2020, Kelley was diagnosed with terminal congestive heart failure and kidney disease. His medical records indicated episodes of confusion. Paula Kristian, a neighbor, intervened in Kelley's medical decisions, which prompted concerns from Plaintiff and others.

2. After Kelley's discharge from the hospital, Plaintiff moved into Kelley's Millsboro, Delaware home to provide full-time care. Their relationship became complicated and volatile, culminating in a heated argument on Easter Sunday 2020. During this argument, Plaintiff berated Kelley and demanded $28,000 for caregiving services. That was their final conversation. Kelley asked Plaintiff to leave his Millsboro home, and Plaintiff never returned. Shortly after Plaintiff's departure, Kelley became convinced that Plaintiff had stolen from him, including his deceased wife's wedding ring and funds from his bank

accounts. Kristian was seemingly the source of these beliefs. Although the wedding ring was later found, Kelley remained convinced of the theft.

3. In May 2020, Kelley contacted an estate planning attorney to revise his estate plan. Kelley stated his desire to remove Plaintiff as a fiduciary and beneficiary of Kelley's estate, citing the falling out and alleged theft. Counsel conducted a follow-up call with Kelley alone to confirm his wishes. The resulting estate planning documents, which substantially reduced Plaintiff's inheritance, were signed on July 16, 2020 (the "2020 Documents"). Neighbors continued to express concerns about Kristian's behavior, noticing her secretive visits to Kelley and removal of furniture from his home. Some also noted Kelley's decline. Defendant Juli S. Decker — Kelley's longtime neighbor and friend — even contacted Adult Protective Services with concerns about Kristian's influence over Kelley.

4. After Kristian moved away, Decker became more involved in Kelley's care and affairs starting around November 2020. Kelley sought to make changes to his estate plan once again. He authorized Decker to communicate with counsel on his behalf. Another set of revised estate planning documents were executed on March 1, 2021 by Zoom (the "2021 Documents"), with Kelley, Decker, and a caregiver for Kelley present. The 2021 Documents further solidified Plaintiff's disinheritance. They benefited Decker (who received Kelley's home) as well as other individuals and charities.

5. Kelley died several weeks later on April 7, 2021. Plaintiff sued to invalidate the 2021 and 2020 Documents for lack of capacity and undue influence. Senior Magistrate Molina issued a Final Report and Plaintiff filed exceptions. The assigned Magistrate overruled the exceptions and confirmed the Final Report on the following grounds:

> a. Plaintiff sought to restore his beneficiary status and invalidate Kelley's entire estate plan. To achieve that end, Plaintiff needed to prove that both sets of documents were invalid due to undue influence or lack of capacity. The Magistrate made detailed factual findings about the circumstances surrounding the execution of both sets of documents. The undue influence claim was analyzed in the context of each alleged influencer: Kristian for the 2020 Documents, and Decker for the 2021 Documents. These facts were then considered in the context of Plaintiff's claims. Given Plaintiffs' overarching challenge, the Magistrate's analysis of the 2020 and 2021 Documents together was logical and appropriate.
>
> b. Regarding Kristian and the 2020 Documents, the Magistrate appropriately credited the testimony of Kelley's attorney. Counsel testified that she believed Kelley was competent and not unduly influenced when he signed the 2020 Documents. Kelley's decision to disinherit Plaintiff was more likely prompted by the Easter 2020 argument that preceded Kelley's decision to revise his estate plan.
>
> c. Second, concerning Decker and the 2021 Documents, the Magistrate again relied on counsel's testimony confirming Kelley's competence and lack of undue influence during execution along with Decker's testimony. Although Decker became more involved in Kelley's affairs and benefited from the 2021 Documents, the later changes in 2021 were properly viewed in the context of Kelley's continued desire to disinherit his son and reward those providing him care and companionship. The Magistrate's decision is consistent with the legal

presumption that testamentary documents reflect the testator's free will. The burden was on Plaintiff to prove otherwise. He failed to carry it.

d. As a disinterested and experienced estate planning attorney, counsel's assessments of Kelley's competency and freedom from undue influence should be given "considerable weight." Counsel took diligent steps to learn Kelley's true intentions. She spoke to Kelley alone to confirm his desire to remove Plaintiff as a fiduciary and beneficiary. Counsel's involvement in drafting and executing the documents also makes her testimony highly probative. Her belief that Kelley was competent and not unduly influenced when executing both the 2020 and 2021 Documents provides meaningful evidentiary support to the Magistrate's findings.

e. Counsel, who drafted the estate documents, did not receive a substantial benefit. Generally, where the drafter of the will is a lawyer acting in a lawyer-client relationship, sufficient safeguards exist to permit the application of the usual presumptions and burden of proof. Thus, where the relevant confidential relationship is between an attorney and her client, and the attorney does not stand to benefit substantially from the execution of the documents she has been called upon to draft, burden of proof shifting will not apply.

f. Kelley bequeathed $10,000 to Plaintiff. The 2021 Document includes a no-contest provision: "If any person attempts to contest or oppose the validity of this trust or any amendment to this trust, or commences, continues, or prosecutes any legal proceedings to set this trust aside, then that person will forfeit his or her share, cease to have any right or interest in the trust property, and will be considered to have predeceased me for purposes of this instrument." The Magistrate accurately interpreted the plain language of this provision in holding that Plaintiff forfeited his $10,000 bequest.

D. *Walker v. Walker (In re Est. of Walker),* 320 Neb. 139 (Supreme Court of Nebraska 2025). A prior will, executed when the testator's testamentary capacity was unquestioned, that conforms substantially to the instrument contested, may be considered as competent evidence refuting charges of undue influence or lack of testamentary capacity, is relevant, and is not inadmissible hearsay.

1. Rita died on September 26, 2021. She was survived by four sons — Michael, Richard Walker, Stephen Walker, and Mark. On November 22, Mark filed a petition in the county court in which he sought formal probate of a will dated September 15, 2021, that he purported to be the validly executed last will of Rita. The will offered by Mark named Mark as the sole beneficiary and personal representative of Rita's estate, and it omitted Rita's three other sons. Michael objected. He instead petitioned for a formal adjudication of intestacy and nominated himself as personal representative. Michael alleged that Rita lacked testamentary capacity as of September 15, 2021, which was 11 days prior to her death, and the will was the product of undue influence.

2. The county court held a bench trial. Mark testified in support of the offered will. Thomas Kaspar, Jr., who was a friend of Mark and had been a friend of Rita and her late husband, testified regarding his having notarized the will offered by Mark. Mark offered into evidence a typed document that Mark purported to be a prior will that had been signed by Rita in February 2016 that provided for the same disposition of the estate as the will that Mark offered for probate. The court therefore refused to admit it into evidence.

3. Michael testified in opposition to the will. Michael called Richard and Stephen as witnesses, and he recalled Mark to testify. The brothers all generally testified regarding their interactions with Rita and with one another in recent years. Michael also presented testimony by Leslie Royal, a nurse who had treated Rita at a rehabilitation facility a year or two prior to Rita's death. Rita had injured her back in a car accident in which Mark had been driving. Royal testified, inter alia, that one evening, she heard Mark "yelling" at Rita regarding the car accident. Royal testified that Mark told Rita that she would "do what she was told" or he would take her out of the rehabilitation facility and she would "just die at home." Royal testified that she was alarmed by the incident and that she reported the incident to the facility's social services department. Mark acknowledged he had a tense discussion with Rita concerning Michael's effort to encourage Rita to pursue a personal injury action related to the car accident. But Mark denied that he had said the specific things that Royal had testified to, and he testified that while he was aware a report had been made to the rehabilitation facility's social services department, no action was taken in response to the incident.

4. Following the bench trial, the county court concluded that the will offered by Mark was validly executed, but refused to admit the will for probate because it found that Mark failed to meet his burden to prove Rita's testamentary capacity at the time of the will's execution in September 2021 and the will was the product of undue influence. Rita was on hospice care and that she "was taking pain medication as well as CBD oil, dying from pancreatic cancer, and experiencing pain" when she signed the will and that within 2 days of signing the will, Rita was taken to the hospital "for a serious medical issue." Several days before signing the Will, Rita was sleepy and unable to wake up because of pain meds and that when talking she would lose her train of thought and get frustrated. Mark testified that he had drafted the will from a document he obtained from the internet. The court did not hear evidence that Rita knew the nature of the acts she was making in the Will, the nature and extent of her property, or proposed disposition of her property.

5. The county court found by a preponderance of the evidence that Rita was subject to undue influence, Mark had the opportunity to exercise such influence on Rita, there was a disposition to exercise such influence, and the result was clearly the effect of such influence.

6. The undisputed testimony is Rita was dying from pancreatic cancer in September 2021. She was suffering from pain, using prescription pain medication and CBD oil, and on hospice care. The Will was executed 11 days before her death. The Will was "written" by Mark who admitted he "pulled it down off the internet." There was no evidence presented that Rita had the opportunity to read or understand the contents of the Will. The Will leaves everything to Mark. Mark signed as a witness as did Kaspar. Mark threatened Rita to do what he told her to, or she would die at home. Rita's other three sons were making multiple visits a week to visit her. Mark did not have any of them serve as a witness to the execution of the Will. Mark called a friend, Kaspar, to notarize the Will. The facts and circumstances of the drafting of the Will, the nature and timing of the execution, the opportunity and disposition to exercise undue influence clearly prove the Will is a product of undue influence.

7. The court ordered probate to proceed as an intestate proceeding, and the court appointed Michael to be personal representative of the estate. Mark filed a motion for new trial or, in the alternative, to alter or amend the order. The county court overruled the

motion and specifically rejected Mark's argument regarding the exhibit. Mark appealed. On appeal, the Nebraska Supreme Court held that a prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his or her property. Mark's stated purpose in offering the exhibit was to show Rita's intent and mindset, which fit squarely within the hearsay exception for a statement of a declarant's then-existing state of mind. The county court erred when it determined that exhibit was inadmissible hearsay. A prior will may be considered competent evidence for the purpose of refuting charges of undue influence or want of capacity by showing a constant and abiding scheme. Competent evidence of a testator's constant and abiding scheme for the distribution of his or her property is not limited to prior duly executed wills. The exhibit was relevant for this precise purpose and therefore was admissible. The Nebraska Supreme Court reversed and remanded the case.

8. On remand, the county court received the exhibit into evidence. At the hearing, Mark requested that the court allow testimony by an additional witness, Mary Williamette Preston, who was Rita's sister. The county court refused to allow testimony by Preston. The court stated that this court's direction was clear that the county court was to admit the exhibit and to consider it with the existing record. The court allowed Mark to make an offer of proof regarding Preston's testimony, and at a later hearing, the court received an affidavit of Preston as an offer of proof. In the affidavit, Preston generally stated that she had been close with Rita, that she knew that Mark had taken care of Rita in her final years, and that Rita had told her more than once that she intended for Mark to receive her estate and to "get everything." Preston also generally stated in the affidavit that Rita made all her own decisions up until her death and that in her final weeks, Rita was able to make decisions and was "clear in the head."

9. The county court again determined that the will that Mark offered should not be admitted for probate. In its order, the county court generally repeated the recounting of evidence from the bench trial that it had set forth in its July 12, 2022, order. The county court found in the August 2024 order that Mark failed to meet his burden regarding Rita's capacity even when considering the contents of the exhibit. The court conceded that the exhibit showed a constant and abiding scheme for the distribution of Rita's estate and that the document was signed by Rita and was notarized. The court found that the exhibit reflected Rita's state of mind in 2016. However, the court stated the exhibit was not the will being contested in this matter and evidence regarding Rita's capacity in 2016 was limited. The court turned its focus to evidence of Rita's capacity when she signed the will in September 2021, and the court repeated the evidence relevant to Rita's capacity that it had set forth in the July 12, 2022, order. The court concluded its analysis of capacity by again acknowledging that the exhibit showed a constant and abiding scheme for distribution of Rita's estate, but the court stated that given the facts and circumstances specific to the signing of the Will on September 15, 2021, it gave the exhibit little or no weight in making its decision. The court again found by a preponderance of the evidence that Rita was subject to undue influence by Mark. The court ordered that the will would not be admitted for probate and that the case would proceed in intestacy, and it appointed Michael as personal representative.

10. Mark appealed again, and the Nebraska Supreme Court affirmed on the following grounds:

a. The county court correctly determined that admitting new evidence, including Preston's testimony, was outside the scope of the mandate on remand. In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order. When a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate. When the judgment of a trial court is reversed on appeal and the cause remanded without specific instructions, it is the duty of the trial court to exercise its discretion in the further disposition of the case. The case was remanded to the county court with directions to reconsider the existing record, including the exhibit, to determine whether Mark met his burden of proving testamentary capacity and whether Michael met his burden of proving undue influence. Because the county court was given specific instruction on remand, it was required to comply with the specific instruction, and it had no discretion to deviate from the mandate by admitting any additional evidence other than the exhibit.

b. Proponents of a will have the burden of establishing prima facie proof of due execution, death, testamentary capacity, and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. In this case, Mark, as the proponent of the will, had the burden of establishing prima facie proof of Rita's testamentary capacity, while Michael, as a contestant of the will, had the burden of establishing undue influence. Each had the ultimate burden of persuasion as to the respective issues.

c. While a self-proved will establishes prima facie proof of testamentary capacity, the county court in this case found that the will offered by Mark was not self-proved because it did not meet statutory requirements.

d. Mark mainly relied on his own testimony that Rita was making her own decisions and directing her own affairs, that the specific medication she was taking allowed her to remain clear, and that she continued to socialize with family and neighbors. Mark also cited testimony by Kaspar that Rita appeared to sign the will voluntarily, that she read the will before she signed it, and that she did not appear to be confused. Mark also noted the similarity in the dispositional terms of the exhibit.

e. Competent evidence supports the county court's finding that Mark did not show that Rita had testamentary capacity on September 15, 2021. Because the will was not self-proved, Mark needed to present other evidence to provide a prima facie case of testamentary capacity. The county court properly focused on the factors specific to testamentary capacity, such as understanding the nature of Rita's act in making a will, knowing the extent and character of her property, and knowing and understanding the proposed disposition of her property, and the court found that Mark did not provide sufficient evidence of those specific factors. Evidence provided by Michael regarding Rita's physical and mental state at the time the will

was executed provided context and was relevant to the county court's determination regarding Rita's testamentary capacity.

f. The county court noted evidence of Rita's physical and mental condition on September 15, 2021, the date the will was signed, which was 11 days prior to her death, as well as evidence that Mark prepared the will and signed it as a witness. Although the court acknowledged that Kaspar notarized the will and witnessed Rita's reading and signing the will, it noted that Kaspar did not question Rita regarding the contents of the will. The court further noted evidence that although Rita's other sons made multiple visits to Rita around the time the will was signed, Mark did not have any of the other sons serve as a witness to the execution of the will. The court found credible the testimony of Royal to the effect that Mark had threatened Rita to do what he told her. Based on the evidence of facts and circumstances surrounding the drafting and execution of the will, the court found that Rita was subject to undue influence, that Mark had the opportunity to exercise such influence on Rita, that Mark had the disposition to exercise such influence, and that the result was clearly the effect of such influence.

g. On appeal, Mark contended that Michael did not meet his burden to establish undue influence. Mark argues that although the evidence might show he had an opportunity to exert undue influence, there was no evidence to show that he was disposed to exert undue influence or that the will was clearly the result of undue influence. Mark also argues that the county court inappropriately shifted the burden to him to disprove undue influence, and he references in his appellate brief the portion of the county court's order that states "The Court, even considering exhibit 7, is not satisfied the Will was not the result of undue influence." Mark further argues that the county court abused its discretion when it afforded exhibit 7 little to no weight, despite acknowledging that it showed a constant and abiding scheme for the distribution of Rita's property.

h. Competent evidence supported the county court's finding that Michael established undue influence. Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition. The county court's order did not shift the burden to Mark to disprove undue influence. The county court was clear in its order that as the party contesting the will, Michael had the burden of proof and the ultimate burden of persuasion regarding undue influence.

E. *Walters v. Aldrich (In re Est. of),* 2025 Wash. App. LEXIS 1711; 2025 LX 317528 (Court of Appeals of Washington, Division One 2025). The presumption of undue influence or mere suspicion of undue influence is not sufficient to defeat a motion for summary judgment.

1. Michael Walters was the third of five siblings: Sandee, Karen, Michael, Teri, and Bobby. By 2004, three of the siblings had passed. The two remaining siblings, Walters and Teri Beede, had a closer relationship when they were younger, including throughout Walters's first marriage during the 1980s and 1990s. However, after 2012, when their mother died, their relationship was not as close. They did not see each other in person frequently, and they would speak on the phone "[a] couple times a year." Walters's primary asset was a single-family residence in Mountlake Terrace, Washington (the "Property"). Walters executed a will naming Nicholas Aldrich, Sr. the sole beneficiary of Walters's estate.

2. In early 2018, while Walters was a patient at Swedish Hospital Edmonds ("Swedish"), he met Aldrich. Aldrich worked as a Certified Nursing Aide ("CNA") at Swedish and was 71 years old when they met. According to Aldrich, he cared for Walters several times and got to know him. During one of Walters's stays at Swedish, he shared with Aldrich that he had no relatives or friends. According to Aldrich, when he asked who picked up Walters's mail, Walters told him, "Nobody. It just piles up on the front porch." Aldrich then volunteered to collect his mail. According to Aldrich, the two developed a friendship, and he began visiting Walters to spend time with him and to help him with various tasks Walters could not accomplish on his own. During one of these visits, Aldrich found Walters distraught. According to Aldrich, Walters had applied for a reverse mortgage on the Property, but the bank had declined the application. Aldrich stated that "[t]o support [his] friend . . . , [he] promised to pay [Walters's] mortgage on the Property."

3. Walters signed a quitclaim deed granting his Property to Aldrich. On April 11, 2018, Aldrich made his first payment on Walters's mortgage for the Property, paid for 4 months of mortgage arrearage payments, and at the time of Aldrich's November 2023 declaration, continued to pay the Property mortgage to date.

4. On June 4, 2018, Walters executed a Last Will and Testament in which Aldrich was named the sole beneficiary of Walters's estate (the "Estate"). Aldrich was named the executor of the will, and Aldrich's daughter, Katherine Josee, was named an alternate executor. Josee and her husband served as witnesses to the will. Walters was 65 years old at the time.

5. In September 2018, a social worker at a rehabilitation center where Walters was staying at the time raised concerns about the transfer of Walters's Property to Aldrich, and a police investigation ensued. An officer for the Mountlake Terrace Police Department, Megan Johnson, first interviewed the social worker, who was concerned about perceived suspicious circumstances as well as the potential jeopardy to Walters's access to medical care through the State if he no longer had his house as a surety. Johnson then interviewed Walters, who confirmed he met Aldrich while he was treated at Swedish and that he transferred his home via quitclaim deed to Aldrich. This report was then forwarded to Adult Protective Services ("APS").

6. In October 2018, APS began an investigation of a referral regarding Walters based on concerns of self-neglect. The investigation concluded with a "Comprehensive Investigation Document" ("Investigation Document") that substantiated the allegation. The Investigation Document confirmed that "health care professionals ha[d] informed [Walters] that an adult family home or assisted living facility is a recommended option for him because [Walters] need[ed] maximum assistance with his health care." However, "[b]oth [of] these options need financial resources which can be leveraged by [Walters] using his house to pay for [these] options." Upon realizing that Walters had transferred his home to Aldrich, according to the Investigative Document, "APS worked to reverse this transaction," so he could access care if he chose to. Sometime in November 2018, with APS support, Walters requested that Aldrich deed the Property back to him. On December 5, 2018, Aldrich transferred the Property back to Walters.

7. In March 2019, the Department of Health ("DOH") also began investigating a separate complaint against Aldrich concerning unprofessional conduct as a CNA in violation of the statute regulating discipline of health professionals. Aldrich was terminated from Swedish due to his failure to comply with Swedish's policies.

8. Until Walters's death in 2022, Aldrich and Walters continued to spend time together. Starting on April 17, 2019, Aldrich arranged for his brother to clean Walters's windows and build a shed in the Property's backyard so Walters could store his stuff when he moved out to an adult family home. According to Aldrich, he also: (1) paid more than $4,000 in arrears to bring Michael's Property mortgage current; (2) paid more than $59,000 of personal funds towards Michael's mortgage on the Property from April 11, 2018 through August 6, 2022; (3) paid more than $1,200 monthly towards Michael's Property mortgage with personal funds; (4) trimmed Michael's trees as required by Michael's insurance company; (5) found an insurance company that would accept Michael; (6) paid for and built a shed in Michael's backyard for Michael to store his belongings; (7) loaned Michael $4,000 without interest, that Michael paid back; (8) paid Michael's $3,000 bail for Michael's DUI, took Michael to court, and paid for getting Michael's car out of police impound when Michael was cited with a DUI; and (9) loaned Michael $2,000 for Michael's attorneys' fees to defend against Michael's DUI.

9. Walters passed on July 28, 2022, and pursuant to his will, the court appointed Aldrich Personal Representative of the Estate.

10. Beede filed a complaint under the Trust and Estate Dispute Resolution Act ("TEDRA") seeking to invalidate the will on the grounds of undue influence and remove Aldrich as Personal Representative and asserting a claim of financial exploitation. Beede requested that the trial court order APS to release to her and Aldrich any confidential information APS held related to investigations regarding Walters. Instead, the trial court ordered the release of the information directly to it. Following an in camera review of the materials produced by APS ("APS records"), the trial court released 65 out of 301 pages. Aldrich filed a motion for summary judgment seeking dismissal of Beede's claims, which the trial court granted, and the court ordered Beede to pay $37,429.75 of Aldrich's fees and costs.

11. Beede appealed and the court of appeals affirmed the dismissal of the complaint on the following grounds:

a. Viewed in the light most favorable to Beede, the record suggests Aldrich and Walters shared a confidential relationship.

b. To determine whether overall, the beneficiary brought about or affected the testamentary instrument, courts consider the greater context of the relationship. Here, there is not the type of evidence that Aldrich engaged in "systematic manipulation" without which the will would not have come into being. However, for purposes of establishing the presumption of undue influence, even if Aldrich sought solely to assist Walters in carrying out his wishes, it is a reasonable inference that he assisted in bringing about the will.

c. A relevant factor asks whether the beneficiary received an unusually or unnaturally large portion of the estate. "Unusualness" or "unnaturalness" can be measured by comparison to the decedent's testamentary instruments, or bequests to other beneficiaries. The record does not indicate that there were prior testamentary instruments, so there is no helpful prior comparison. But Walters left the entirety of his estate to Aldrich after knowing him for only four months. Thus, Aldrich did receive an unusually large portion of the Estate.

d. A will can be construed as unnatural when the beneficiary is not the "natural object" of a testator's bounty. Here, even before the relationship with Aldrich

developed, Beede was not closely involved in Walters's life. And on at least three different occasions during the APS investigation, Walters denied to others having any living family members. Here, Beede presented no evidence that physical limitations rendered Walters completely isolated from others and dependent solely on Aldrich for care, or that at the time the will was executed, Walters experienced cognitive impairment. Nevertheless, viewing the record as a whole and considering the totality of the circumstances in the light most favorable to Beede, the record includes facts and circumstances sufficient to raise a presumption of undue influence.

e. If the facts raise a presumption of undue influence, the burden of production shifts to the will proponent, who must then rebut the presumption with evidence sufficient to balance the scales and restore the equilibrium of evidence touching the validity of the will. The presumption of undue influence is not sufficient to defeat a motion for summary judgment, nor is "mere suspicion of undue influence" enough. Rather, the contestant must establish undue influence by producing direct or circumstantial positive evidence. Evidence supporting a presumption may also be considered as direct or circumstantial evidence of actual undue influence.

f. While Walters needed significant assistance with his physical care, the presumption of undue influence was effectively rebutted by evidence that Walters was acting independently and exercised his judgment and choice when executing his will.

g. Even when Walters was provided with resources to explore renting his house or using the proceeds from selling the house to pay for his care, he did not follow through on either of the possibilities and chose to go back to his home situation despite medical recommendations. A narrative police report from the fraud investigation recounted a conversation with Walters in which he indicated his intent regarding the house: "Walters told me he did not have any family or friends to leave his house to in his will, so he told Aldrich he wanted to will the house to him. Aldrich told Walters they could just complete a quitclaim deed and transfer the house now instead of waiting. Walters requested they find a lawyer to help with the transfer, and Aldrich said they didn't need a lawyer. Walters told me he does not feel uncomfortable about the transfer, and he trusts Aldrich." By his words as well as actions, Walters conveyed a desire to remain in his home. While Aldrich's actions made it possible for Walters to do so, his assistance alone does not establish the will was the product of undue influence.

h. Despite the relatively short length of Walters's relationship with Aldrich at the time of the will, the ensuing friendship and financial support Aldrich provided for the remaining four years of Walters's life — in excess of $59,000 — places his bequest in proper context. Indeed, Aldrich recounted visiting Walters consistently, helping Walters maintain his home, loaning Walters money, and assuming Walters's mortgage so that Walters could remain in his home.

i. The rebuttal evidence showed Walters's desire to bequeath his property to his friend and caretaker, Aldrich. Neither party disputes that Walters's health was poor. However, despite his history of alcoholism, depression, and anxiety, Beede does not provide evidence of cognitive impairment that made Walters vulnerable

to undue influence regarding his testamentary intent. Despite a close relationship between Aldrich and Walters, Beede does not provide any positive evidence, direct or circumstantial, that indicated Aldrich isolated Walters from others or that the close relationship between the two prevented Walters from exercising his judgment and choice. While Aldrich may have facilitated the creation of Walters's will, this facilitation was consistent with — not in contravention of — Walters's repeated desire to gift the property to Aldrich. And, although Aldrich received an unusually large portion of the Estate, in context, this was consistent with the friendship and robust support Aldrich provided to Walters in his final years of life. Beede fails to overcome the substantial burden to show by clear, cogent, and convincing evidence that the will was the product of undue influence and not Walters's intent.

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

A. *Lindsey v. Lindsey (In re Est. of Lindsey),* 2025 Cal. App. Unpub. LEXIS 3244; 2025 LX 56875; 2025 WL 1501019 (Court of Appeal of California, Fourth Appellate District, Division One 2025). Beneficiary established elements of a promissory estoppel claim, and court must determine beneficiary procured that promise through undue influence.

1. Edna Jeter Lindsey created a revocable trust in 1986 in which she named her four children as beneficiaries: Charles, Jane, Jan, and Gweneth Lindsey. At the time of her death in September 2011, the only surviving beneficiaries were Charles, Jane, and Jan, as Gweneth predeceased Edna and had no children. Under the terms of the trust, Jan was to receive Edna's personal property. The remaining trust assets — Edna's house and her investment and bank accounts — were to be divided equally among the named beneficiaries or their survivors. In her petition with the probate court, Jane claimed that either of two actions Edna took after the last trust amendment on December 2, 2002, required an order directing the trustee to distribute Edna's entire estate to her.

2. On December 9, 2002, Edna signed a letter she and her then-attorney Karen Black had drafted (the "2002 letter"). It instructed Black, "If any of my children attempt to obtain a conservatorship against me, I hereby authorize you, or the agent under my power of attorney, to amend the Edna Jeeter [sic] Lindsey trust, to exclude as a beneficiary of my estate any child that has been involved in trying to obtain a conservatorship after this date, unless you and my trustee believe the conservatorship is appropriate at that time." Edna further explained, "I trust your judgment in this respect, and I believe you will resist a conservatorship as long as it can be avoided."

3. The conservatorship Edna mentioned was part of a long-simmering discord between Edna and two of her children — Charles and Jan — with Jane tending to support Edna. Edna's husband passed away in April 2000 while they were living in San Diego, California. At that time, Charles lived in Tucson, Arizona, whereas Jane and Jan lived in different communities near Santa Cruz, California. Shortly after her husband died, Edna moved to an apartment in Tucson to be close to Charles. In September 2001, with Jane's help, Edna moved back into her San Diego house without telling Charles or Jan. Rather than return to Santa Cruz, Jane moved into Edna's house and lived there until Edna's death in 2011.

4. Shortly after Edna returned to San Diego, Charles and Jan sought involuntary conservatorships over Edna's person and estate. They took this step because they had

been unable to reach Edna for three weeks after she left Tucson. Charles and Jan accused Jane of "abduct[ing]" Edna in Tucson, helping "unload" one of Edna's checking accounts, and "shutting [Edna] away from the rest of her family and friends." Adding to Charles and Jan's concerns was the fact that Edna had been suffering from dementia and other cognitive and behavioral issues.

5. Edna wrote letters to Charles and Jan, making it clear that although she loved all her children "very much," she was "royally pissed" that they were trying to "take [her] and [her] activities over, tell [her] where to live, and "control [her] bank accounts and investments." Edna initially indicated she "did not want to see or talk to" either of them unless they withdrew their conservatorship petition. But by the time she signed the 2002 letter, she had planned to meet with all her children to discuss her wishes. In the 2002 letter, however, she instructed Black, "Should my children continue to harass me, or attempt in any fashion to control the management of my estate or my person . . . you are hereby directed to seek a restraining order on my behalf. If they continue to try to dictate where I live, with whom I live, and how I spend my time, I do not want anything more to do with them."

6. When Edna signed the 2002 letter, the conservatorship proceedings had been suspended at Charles and Jan's request, but they were put back on calendar in January 2003. Although Black filed an opposition to the petition, she was also attempting to settle the case with a limited conservatorship to facilitate communications between Edna and her children. The parties resolved the matter in February 2004 after Edna agreed to this arrangement and the appointment of a conservator. Despite the fact that Charles and Jan formally continued to pursue a conservatorship after Edna signed the 2002 letter, Black never amended the trust to exclude them as beneficiaries.

7. In January 2003, after having lived in San Diego with Edna for sixteen months, Jane told her that she wanted to move back to Santa Cruz. Starting in 1998, Jane worked in the Santa Cruz area as a relief veterinarian. Until sometime in 2005, which is when Jane transitioned to working mostly at clinics in and around San Diego, she and Edna would occasionally travel to Santa Cruz so Jane could work. Jane wanted to move back to Santa Cruz in part to purchase the veterinary clinic that she had to forgo buying in September 2001 because she needed to help Edna move from Tucson to San Diego.

8. Edna did not want to give up Jane's care and companionship, but she also did not want to move to Santa Cruz. According to Jane, Edna promised to leave her the house and "all her mutual funds" if she would stay in San Diego and provide Edna with live-in care for the rest of her life. Edna variously told others, including trustee Brito, that when she passed away, Jane would receive the house, the house and Edna's "investments," or "everything." This promise was not memorialized in writing by Edna, Jane, or Black, who did not recall hearing about it while Edna was still alive.

9. There is no dispute that Jane stayed with and cared for Edna until her death. As Jane described it, Edna was "velcroed" to her in that she "basically did what [Jane] did when [Jane] did it." Edna went with Jane to work, where she would need to be occupied with tasks such as helping the receptionists or assisting Jane during surgical procedures. When Jane was not working, she either was taking care of Edna or waiting in senior centers while Edna attended classes or played bridge. Because Edna slept in the same room as Jane, the only alone time Jane enjoyed was when Edna would watch television or go to bed early. Edna was in good physical health when Jane moved in with her. But

by 2009, she needed a wheelchair or a walker and the help of a care assistant whenever she and Jane went out.

10. Edna had instructed her attorneys not to discuss her trust with any of her children. Thus, although Jane was aware of the 2002 letter, she did not learn until after Edna died that the trust had not been amended to disinherit Charles and Jan. Accordingly, in February 2012, Jane filed a "Petition Concerning Internal Affairs of Trust" to obtain an order directing the trustee to distribute Edna's entire estate to her. The probate court denied the petition, entering judgment in favor of Charles and Jan. Jane appealed.

11. On appeal, the court of appeals reversed and remanded on the following grounds:

a. The trust stated that as its trustor, Edna could "amend the terms of the trust by [signing] a written instrument." The 2002 letter did not amend the trust to disinherit Charles and Jan. The letter makes clear Edna's expectation that any amendment to disinherit one of her children for seeking a conservatorship could occur only upon Black's and Brito's subsequent exercise of their collective judgment generally, and specific determination, that any conservatorship being sought was not appropriate. This discretion is reflected in Edna's use of the term "authorize" rather than "instruct" or "direct." That Black and Brito were "authorize[d]" to amend the trust did not require them to do so. Moreover, the remainder of the paragraph withdrew even that authority if Black and Brito believed a conservatorship was "appropriate." By requiring these additional steps before removing a child as a beneficiary, Edna did not intend for the letter itself to amend the trust.

b. The probate court erred by rejecting the entirety of Jane's promissory estoppel claim. She asserted on appeal that staying in San Diego to be Edna's lifelong, live-in caretaker was an act or forbearance she reasonably undertook in reliance on Edna's unambiguous promise that she would receive her entire estate. As for her detrimental reliance, Jane stresses the impact taking on this responsibility had on her personal life.

c. A court may apply promissory estoppel to enforce oral contracts or promises to make a devise of property that are established by clear and convincing evidence. The existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the only one that can be reasonably drawn from the evidence.

d. The probate court found that Edna's promise was not clear and unambiguous because the witnesses' testimony varied as to exactly what assets she planned to leave Jane. This uncertainty is not fatal to Jane's claim. It is true that the witnesses' recollections were inconsistent as to which assets other than the house Edna promised to leave Jane. But there was no dispute that Edna's expressions of her promise to Jane always mentioned the house. As the promise related to other assets, we must defer to the court's conclusion that Jane failed to establish by clear and convincing evidence which of them Edna intended to leave her. But there was no question that Edna intended for Jane to receive the house. Thus, that aspect of her promise was definite enough that a court can determine the scope of the duty as required to satisfy the first element of promissory estoppel.

e. Although the probate court was likely correct to question whether Jane reasonably relied on a promise to receive Edna's entire estate when she knew that Edna wanted to maintain relationships with all her children, Jane's reliance on a promise that she would receive the house does not raise those same concerns. Moreover, the facts were not disputed that Edna made her promise while facing the prospect of losing Jane's care and companionship during a time when her relationships with Charles and Jan were undeniably strained. It is not manifestly unreasonable under these circumstances for Jane to have relied on Edna's promise to leave her the house. Jane's devotion of all her free time to Edna's care for the rest of her life — also not disputed by Charles and Jan — was an action of a definite and substantial character as required for detrimental reliance.

f. Accordingly, the probate court erred in ruling that Jane failed to establish the elements of promissory estoppel as to Edna's house. The court on remand must determine whether Jane procured that promise through undue influence. We express no opinion on what the outcome of that analysis should be.

B. *Brown v. Amidan,* 2025 UT App 144 (Court of Appeals of Utah 2025). Court may reform trust to remove no-contest provision under UTC where provision was included based on a mistake of expression and settlor did not know provision was included.

1. Dorothy and her husband, Carmon Brown, had five children: Stephen, Jesse, Bonnie, Larry, and Gary. Dorothy and Carmon owned property (the "Canyon Property") near Causey Reservoir in Weber County, Utah. After Carmon died in 2002, Dorothy established a trust to divide her estate, including the Canyon Property, evenly among the five children upon her death.

2. In 2003, Dorothy amended the trust to leave the Canyon Property to Jesse. The rest of the estate was still to be divided equally among the five children. The other children did not learn about Dorothy's decision to leave the Canyon Property to Jesse until much later, when Bonnie and Stephen obtained a copy of the amended trust for tax purposes. The discovery led to family strife for years.

3. Dorothy again amended the trust twice in 2011 and once more in 2016. None of these amendments changed the provision that left the Canyon Property to Jesse. However, the 2016 amendment did differ from the prior iterations in one important respect. While Dorothy was a trustee in each of the prior versions, the 2016 amendment designated Bonnie as the sole trustee.

4. On September 12, 2017, Dorothy — at the age of 96 — fell and broke multiple bones. A few days later, Bonnie and Jesse argued over some of the disbursements that Bonnie had made on behalf of the trust. The fight distressed Dorothy, and she asked Larry, "Why do my kids always have to fight?" Larry responded, "You know why, Mom. That addendum or trust change has us all upset." Larry suggested that Dorothy could end the fighting by amending the trust to divide the Canyon Property equally among the children. Dorothy responded, "Do it."

5. Larry and Stephen then had a lawyer draft an amended trust document for Dorothy to sign. After she fell, Dorothy had been taking pain medication every day, but on September 20, 2017, she held off on taking the medication until the afternoon. That morning, Bonnie twice read to Dorothy a statement explaining that the trust would be amended to leave all the trust property — including the Canyon Property — in equal shares to the five

children. Then, with Bonnie steadying her hand, Dorothy signed an instrument amending the trust (the "Final Trust").

6. In addition to changing the provision regarding the Canyon Property, the Final Trust again designated Bonnie as the sole trustee. It also included a no-contest provision. But Dorothy had not requested such a provision, Bonnie was unaware of it, and Bonnie did not read it to Dorothy.

7. Dorothy passed away in December 2018. In July 2019, Jesse sued Bonnie, both in her personal capacity and in her capacity as trustee. The complaint asserted that a confidential relationship existed between Bonnie and Dorothy and that the Final Trust was the result of Bonnie's undue influence. The complaint sought reformation of the Final Trust to reflect the terms of the 2016 amendment, which had retained the provision leaving the Canyon Property to Jesse. In the alternative, the complaint sought to have the Final Trust declared void.

8. The court determined that: (1) a confidential relationship existed between Bonnie and Dorothy, which created a rebuttable presumption that the Final Trust was the product of Bonnie's undue influence; (2) Bonnie rebutted that presumption; and (3) Dorothy did not intend to include the no-contest provision. Consequently, the court found that the Final Trust was valid. Based on the supplemental briefing, the court also determined it could reform the Final Trust to remove the no-contest provision, and it did so.

9. Jesse appealed and the court of appeals, with one concurring justice, affirmed on the following grounds:

> a. Jesse argues that the district court should have admitted rebuttal testimony by his expert. The court declined to address the merits of the argument because Jesse didn't provide a transcript of the ruling on appeal. Without the transcript, the court must presume the correctness of the court's ruling. In his principal brief, Jesse failed to specifically attack the district court's conclusion that the expert's rebuttal testimony was needlessly cumulative and therefore excludable. The court of appeals must affirm a court's ruling when it is based on multiple independent alternative grounds and the appellant challenges only one of those grounds. Jesse's failure to attack the court's determination until his reply brief leaves this alternative ground effectively unaddressed. Because Jesse failed to include a transcript of the district court's ruling and does not address one of the two independent alternative grounds for the ruling in his principal brief, Jesse has not met his burden of persuasion on appeal.
>
> b. Jesse asserts that the district court should not have considered Bonnie's reformation argument because Bonnie failed to plead it and raised it for the first time during closing arguments. There is no issue with the district court's decision. For one thing, it was Jesse — not Bonnie — who placed reformation on the table in the first place. Bonnie merely argued that the court could remove the no-contest provision if it decided to reform the Final Trust. And Jesse cites no authority for his implied argument that a court can only reform a trust in a way that conforms with the wishes of the party who originally raised reformation.
>
> c. Every judgment other than a default judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings. By requesting supplemental briefing on whether it could reform the

Final Trust to remove the no-contest provision, the court provided Jesse with notice of the issue and an opportunity to address it. There was no error in the court's decision to reform the Final Trust to remove the no-contest provision despite Bonnie's failure to plead reformation or raise it until closing arguments.

d. Section 415 of the Utah Uniform Trust Code, which is identical to section 415 of the Uniform Trust Code (UTC), provides that "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." The UTC's official comment to section 415 explains that the provision "applies whether the mistake is one of expression or one of inducement" and that "[a] mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included." The text of section 75B-2-415 and the UTC comment make clear that, assuming the district court made the relevant findings, it had the authority to reform the Final Trust to remove the no-contest provision.

e. And here, the court made detailed findings that the no-contest provision was included in the Final Trust based on a mistake of expression. Jesse has not challenged those findings, and they are not clearly erroneous. Indeed, there is no evidence that Dorothy specifically requested the no-contest clause. For one thing, it was Stephen and Larry — not Dorothy — who contacted the lawyer to draft the Final Trust. And there is no evidence that Dorothy spoke to the drafting lawyer. Moreover, Bonnie testified that neither she nor Dorothy knew that the no-contest provision was included in the Final Trust and that she had not read it to Dorothy. For these reasons, the district court had the authority under the Utah Uniform Trust Code to reform the Final Trust to remove the no-contest provision.

f. Jesse has not marshaled the evidence in favor of the district court's factual findings underlying the conclusion that the Final Trust was not the product of Bonnie's undue influence. Jesse also has not included many of the relevant transcripts on appeal. Although the record contains the ruling itself, the only trial testimony in the record that specifically addresses undue influence comes from an expert who testified that the Final Trust was not the product of Bonnie's undue influence. The court therefore must presume that the missing trial transcripts also supported the district court's determination on this point. Because Jesse has not marshaled the evidence in favor of the factual findings underlying the district court's determination that the Final Trust was not the result of Bonnie's undue influence, and because Jesse has not included essential parts of the record on appeal, the court must affirm the court's ruling on this point.

C. ***In re Est. of Riss,*** **2025 Tenn. App. LEXIS 134; 2025 LX 44488; 2025 WL 1147569 (Court of Appeals of Tennessee, at Nashville 2025).** Codicil failed to meet the statutory requirements of a valid testamentary instrument because the witness signatures were affixed to an attesting affidavit but not to the codicil, and holographic document fails because it did not contain any material provisions directing the distribution of the estate.

1. Decedent Nancy G. Riss died in November 2022 at age 85 in Williamson County, Tennessee. She is survived by her two sons, Adam Riss ("Petitioner") and David Riss

("Respondent"). Decedent's Will, executed on September 25, 2018, states, in pertinent part, "[i]f my husband does not survive me, I leave my residuary estate to my children who survive me in equal shares per stirpes." At the time the Will was executed, Decedent was married to Simson Riss, who later died on August 15, 2019.

2. Following her husband's death, Decedent executed a typewritten document on August 29, 2019, titled "CODICIL TO THE LAST WILL AND TESTAMENT OF NANCY GENE RISS" ("the Codicil"). The Codicil purported to modify the Will by removing Petitioner as co-executor of Decedent's estate ("the Estate") and excluding him from receipt of any beneficial part of the Estate. Instead, it named Respondent as the sole executor and beneficiary of the Estate.

3. Immediately below the terms of the Codicil appear the signatures of Decedent and a Notary Public. No witness signatures appear below the terms of the Codicil. Nevertheless, immediately following the Notary's signature (which does not include an acknowledgement), and on the same page as the terms of the Codicil, an Attestation Affidavit ("the Affidavit") appears. Beneath this text, two witness signatures appear, along with an Acknowledgement by the Notary. Decedent's signature does not appear beneath the Affidavit. That same day, Decedent executed a separate, handwritten document (the "Holographic Document") explaining her reasoning for purportedly wanting to change the Will but disposed of no property. The bottom of the Holographic Document includes the signature, acknowledgement, and seal of a Notary Public.

4. Petitioner filed a "Petition to Admit Decedent's Will, and to Set Aside the Codicil" in the Chancery Court for Williamson County, alleging that the Codicil was a result of undue influence and lack of capacity of Decedent. The trial court found the petition and answer to, in effect, be a complaint and answer to a will contest regarding the Codicil to the Will and opened the Estate as an intestate administration, pending resolution of the will contest.

5. Petitioner subsequently filed an amended petition, contending that the Codicil fails to meet statutory requirements to be deemed a valid testamentary instrument. Respondent thereafter filed a counter-complaint, arguing that the Codicil meets the statutory requirements to be considered a valid testamentary instrument, and, even if it does not, the Holographic Document constitutes a separate holographic codicil that incorporates the typewritten Codicil by reference. Petitioner answered, refuting the Holographic Document's testamentary validity and further asserting that it does not contain any dispositive provisions but is rather an extrinsic list that is inadmissible under the parol evidence rule.

6. Petitioner filed a motion for judgment on the pleadings, which the trial court granted and ordered the Estate to be administered in accordance with the Will executed by Decedent in 2018.

7. On appeal, the court of appeals affirmed on the following grounds:

> a. The Codicil is a single-page document containing the signatures of the testator and two witnesses. Although they appear on the same page, the Affidavit and Codicil are two distinct legal documents, and each is governed by a different statute. The statutory requirements for the execution of a will must be independently met and cannot be satisfied by signatures on an attestation affidavit.

b. The statutory requirements for the valid execution of attested wills "have remained virtually unchanged" since they were prescribed in 1941 under the Execution of Wills Act.

c. Tennessee Code Annotated § 32-1-104 clearly and unmistakably requires attesting witnesses to sign the will in the presence of the testator and in the presence of each other. Moreover, and significantly, an attestation affidavit "is not part of the Will" but is instead prepared pursuant to Tennessee Code Annotated § 32-1-110, which permits the use of attestation affidavits to prove a will.

d. This statute authorizes use of an affidavit of attesting witnesses in lieu of live testimony only if a will is uncontested. By requiring the affidavit to be written on the will or, if that is impracticable, some paper attached to the will, a clear distinction is drawn between an affidavit of attesting witnesses and a will.

e. Accordingly, witness signatures appearing only on the affidavit and not the will are insufficient to be considered signatures to the will. Properly executed attestation affidavits do not "negate or satisfy" the statutory requirements for a valid will under the Execution of Wills Act.

f. Attempting to treat the Codicil as one comprehensive document that includes the witness signature entirely ignores the legislature's clear distinction between the affidavit of attesting witnesses and their signatures on a will. Tennessee has not adopted the doctrine of integration. Thus, the decedent's signature on the affidavit did not satisfy the statute requiring the testator's signature on a will. That the Affidavit and the Codicil appear within the same one-page document negates neither their distinction as separate documents nor the statutory requirements that must be independently met to be considered a valid testamentary document. The witness signatures appearing on the Affidavit but not the Codicil fails to meet the statutory requirements of a validly executed will under Tennessee Code Annotated § 32-1-104.

g. For a holographic will to be statutorily valid in Tennessee, the signature and all material provisions must be in the handwriting of the testator. Additionally, a testamentary intent must accompany the performance of the statutory requirements, and this must be proven in a manner which conforms to applicable rules of evidence and procedure.

h. Petitioner has admitted to the factual allegations concerning the content of the Holographic Document, that it was written entirely in Decedent's handwriting, and that it contains Decedent's signature. The trial court correctly determined that the issue is whether Decedent included "all material provisions" in the Holographic Document, a statutory requirement for a valid holographic will under Tennessee Code Annotated § 32-1-105, which is a question of law.

i. Decedent makes no material disposition of her Estate in the Holographic Document. A valid holographic will must satisfy the statutory requirements and demonstrate that it was the testatrix's clear intention to dispose of her property after her death. Here, there is nothing in the Holographic Document demonstrating a clear intention of the manner in which Decedent wished to dispose of her property upon her death. Instead, she merely expresses her grievances with Petitioner and avers that, "[f]or the above reasons and more, I no

longer wish to have any relationship with [Petitioner] and his wife Lisa, and children Remy Skye and Graham." There are no instructions regarding how she wishes the Estate to be distributed. As such, the Holographic Document does not dispose of the Estate. Therefore, the Holographic Document fails to satisfy the requirement that it contains material provisions disposing of Decedent's Estate to be considered a valid holographic will.

D. *In the Matter of the Estate of Gravel,* 2025 Mass. App. Unpub. LEXIS 653 (Appeals Court of Massachusetts 2025). Attempted trust amendment invalid for failure to adhere to trust terms requiring beneficiary consent to amendments.

1. In 2017, Mary Jane Gravel ("decedent") settled the Everest Realty Trust ("trust") as part of her estate plan. The declaration of trust named her son Shane A. Gravel ("Shane") as the successor trustee and, by attached exhibit, identified Shane's three minor children as beneficiaries.

2. In 2022, the decedent executed a document titled "Amendment to Everest Realty Trust" ("2022 trust amendment"), replacing the sentence naming Shane as successor trustee with a new sentence naming her nephew, Jason J. Armstrong ("Jason"), as successor trustee. The same document included a new section naming Jason to "receive all property, accounts, and other titles and property" of the trust. After the decedent died, Shane and Jason filed competing petitions for probate of the estate, each of which identified the petitioner as the personal representative named in the decedent's will. In addition, and in the same court, Jason sought a declaration that the 2022 trust amendment was valid ("third action"), which Shane contested. After cross-motions for summary judgment in the third action, a judge of the Probate and Family Court ("motion judge") granted summary judgment in favor of Shane and declared the 2022 trust amendment void ab initio.

3. On appeal, the court of appeals affirmed on the following grounds:

a. Disagreement about the nature of the trust — specifically, whether the trust is properly considered as revocable or nominee — underlies the parties' dispute, with Jason asserting that the decedent settled a revocable trust that she properly amended by the 2022 trust amendment, and Shane maintaining that it was an irrevocable nominee trust that was not amended. Even assuming, favorably to Jason, that the trust was revocable, the decedent failed to follow its express terms when executing the 2022 trust amendment.

b. Assuming that the trust was revocable, the decedent could have amended it "by complying with a method provided in the terms of the trust." See *Phelps v. State St. Trust Co.*, 330 Mass. 511, 512, 115 N.E.2d 382 (1953) ("a valid trust, once created, cannot be revoked or altered except by the exercise of a reserved power to do so, which must be exercised in strict conformity to its terms"). The trust instrument specified that amendments could be made "by an instrument in writing signed by beneficiaries holding at least 51% of the beneficial interest as designated by the Schedule of Beneficiaries and acknowledged by one or more of them." This term unambiguously requires signed approval by the trust's beneficiaries to amend the trust. The 2022 trust amendment did not include the signatures or acknowledgements of any beneficiary and thus did not comply with these terms, so the amendment is void.

c. Jason asserts that it was impossible for the trust to be amended pursuant to its terms because the minor beneficiaries could not legally consent to amend the trust. This provision does not apply because, pursuant to the schedule of beneficiaries, "the beneficial interests of the minor beneficiaries were being held in trust by their legal guardian," and "[t]he legal guardian of the beneficiaries, acting as their trustee, could have taken action on their behalf" to amend the trust. Thus, the beneficiaries' ages posed no actual impediment to amending the trust pursuant to its terms. This is true even if the beneficiaries' interests in the trust had not yet vested; regardless of whether the beneficiaries' rights had vested, any revocation or amendment must be pursuant to the trust's terms. As the decedent made no effort to adhere to those terms in the 2022 trust amendment, the amendment was void ab initio.

E. *Roszkowiak v. Roszkowiak,* 2024 IL App (2d) 230265; 2024 Ill. App. LEXIS 2857; 2024 LX 32173 (Appellate Court of Illinois, Second District). Whether the term "scrivener," "typist," or "recorder" is used, a settlor may amend or revoke his or her own trust using the aid of an individual who acts entirely and only at the settlor's direction.

1. Diana Roszkowiak passed away in June 2020 at the age of 77. She was preceded in death by her husband of 51 years, Gerald, and was survived by 14 children and more than 40 grandchildren. During her life, Diana set up a revocable trust to manage and distribute her assets. She also made one amendment to the trust, which was largely funded with two pieces of real property: Diana's residence in Grayslake and a single-family home in Wausaukee, Wisconsin, which was primarily used for family vacations. The amended trust documents provided that each piece of property would be distributed to named groups of Diana's children for them to jointly own and maintain as a board of beneficiaries. Each beneficiary would have the right to purchase the property and the right of first refusal of sale. The trust documents also provided that Diana could amend her trust at any time, through a written instrument delivered to herself as trustee.

2. There was some evidence that Diana had been unhappy that prior trust documents had been taken from her home or examined without her permission. Diana spoke to her daughter Wendy Fonk, on FaceTime, to notify her of a change in the trust to convey the Wausaukee property to Wendy upon Diana's death. On June 11, 2020, Diana asked Jennifer to type a second amendment to her trust, the addendum at issue. Diana presented Jennifer with a handwritten rough draft of the addendum and a tax bill to use for the legal description of the Wausaukee property. The proposed addendum removed the board of beneficiaries for the Wausaukee property and stated that the trust would convey the property to Wendy upon Diana's death. Jennifer typed as Diana spoke. According to Jennifer, she typed what her mother said "verbatim" and did not "stray from, alter, or add any changes" to her mother's dictation. Another sibling, Timothy Roszkowiak, witnessed the exchange. On June 11, 2020, Diana had the addendum notarized and delivered to her as trustee. On June 12, 2020, Diana gave the document to her youngest son, Austin Roszkowiak, who was the sole named successor trustee.

3. On June 14, 2020, Diana was scheduled for heart surgery the following day. In her hospital room, Diana made a video recording of herself reading the addendum aloud and affirming that those were her wishes as the trust's settlor. On June 21, 2020, Diana passed away.

4. After Diana passed, Austin filed suit as successor trustee, seeking a judicial construction of the trust. As part of the suit, Jason Roszkowiak, Polly Klein, Julie Tochor, and Quintin Roszkowiak ("defendants"), who had been previously named to the board of beneficiaries, objected to the addendum. Austin sought a declaratory judgment stating that the addendum was valid. Defendants maintained that, because Jennifer is not an attorney, her "drafting" the amendment was void, in violation of the Consumer Fraud and Deceptive Business Practices Act ("Deceptive Practices Act"), which requires that only a licensed attorney may draft trust documents. The court denied defendants' motions to dismiss and motions for summary judgment. The court determined that there was a disputed issue of fact as to Jennifer's role in the creation of the addendum, i.e., whether she acted as a "mere scrivener" or had any personal contribution to its drafting. The court explained that Jennifer's and Timothy's testimony about the creation of the addendum was unrebutted. The court found that the "process" of drafting the amendment — "which involved Jennifer listening to Diana's wishes and then typing them up into the document that would eventually become the [a]ddendum" — established Diana's role as its "true author." The parties had stipulated that Diana had the mental and physical capacity to prepare the addendum, and the court found evidence that Diana was familiar with the legal terminology necessary to effectuate such a "significant departure from [her] prior estate plans." Similarly, the court noted that Jennifer credibly testified she had not altered her mother's dictation and that the video recording was conclusive proof of Diana's intent and wishes. The court found that the only contrary evidence — Jason's testimony that his mother was somehow unduly influenced — was vague and unpersuasive. After the judgment was entered, defendants appealed.

5. On appeal, the court of appeals affirmed on the following grounds:

a. The Deceptive Practices Act provides, in pertinent part, that "[t]he assembly, drafting, execution, and funding of a living trust document or any of those acts by a corporation or a nonlawyer is an unlawful practice within the meaning of this Act."

b. However, it is a well-established rule that a settlor can amend his or her own trust. The statute does not prohibit an individual from preparing his own living trust documents, even if that individual is not an attorney. To rule to the contrary would be to ignore the entire purpose of the Deceptive Practices Act, which is to protect consumers from fraud and deceptive business practices. There is nothing about a person drafting his or her own living trust documents that would give rise to a claim of fraud or deceptive business practices.

c. The complaint in this case alleged that Jennifer was a nonlawyer who had no authorial contribution to the document she typed. This allegation indicated that there was a cognizable claim, such that defendants could not entirely defeat the claim at the pleading stage. Then, at the summary judgment stage, the trial court determined that there was a material factual issue about Jennifer's role. Defendants do not dispute those points beyond merely asserting that they should have prevailed prior to any trial.

d. A settlor is not prevented from amending or revoking his or her own trust. Whether the term "scrivener," "typist," or "recorder" is used, we determine, like the trial court, that a settlor may amend or revoke his or her own trust using the aid of an individual who acts entirely and only at the settlor's direction. Where the

evidence shows that the settlor is the document's true author, it would not protect consumers from deceptive business practices to exclude the settlor's own words. The unrebutted evidence showed that Diana directed Jennifer's actions and then had the document notarized and delivered. What is more, the video recording removed all doubt regarding Diana's wishes, her state of mind, and her intent to amend the trust. There was substantial compliance with the trust's requirements, making the addendum effective.

XXXIV. PROOF OF CLAIMS

A. *Morris v. Dall,* 320 Neb. 122 (Supreme Court of Nebraska 2025). Oral contract to pay for costs of home renovations too indefinite to be enforced against trust.

1. Karen and Jane were two of the beneficiaries of the Schindler Family Trust (the "trust"), which was established by their parents as co-trustees. The trust owned several properties. Jane E. Morris and Steven L. Morris alleged that they orally agreed to renovate one of the properties for the co-trustees. In exchange, the Morrises contended that it was agreed that the trust would reimburse them for the cost of the renovations after the property was sold. The total cost of the renovations was $27,650.49. After the co-trustees passed away and Karen became the trustee, Karen sold all of the trust's properties. None of the trust funds were used to reimburse the Morrises for the renovations.

2. The Morrises sued for breach of contract, unjust enrichment, promissory estoppel, and breach of fiduciary duty/accounting. At trial, Steven and Jane testified that they entered into an oral agreement with the co-trustees to renovate the co-trustees' primary residence (the "51st Street property") in exchange for being paid for the cost of the renovations, but not for their labor, from the proceeds of the sale of the home. Karen testified that she had warned Jane, before the renovations began, that because of a line of credit associated with the 51st Street property, there would not be any money left from which the Morrises could be repaid.

3. During renovations, additional issues were identified expanding the scope of the work, such as termites and lack of insulation, which the Morrises repaired. Ultimately, the Morrises renovated three bedrooms, a bathroom, the living room, dining room, and kitchen in the house. The renovations were done well.

4. The co-trustees passed away in 2016 and 2019, respectively. Jane requested that Karen reimburse the Morrises for the renovations. Karen declined to reimburse the Morrises. Karen invited Jane to make an offer on the property, which she proposed would then allow the Morrises to resell the property and recoup the costs of the renovation that way. In September 2021, Karen sold the 51st Street property for $134,950. The line of credit associated with the home was in the amount of $33,631.61. There was also a mortgage payoff of $68,562.29 and additional costs associated with the sale of the property. Accordingly, the trust netted a total of $21,477.73 from the sale.

5. As one of her first tasks as trustee, however, Karen paid the costs associated with their father's funeral. At that time, none of the properties had yet been sold, and there was no cash available in the trust. Accordingly, Karen paid for the funeral expenses out of pocket. She testified that the funeral expenses were roughly $18,000. As such, after receiving the $21,477.73 from the sale of the 51st Street property, Karen used that amount to reimburse herself for the funeral expenses. Because of the repayment of the line of credit,

the mortgage, and Karen's reimbursement, there was less than $5,000 left from the sale of the house that could have been paid to the Morrises.

6. Jane requested that Karen provide a full accounting of the trust property, liabilities, receipts, and disbursements. Karen offered the "trustee reports," which consisted of emails from Karen to the beneficiaries of the trust informing them of the status of various trust matters, including sales of properties, decisions regarding appraisals, leases on properties not sold, and claims being made against the trust. In January 2022, Karen sent the beneficiaries an email indicating that all trust properties had been sold, and that, as such, the trust no longer had any assets and was to be dissolved. At the time she closed the trust, there was more than $800,000 remaining from the sale of the trust properties, and the beneficiaries of the trust, including Jane, each received roughly $80,000.

7. The district court denied the Morrises' claim for breach of contract, finding that the terms of that agreement were not sufficiently definite and certain such that it could be a legally enforceable contract.

8. The court also denied the claims for unjust enrichment, promissory estoppel, and breach of fiduciary duty and accounting. The court also denied all claims for attorney fees, finding that none of the claims or defenses asserted were frivolous. On appeal, the Nebraska Supreme Court moved the matter to its own docket and affirmed on the following grounds:

> a. It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto. Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other. A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
>
> b. In this case, the agreement at issue does not comport with those requirements. The agreement in question is entirely oral, the terms of which we know very little. The agreed scope of the desired renovations is unclear. The scope of the renovations expanded well beyond that initially anticipated. Further, throughout this process, the co-trustees were not present and, instead, relied upon communications from the Morrises regarding the expanding scope of the improvements. This sort of indefiniteness precludes this court from being able to determine the precise legal liability of the parties to the contract. Where the promisor retains an unlimited right to decide later the nature or extent of his or her performance, the promise is too indefinite for legal enforcement. Such is the case here.
>
> c. The parties agree that the Morrises conferred a benefit on the trust by making renovations to the 51st Street property. The parties also agree that the Morrises did not present any evidence regarding an increase in property value caused by the renovations. Instead, the dispute centers on whether the evidence of the costs that the Morrises incurred in performing the renovations was sufficient to entitle them to recover under a theory of unjust enrichment. The court cannot conclude that the district court erred in denying the Morrises' unjust enrichment

claim. The trial court heard the evidence and found that there was insufficient evidence that the property's value was increased or that the renovation costs were reasonable.

d. The court does not agree that the co-trustees made a promise to reimburse for the costs of the renovations and that that promise induced them to complete the renovations. The alleged promise by the co-trustees to reimburse the Morrises for the renovations was too indefinite, and, therefore, it was not reasonable for the Morrises to rely on said promise.

e. Karen testified that she provided an inventory of the trust assets, excluding machinery, provided regular "Trustee Reports," provided a final accounting setting forth all receipts and disbursements, and kept the beneficiaries up to date on her actions as trustee. Other beneficiaries testified that they had no concerns with the way Karen acted as trustee. The court did not clearly err in denying the Morrises' claim for breach of fiduciary duty/accounting.

XXXV. INSURANCE

A. *Est. of Mechling v. United States Bank N.A.*, 2025 U.S. Dist. LEXIS 153123, 2025 U.S. Dist. LEXIS 153123; 2025 LX 373580 (United States District Court for the District of Connecticut 2025). Ignoring contacts with California and Pennsylvania and applying Wisconsin law, where insured is a willing participant in an alleged STOLI scheme, his estate is barred by his unclean hands from recovering the proceeds of the allegedly illegally obtained policies.

1. A stranger-originated life insurance ("STOLI") policy is one obtained by the insured for the purpose of resale to an investor with no insurable interest in the life of the insured — essentially, it is a bet on a stranger's life. Notably, every relevant state's law provides that, after a life insurance policy has been issued, an insured may resell that policy to an investor, who would become the policy's beneficiary and assume payment of the premiums. Thus, with respect to transferability, the difference between non-STOLI and STOLI policies is simply one of timing and certainty; whereas a non-STOLI policy might someday be resold to an investor, a STOLI policy is intended for resale from before its issuance. While life insurers are required by law to permit resale of policies originally obtained for estate planning purposes, they are not obligated to issue policies intended for resale from the outset. STOLI policies became a popular investment in the mid-2000s for hedge funds and others eager to bet that the value of a policy's death benefits would exceed the value of the required premium payments.

2. In March 2007, Oceanus engaged a Wisconsin law firm to advise on a program to purchase options for life insurance policies (the "Oceanus Program"). Under this program, Oceanus allegedly sought to purchase options related to the purchase of large life insurance policies (i.e., life insurance policies with death benefits of $1,000,000 or more) with each option to be purchased from an irrevocable trust (the "Insurance Trust") established for the benefit of the Insured's spouse and/or children and more remote lineal descendants. This trust would then create a sub-trust to hold each policy, with beneficial interests in the sub-trust to be held by the Insurance Trust. Oceanus then would purchase options to buy the Insurance Trust's beneficial interest in the sub-trusts holding the policies. Once the Option has been granted to Oceanus, the Insurance Trust will not be able to transfer the Beneficial Interests in the Sub-Trusts except as expressly permitted by Oceanus.

3. In 2007, Russell Mechling, with the assistance of advisors such as his accountant, took out two life insurance policies (the "Policies") after learning of the Oceanus Program. Each policy was in the amount of $5 million and were issued by a Connecticut-based insurance company, PHL Variable Insurance Co. ("PHL"). At the time, Mr. Mechling was 77 years old, and had been domiciled in Pennsylvania continuously since graduating college. Mr. Mechling was not easily taken advantage of, was described by his good personal friend and accountant as a bright guy, and very successful as a businessperson, and would not typically sign a document without reading its contents.

4. On May 24, 2007, before Mr. Mechling applied for the Policies, three trusts were established: (1) The Russell B. Mechling, Jr. Irrevocable Life Insurance Trust, a California Trust (the "California Trust"), (2) The Russell B. Mechling, Jr. 2007 Irrevocable Trust, a Wisconsin Trust (the "Wisconsin Trust"), and (3) The Russell B. Mechling, Jr. 2007 Irrevocable Sub-Trust, a Wisconsin Trust (the "Sub-Trust"). For both the Wisconsin Trust and the California Trust, Mr. Mechling was the settlor, and his wife and children were the initial beneficiaries.

5. The Administrative Trustee of the Wisconsin Trust was Oceanus's law firm, and the Investment Trustee was Mr. Mechling's accountant. The trust agreement contained a Wisconsin choice-of-law clause. The Wisconsin Trust was the settlor and the beneficiary of the Sub-Trust, and Oceanus's law firm was the Trustee. Among the stated purposes of the Wisconsin Sub-Trust was to acquire equitable title to one or more insurance policies issued upon the life of Russell B. Mechling, Jr., and to receive all of the proceeds from such policies upon his death.

6. Catherine D. Williams, a California resident, was the Trustee for the California Trust, and Mr. Mechling's wife and six of his children were its initial beneficiaries. Under the agreement for the California Trust, Ms. Williams had the power to merge all of the trust property with the property of any other trust created by Mr. Mechling, which is held for the benefit of the same beneficiaries and transfer all of the trust property held hereunder to that other trust, to be administered under the instrument governing that other trust. The California Trust was signed in Pennsylvania, and was subject to a California choice-of-law clause.

7. Around May 2007, U.S. Bank opened a checking account for the Wisconsin Trust. After the trusts were created, the Policies were applied for. Although the applications for the Policies state that it was signed in California, the parties agree that Mr. Mechling and his insurance agent signed the Policies in Pennsylvania. The Policies had "Issue Dates" of June 10, 2007. The Policies were approved for use in California, and utilized California forms. They bore the lettering "CA" on numerous pages and contained legal disclosures related to California law, including the California Life and Health Insurance Guaranty Association Act. On July 2, 2007, the Policies were shipped to an individual in Irvine, California. On July 9, 2007, Mr. Mechling and his wife signed a Consent and Acknowledgement Agreement with Oceanus that contained a Wisconsin choice-of-law clause. On July 10, 2007, under a Merger Agreement with no choice-of-law clause, the California Trust and the Sub-Trust were merged.

8. A Nominee Agreement became effective on that same date that allowed the Sub-Trust to hold the Policies "in the name of a nominee," Ms. Williams, "without any mention of the Sub-Trust's equitable ownership of the Policies in the records of the insurance carrier." The Nominee Agreement further provided that, although Ms. Williams would

thus be represented to the insurance company as the owner of the Policies, Ms. Williams may not take any action with respect to any of the Policies or exercise any incidents of ownership with respect to any of the Policies, without prior express written instruction from the Wisconsin Sub-Trust. Under the terms of the Merger Agreement, the California Trust was terminated after transferring all of its assets to the Sub-Trust and satisfying its obligations under the Nominee Agreement. On July 13, 2007, the delivery receipts for the Policies were signed by Ms. Williams.

9. On that same date, Oceanus wired the initial premium payments to PHL. By their terms, the Policies did not take effect unless and until, among other things, the premium required for issuance has been paid in full. Also on July 13, 2007, under an Option Agreement with a Wisconsin choice-of-law clause, Oceanus purchased an option granting to Oceanus the right to purchase all of the beneficial interests in the Sub-Trust and therefor the underlying Policies, in exchange for an "Option Premium" and a "Strike Price" payable in exchange for, and in consideration of, the purchase of all of the beneficial interests in the Sub-Trust. On October 31, 2007, Oceanus's law firm sent a $300,000 payment to Mr. Mechling's wife in connection with the issuance of the Policies. On or around July 17, 2009, Oceanus exercised the option and thereby obtained by assignment the beneficial interest in the Wisconsin Sub-Trust and thus ownership of the Policies. On July 30, 2009, DeWitt sent Mr. Mechling's wife an additional check in the amount of $28,243 for the "Strike Price."

10. A third party contacted Mr. Mechling and his family to inquire about his health through the entirety of the Policies' existence, and Mr. Mechling never complained about these calls or letters. Neither Mr. Mechling nor his family members ever contacted PHL, the California Trustee, the Administrative Trustee, or any other owner of the Policies to try to regain control of the Policies, unwind the transfer of the Policies, or assume responsibility for paying the Policies' premiums.

11. On October 16, 2020, Mr. Mechling died. Mr. Mechling had never been to Wisconsin, did not own property in Wisconsin, and never earned income or conducted business in the state. U.S. Bank serves as a securities intermediary, and holds property credited to Financial Credit Investment III SPV-A (Cayman), L.P.'s ("Cayman") Securities Account as a custodian separate and apart from U.S. Bank's own assets. Under the agreements by which U.S. Bank and the beneficial owners (including Cayman) agreed that U.S. Bank would serve as securities intermediary, U.S. Bank and the beneficial owners (including Cayman) agreed, pursuant to the UCC, to treat as "financial assets" all life insurance policies and proceeds held by U.S. Bank for Cayman, and Cayman agreed to indemnify U.S. Bank.

12. The Estate of Russell Mechling ("the Estate" or "Plaintiff"), by its Executor Ellen Ulmer, filed suit against U.S. Bank and Cayman to recover death benefits received by Defendants for the two $5 million alleged STOLI policies taken out on Mr. Mechling's life. The Estate filed its motion for summary judgment, with certain portions and exhibits filed under seal. On the same date, Cayman filed its motion for summary judgment, with certain portions and exhibits filed under seal. U.S. Bank likewise filed its motion for summary judgment on that date, and sealed certain portions and exhibits.

13. The court denied the Estate's motion for summary judgment, and granted U.S. Bank's and Cayman's motions for summary judgment, on the following grounds:

a. Here, there is a conflict between Wisconsin law and that of Pennsylvania and California that makes summary judgment appropriate. Under Wisconsin law, if the policyholder lacks insurable interest, a court with appropriate jurisdiction may order the proceeds to be paid to someone other than the person to whom the policy is designated to be payable, who is equitably entitled thereto, or may create a constructive trust in the proceeds or a part thereof, subject to terms and conditions of the policy other than those relating to insurable interest or consent.

b. Under Pennsylvania law, however, so long as a life insurance policy is issued with a valid insurable interest at its inception, no transfer of such policy or any interest thereunder shall be invalid by reason of a lack of insurable interest of the transferee in the life of the insured or the payment of premiums thereafter by the transferee. Likewise, under applicable California law, an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs. Thus, whereas the Estate may be equitably entitled to the proceeds of the alleged STOLI Policies under Wisconsin law, it has no such entitlement under applicable Pennsylvania or California law. As a result, because there is an outcome-determinative conflict between the laws of Wisconsin and those of California and Pennsylvania, a choice-of-law analysis is appropriate here.

c. For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. In general, to determine which state has the "most significant relationship," courts look to these non-exclusive factors: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

d. Where there has not been a choice-of-law by the parties, the choice-of-law with respect to an issue in contract is determined by the local law of the state which has the most significant relationship to the transaction and the parties. In the absence of an effective choice-of-law by the parties, the following contacts are to be considered: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

e. For life insurance contracts that have been issued to the insured upon his application, in the absence of an effective choice-of-law by the parties, the validity of [such] life insurance contract and the rights created thereby are determined by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties, in which event the local law of the other state will be applied.

f. Here, the parties identify various choice-of-law clauses embedded in different agreements: the Wisconsin Trust Agreement, the Consent and Acknowledgement Agreement and Beneficial Interests Option Agreement each contain a Wisconsin choice-of-law clause. By contrast, the California Trust contains a California choice-of-law clause. The Policies themselves, however, contain no explicit choice-of-law provisions. In the absence of a valid choice-of-law provision, the Restatement establishes a special presumption in favor of application of the law of the jurisdiction where the insured was domiciled at the time the policy was applied for. In cases involving alleged STOLI policies, however, courts have placed lesser emphasis on the location of the insured.

g. As a result, while Pennsylvania law would presumptively apply in a typical insurance dispute, given the unique circumstances here, the court examines other factors. As for the location of the subject matter of the contract, as discussed above, while for insurance companies, this factor typically weighs in favor of the law of the state where the insured is domiciled, in cases involving alleged STOLI policies, the location of the insured is given less weight.

h. The Consent and Acknowledgement Agreement indicates that it was signed in Pennsylvania. Given that parties in Pennsylvania, California, and Wisconsin each played a role in rendering the contract binding, this factor is neutral. Likewise, while the place of negotiation typically "is a significant contact," here, where the transaction contains negotiations with parties in Wisconsin, Pennsylvania, and potentially California, this factor is given little weight.

i. Here, Oceanus wired from Wisconsin the premiums for the Policies to PHL in Connecticut. Moreover, taking a broader view of the transaction between the ultimate beneficiary of the Policies and Oceanus, all parties to the Beneficial Interests Option Agreement, granting Oceanus an option to acquire the beneficial interests in the parties, are referred to in the agreement as Wisconsin entities. As a result, Wisconsin has stronger ties to the place of performance than either California or Pennsylvania.

j. While Mr. Mechling was domiciled in Pennsylvania continuously since graduating college, and Oceanus was incorporated in Wisconsin, questions of fact remain as to whether the team responsible for administering Oceanus's interest in the Policies was based in Wisconsin or California. The original "Owner" of the Policies was a California-based trust, and the Policies were approved for use in California, and utilized California forms. In addition, while the parties dispute the place of delivery, they agree that the delivery receipts for the Policies were signed in California and that the policies were physically delivered in California. Questions of fact remain that prevent a clear determination of the state with the "most significant relationship," although these factors favor either California or Wisconsin law.

k. Because in STOLI cases, the beneficial interest in the Policies are owned by a Trust established for the purpose of transferring that beneficial interest to a third party, courts have often found that considerations such as the location of the Trust holding the policy, while not a dispositive factor alone, often has the most significant relationship to the matter. Here, unlike the typical STOLI case, the Trust initially owning the beneficial interest in the Policies was domiciled in California

and then transferred ownership of the beneficial interest to a Trust domiciled in Wisconsin shortly after the Policies were applied for. Moreover, the initial Trust in California was held out to be the Owner of the Policies, even after the Trust had been dissolved.

l. Overall, the relevant factors favor Wisconsin law. While the "Owner" of the Policies on the application, and on official documentation thereafter, was the California Trust, the documentation between Oceanus, the trusts, and the Mechling family suggests that the parties considered the transaction to be primarily governed under Wisconsin law and directed for the benefit of Wisconsin entities. Two of the three trusts created before applying for the Policies were Wisconsin trusts formed under agreements governed by Wisconsin law. Moreover, even construing the facts in the light most favorable to Cayman, and assuming the policies were delivered to California and the California Trust held the policies before its dissolution, within days of its receipt of the Policies, the California Trust transferred ownership of the Policies to the Sub-Trust and was dissolved, indicating that the "Owner" of the Policies, as understood by the parties, was always intended to be the Wisconsin Sub-Trust.

m. In addition, while PHL continued to send documents to the California Trust and administered the policies in accordance with California law, under the Nominee Agreement, the California Trustee, as well as Oceanus and Mr. Mechling, understood the true Owner of the Policies, and the only entity with all rights to take action with respect to the Policies, to be the Wisconsin Sub-Trust. Finally, while not dispositive alone, the fact that several key documents to the transaction, including the Consent and Acknowledgement Agreement and the Option Agreement had Wisconsin choice-of-law clauses, which further demonstrates that the parties could, and likely would, reasonably expect Wisconsin law to apply.

n. The Policies were physically delivered in California and used California forms, and thus California has an interest in regulating insurance policies delivered in its borders and administered under its laws.

o. Wisconsin law applies to all insurance policies delivered or issued for delivery in this state, on property ordinarily located in this state, on persons residing in this state when the policy or group certificate is issued, or on business operations in this state. Given the unique circumstances of this case, where the Policies were procured for the benefit of a Wisconsin Sub-Trust to further a transaction predominantly governed by Wisconsin law, but utilized California's insurance laws and physically delivered the Policies to California in order to do so, this factor is neutral.

p. As a result, while the unique circumstances here make the determination of a choice-of-law a close case, Wisconsin law likely has the most significant relationship to this case. As discussed below, however, even assuming without deciding Wisconsin law can, and does apply here, the Estate fails to show its equitable entitlement to the proceeds of the Policies.

q. Under Wisconsin Statute Section 631.07(4), no insurance policy is invalid merely because the policyholder lacks insurable interest or because consent has not been given, but a court with appropriate jurisdiction may order the proceeds

to be paid to someone other than the person to whom the policy is designated to be payable, who is equitably entitled thereto, or may create a constructive trust in the proceeds or a part thereof, subject to terms and conditions of the policy other than those relating to insurable interest or consent.

r. Payment based on equitable entitlement is only an option available if justice requires payment to someone other than a designated payee. The Estate fails to show that it is equitably entitled to the proceeds of the policies under the doctrine of unclean hands. Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime, or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. One way a party may act wrongfully such that it would bar equitable recovery is for the party to be involved in the transaction through which she gains rights, and then ignore those rights for years.

s. In cases where both parties are in delicto concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offense. And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be.

t. Here, even construing the evidence in the light most favorable to the Estate, Mr. Mechling and his wife were willing participants in the alleged STOLI scheme, and thus his Estate cannot recover the proceeds of the allegedly illegally obtained Policies. The Estate alleges that Mr. Mechling's estate planner and general business attorney did not recommend that Mr. Mechling participate in the program as part of his estate plan and believed that Mr. Mechling had no need for life insurance at that time from an estate or inheritance tax liquidity standpoint, and the Policies were not part of his estate plan, which had already been well established by that time.

u. The undisputed evidence also shows that Mr. Mechling was a willing participant in the Oceanus Program, and benefitted from his participation in the alleged STOLI scheme. Mr. Mechling was a signatory to the Wisconsin Trust Agreement and the California Trust Agreement, and both he and his wife signed a Consent and Acknowledgment Agreement. Moreover, Mr. Mechling signed applications for the Policies that represented to the Insurer, PHL, that there was no intention to transfer ownership in the policies.

v. In exchange for his participation in the Oceanus Program, Mr. Mechling and his family received a sum totaling several hundred thousand dollars while Mr. Mechling was still alive. Moreover, in the more than ten years between Oceanus exercising its option and Mr. Mechling's death, neither Mr. Mechling nor his family members ever contacted PHL, the California Trustee, the Administrative Trustee, or any other owner of the Policies to try to regain control of the Policies, unwind

the transfer of the Policies, or assume responsibility for paying the Policies' premiums.

w. Given the Mechlings' participation in the alleged STOLI scheme, the Estate thus would not be equitably entitled to the proceeds, even if it showed that the proceeds were established as part of a STOLI scheme. Everyone who engages in the fraud scheme forfeits all rights to protection, either at law or in equity.

x. Even crediting the Estate's assertion that Mr. Mechling "didn't understand all the details of the Oceanus transaction," the Estate fails to show evidence "of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree."

y. The Wisconsin legislature chose a specific remedy to deter STOLI policies: rather than invalidating the policy, it required the insurer to honor its promise. As a result, where there is not an insurable interest, the remedy under the statute is not to invalidate the policy, but to determine whether another party is equitably entitled to the proceeds of the policy. While the party with an insurable interest may be equitably entitled to the proceeds, because Mr. Mechling was a willing participant in the STOLI scheme and his family financially benefitted from engaging in the behavior that the law prohibits, as is the case here, there is not a genuine issue of material fact as to the Estate's equitable entitlement to the proceeds of the Policies.

z. Although the Estate believes its proposed remedy of distributing the proceeds to the decedent's Estate, regardless of the decedent's participation in the STOLI scheme, provides a better remedy than that set out by the Wisconsin legislature, the court is not going to substitute its judgment for that of the Wisconsin legislature and courts.

aa. Because from the undisputed facts it clearly appears that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct, the court denies summary judgment to the Estate as there is no genuine issue of material fact as to its equitable entitlement to the proceeds of the Policies.

B. *Stevenson v. Mass. Mut. Life Ins. Co.*, 2025 U.S. Dist. LEXIS 156867; 2025 LX 379578 (United States District Court for the District of Montana, Missoula Division 2025). In refusing to dismiss claims against insurance agent, insurance company, and lender related to collapsed premium financing structure for life insurance, court holds that lender owed duty of care, premium financing brokerage firm owed duty of care, insurance agents are not immune from the duty imposed on us all to avoid causing foreseeable harm, and defendants may be found to be agents and vicariously liable for lender's actions.

1. The Stevenson family are third-generation funeral home professionals. The Stevenson family are not sophisticated financial professionals. The Stevenson family's lawyer has advised the family on various legal matters. Like the Stevenson family, Ms. Jones was not a financial advisor or sophisticated financial professional. Ms. Jones was the trustee of the trusts used to apply for and buy the life insurance policies that form the basis of this lawsuit.

2. Joshoa Gardner is a licensed insurance agent and was the principal owner of Summit Financial. At some point, Gardner ceased doing business as Summit Financial and began operating as GP Capital. Summit Financial and/or GP Capital were insurance and financial services firms that provided professional advisory services for retirement and estate planning. Over the course of a decade or more, GP Capital Partners LLC, Joshoa Q. Gardner, and Summit Financial Group ("Gardner Defendants") developed a relationship with the Stevenson family. The Stevenson family relied on Gardner Defendants to guide them in their financial, estate, and retirement planning affairs. Gardner Defendants led the Stevenson Family to and advised them to enter the technically complex tripartite structure of premium financed life insurance. Gardner Defendants assured the Stevenson family that Gardner Defendants had the skill, expertise, and knowledge to engage in the detailed suitability and financial analysis required to plan the Stevenson family's low-risk estate and retirement goals by way of premium financed life insurance.

3. Defendants Penn Mutual Life Insurance Company ("Penn Mutual") and Penn Insurance and Annuity Company ("PIA") (collectively, "Penn Defendants" or "Insurance Defendants") appointed and authorized Gardner to act as their respective agents to solicit their insurance policies, produce their insurance policies, prepare and accept policy applications, and sell their insurance policies to the Stevenson family. Insurance Defendants also appointed and authorized Gardner to act as their agent(s) to prepare life insurance product illustrations for the purpose of selling their life insurance policies to the Stevenson family, present life insurance product illustrations to the Stevenson family, and submit illustrations with the Stevenson family's applications. Insurance Defendants granted Gardner and/or Gardner Defendants the authority to make representations on behalf of Insurance Defendants for purposes of soliciting policies, soliciting and preparing applications, acting as a point of contact between Insurance Defendants and the Stevenson family, and preparing and presenting policy illustrations. Insurance Defendants appointed, authorized, and empowered Gardner and/or Gardner Defendants to solicit, produce, and sell to the Stevenson family premium financing arrangements with premium finance companies. Gardner and/or Gardner Defendants earned commissions and other financial incentives and benefits from Insurance Defendants for soliciting, selling, supervising, and renewing Insurance Defendants' life insurance policies.

4. Succession is a premium financing brokerage firm that markets itself as the creator of premium financing for life insurance and advertises that it protects and maximizes wealth through financing policy premiums through a customized loan. Succession held itself out as a "strategic partner," on whom life insurance customers can trust to create "tailored legacy plans," specifically with respect to financing life insurance premiums. Succession does business by soliciting, brokering, and packaging loans for premium financed insurance products. Wintrust Life Finance and Barrington Bank & Trust Company, N.A. ("Wintrust") is a lending entity that loans insureds like the Stevenson family sums to fund the premiums on life insurance policies.

5. Succession acted as the middleman between Wintrust and Gardner Defendants by brokering, securing, and explaining to Gardner Defendants the performance of the premium loans to fund the life insurance policies Gardner Defendants solicited and sold to the Stevenson family. Gardner Defendants acted as the middlemen between Lender Defendants and the Stevenson family. Prior to 2023, the only communication between Lender Defendants and the Stevenson family came in the form of illustrations, promissory notes, and renewal letters. Prior to Wintrust sending materials to the Stevenson family,

Gardner Defendants would alert the Stevenson family in advance so that Gardner Defendants could arrange a meeting with the Stevenson family to explain Wintrust's materials.

6. Gardner Defendants collected signatures from the Stevenson family for Wintrust's loan materials, including promissory notes, and then Gardner Defendants sent those materials back to Wintrust. Wintrust never required or requested that the Stevenson family send any materials directly to Wintrust, nor did they object to Gardner Defendants sending the materials to Wintrust on the Stevenson family's behalf.

7. Wintrust authorized its broker, Succession, with the authority to present loan performance, stability, and suitability information to the Stevenson family through Gardner Defendants. Wintrust attached Succession's illustrations to Wintrust's communications to the Stevenson family, giving Succession's illustrations the imprimatur of Wintrust's approval and authorization to explain the stability of the loan structure. Succession authorized Gardner Defendants to act on and speak for Succession on its behalf with respect to communications about the loans and renewals to the Stevenson family. Succession provided Gardner Defendants with copies of loan performance illustrations with Succession's logos and letterhead for the purpose of presenting, explaining, and selling the loans Succession brokered to the Stevenson family on Succession's behalf.

8. Given the lack of direct communication between Lender Defendants and the Stevenson family, the loan materials Lender Defendants provided directly to Gardner Defendants to then provide and explain to the Stevenson family, and Gardner Defendants' representations about working with the Lender Defendants, the Stevenson family reasonably understood Lender Defendants had authorized and appointed Gardner Defendants to act as their agents.

9. Gardner Defendants received substantial commissions by facilitating the relationship between the Stevenson family and Lender Defendants. Lender Defendants also received substantial benefits by brokering and selling loan packages to the Stevenson family.

10. The premium financed life insurance structure is complex, volatile, and interest rate sensitive. In or around 2013, Gardner Defendants purported to analyze the Stevenson family's total financial and investment portfolio. Gardner Defendants purported to evaluate and recommend suitable life insurance options to achieve the Stevenson family's retirement and estate planning goals. The Stevenson family did not approach Gardner Defendants to procure premium financed life insurance for them. The Stevenson family conveyed to the Gardner Defendants that they were risk-averse, at least with respect to retirement and estate planning. The Stevenson family wished to protect the wealth they built for the benefit of their children, grandchildren, and their church. The Stevenson family was not seeking a complex, high-risk investment scheme that would jeopardize their business and family legacy. Nevertheless, Gardener Defendants pitched the Stevenson family on structuring their retirement and estate planning goals on a highly complex and extremely volatile premium financed life insurance program. The complexity of the tripartite structure Gardner Defendants constructed for the Stevenson family went well beyond an insurance salesman procuring and selling auto coverage, as evidenced by the illustrations Josh Gardner provided to the Stevenson family in 2013. Unlike the straightforward sale of insurance from insurance agent to insured, the structure Gardner Defendants built for the Stevenson family involved coordination with sophisticated Lender Defendants and Insurance Defendants, as well as the creation of irrevocable trusts. In

order to sell the premium financed program urged on the Stevenson family, Gardner Defendants promoted themselves to the Stevenson family as experts in a variety of highly skilled professions, such as financial planning, life insurance, estate planning, banking, and trust law.

11. As early as 2013, but no later than 2014, Gardner Defendants advised and directed Todd F. Stevenson ("Todd") to create the Todd Stevenson 2013 Irrevocable Family Trust, an irrevocable life insurance trust that would own two of the whole life insurance policies Gardner Defendants sold Todd. Todd created the trust. Then, in 2017, Gardner Defendants advised and directed Terri Stevenson to create the Terri L. Stevenson 2016 Irrevocable Family Trust that would own the whole life insurance policies Gardner Defendants sold Terri. Terri created the trust. Also in 2017, Gardner Defendants directed and advised Todd to create the Todd F. Stevenson Irrevocable Life Insurance Trust that would own additional whole life insurance policies Gardner Defendants sold Todd. Todd created the additional trust. The same year, Gardner Defendants advised and instructed that Joe Stevenson create the Joseph D. Stevenson Irrevocable Life Insurance Trust. Joe created the trust. Todd, Terri, and Joe would not have created the trusts but for Gardner Defendants' direction that it was the appropriate and suitable course with respect to the Stevenson family's estate planning goals.

12. After Todd created the first Stevenson family irrevocable life insurance trust, Gardner Defendants began the process of selling Mass Mutual, Penn Mutual, and Penn Annuity policies to the Stevenson family. Josh Gardner started with Todd, by soliciting and selling him two Mass Mutual whole life insurance policies. The first policy had an initial face value of $7,500,000 and the second had an initial face value of $10,000,000. Defendants did not appropriately analyze nor consider the suitability and size of the combined $17.5 million death benefit Gardner Defendants solicited and sold to Todd, given the Stevenson family's net worth and other insurance underwriting factors and guidelines. Defendants were not focused on the suitability, stability, and security for the risk-averse Stevenson family, but rather sold the large policies in order to generate the highest commissions and profits for themselves. The 2014 Todd Policies' performance illustrations were produced by Mass Mutual and presented to the Stevenson family by Gardner Defendants.

13. Gardner Defendants misrepresented the stability and suitability of the premium financed structure. For example, in 2014, Gardner Defendants sent an email to Ms. Jones and Todd stating that the Stevenson family could surrender the Mass Mutual Policies that day and walk away with $10 million. This statement was false or misleading, because Gardner Defendants were representing non-guaranteed values as guaranteed, without any caveat or disclaimer that the policies may not perform as Gardner Defendants represented they would. The purpose of the statement was to advance the illusion that the premium financed life insurance structure was a stable, certain, and safe estate and retirement planning program, rather than a volatile, high-risk investment scheme. Gardner Defendants also communicated to the Stevenson family in writing that "the annual premium savings offsets the interest cost on the loan," without any disclosure or disclaimer that the promised "offset" was contingent on non-guaranteed elements.

14. Next, in 2017, Gardner Defendants solicited and sold Terri a Mass Mutual life insurance policy and a Penn Mutual life insurance policy. These policies were assigned to the Terri L. Stevenson 2016 Irrevocable Family Trust shortly after purchase. The first policy had an initial face value and initial supplement rider value totaling $10,000,000. The

second had an initial face value plus initial supplement rider value totaling $5,000,000 and was apparently issued on January 18, 2017. The policies' performance illustrations were produced by Mass Mutual and Penn Mutual and presented to the Stevenson family by Gardner Defendants.

15. Gardner Defendants then solicited and sold Todd J. Stevenson ("T.J.") a Mass Mutual Life Insurance Policy and a Penn Annuity Accumulation Builder Select Universal Indexed Life Insurance Policy (together, the "2017 T.J. Policies"). The 2017 T.J. Penn Annuity Policy No. 92433340 had an initial face value of $10,000,000. The 2017 T.J. Mass Mutual Policy No. 22486207 had an initial face value plus an initial supplement rider value totaling $2,000,000. The 2017 T.J. Policies' performance illustrations were produced by Mass Mutual and Penn Annuity and presented to the Stevenson family by Gardner Defendants.

16. Also in 2017, Gardner Defendants recommended that Todd's other trust, the Todd F. Stevenson Irrevocable Life Insurance Trust, purchase a Penn Annuity Guaranteed Life Insurance Policy (the "2017 Todd Policy"). The 2017 Todd Policy No. 2746933 had an initial face value plus initial supplement rider value totaling $11,500,000. The 2017 Todd Policy's performance illustrations were produced by Penn Annuity and presented to the Stevenson family by Gardner Defendants.

17. Finally, Gardner Defendants recommended that the Joseph D. Stevenson Irrevocable Life Insurance Trust purchase a Penn Mutual Guaranteed Life Insurance Policy (the "2017 Joe Policy"). The 2017 Joe Policy No. 2746927 had an initial face value plus initial supplement rider value totaling $11,500,000. The 2017 Joe Policy's performance illustrations were produced by Penn Mutual and presented to the Stevenson family by Gardner Defendants.

18. The Stevenson family purchased the 2014 Todd Policies, the 2017 Terri Policies, the 2017 T.J. Policies, the 2017 Todd Policy, and the 2017 Joe Policy (together, the "Life Insurance Policies") relying on evaluations, recommendations, assurances, illustrations, projections, and instructions Gardner Defendants provided and presented to them. On every sale of every policy, Gardner Defendants were paid commissions and received other financial benefits and incentives from Insurance Defendants.

19. Gardner Defendants repeatedly — including at annual meetings with the Stevenson family — assured the Stevenson family that the Life Insurance Policies were a part of a suitable, stable, and safe estate and retirement planning paradigm, stably balanced against the loans that funded them, into which the Stevenson family could safely pour their savings, rather than one leg of a volatile and high-risk and unstable financial structure. Gardner Defendants repeatedly omitted or misrepresented information about the high-risk, highly complex nature of funding the Life Insurance Policies through premium financing, which Gardner Defendants convinced the Stevenson family was the appropriate and stable means of paying for the Life Insurance Policies.

20. While Gardner Defendants solicited and sold the Stevenson family on the Policies, Gardner Defendants and Lender Defendants worked in concert to package and secure loans that would purportedly pay the premiums on the Life Insurance Policies. Insurance Defendants knew about, condoned, and encouraged Gardner Defendants to invite the Stevenson family into the volatile tripartite relationship with themselves and Lender Defendants. Lender Defendants knew their loans funded the Policies, and Lender Defendants knew that without their loans funding the Policies, the Policies would not

exist. Coordinating with Gardner Defendants, Succession solicited and brokered loan packages from Wintrust Defendants to fund the premiums on the Life Insurance Policies. Lender Defendants created loan illustrations curated and customized for the Stevenson family to purportedly demonstrate to the Stevenson family how their loans would safely and stably pay the premiums on the Policies Gardner Defendants were selling or had already sold to them. Lender Defendants provided and presented loan package illustrations and other loan information and communications to the Stevenson Family through their agents, Gardner Defendants, all stamped with Lender Defendants' logos and names. Lender Defendants did not explain their illustration directly to the Stevenson family; instead, they relied on agents to do that for them. For Wintrust Defendants, those downstream agents were Succession and Gardner Defendants. For Succession, the downstream agents were Gardner Defendants.

21. In 2017, Gardner Defendants encouraged the Stevenson family to increase their premium financed whole life insurance investment by dropping Terri's previously held term life insurance policies and purchasing the 2017 Terri Policies. Gardner Defendants further advised the Stevenson family to roll the purported savings borne of entering the tripartite structure into the premium loans, to "keep the loan balance from getting out of control." Gardner Defendants did not provide any caveat or disclaimer that the policies and loans may not perform as Gardner represented they would. In 2023, interest rates rose from historically low levels. In May 2023, Gardner Defendants revealed to the Stevenson family that due to an interest rate environment above 5%, the consequences of which were never disclosed to the Stevenson family, the tripartite structure had sunk. The Stevenson family's assets no longer matched their liabilities. In her July 2023 notes, Ms. Jones wrote "upside down by 2.5 million . . . wow." At the time the lawsuit was filed, the debt service of the premium had outpaced the valuation of the Policies by roughly $8,000,000. It is estimated that the Stevenson family incurred damages that are three-to-ten times the outpaced loan balance when the Policies are compared to safer estate and retirement planning products.

22. Plaintiffs sued in 2024, alleging: ordinary and professional negligence; negligent misrepresentation; breach of fiduciary duty; negligence per se; direct constructive fraud, actual fraud, and fraudulent inducement; unjust enrichment; punitive damages; and recission and restitution.

23. In a remarkable display of what a cynic might view as "overlitigation," and despite the fact that the court had yet to hold a preliminary pretrial conference, the matter has just short of 200 docket entries. Among this swarm of filings are Wintrust's Motion to Dismiss and Motion for Protective Order, Succession's Motion to Dismiss, Gardner Defendants' Motion to Dismiss, PIA's Motion for Judgment on the Pleadings, and Penn Mutual's Motion for Judgment on the Pleadings. The court denied Wintrust's motion to dismiss, CMS's motion to dismiss, and Gardner Defendants' motion to dismiss, granted the Defendants' motions for judgment on the pleadings in part, and denied Wintrust's motion for protective order as moot on the following grounds:

> a. Plaintiffs clarified that T.J. is the sole Plaintiff asserting claims against PIA. Pursuant to this concession, all claims asserted against PIA with the exception of those claims brought by T.J. Stevenson were dismissed without prejudice.
>
> b. T.J.'s policies were issued by Mass Mutual and PIA. However, that fact does not absolve Penn Mutual of the injuries it allegedly inflicted on Plaintiffs. Indeed,

the SAC repeatedly alleges that Insurance Defendants — including Penn Mutual — worked with Gardner Defendants to solicit the policies, prepare applications, and present the policy illustrations that ultimately led to the injuries Plaintiffs suffered. Ms. Jones has standing as the trustee of the trusts. But Penn Mutual fails to explain why Terri, Todd, and Joseph lack standing. Penn Mutual cited California law that only a trustee of a trust can sue in the name of the trust. But did not provide any citation to — and the court is unaware of — any authority that suggests Montana substantive law mirrors that of California on this issue. Absent law supporting Penn Mutual's argument and accepting the facts pled in the SAC as true, Terri, Todd, and Joseph have standing as real parties in interest to assert their tort claims against Penn Mutual.

c. According to Wintrust, and Succession, Plaintiffs' claims began to accrue — at the latest — in November 2019 when the last promissory note was executed. However, the statute of limitations did not begin to accrue until Plaintiffs suffered damages and discovered their injuries. A claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action. Here, Plaintiffs did not suffer damages until 2023. Because Plaintiffs filed this action within the three-year limitation set out by Montana statute, Plaintiffs' negligence claims are not time-barred. As to Plaintiffs' fraud claims, the Court finds that — pursuant to the discovery doctrine — the claims did not begin to accrue until 2023. Under Montana law, the period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if: (1) the facts constituting the claim are by their nature concealed or self-concealing; or (2) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause. Here, Plaintiffs allege that they discovered the "financial catastrophe" in July 2023. July 2023, then, is when Plaintiffs' fraud claims began to accrue. Here, the nature of the damages could not be known to Plaintiffs until Gardner informed them that they were "upside down by $2.5 million." And, even if a reasonable individual would have discovered the damages sooner, the Montana Supreme Court has made it clear that issue is a question of fact for the jury.

d. The complex and technical nature of the premium financed structure Wintrust sold to Plaintiffs is readily distinguishable from a straightforward consumer mortgage loan that forms the basis of a typical bank-debtor relationship. In the consumer loan context, the nature of the relation between lender and borrower is generally a non-fiduciary, arm's length contractual relationship. However, extraordinary circumstances or interactions between a lender and borrower or applicant may nonetheless independently give rise to a general or fiduciary duty of care to the borrower or applicant. Based on the relative disparity of knowledge and the objectively reasonable expectation that the recipient should be able to trust and rely upon a professional advisor, the provision of professional advice intended to guide another in the conduct of the other's affairs regarding a technically complex subject matter generally gives rise to a fiduciary relationship, with attendant fiduciary duties of loyalty, trust, and competence owed to the

recipient of the advice. There are three scenarios in which special circumstances create a duty of care owed by a bank to a borrower: (1) one who speaks must say enough to prevent his words from misleading the other party; (2) one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and (3) one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose other facts. The allegations are sufficient to establish that Wintrust owed a duty of care and, therefore, Plaintiffs direct liability claims against Wintrust meet the pleading standard.

e. Succession appears to argue that making fraudulent representations about the tripartite structure does not fall within Succession's duty to exercise reasonable care in soliciting and packaging the loans on the policies. Succession does not dispute — nor could it — the complexity and volatility of the tripartite structure. Succession likewise does not dispute that such a structure is inappropriate for low-risk estate and retirement planning goals. Therefore, it was foreseeable that Succession would cause harm to Plaintiffs by presenting Plaintiffs with illustrations that represent the structure as stable, low-risk, and appropriate for Plaintiffs' financial situation. The allegations establish that Succession's failure to exercise reasonable care increased the risk of harm to the Stevenson family and resulted in harm to the Stevenson family because of the Stevenson family's reliance on Succession's undertaking. Taking the facts alleged in the SAC as true, Succession owed both ordinary and professional duties of care to Plaintiffs.

f. Insurance agents are not immune from the duty imposed on us all to avoid causing foreseeable harm. Therefore, the scope of an insurance agent's duty is not limited to the duty to procure. An insurance agent owes, as all parties do, a general common law duty to use reasonable care under the circumstances to avoid causing foreseeable harm to others. Imposing a duty on an insurance business to act with reasonable care and not misinform its customers regarding their insurance coverage clearly comports with public policy considerations. The Montana Supreme Court has emphasized repeatedly that the duty an insurance agent owes to an insured proves fact-dependent — an agent's duty in one situation may differ from an agent's duty in another situation. On the most basic level, an agent has the duty to obtain for an insured the insurance coverage that the insured requests. An agent's duty changes from insured to insured based on the coverage requested. The inquiry becomes more complicated when additional factors get added, such as a business owner's general request for coverage that adequately will cover her business assets. To the extent that a dispute exists as to the scope of the duty Gardner Defendants owed to Plaintiffs, that dispute is a question of fact for the jury. The court is unaware of any authority that suggests insurance companies do not owe a duty of reasonable care to avoid causing foreseeable harm to others.

g. Wintrust, Succession, and Penn Defendants all argued that they cannot be held vicariously liable for any alleged acts or omissions of the Gardner Defendants because there was no agency relationship between these Defendants and the Gardner Defendants. Here, Plaintiffs allege that Wintrust alerted Gardner Defendants when Wintrust sent direct communications to Plaintiffs so that Gardner Defendants could arrange a meeting with Plaintiffs to explain those

materials. Wintrust's loan materials included Wintrust's letterhead and logos, and Gardner Defendants provided those materials to Plaintiffs. Gardner Defendants collected Plaintiffs' signatures for Wintrust and sent signed paperwork back to Wintrust. These facts are sufficient to support a plausible claim that Gardner Defendants acted as Wintrust's agents.

h. As for Succession, Plaintiffs allege that "Succession provided Gardner Defendants with copies of loan performance illustrations — covered with Succession's logos and letterhead — for the purpose of presenting, explaining, and selling the loans Succession brokered to the Stevenson family on Succession's behalf, entrusting Gardner Defendants to explain the function, suitability, stability, and performance of the loan packages in view of the insurance policies the loans funded and to entice the Stevenson family to buy into the loan program." Plaintiffs further allege that based on email communications between Gardner Defendants and Succession that Gardner Defendants provided to the Stevenson family, the Stevenson family "reasonably understood Succession had authorized the Gardner Defendants to communicate with the Stevenson family with respect to Succession's brokered loans." According to the SAC, Succession provided Gardner Defendants with Succession-branded loan illustrations and plans to assist Gardner Defendants in selling the premium financed structure loans to Plaintiffs. The Court finds these facts sufficient to support a plausible claim that Gardner Defendants acted as Succession's agents.

i. Regarding the alleged agency relationship between Gardner Defendants and PIA and Penn Mutual, Plaintiffs allege that Penn Defendants appointed and authorized Gardner to act as their agents to solicit insurance policies, produce their policies, prepare and accept applications, and sell their policies to Plaintiffs. Plaintiffs further allege that Penn Defendants "knew about, condoned, and encouraged Gardner Defendants to invite the Stevenson Family into the volatile tripartite relationship with themselves and Lender Defendants." Penn Defendants paid Gardner "substantial commissions and other financial incentives and benefits for soliciting, selling, supervising, and renewing" Penn Defendants' life insurance policies. Penn Defendants sent Plaintiffs letters and documents that listed Gardner as the servicing producer or presenter of the Penn Defendants' policies, and listed Gardner on statements as the designated point of contact. The Stevenson Family reasonably believed that Gardner and/or Gardner Defendants were acting within the authorized scope of their agency relationship with Penn Defendants. These facts were sufficient to overcome Penn Defendants' motions for judgment on the pleadings as to the vicarious liability claims.

j. Gardner Defendants and Penn Defendants' claim that Montana does not recognize a fiduciary relationship between an insurance agent and a customer is false. The court cannot conclude that there are no factual circumstances under which an insurance agent creates a fiduciary relationship with its customer.

k. Here, the complaint alleges that Gardner Defendants "falsely represented the premium financed structure as suitable and stable for the Stevenson family's circumstances and stated goals and falsely represented that the structure would perform at a certain level without explaining the substantial risks associated therewith, including premium financed interest rate risk, policy performance risk,

bank financing risk, carrier risk, lapse risk, and tax audit risk." The allegations support a plausible claim for violation of state law.

l. Plaintiffs' claim for constructive fraud does not fail as a matter of law because the court rejected the argument that insurance agents are not fiduciaries. These alleged facts, taken as true, support plausible claims for fraud and fraudulent inducement. The facts are sufficiently particular to state plausible claims for constructive fraud, actual fraud, and fraudulent inducement.

m. Gardner Defendants argue that Plaintiffs' unjust enrichment claims fail as a matter of law because Plaintiffs did not pay commissions and Plaintiffs fail to state facts to support the nonexistence of a contract, and Plaintiffs were compensated for the benefits they allegedly conferred upon Gardner Defendants. (Doc. 146-2 at 48-49.) Penn Defendants argue that they cannot be vicariously liable for unjust enrichment because Plaintiffs do not allege that they paid any premiums to Gardner Defendants. (Docs. 169 at 31, 171 at 34-35.) The Court finds these arguments unpersuasive.

n. The doctrine of unjust enrichment is an equitable means of preventing one party from benefitting from his or her wrongful acts, and in the absence of a contract between parties, it may create an implied contract in law. The complaint satisfies the elements for claim of unjust enrichment. Gardner earned commissions through Plaintiffs' participation in the tripartite scheme. The court rejected Gardner Defendants' position that because Plaintiffs did not pay that commission to Gardner Defendants, Plaintiffs did not confer the benefits onto Gardner Defendants. The court likewise rejected Penn Defendants' mirroring argument regarding the payment of premiums. Acceptance of these arguments would encourage the use of complicated multiparty schemes — like the one that is alleged here — to avoid liability for one's wrongdoing. The court further rejected Gardner Defendants' argument that Plaintiffs received value in return for the benefits conferred on Gardner Defendants. At risk of stating the obvious, to view the loss of millions of dollars as a "benefit" to the party that suffered the loss would require a spectacular sequence of mental gymnastics, an exercise this Court is unwilling to participate in. Gardner was aware of the benefits he gleaned from Plaintiffs participation in the tripartite structure. And finally, the acceptance and retention of those benefits Gardner Defendants incurred is inequitable.

o. Under Montana law, punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice. Here, Plaintiffs allege that Gardner Defendants deliberately acted with conscious disregard of the high probability of financial injury to Plaintiffs, by ignoring Plaintiffs' financial goals and risk aversion and instead selling them on volatile high-risk financial products that were unsuitable for Plaintiffs' needs. Plaintiffs further allege that Gardner Defendants knowingly made misrepresentations and omissions which caused Plaintiffs' injuries. Taking these allegations as true, it is plausible that Plaintiffs could prove actual malice and actual fraud.

p. The theory of unjust enrichment and restitution is brought into play when no contract between the parties exists and the court implies a contract in law. Indeed, unjust enrichment is a prerequisite to restitution, because there can be no

restitution without unjust enrichment. Plaintiffs' pled fraud and unjust enrichment with particularity.

q. Plaintiffs allege that they had a special relationship, including a fiduciary relationship, with Gardner Defendants. Plaintiffs allege that they have repeatedly sought information about the suitability, stability, and status of the Life Insurance Policies, payment of premiums and other costs, premium loan balances and fees, and the commission structure between the entities, but full information has never been produced. These allegations, accepted as true, support a plausible claim for accounting.

r. There is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations. We do not call this process sham pleading: we call it litigation.

XXXVI. CREATION, VALIDITY, & FUNDING

A. *In re Braswell,* 2025 La. App. LEXIS 677 (Court of Appeal of Louisiana, Second Circuit 2025). Dual wills invalid for lack of capacity and undue influence.

1. Valerie Braswell ("Valerie") suffered from chronic health problems, including COPD and cervical stenosis, that left her virtually a quadriplegic. She was divorced and had one child, Suzanna Leigh Braswell ("Suzanna"), and two sisters, Julie Bryan White ("Julie") and Jennfier Bryan Clark ("Jennifer"). Due to her health condition, from 2017 through 2020, Valerie and her mother were both living in Heritage Manor Stratmore nursing facility in Shreveport, Louisiana. With the onset of Covid in 2020, Valerie's father, Bill Bryan ("Bill"), elected to move into a home that could accommodate Valerie and her mother, and they moved home.

2. Valerie's two sisters lived in Texas but would visit the home approximately once a month. Bill needed help caring for Valerie and her mother, so he hired Debra Pardee ("Debra") and Stephanie Barbo ("Stephanie") from the nursing home to be their caretakers. Debra and Stephanie worked alternating 12-hour shifts in Bill's home from 8 a.m. to 8 p.m., with Debra primarily caring for Valerie. Valerie's mother died in February of 2021.

3. On April 20, 2021, two months after her mother's death, Valerie was driven by Debra, and they left Bill's home to "run errands." They first went to a doctor's appointment for Valerie, where she met with the doctor and his nurse practitioner. Next, they stopped by Valerie's bank, where Valerie was taken inside, and Debra was added to her bank account. From the bank, they next went to the office of attorney Patricia Miramon ("Miramon"), who is primarily an estate planning attorney. Valerie and Debra had previously communicated with Miramon about executing a will for Valerie.

4. While at Miramon's office, Valerie told Miramon that her sisters hated her, and Bill was pressuring her to create a will in favor of her sisters. She wanted to show them a will to get them to stop pressuring her, while secretly intending for there to be a second will in favor of Debra that she was not going to show her family. She also told Miramon she did not have a good relationship with her daughter. Valerie executed the two wills in quick succession. In the first will, she bequeathed two pieces of furniture to her daughter, Suzanna, and left the remainder of her estate to her sisters as her universal legatees (the "first will"). Three minutes later, Valerie executed a second will that revoked the first will

and bequeathed the same pieces of furniture to Suzanna and the remainder of her estate to Debra (the "second will"). Valerie returned home and showed the first will to Bill, but she and Debra kept the existence of the second will a secret. Valerie died a few months later, on August 11, 2021.

5. On August 21, 2021, Valerie's sisters filed a petition for probate of the first will, with no mention of the undisclosed second will. An order making the first will executory was signed and filed on August 23, 2021, in docket number 632,226 in the First Judicial District Court. On September 2, 2021, Debra filed a petition for probate of statutory testament under a new docket number, docket number 632,443, also in the First Judicial District Court, and an order filing and executing the second will was signed on September 8, 2021. At that moment, there were competing wills and corresponding orders.

6. On October 22, 2021, Debra filed a rule to annul probate and rescind orders of appointment of co-executors and independent executorship in the matter filed by Valerie's sisters. On February 7, 2022, the trial court granted the rule to annul, and the two separate matters were consolidated. Numerous motions were then filed by the parties, and the matter was set for trial to address the sisters' claims of undue influence exerted by Debra and Valerie's lack of testamentary capacity.

7. A bench trial began on July 27, 2023. The first witness to testify was nurse practitioner Laura Perkins ("Perkins"). She testified that she works at Willis-Knighton Medical Center at Internal Medical Center, where she is a nurse practitioner, and the court qualified her as an expert nurse practitioner. She testified Valerie was almost quadriplegic and had depression and anxiety. Perkins described Valerie's lack of what she considered "executive function," which she testified was the "ability to make decisions, complex decisions, ability to do things that take more than one step, the ability to act like an adult." Perkins testified that she saw Valerie on the day she executed the wills and that she did not have the executive function to execute the wills. On cross-examination, Perkins testified that there was nothing in Valerie's chart about the loss of executive function.

8. Attorney Miramon testified that she sends potential clients information sheets to fill out before their first meeting and Valerie came in with her sheet filled out. Miramon testified: "She told me that she was being pressured by her father and her sisters to do this will leaving everything to them and that she didn't want that. And that she had a bad relationship with her sisters. And that they hated her. They wanted her dead. They didn't want her to live with her dad. Her dad was putting a lot of pressure on her. And she had — she wanted me to do two separate wills."

9. Miramon acknowledged that Valerie could not write on her own, and someone else had handwritten in that Debra Pardee should inherit Valerie's estate. She testified that Valerie signed the first will at 4:35 p.m. and revoked it at 4:38 p.m. Miramon testified that she knew Valerie's intention was always to revoke the first will soon after signing it. She did not want her family to know about the revocation of the first will until after she died. After Valerie revoked the first will, she executed the second will, which leaves the hope chest and antique desk to Suzanna and all of her remaining property to Debra. If Debra is unable to receive the property, then the property would go to Debra's children, Crystal Todd Pryor, Jesse Quintana Todd, and Chase Duran Todd.

10. Miramon stated that when Valerie came to her office, she was in an electric wheelchair, but Miramon did not ask her about the specifics of her condition or

medications. On the day they executed the wills, they also created and executed a new power of attorney for Valerie, naming Kenneth Pardee ("Kenneth"), Debra's husband, as the power of attorney with Debra as the alternative agent. Miramon noted that she does normally ask people who come to her for estate planning a series of basic questions about themselves to make sure they are lucid and can answer. Miramon testified that Valerie seemed lucid and capable, and she did not seek a doctor's note about her capacity.

11. Also testifying at trial was Dr. Robert Hernandez, an internal medicine doctor, who confirmed that he began treating Valerie in October of 2017. He testified that Valerie's anxiety medications can cause confusion, disinhibition, and problems with mental functioning and cognitive ability. Dr. Hernandez also testified that Valerie could be easily influenced due to her lack of executive function and that Valerie never expressed that her sisters disliked her. Under cross-examination, he testified that Valerie had never undergone any cognitive testing or ever been diagnosed with dementia or Alzheimer's.

12. Julie White, Valerie's sister, testified that they had a normal sister relationship and that she did not hate Valerie. Julie stated that Debra drained Valerie's bank account before her death using her power of attorney. Bill, Valerie's father, testified that Valerie was not capable of entering into contracts with other people. He testified that Valerie was dependent on her caregivers for her every need. He stated that he had no idea that Valerie was going to Miramon to create a will until she came home and showed him the first will. He did not know about the second will until after Valerie had died. On cross-examination, he testified that Valerie knew who and where she was and was cognizant of what was going on around her.

13. Crystal Pryor testified that she is Debra's daughter and that she heard Valerie say that her sisters did not like her. She testified she never saw her mother trying to unduly influence Valerie or take advantage of her. On cross-examination, she testified that she interacted with Valerie about ten times in total and did not know the extent of her medical problems.

14. Stephanie Barbo testified that she and Debra worked separate 12-hour shifts for Valerie and her mother, while she was alive. She testified that Valerie told her that her sisters hated her and that she did not have a relationship with her daughter. She testified that she heard Valerie's father tell Valerie that she had to sell her home or go back into a nursing home. She and Debra have been friends since they were teenagers.

15. Kenneth Pardee, Debra's husband, testified that Valerie was very smart and wanted Debra to have everything of hers because her sisters were going to have plenty after their father's death. He testified that he did not know what was in the second will, even though he was the executor of the will. Testimony clearly shows that Kenneth did not understand the difference between a will and a power of attorney. He testified he never made any financial decisions for Valerie and did not authorize his wife to remove any money from Valerie's accounts. He did not authorize his wife to sign as Valerie's power of attorney on the sale of her house. He did not authorize the removal of $85,900 from Valerie's account by his wife.

16. Debra testified that Valerie told her that she wanted to create a will so that her father and sisters would stop threatening to put her back in a nursing home. She testified that she felt so badly for Valerie that she offered for Valerie to come live with her and her husband after her father died. She acknowledged that she drafted a $65,000 check out

to herself from Valerie's account for improvements to her home. She testified that Valerie was fine on April 20, 2021, when she went to the doctor and to Miramon's office.

17. Debra alleged that she did not know about the two-will scheme. She believed Valerie had capacity and did not influence Valerie. She testified that Bill and Valerie told her what to write down on Miramon's questionnaire, including that Debra would inherit all her personal property. She testified that Bill was aware that Valerie was going to Miramon's office. She stated that Valerie executed a power of attorney that granted her the right to act as power of attorney but admitted that she has never produced a copy of the power of attorney that grants her that authority. On cross-examination, Debra testified that Bill and Julie told her to withdraw the $85,900 from Valerie's account days before Valerie died because they wanted her to have the money.

18. Suzanna testified that she and her mother had a strained relationship, but they never went more than 10 years without speaking, as had been suggested by Debra. Suzanna testified that she went with her grandfather to see her mom in the nursing home when she lived with Bill in 2019. On cross-examination, Suzanna admitted to several criminal convictions and that she never visited her mother after Bill moved her into the home in 2020.

19. The trial court found that Julie and Jennifer had standing as the universal legatees of the first will to challenge the validity of the second will. The court found that on April 21, 2021, "Valerie did not have the mental and emotional capacity to deliberate her actions and knowledgeably and act independently to make an unconfused and uninfluenced decision to execute a will." The court further found that Valerie was unduly influenced, and the evidence showed a substitution of volition. The court specifically found that the timing and deceptive circumstances of the wills, coming when Valerie was grieving the death of her mother and was having her medications adjusted, was troublesome. The trial court found that both wills were null and any orders probating them and any orders arising therefrom were vacated. The court ordered that Valerie died intestate and Suzanna, as her only child, was her sole intestate heir.

20. The Pardees appealed this judgment and the court of appeals affirmed on the following grounds:

> a. Julie and Jennifer had standing to attack the second will, as the heirs and legatees of the first will. While the particular facts of this case are complex and purposefully confusing by the actions of various parties, including the decedent herself, it remains that Julie and Jennifer argued the second will was the product of undue influence. While the trial court ultimately found both wills were tainted by a lack of capacity, the argument still existed at the time the second will was challenged by Julie and Jennifer as the product of undue influence but the first will was not, giving them the opportunity to inherit under the first will. Considering that the articles of civil procedure are to be construed liberally, Julie and Jennifer had standing to challenge the second will, as the heirs of the first will.
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> b. All persons have capacity to make and receive donations inter vivos and mortis causa, except as expressly provided by law. Capacity to donate mortis causa must exist at the time the testator executes the testament. There is a presumption in favor of testamentary capacity. In will contest cases, absent a finding of manifest

error, the factual findings of the trial court are accorded great weight and will not be disturbed on appeal.

c. The trial court found Perkins and Dr. Hernandez to be credible and noted "the two medical caregivers who actually saw Valerie on the day she executed the disputed testaments both unequivocally stated that she lacked capacity." In the face of conflicting evidence and testimony, the trial court was in the best position to make credibility determinations.

d. A donation inter vivos or mortis causa shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor. Mere advice, or persuasion, or kindness or assistance, should not constitute influence that would destroy the free agency of the donor and substitute someone else's volition for his own. A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

e. Because Valerie and Debra had established a relationship of confidence and were not related by affinity, consanguinity, or adoption, only a preponderance of the evidence was required to show undue influence. Here, the evidence is sufficient to support the trial court's finding of undue influence by Debra over Valerie. As noted above, the trial court made credibility determinations based on witness testimony and found that Debra's testimony that she was unaware and uninvolved in the two-will scheme to be implausible. The trial court determined that the evidence showed that the Pardees, Stephanie, and Crystal took advantage of a critically ill woman after witnessing the conflict within her family after the death of her mother. The court gave great credence to Valerie's medical team's testimony that she did not have the capacity on April 21, 2021, to execute the wills and that her overall mental and physical health made her susceptible to influence from those around her.

B. *In re Est. of Lacy,* 2025 Wash. App. LEXIS 433; 2025 WL 763815 (Court of Appeals of Washington, Division Two 2025). Probate of will signed with an "X" denied due to conflicting statements by will proponent.

1. Dean Roy Lacy died on October 12, 2022. It appears that Lacy's estate was subject to an intestacy probate action based on David Leon VanDover, Sr.'s October 2022 statement to Lacy's daughter, Valerie Trimble, that Lacy died without a will. Lacy's five biological children were his heirs. Trimble was appointed administrator of Lacy's estate.

2. In October 2023, VanDover filed a supplemental petition seeking an order admitting Lacy's alleged will to probate. The alleged will appears to have been initialed and signed by Lacy with an "X." The alleged will left the entire residual estate to VanDover and excluded all of Lacy's biological children. The alleged will also appointed VanDover as executor of the estate. The alleged will was witnessed by Dennis Brock and Michael Gardner on September 30, 2022, but was not notarized. Later, an attestation of

authenticity for Dennis Brock was notarized on May 26, 2023, and for Michael Gardner on July 11, 2023. The attestation of authenticity stated that they were present at the execution of the will and the alleged will was a true and correct copy of the will that Lacy executed. Finally, VanDover filed a declaration, dated September 5, 2023, claiming that he believed the will had been intentionally lost by the survivors.

3. The hearing on VanDover's supplemental petition was set for October 12, 2023. Trimble's attorney appeared at the hearing; VanDover failed to appear. The superior court commissioner entered an "Order DENYING Supplemental Petition and REJECTING Copy of Will" which included written findings of fact: (1) in addition to other serious deficits, the will was not properly notarized at the time of signing and the subsequent attestations which were notarized on May 26, 2023, and July 11, 2023, are not sufficient to cure the deficit of a notary at the time of signing; (2) if the will was signed on the date in question it would have been obtained while the decedent was actively dying and may have lacked capacity; (3) VanDover produced the alleged "copy" of the will well after instigating a creditor's claim that was rejected by the Administrator; (4) the statements of VanDover are in direct opposition to statements and documentation filed by VanDover that he would have been the custodian of any such original will, rather than the "survivors" of the decedent; (5) filings by VanDover also contained the following statement: "Although he had a will prepared, his photo identification could not be found and was needed to sign the will. The notary public told me to contact her again once I was able to obtain a new identification card for him. Although I was able to obtain a new card for him, it arrived two days after his passing. The will was not signed in time, which was definitely not what he wanted. But his time ran out"; and (6) there is a lack of clear, cogent and convincing evidence necessary to admit the alleged copy of the will to probate.

4. The commissioner denied the supplemental petition, rejected the alleged will, and affirmed the intestate status of the estate. VanDover filed a motion for reconsideration of the commissioner's order, explaining that he had appeared at court but went to the wrong courtroom. He also stated that a "court official" told him that there was no hearing scheduled that day. Further, VanDover alleged that because the commissioner found that there was no notice provided to the administrator and heirs, the court had no jurisdiction to enter the order denying the supplemental petition. The commissioner denied the motion for reconsideration.

5. VanDover appealed and the court of appeals affirmed on the following grounds:

> a. VanDover argues that the commissioner lacked jurisdiction to enter an order in this case because he failed to properly serve the administrator and heirs, and therefore, the commissioner's order is void. Here, VanDover may have improperly served the administrator and the heirs, but the attorney for the administrator of the estate appeared at the hearing and affirmatively asked the superior court to grant relief by denying VanDover's petition and rejecting the alleged will. Therefore, the administrator consented to jurisdiction and the remaining heirs are not challenging the validity of the commissioner's order. Accordingly, VanDover's claim that the superior court lacked jurisdiction fails.
>
> b. VanDover argues that he proved the alleged will was valid. However, VanDover fails to properly challenge any of the superior court's findings of fact supporting its order rejecting the will. Accordingly, VanDover's argument fails.

c. The commissioner entered written findings of fact, including a finding that VanDover failed to present clear, cogent, and convincing evidence necessary to admit the will to probate. VanDover does not challenge any of the commissioner's findings of fact. Therefore, the commissioner's findings of fact are verities on appeal. Further, VanDover offers no argument regarding how the commissioner's findings, which impliedly find that VanDover's evidence is not credible in light of the conflicting statements VanDover made throughout the case, do not support the commissioner's conclusion rejecting the alleged will.

d. Here, in violation of the applicable rule, VanDover scheduled the hearing on the motion for revision more than 30 days from the commissioner's written order sought to be revised. Therefore, the superior court properly denied the motion for revision as untimely by applying the local court rules in effect at the time VanDover filed and scheduled his motion for revision. To the extent VanDover argues he demonstrated good cause for failing to comply with the local court rule because LINX allowed him to schedule the hearing outside of the required 30 days, this argument was raised for the first time in his reply brief and is too late to warrant consideration.

C. *In re Est. of Rocco,* 2025 Pa. Super. LEXIS 256 (Superior Court of Pennsylvania 2025). Will executed during COVID pandemic is valid.

1. On January 26, 2021, Leslie Dutchcot, Esquire, who was a District Court Magistrate, went to the home of Patricia Ann Rocco ("Decedent") and Joyce A. Posel ("Executrix") for the purpose of having the Decedent execute estate planning documents and to perform a marriage ceremony between the Decedent and the Executrix. Due to concerns about the COVID virus, Attorney Dutchcot, along with Melanie Lewis (who was there as a witness), did not enter the residence. Rather, Attorney Dutchcot was on the front porch and Ms. Lewis was on the sidewalk in front of the residence, which was approximately seven (7) feet from the front door. They observed the Decedent execute a Power of Attorney and her Last Will and Testament ("2021 will"). Ms. Lewis signed the documents as a witness while she was at the residence. Michael Marks, Esquire, executed the documents as a witness; however, it is agreed that he was not present at the time the documents were actually executed.

2. Attorney Dutchcot, Ms. Lewis, and the Executrix all stated that the Decedent was in good spirits, she did not have any mental limitations, counsel thoroughly explained the documents to the Decedent, the Decedent stated that she understood the documents, and no one assisted the Decedent in executing the documents.

3. Decedent died on July 7, 2021. On September 15, 2021, Executrix filed a petition for grant of letters testamentary. The petition included a copy of the 2021 will, which bequeathed Decedent's property "to whoever is Trustee of a certain Revocable Agreement of Trust" that Decedent created on January 26, 2021. That same day, the register of wills granted letters testamentary to Executrix.

4. On August 17, 2022, Patrick J. Passanante ("Appellant") filed a petition for citation sur appeal and petition for citation to trustee and trust beneficiary to void revocable agreement of trust. In this filing, Appellant explained that he and Decedent "were first cousins and lifelong best friends." Despite this close relationship, Appellant claimed that Decedent "never mentioned a romantic relationship with Executrix" or the execution of

the 2021 will. Appellant believed that Decedent's operative will was a document executed on October 25, 2011 ("2011 will"). Appellant claimed that the 2011 will named Appellant "as one of many beneficiaries and the executor." Thus, Appellant's petition raised counts of undue influence, lack of testamentary capacity, and lack of capacity to execute trust. Appellant concluded that the court should render void the 2021 will and revocable trust agreement. Executrix filed preliminary objections on September 23, 2022. Among other things, Executrix argued that Appellant's petition failed to include sufficient facts to support the claims that Decedent lacked testamentary capacity or was incapable of executing the revocable trust agreement.

5. Appellant filed a petition for rule to vacate probate of the 2021 will. Appellant argued that the 2021 will "contains a self-proving affidavit that the two subscribing witnesses were present when [Decedent] signed [the 2021] will." Appellant insisted, however, that "Michael Marks, one of the supposed witnesses to the [2021] will, was not present at the time the purported will was executed." Rather, Attorney Marks "signed the [2021] will when he was in his office in Squirrel Hill and not at [Decedent's residence at] 119 Kaplan Avenue despite his signature appearing on the [2021] will that he was present when the [2021] will was signed[.]" Under these circumstances, Appellant posited that Executrix "committed a fraud on the [court] when she signed the petition for grant of letters that the [2021] will was a self-proved will[.]"

6. Appellant further argued that Decedent did not have the ability to sign her name when she executed the 2021 will. Instead, Decedent "made her mark on the purported will dated January 26, 2021." Appellant maintained that two subscribing witnesses are required for a will signed by mark, but two witnesses were not present when Decedent made her mark in 2021. For these reasons, Appellant concluded that the court should vacate the probate of the 2021 will.

7. Executrix filed additional preliminary objections. Executrix noted that there were three (3) witnesses to the execution of the 2021 will: Attorney Dutchcot, Ms. Lewis, and Executrix. Further, Executrix observed that the 2011 will proffered by Appellant listed six (6) beneficiaries in addition to Appellant and Executrix. Executrix complained that these six beneficiaries were not named as parties in the petition and they were not served with or named in the rule or citation.

8. Ultimately, the court scheduled the matter for a hearing on January 18, 2024. The day before the hearing, Executrix filed a motion in limine. Again, Executrix argued that the court lacks jurisdiction. Despite this argument regarding jurisdiction, the court conducted the hearing as scheduled. The court received testimony from Ms. Lewis, Attorney Dutchcot, Executrix, and Appellant.

9. On May 30, 2024, the court issued an opinion and order granting Executrix's motion in limine, sustaining the preliminary objections in part, overruling all remaining preliminary objections, and dismissing Appellant's petitions.

10. Appellant appealed, and the superior court affirmed in part, reversed in part, and remanded on the following grounds:

> a. A will may be admitted to probate, without subscribing witnesses, if the testator signs their name at the end of the will. Under such circumstances, the state Supreme Court has approved the Oath which is required to be filed by the non-subscribing witnesses. The Oath requires the non-subscribing witness to be well

acquainted with the testator, familiar with the handwriting and signature of the decedent and the signature on the will is that of the testator.

b. The Probate, Estates and Fiduciaries Code governs the form and execution of wills as follows: "Every will shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions: (1) Words following signature — The presence of any writing after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature; and (2) Signature by mark — If the testator is unable to sign his name for any reason, a will to which he makes his mark and to which his name is subscribed before or after he makes his mark shall be as valid as though he had signed his name thereto: Provided, that he makes his mark in the presence of two witnesses who sign their names to the will in his presence."

c. The Code addresses the necessity of witnesses as follows: "All wills shall be proved by the oaths or affirmations of two competent witnesses and: (1) Will signed by testator — In the case of a will to which the testator signed his name, proof by subscribing witnesses, if there are such, shall be preferred to the extent that they are readily available, and proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness; (2) Will signed by mark or by another — In the case of a will signed by mark or by another in behalf of the testator, the proof must be by subscribing witnesses, except to the extent that the register is satisfied that such proof cannot be adduced by the exercise of reasonable diligence. In that event, other proof of the execution of the will, including proof of the subscribers' signatures, may be accepted, and proof of the signature of a witness who has subscribed to an attestation clause shall be prima facie proof that the facts recited in the attestation clause are true."

d. The Code also provides for self-proving wills.

e. The phrase, to "prove a will" is a term of art which broadly addresses the need to verify that the writing in question is, in fact, a valid testamentary instrument. The requirement that two witnesses attest to the validity of the testator's signature arises from this broader objective. When dealing with a will signed by testator, it is not necessary that there be subscribing witnesses if testator's signature can be proved by two witnesses at probate. Necessarily, such proof does not contemplate an attestation as to testator's mental capacity but only proof of the fact that the signature affixed to the testamentary instrument is that of the testator. Such proof verifies the will as one signed by the testator and, at least prima facie, establishes a will.

f. Ms. Lewis "was there to be a witness to the signing of Decedent's powers of attorney, her will, and to witness a marriage ceremony." Ms. Lewis did not enter Decedent's house "[b]ecause it was during COVID and we did not want to risk infecting anybody, so we were trying to stay about six feet away from everybody." Ms. Lewis was outside the house with Attorney Dutchcot, while Decedent and Executrix remained inside the house. From her position on the sidewalk, Ms. Lewis "was still able to see everything that was going on." Ms. Lewis described Decedent as "excited to move forward with getting married and to sign her documents." Despite Decedent "using oxygen" and not being "able to stand for

long periods," Ms. Lewis testified that Decedent was "[f]riendly, comfortable. She seemed like she was in good spirits."

g. After the marriage ceremony, the parties commenced execution of the estate planning documents. Decedent indicated that she understood the documents presented by Attorney Dutchcot. Ms. Lewis testified that Decedent signed the will on her own, with no one moving the pen for her. On direct examination, Executrix's counsel showed the 2021 will to Ms. Lewis, who confirmed that Decedent signed the document on the date at issue. On cross-examination, Ms. Lewis repeated that she saw Decedent sign the 2021 will from her place on the sidewalk, and the front door to the residence was propped open the entire time that Ms. Lewis was present. Ms. Lewis also estimated that her position on the sidewalk was approximately seven (7) feet away from the front door.

h. Following Ms. Lewis, Attorney Dutchcot provided her recollection of Decedent's execution of the will. Attorney Dutchcot testified that she had twice spoken with Decedent about the drafting of the estate planning documents, and Decedent "was a willing participant in this event."

i. At no point did Attorney Dutchcot lose sight of Decedent. Just as he did with Ms. Lewis, Executrix's counsel showed the 2021 will to Attorney Dutchcot. Attorney Dutchcot indicated that she drafted the 2021 will, and Decedent signed pages six (6) and seven (7) of the will in front of her.

j. The Orphans' Court found Ms. Lewis and Attorney Dutchcot to be credible. The court did not commit an error of law or abuse its discretion. Although Appellant correctly points out that the 2021 will does not pass muster as a self-proving will, this does not prove fatal. The will was in writing and signed by Decedent at the end thereof. Ms. Lewis and Attorney Dutchcot testified that they watched Decedent place her signature on the 2021 will without any assistance. Thus, the evidence supported the Orphans' Court's conclusion that Decedent did not sign by mark. Further, Ms. Lewis and Attorney Dutchcot's testimony supplied adequate proof of the fact that the signature affixed to the 2021 will was that of Decedent. The court properly dismissed Appellant's petition for rule to vacate probate of the 2021 will, which was premised upon the argument that the 2021 will was not properly witnessed.

k. In the absence of an indispensable party, a court lacks jurisdiction over matters before it. A trial court order dismissing an action because a plaintiff fails to join an indispensable party is a final and appealable order, as it puts the parties out of court without reaching the merits of the action. Instantly, Appellant's petition for citation sur appeal sought redress against Executrix only. The beneficiaries of the 2011 will would not suffer prejudice by any decision specific to this petition. The Orphans' Court opinion reveals no discussion of the merits of Appellant's petition for citation sur appeal. First, the Orphans' Court evaluated the arguments set forth in Appellant's petition for rule to vacate probate of the 2021 will, which concerned the number of witnesses. Immediately thereafter, the Orphans' Court evaluated Executrix's motion in limine. The court concluded that Appellant should have joined the beneficiaries of the 2011 will. Although not expressly stated, we presume that the court's failure to discuss the merits of Appellant's petition for citation sur appeal was due to its disposition of Executrix's motion in limine. In

light of the conclusion that the beneficiaries of the 2011 will were not indispensable parties, the court erred in dismissing Appellant's petition for citation sur appeal without reaching the merits. Consequently, the court reverses the portion of the court's order granting Executrix's motion in limine and dismissing Appellant's petition for citation sur appeal and petition for citation to trustee and trust beneficiary to void revocable agreement of trust.

D. *In re Est. of Spofford,* 2025 ME 15 (Supreme Judicial Court of Maine). Cognitive impairment, dementia, and guardianship and conservatorship do not preclude finding of requisite testamentary capacity to execute a will.

1. Michael Zani and Peter Zani are the sons of Patricia M. Spofford, who passed away on June 7, 2020. The Zanis appeal from the order of summary judgment entered by the Probate Court finding that there was no genuine issue of material fact concerning Spofford's testamentary capacity when she executed her will on March 1, 2018.

2. The Maine Supreme Court affirmed on the following grounds:

a. Videos of the will's execution recorded by Spofford's attorney show that Spofford understood "the business [she] was engaged in"; possessed knowledge of the makeup and general extent of her estate; could identify her family members and her relationships to them; knew how she wished to dispose of her estate; and had clear wishes about the persons she wanted "to participate in [her] bounty" and whom she wished to exclude. The videos also establish that Spofford reviewed her will with her attorney, that Spofford confirmed that the drafted will accurately reflected her wishes, and that she signed her will in the presence of two witnesses and a notary.

b. Testimony by Spofford's primary care physician further supports the conclusion that Spofford possessed testamentary capacity when she executed her will. In an affidavit, the physician stated that he had examined Spofford on the day that she executed her will and had concluded, based on that examination "as well as [his] review of [Spofford's] medical history," that she "possessed the capacity and intention to execute a testamentary will on March 1, 2018."

c. The evidence on which the Zanis rely is too remote from the issue of Spofford's testamentary capacity at the time that she executed her will to create a genuine dispute of material fact. The Zanis reference, for example, an incident that occurred a year before the execution of Spofford's will in which she assaulted her caregivers and drove erratically through town. They also reference notes in Spofford's medical records regarding her cognitive issues written by the same doctor who determined that she was of sound mind on the day she executed her will. The Zanis specifically discuss a February 15, 2018, note in which Spofford's physician wrote that she displayed "[s]ignificant cognitive dysfunction" and a June 4, 2018, note in which he described Spofford as "uncooperative," "not able to listen," and "aggressive and reactive." The Zanis also reference a report by another doctor, based on two examinations of Spofford conducted in the summer of 2017, in which that doctor diagnosed Spofford with cognitive impairment and recommended the appointment of a guardian and conservator. This evidence does

not create a genuine dispute of material fact regarding whether Spofford lacked testamentary capacity on the day that she executed her will.

d. Additionally, the Zanis challenge their mother's capacity partly on the ground that she had been diagnosed with dementia and Alzheimer's disease; however, some degree of cognitive impairment, including dementia, does not preclude testamentary capacity. Although fixed insanity has been established, it may be shown that execution was during a lucid interval. There may, in a case of senile dementia, be such a thing as a lucid interval, during which the person is qualified to will.

e. Also, while the Zanis argue that "the fact that [Spofford] was under a guardianship and conservatorship at the time the will was executed . . . is certainly persuasive evidence that testamentary capacity did not exist," someone under guardianship and conservatorship may have the requisite testamentary capacity to execute a will. The incapacity of guardianship is simply a fact which may be proven like any other fact tending to establish mental incapacity, but it does not work an estoppel upon the proponents. The law recognizes that a person may require a guardian by reason of incapacity in one particular, while, in other respects, he may be entirely competent. It is well settled that there may be partial insanity of the testator, some unsoundness of mind, that does not in any way relate to his property or disposition of the same by will.

E. *Johnson v. Synchrony Bank,* 2025 U.S. Dist. LEXIS 154616 (United States District Court for the District of South Carolina 2025). Plaintiff cannot create a trust merely by drafting a document she purports to be a trust and affixing her signature, fingerprint, and a stamp, and related "sovereign citizen" claims are frivolous and subject to summary dismissal.

1. Even if Plaintiff had formed trusts recognizable under the law, she cannot proceed pro se on behalf of trusts.

2. Miyuki Maureen Johnson as Trustee for Miyuki Maureen Johnson Irrevocable Trust ("Plaintiff"), proceeding pro se, brings this action alleging claims against Synchrony Bank ("Defendant").

3. Plaintiff alleges on or about June 9, 2025, she "submitted a lawful A4V (Accepted for Value) remittance" to discharge the $11,695.29 debt owed to Defendant for the financing of an air conditioning unit. Plaintiff claims "Defendant received the remittance package and failed to provide a lawful rebuttal, rejection, or return within with 72-hour window or the 15-day rebuttal period required by commercial law." She asserts "Defendant's dishonor and continued balance reporting constitute commercial default under UCC 3-603 and 3-311, and unlawful coercive pressure against the Trustee."

4. Plaintiff maintains she is entitled to protections under the ADA (42 U.S.C. § 12101 et seq). She requests the court award her $100,000 in damages, legal and administrative costs, injunctive relief to stop further collection activity, and all other relief the court considers just and proper.

5. The federal magistrate recommended the district judge dismiss the matter with prejudice and without leave for amendment, and the district court accepted the report and dismissed the matter, on the following grounds:

a. Plaintiff filed her complaint pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss a case upon a finding that the action fails to state a claim on which relief may be granted or is frivolous or malicious. A finding of frivolity can be made where the complaint lacks an arguable basis either in law or in fact. A claim based on a meritless legal theory may be dismissed sua sponte.

b. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Pro se complaints are held to a less stringent standard than those drafted by attorneys. In evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. A federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case.

c. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts that set forth a claim currently cognizable in a federal district court. Although the court must liberally construe a pro se complaint, the United States Supreme Court has made it clear a plaintiff must do more than make conclusory statements to state a claim. Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face, and the reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions.

d. As an initial matter, the undersigned notes that Plaintiff makes conclusory assertions that this court has jurisdiction over the matters addressed in her complaint. The undersigned declines to engage in an exhaustive jurisdictional analysis given the frivolousness of Plaintiff's complaint, but notes that without further information, it is not clear from the face of the complaint that the court has subject-matter jurisdiction.

e. Plaintiff, who purports to serve as the trustee for several trusts, has recently filed 11 cases in this court with similar allegations. Attachments to Plaintiff's complaints show that she allegedly created various trusts, assigned encumbered assets to the trusts, submitted to defendants letters and documents she stated served as "lawful discharges and assignments" of the obligations owed to defendants, completed UCC financing statements purportedly perfecting security interests in the assets, instructed defendants to cease debt enforcement actions, and is now requesting the court grant her damages and injunctive relief based on defendants' failures to respond favorably to her submissions.

f. Alleged trust documents Plaintiff attached to some of her complaints suggest no trusts were lawfully created. Among these documents is a "Certificate of Trust Authority" that provides "MMJ Enterprise Foreign Express Trust is a private, irrevocable, foreign trust lawfully formed under the laws of equity, natural law, and ecclesiastical jurisdiction" that "operates independently and is not subject to statutory registration or regulation, except as voluntarily submitted by its Trustee."

g. Plaintiff also attached a "Security Agreement" between "Miyuki Maureen Johnson, Trustee of the DK Johnson Living Trust" as "Secured Party" and "DK Johnson (Deceased), by and through his estate and trust affairs administered by the above-named Trustee" as "Debtor" and a death certificate reflecting that D. K. Johnson died on December 23, 2024, in Columbia, South Carolina, and that Plaintiff was his daughter. The review of the evidence Plaintiff attached to her complaints reveals no "Certificates of Trust Authority" or other similar documents for any of the other trusts for which Plaintiff asserts she is acting as trustee.

h. Just as fictional character Michael Scott in the American sitcom "The Office" believed he could declare bankruptcy by shouting "I declare bankruptcy," it seems that Plaintiff believes she can create a trust merely by drafting a document she purports to be a trust and affixing her signature, fingerprint, and a stamp. Neither action is legally valid.

i. Even if Plaintiff had formed trusts recognizable under the law, she cannot proceed pro se on behalf of trusts. If Plaintiff's cases were not subject to summary dismissal as frivolous and if the trusts had been lawfully created, Plaintiff would be required to secure legal counsel to proceed on behalf of the trusts.

j. Plaintiff's cases invoke "sovereign citizen" ideology. Sovereign citizens are a loosely affiliated group who believe that the state and federal governments lack constitutional legitimacy and therefore have no authority to regulate their behavior. They attempt to benefit from the protections of federal and state law while simultaneously proclaiming their independence from and total lack of responsibility under those same laws. Based on the above, and even though she does not use the specific words "sovereign citizen," Plaintiff's claims are based in that ideology, frivolous, and subject to summary dismissal. A court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," a category encompassing allegations that are "fanciful," "fantastic," and "delusional." As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them.

k. Plaintiff includes a document titled "Commercial Remittance—Accepted for Value" that states: "Dear Synchrony Bank, Please be advised that a lawful commercial remittance in the amount of $11,695.29 is enclosed for full discharge and settlement of the referenced account under UCC §3-305 and §3-603. This account is listed on Schedule B of MMJ Enterprise Foreign Express Trust and is being discharged under trust authority using the Accepted for Value (A4V) process. The discharge is logged in the trust ledger and supported by lawful documentation. Enclosed please find: This remittance letter; Affidavit of Trustee; Trust Expense Assignment; Certificate of Trust Authority (available upon request); UCC-3 Filing Record (available upon request). This discharge satisfies all obligations on the account. Any continued billing, denial of discharge, or interference will be treated as a violation of commercial lien rights and trust protections."

l. She presents no evidence to indicate she submitted any legal tender, such as cash, a check, or money order to satisfy the balance owed. Instead, she claims

the document referenced above satisfies the debt owed to Defendant, that Defendant failed to honor the document as payment, and that Defendant now owes her $100,000. Her allegations are as baseless as they would be if she had merely claimed she had satisfied the balance due to Defendant with Monopoly money and attempted to sue Defendant because it did not respond.

m. This court and numerous others have dismissed complaints brought by sovereign citizens positing similar legal theories to those Plaintiff advances. It is plain on the face of Plaintiff's Complaint that her claims are brought under a sovereign citizen theory. This is a frivolous legal theory that is consistently rejected by federal courts. The theories of "sovereign citizens" are not established law in this court or anywhere in this country's valid legal system. As Plaintiff's complaints present a frivolous sovereign citizen theory, they are dismissed as frivolous.

F. *Succession of Brocato,* 2025 La. App. LEXIS 360 (Court of Appeal of Louisiana, Fourth Circuit 2025). Holographic will written on consecutive pages of notebook valid despite date errors and signature placement in middle of document.

1. Laurie Maria Brocato ("Decedent") died on October 5, 2021. On March 14, 2022, Decedent's nephew, Mr. Glorioso, filed a Petition to Probate Olographic Testament and Appointment of Dative Independent Executrix, seeking to have an olographic testament of Decedent's, dated November 4, 2019, probated and to have his mother and Decedent's sister, Ms. Duvall, appointed as the dative independent executrix of Decedent's estate. On the same day, the district court ordered that the November 4, 2019 testament be recorded, filed, and executed by its terms. Ms. Duvall was appointed as the executor of Decedent's estate on March 22, 2022. However, on April 7, 2022, Mr. Glorioso replaced Ms. Duvall as the executor of Decedent's estate due to personal health reasons.

2. On June 28, 2022, Decedent's surviving spouse, Ms. Vickers, filed a Petition to Revoke and Annul Probated Testament Dated November 4, 2019, to Revoke Appointment of Brandon Glorioso as Dative Testamentary Executor, in Due Course to Probate Olographic Testament Dated January 31, 2021, February 1, 2021, and February 2, 2021, and to Appoint Administratrix (the "petition to revoke"). The petition to revoke sought to have the November 4, 2019 testament revoked, to have Mr. Glorioso removed as executor and replaced by Ms. Vickers, and to have a subsequent testament dated on three consecutive days — January 31, 2021, February 1, 2021, and February 2, 2021 — probated as Decedent's last will and testament. This testament was written on consecutive pages in a bound notebook.

3. At the April 30, 2024 hearing, several witnesses testified. First, Ms. Vickers testified as to her relationship with Decedent as well as Decedent's health history and the circumstances surrounding Decedent's death. Ms. Vickers also provided testimony that the testament at issue in this appeal was written and signed in the hand of Decedent. Specifically, Ms. Vickers testified that she recognized the handwriting and signature as Decedent's based on the following: "She was always writing in notebooks, in journals. Sometimes she practiced her handwriting. She'd do her signature — just a whole page full of her signatures. She would write on the back of the scrap of paper. She was always writing notes as she went through the house, grocery lists — you know — all kinds of things. Notes to me, cards." As to Decedent's signature specifically, Ms. Vickers testified that "[s]he had a very specific signature."

4. Next, Adele Thonn, who was qualified as a handwriting expert and forensic document examiner, testified that, after considering Decedent's writing samples that she was given, there was a "strong probability" that the testament was drafted by Decedent. Ms. Thonn explained that the term "strong probability" is a technical term in the field of handwriting analysis and is the second highest opinion, meaning that the evidence is very persuasive and "the examiner is virtually certain that the questioned and the known documents were written by the same person."

5. Following, Douglas Bourgeois, a decades-long friend of Decedent, also provided testimony in support of the handwriting in the testament belonging to Decedent. While Mr. Bourgeois did not testify as to Decedent's signature, he testified that the testament at issue was unequivocally written in her handwriting. Mr. Bourgeois relayed that he believed the testament was written in Decedent's handwriting "[b]ased on the handwriting [he] had in [his] own cards — you know — cards and letters [from Decedent]. And just the general way she wrote . . . the way she did capital L's and capital M's."

6. The remaining two witnesses, James Duvall ("Mr. Duvall") and Mr. Glorioso, testified as to the acquiring of one of Decedent's previously written testaments. Mr. Duvall provided that Decedent had given him an envelope containing a will, which he was instructed to deliver to his wife, Ms. Duvall, who then gave it to Mr. Glorioso. Mr. Duvall testified that he never saw the contents of the envelope until the proceedings in this matter began. Likewise, Mr. Glorioso testified that he had been given the envelope from his mother, which he then placed inside of his own blue envelope. Mr. Glorioso stated that he did not open the envelope from his mother until after Decedent passed away and Ms. Duvall reminded him that he had them.

7. On June 17, 2024, the district court granted Ms. Vickers' petition to revoke; annulling the order that probated the November 4, 2019 testament and appointed Mr. Glorioso as executor; and accepting for probate the January 31, 2021, February 1, 2021, and February 2, 2021 testament. The district court found that Decedent's January 31, 2021, February 1, 2021, and February 2, 2021 testament complied with the date requirements, the signature requirement, and the handwriting requirement for an olographic testament.

8. On appeal, the court of appeals affirmed on the following grounds:

> a. The proponent of an olographic will has the burden of proving that it was entirely written, dated, and signed by the testator. Specifically, the olographic testament must be proved by the testimony of two credible witnesses that the testament was entirely written, dated, and signed in the testator's handwriting.
>
> b. An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. Although the date may appear anywhere in the testament, the testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament. The olographic testament is subject to no other requirement as to form. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary. Additions and deletions on the testament may be given effect only if made by the hand of the testator.

c. The law does not require that an olographic will be written in its entirety on the same date. Extrinsic evidence can be admitted to clarify an ambiguous date. Under Louisiana law, there is a presumption in favor of the validity of testaments in general and proof of the nonobservance of formalities must be exceptionally compelling to rebut that presumption. Moreover, when a testament is written in olographic form without the aid of counsel, the intention of the testator is to be given paramount importance. Because Louisiana law favors maintaining the validity of testaments, courts liberally construe the requirements, maintaining the validity of the will if at all possible, as long as it is in substantial compliance with the statute.

d. Appellants argue that because Decedent's signature does not appear at the very end of the testament, but rather at the top of the second of four pages, that renders the testament invalid in form. Appellants also assert that the testament contains conflicting dates on the second page of the testament, which creates uncertainty and invalidates the testament. Noteworthy is the fact that there are no issues in this appeal pertaining to whether the testament was written by Decedent. Rather, this issue focuses solely on the form requirements of date and signature for a valid olographic testament.

e. The testament at issue in this appeal consists of four consecutive pages from a composition notebook. It is uncontested in this case that the first page is dated January 31, 2021, and the third and fourth pages are each dated February 2, 2021. The date at issue is found on the second page of the testament — there are two dates written on this page. At the top of the second page, it appears that the date is written as "2/1/2021." The Appellant asserts that the "2" representing the month of February was actually a "1" with a "2" subsequently written over it. The handwriting expert testified at the hearing that she would not consider the discrepancy to be an overwriting, but rather a patching. When asked to clarify what that terminology meant, she provided, "[m]eaning correcting a mistake. . . . It could also be a malfunctioning pen, or it could be that there's a lack of fine motor control, and so the writing is kind of smeared a little bit." The district court, in its reasons for judgment, found that "[t]he alleged 1 the [Appellants] point[] out under the 2 is barely noticeable; it is a light scratch." From our review of the second page of the testament, the "2" is clearly written without any ambiguity, making the correct date "2/1/2021."

f. The second date on page two is written in the left margin as "2/2/2012." The district court found that this date, taken in context with the dates on the other three pages, as well as the "2/1/2021" date on the same page, was "clearly an error and does not reflect the testator's intent as to the date of this olographic will. . . ." In considering whether the district court abused its discretion in coming to this conclusion, there exists "a strong public policy of the State to sustain the validity of the will and give effect to the testator's wishes whenever possible." Considering the consecutive dates on the four pages of the testament, and the simple switching of the numbers from "2012" to "2021," we do not find that the district court erred by concluding that this mistake by the testator does not render the date uncertain so as to invalidate the testament. This argument is unpersuasive.

g. In the instant matter, Decedent also begins her testament with the date — January 31, 2021 — and then starts by writing, "I, Laurie Marie Brocato. . . ." However, at the bottom of the first page of the testament, she makes dispositions to Ms. Vickers of both her home and her fifty percent interest in a Mercedes vehicle. Decedent's signature appears at the top of the second page, which is after the dispositions have already begun.

h. The instant testament has dispositions made before and after Decedent's signature. The contested testament at issue here includes one signature and two sets of initials. As noted above, it is not disputed in this appeal that the signature and initials were in the handwriting of Decedent. Rather, the issue centers around the location of the signature in the testament. The testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament. The text of the article specifically provides that the signature not being at the end of the testament does not invalidate the testament.

i. The signature being located at the end of the testament is not of paramount importance in meeting the form requirements for a valid olographic testament. In choosing to consider the language of the testament that followed the signature, the district court exercised the great discretion given to it by the Civil Code. Another factor that supports the district court's decision to find this testament valid is the inclusion of Decedent's initials in two subsequent locations of the testament. The first set of initials appears on page two in the left-hand margin, and the second set of initials appear at the top of the third page of the testament. Decedent's continued initialing of the testament after her signature means that she was intending to write this testament as one document, although drafted over several days.

XXXVII. DAMAGES & REMEDIES

A. *Est. of Mummert v. Cassinelli,* 2025 U.S. Dist. LEXIS 4528; 2025 LX 187727; 2025 WL 57716 (United States District Court for the Western District of Tennessee 2025). Criminal restitution obligation not enforceable against third-party-funded escrow account where defendant died prior to sentencing.

1. John Paul Mummert died on July 30, 2018. Mr. Mummert's Last Will and Testament ("Will") nominated his attorney, who drafted the Will, to serve as his Executor without the requirements of bond, inventory, or an accounting. The Shelby County Probate Court appointed the attorney to serve, without bond, as the Personal Representative of the Estate of John Paul Mummert ("Estate" or "Plaintiff"). The attorney was removed as Personal Representative of the Estate a little over a year after being appointed.

2. While serving as Executor, the attorney allegedly withdrew money from the Estate's accounts, including an account at Commercial Bank & Trust Company ("Commercial Bank"), and then used that money to pay personal expenses. This alleged conduct resulted in the attorney being indicted on four counts of wire fraud. Two attorneys represented the attorney in the criminal matter for those wire fraud charges — one of whom (the "Defendant") was admitted pro hac vice in the matter and allegedly served as the escrow agent.

3. The attorney pled guilty to a single count of wire fraud pursuant to a plea agreement. As set forth in the plea agreement, the attorney agreed to plead guilty to Count 2 of the Indictment and pay restitution to the Estate of John Paul Mummert and to any other identifiable victims who suffered losses as a result of the criminal conduct which is the subject of this Plea agreement in an amount not to exceed $124,190.57. The United States agreed to dismiss Counts 1, 3, and 4 of the Indictment at sentencing. The parties also agreed that, for purposes of calculating the guideline sentencing range, the amount of the loss was at least $95,000 but not more than $124,190.57.

4. At the change of plea hearing, one of the counsel appeared on behalf of Ms. Chiles; but the Defendant was not present. Counsel represented that the restitution funds were in Defendant's escrow account and a check was being sent made out to that estate to make payment in full. A sentencing hearing was scheduled and the attorney was released on her previous bond. Less than 13 hours after pleading guilty, the attorney committed suicide.

5. A little over two weeks later, counsel for the Estate sent a letter to the attorney's counsel and stated that he did not believe the attorney's death affected the Defendant's obligation, as escrow agent, to disburse the restitution funds that she was holding to the Estate. The Defendant disagreed with counsel for the Estate's contentions, and explained that the money she previously held in trust for the potential payment of the restitution did not belong to the attorney, and that the Defendant had returned the funds to the third party to whom the money belonged when that party requested its return. Plaintiff believes that the third party was the attorney's mother.

6. Plaintiff's sued Defendant for breach of escrow agreement and escrow agent's duties and breach of the implied duty of good faith and fair dealing. The Defendant moved to dismiss, which the court granted on the following grounds:

> a. The Court has diversity jurisdiction. The parties here are diverse. State substantive law applies to state law claims brought in federal court. Federal courts sitting in diversity apply the choice-of-law rules of the forum state. For contract disputes, Tennessee follows the rule of lex loca constractus, meaning that a contract is presumed to be governed by the law of the jurisdiction in which it was executed absent a contrary intent. For tort claims, Tennessee uses the most significant relationship test set forth in the Restatement (Second) of Conflict of Laws, which provides that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principals stated in Restatement (Second) of Conflict of Laws § 6.
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> b. Plaintiff did not respond to Defendant's argument about Plaintiff's claim for breach of the implied duty of good faith and fair dealing. Instead, Plaintiff conceded that this is not a standalone claim. Therefore, the motion to dismiss is granted for the claim for a breach of the implied duty of good faith and fair dealing.
>
> c. Plaintiff's claim for breach of escrow agreement and escrow agent's duties does not allege a plausible claim for relief.
>
> d. There are not facts to support the allegation that the third party who provided the restitution funds was no longer the owner of the funds. Plaintiff doesn't identify any escrow agreement term that Defendant violated or failed to act in

accordance with, nor does it specify how Defendant violated her fiduciary duties. Counsel's statements to the Court are not part of the plea agreement, and the plea agreement, which Plaintiff says functioned as the escrow agreement, does not identify an escrow agent or "holder" for the restitution funds, nor does it include any terms as to the disbursement of any funds held in escrow. Plaintiff didn't have to include "detailed factual allegations," but it had to provide more than unadorned, the-defendant-unlawfully-harmed-me accusations.

e. Plaintiff's claim also falters because it's based on the premise that Plaintiff had an enforceable right to the restitution amount set forth in the plea agreement. Plaintiff had no such right. Restitution is a part of one's sentence. District courts don't have inherent authority to order restitution and may do so only as explicitly empowered by statute. Both the Victim and Witness Protection Act of 1982 ("VWPA") and the Mandatory Victims Restitution Act of 1996 provide district courts with statutory authority to order restitution in certain circumstances. But both specify that the district court may exercise its authority to order restitution "when sentencing a defendant." The attorney was never sentenced, and no order of restitution was ever entered. Absent those prerequisites, there is no enforceable restitution obligation.

f. Even if there was an enforceable restitution obligation, Plaintiff's claim in substance seeks enforcement of that obligation against someone other than the attorney or her estate. Plaintiff does not dispute that the funds held by Defendant came from someone other than the attorney. Yet the third party providing the funds was not a party to the plea agreement, and Plaintiff made no factual allegations to support its conclusion that the third party relinquished ownership of the funds upon transfer. Plaintiff has not cited any authority that would allow Plaintiff to enforce the asserted restitution obligation against anyone other than the attorney or her estate.

g. Finally, whatever the parties' obligations in the plea agreement were, those obligations terminated on the attorney's death. When a defendant dies prior to the entry of judgment or while her direct appeal is pending, the defendant's charges abate ab initio. Abatement ab initio is not a mere dismissal of the charges. Instead, everything associated with the case is extinguished, leaving the defendant as if he had never been indicted or convicted. Plaintiff's claim as a third-party beneficiary of the plea agreement therefore fails because the underlying agreement is void and has no legal effect between the parties to the agreement.

B. *In re Will of Cameron*, 335 A.3d 760 (Superior Court of Pennsylvania 2025). Damages for self-dealing can equal the total financial benefit received by the fiduciary and/or his non-party family members who are not beneficiaries of the trust.

1. William R. Cameron, Jr. ("Mr. Cameron") established a revocable trust under an agreement titled "Cameron Family Trust" that was dated with only the year "1992." (the "Family Trust"). Mr. Cameron died on April 22, 1994, a resident of Bucks County, Pennsylvania. Mr. Cameron left a Will dated August 11, 1993 (the "Will"), which was admitted to probate by the Register of Wills of Bucks County on May 9, 1994. Mr. Cameron was survived by his wife, Lois ("Mrs. Cameron"), and by their four children, William R. Cameron, III ("Trustee"), Cynthia J. Carothers ("Cindy"), Robert H. Cameron

("Bob"), and Kimberly A. Earley ("Kim"). Collectively, Cindy, Bob, and Kim are "Appellees."

2. Mr. Cameron established a unified credit trust under his Will (the "Credit Trust"). The Family Trust and the Credit Trust, collectively the "Cameron Trusts," are the subject of this litigation. Mr. Cameron and Trustee were the initial trustees of the Family Trust. After Mr. Cameron died on April 22, 1994, Mrs. Cameron succeeded him and became a co-trustee with Trustee. The Orphans' Court permitted Mrs. Cameron to resign as co-trustee, and appointed Cynthia Carothers as Mrs. Cameron's successor co-trustee with Trustee. Following Mr. Cameron's death, the Family Trust continued for the benefit of Mrs. Cameron. Mrs. Cameron died on February 16, 2019. Upon Mrs. Cameron's death, the Family Trust terminated and is distributable in equal shares to Mr. Cameron's four children (i.e., Appellees and Trustee).

3. Trustee has always been the sole trustee of the Credit Trust. The Credit Trust was created for the sole benefit of Mrs. Cameron during her lifetime. Upon Mrs. Cameron's death, the Credit Trust terminated and is distributable in equal shares to Mr. Cameron's four children (i.e., Appellees and Trustee).

4. Cindy and Bob are the executors of Mrs. Cameron's Estate. During the course of their administration of the Estate, Cindy and Bob discovered that Trustee had obtained a line of credit from Morgan Stanley, using the Cameron Trusts' assets as collateral (the "Express Credit Line"). Appellees initiated this action on November 6, 2019, by filing a Petition to direct Trustee to file an account and to remove him as trustee for each of the Cameron Trusts.

5. Trustee filed an Account for each of the Cameron Trusts on September 8, 2020, along with a single Petition for Adjudication. Appellees filed Objections to both of the Accounts. Trustee made withdrawals from the Express Line of Credit. None of the funds Trustee withdrew from the Express Credit Line were used for the benefit of the Cameron Trusts. All of the funds Trustee withdrew from the Express Credit Line were used for the benefit of Trustee and his non-party family members, including his wife, Regina Cameron ("Gina"), Gina's daughter, Alana Malone ("Alana"), Alana's husband, David Malone ("David"), and Trustee's son, William R. Cameron, IV, none of whom are or were beneficiaries of either of the Cameron Trusts.

6. G.B. Binkley, LLC is an entity owned by Trustee and Gina, through which they operated a 5 & 10 store known as Binkley's Store. The real property where Binkley's Store is located is owned by William Cameron Realty, LLC, an entity owned by Trustee and Gina. The funds Trustee sent from the Express Credit Line to himself and Gina were to install solar panels on Binkley's Store. Roma Bank is the financial institution used by Binkley's Store at the time funds were sent from the Express Credit Line to Roma Bank. The funds Trustee sent from the Express Credit Line to Roma Bank were used to pay off a line of credit of Binkley's Store. Trustee and Gina sold the assets of Binkley's Store for $100,000, but they retained the real property, which they lease to the current operator of Binkley's Store. The funds Trustee sent from the Express Credit Line to Temple University were to pay tuition for [Trustee's] son, William R. Cameron, IV. The funds Trustee sent from the Express Credit Line to the United States Treasury were to pay Trustee and Gina's personal federal income tax. The funds Trustee sent from the Express Credit Line to the State of New Jersey were to pay Bill and Gina's personal state income tax.

7. ISM LLC is a Colorado entity, through which Alana and David run a marijuana business. The funds Trustee sent from the Express Credit Line to ISM LLC were part of the start-up money for ISM LLC. All of the start-up money for ISM LLC was provided by Trustee and Gina. ISM LLC did business as Green Dot Labs. In or about 2016, Alana and Dave formed ISM2, Inc., which does business as Green Dot Labs. Trustee, Gina, Alana, David, and William R. Cameron, IV, all have received wages and/or employee benefits from ISM LLC and/or ISM2, Inc. At no point did either Trustee or Gina Cameron have any equity interest in ISM, LLC or its successor ISM2, Inc.

8. TC Colorado Holdings, LLC, Tuatara Capital Fund I, L.P., and Tuatara Capital Parallel Fund I, L.P. (collectively "Tuatara'") invested $3.3 million in ISM LLC and ISM2, Inc. ("Green Dot Labs") in or about late 2016 or early 2017. Tuatara, in connection with its investment, provided a pre-money valuation of Green Dot Labs at $5.3 million as of October 11, 2016. Because Colorado law prohibited Tuatara, as a non-resident of Colorado, from owning an interest in either ISM LLC or ISM2, Inc., a new entity, called GDL Inc., was formed. Tuatara, Alana, Dave, Trustee, and Gina are all owners of GDL Inc. Trustee and Gina obtained their equity interest in GDL Inc. without providing any funds to GDL Inc., ISM LLC, or ISM2, Inc., other than the funds Bill and Gina provided to startup ISM LLC in 2013. Trustee is also a director of GDL Inc. GDL Inc. now owns the tradename Green Dot Labs and licenses ISM2, Inc. to use that tradename. ISM LLC, ISM2, Inc., and GDL Inc. are affiliated entities that are part of a single business enterprise.

9. The parties filed competing motions for summary judgment. The Orphans' Court determined that it may award a surcharge against a self-dealing fiduciary equal to the total financial benefit received by the fiduciary and/or his non-party family members who are not beneficiaries of the trust. The Trustee filed a petition for permission to appeal the interlocutory order. The superior court granted Trustee's petition.

10. The superior court affirmed on the following grounds:

> a. The Uniform Trust Act ("UTA") contains the following remedies provision: "To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief, including the following: (1) Compelling the trustee to perform the trustee's duties; (2) Enjoining the trustee from committing a breach of trust; (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other mean; (4) Ordering a trustee to file an account; (5) Taking any action authorized by Chapter 43 (relating to temporary fiduciaries); (6) Removing the trustee …; (7) Reducing or denying compensation to the trustee; and (8) Subject to section 7790.2 (relating to protection of person dealing with trustee — UTC 1012): (i) voiding an act of the trustee; (ii) imposing a lien or a constructive trust on trust property; or (iii) tracing trust property wrongfully disposed of and recovering the property or its proceeds."
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> b. This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity.
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> c. Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were

not available, and findings of fact were made by the judge and not a jury. The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms. The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge.

d. If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

e. The requirement of loyalty of a trustee is the most intense fiduciary relationship in our law. There is no principle better settled than that a trustee is not permitted to obtain any profit or advantage to himself in managing the concerns of the cestui que trust. It is a well-recognized general rule that a trustee or fiduciary may not use trust property for his own benefit and if he does, he is liable to a cestui que trust for profits made by him from the use of trust property. The prohibition against self-dealing is absolute; where the trustee violates it, good faith or payment of a fair consideration is not material. The situation is no different where the breach consists of the fiduciary's marked preference of a third person over the beneficiary in respect of a disposition of estate property. As in the case of self-dealing, such conduct constitutes a violation of the fiduciary's basic duty to the beneficiary.

f. Once self-dealing is established, a surcharge may be applied to a fiduciary, not as compensation for any loss to the estate, but as punishment for the fiduciary's improper conduct. The Orphans' Court's decision is free from legal error. The court rejected the Trustee's policy argument, that a surcharge based on the amount of "benefit" is overly broad and more difficult to calculate than pure "profit." Any concerns regarding a factfinder's ability to determine the amount of "benefit" are outweighed by the need for punitive mechanisms to guard against the temptation for trustees to engage in self-dealing.

C. *Kuers v. Shore,* 2025 Tex. App. LEXIS 6124; 2025 LX 340504 (2025). Plaintiff entitled to post-judgment, but not pre-judgment, interest on damage award for attorneys' fees for costs of motion to compel.

1. William Richard Shore, Jr. was named trustee of the Shore Irrevocable Trust, a trust established by his mother Betty Lee Shore in June 2016. He was removed as trustee in 2017. That same year, Mary Jeanine Shore Kuers, the successor trustee of the Shore Irrevocable Trust, sued Shore asserting claims for breach of fiduciary duty, conversion, and declaratory and injunctive relief. As part of her prayer for relief, Kuers requested the recovery of "prejudgment and post-judgment interest as allowed by law."

2. During the course of the litigation, the Estate of Betty Lee Shore intervened and moved to compel Shore to respond to certain discovery. The trial court granted the motion to compel and on December 12, 2022, it awarded Kuers $6,000.00 in attorneys' fees and $2,244.20 for costs associated with the successful prosecution of the motion to compel. One year later, after a bench trial, the trial court signed a final judgment dated November

8, 2023, finding in favor of Kuers on her breach of fiduciary duty claim and awarding Kuers $4,725.00 in economic damages.

3. Kuers filed a Motion for New Trial and in the Alternative, a Motion to Modify Judgment ("Motion for New Trial"). Among other things, Kuers argued she was entitled to a new trial because (1) the actual damages were "manifestly too small in light of the uncontroverted facts at trial" and the trial court's determination that Shore committed breach of fiduciary duty, (2) she was entitled to exemplary damages because of Shore's gross negligence, and (3) she was entitled to attorneys' fees. In requesting that the court modify the final judgment, Kuers argued for sixteen mostly substantive modifications, including one awarding pre-judgment interest and one awarding post-judgment interest. After a hearing, the trial court denied the Motion for New Trial.

4. Kuers appealed and the court of appeals reversed and remanded to the trial court for a calculation of post-judgment interest, but affirmed in all other respects, on the following grounds:

a. An award of pre-judgment interest may stem from one of two sources: (1) general principles of equity or (2) an enabling statute. State law contains three enabling statutes relevant for pre-judgment interest, but these statutes only apply to claims for wrongful death, personal injury, or property damage, condemnation cases, and credit transactions. No statute authorizes an award of pre-judgment interest for claims involving breach of fiduciary duty.

b. Where no statute controls, the decision to award pre-judgment interest is left to the sound discretion of the trial court. Kuers does not explain how the trial court abused its discretion, or why "general principles of equity" required the award of pre-judgment interest in her case. On review of the record, the trial court's decision was not so arbitrary or unreasonable to amount to a clear error of law.

c. Post-judgment interest accrues automatically and is recoverable even if not specifically awarded in the judgment. Under state law, post-judgment interest is mandatory for every money judgment awarded by a court. Post-judgment interest is simply compensation for a judgment creditor's lost opportunity to invest the money awarded as damages at trial.

d. Kuers argued she is entitled to post-judgment interest on (1) her compensatory damage award of $4,725.00; (2) the pre-judgment interest of $2,597.91 on that award; (3) the award for $8,224.20 for attorneys' fee and costs in connection with the Motion to Compel; and (4) pre-judgment interest of $633.94 on that award. While Kuers is entitled to post-judgment interest, the court disagreed with her computation. The trial court did not abuse its discretion in declining to award pre-judgment interest. Thus, pre-judgment interest should not be included in the calculation of any post-judgment interest to which Kuers is entitled. Further, the date from which post-judgment interest should be calculated for all money owed is November 8, 2023 — the date of the Final Judgment — and that the amount upon which post-judgment interest should be calculated is $12,949.20, which comprises the compensatory damage award of $4,725.00 and the $8,224.20 award for attorneys' fees and costs incurred with respect to the Motion to Compel.

XXXVIII. DISCLAIMERS & POWERS

A. *In re Est. of Smith,* 2025 NYLJ LEXIS 1830; 2025 LX 174190 (Surrogate's Court of New York, New York County 2025). Donee of an exclusive power of appointment does not owe a fiduciary duty to treat all permissible appointees equally.

1. Jean Kennedy Smith ("Grantor"), the last surviving sibling of former U.S. President John F. Kennedy, Jr., died on June 17, 2020. The Jean Kennedy Smith 1998 Residence Trust ("1998 QPRT" or "Trust") gave Charles O'Byrne ("Charles") (who was also co-Trustee) a special and exclusive power of appointment to be exercised by him in his individual capacity in his "full and complete discretion" as long as he did so before the second anniversary of the Grantor's death by an acknowledged, written instrument.

2. On June 15, 2022, two days before the deadline, Charles exercised the power of appointment. First, with regard to Grantor's daughter Amanda Smith Hood ("Amanda"), Charles forgave a $1 million promissory note payable by her to the 1998 QPRT and also appointed to her an outright distribution of $1 million. Second, Charles forgave a $750,000 promissory note payable by Grantor's daughter Kym Smith ("Kym") and appointed to her an outright distribution of $1.25 million. Finally, Charles appointed the balance of the 1998 QPRT's assets to himself as continuing trustee of a new trust that he established, known as the JKS 1998 QPRT Receptacle Trust, dated June 15, 2022 ("Receptacle Trust").

3. The Receptacle Trust gives Charles discretion to pay income or principal to any of Grantor's issue and continues to grant him (or any successor trustee) a special, exclusive power to appoint the Receptacle Trust's assets among Grantor's issue, or in default of the exercise of that power, to Amanda and Kym, or if they are deceased, to their issue, per stirpes, outright. The Receptacle Trust terminates on the last to occur of (1) the sale of Grantor's Sutton Place apartment, (2) the final resolution of a particular negligence action commenced against the 1998 QPRT in New York County Supreme Court (which the parties indicate may have been resolved), or (3) the date on which final distributions from all of the Kennedy Trusts (hereinafter defined) and Grantor's estate have been completed. Charles's continuing power of appointment must be exercised within one year after the termination of the Receptacle Trust.

4. Under the 1998 QPRT, William K. Smith, M.D. ("William"), was an equal remainder beneficiary with his siblings, Kym, Amanda and Stephen Smith, Jr. ("Stephen"), if Charles did not timely exercise his power of appointment, that is, he was a "taker-in-default" of the exercise of the power of appointment. William sued to declare invalid the exercise of Charles's power of appointment as well as other related relief. Charles moved to dismiss, pre-answer, as did Amanda and Kym for failure to state a claim, with Amanda and Kym also claiming that William's claims were "utterly refuted" by documentary evidence, namely the provisions of the 1998 QPRT. Stephen opposed the motions to dismiss, as did the guardian ad litem appointed for certain infant grandchildren of the Grantor, who were contingent beneficiaries of the 1998 QPRT.

5. The court dismissed William's claims as a matter of law on the following grounds:

a. There is no ambiguity in the 1998 QPRT, which unequivocally provides that Charles has the power to appoint Trust assets among some of Grantor's descendants to the exclusion of others or in further trust and to continue his power of appointment over the Trust's remainder. Nor does the instrument prohibit Charles from being the trustee of any such further trust. Instead, it explicitly grants

Charles the authority to appoint Trust assets "upon such terms, conditions and trusts" that he deemed appropriate.

b. Although a parenthetical in Section 6.3 of the 1998 QPRT further clarifies that Charles's power of appointment could be exercised to give "another" a "general power of appointment or any special or limited power of appointment exercisable during life and/or by Will," the use of the word "another" is not ambiguous in this context. Rather, this language in Section 6.3 clarifies that Charles need not give only himself a continuing power of appointment over the corpus if he elects to exercise his power of appointment in further trust, but he may also give someone else a general or limited power of appointment. Under these circumstances, where there is no ambiguity, dismissal is appropriate.

c. As for the balance of the relief sought in the petition, including a declaration that the Receptacle Trust is invalid, a direction to Amanda and Kym to return the appointed assets to the 1998 QPRT, and the removal or suspension of Charles as Trustee — such relief necessarily fails given the court's dismissal of the claim that Charles's exercise of the power of appointment was invalid. These conclusions, however, do not have an impact on any claim that Charles breached his fiduciary duty by engaging in acts other than the exercise of his power of appointment or any challenge to the propriety of professional fees and disbursements from the Trust, which should be determined in the context of the accounting for the 1998 QPRT that has been filed by Charles as Trustee.

d. Any suggestion in the petition that Charles breached his fiduciary duty as Trustee by exercising his power of appointment in the manner that he did fails because he exercised the power in his individual capacity. To the extent that the parties opposing the motion claim that a donee of an exclusive power of appointment, like Charles here, owes a fiduciary duty to treat all permissible appointees equally, they have failed to provide any authority in support of that claim. To condone such a proposition would improperly convert and rewrite an exclusive power where appointees may be chosen by the donee to the exclusion of some into a non-exclusive one where all appointees must be favored with an appointment by the donee of the power.

B. *In re Supervised Est. of Bogren,* 2025 Minn. App. LEXIS 125; 2025 LX 66029 (Court of Appeals of Minnesota 2025). A disclaimer that does not state the value of an interest may still be legally binding if it conveys enough information to impart an idea or impression of the interest's qualities, peculiarities, or distinctive traits.

1. Appellant Thomas F. Bogren, Jr. ("son"), and his sister, decedent Lori Jean Bogren ("daughter"), are the children of respondent Thomas Bogren, Sr. ("father"). In April 2022, daughter died intestate with no surviving spouse or children, and with father as her only surviving parent and son as her only surviving sibling. From daughter's estate, father inherited daughter's interest in a promissory note. The value of the interest was $293,899.

2. In October 2022, son visited father's home and asked him to sign a disclaimer regarding his interest in the promissory note, and father did so. The document read as follows: "I, [father] ("Disclaimant"), irrevocably and without qualification renounce, release, decline, disclaim and refuse to accept any and all rights or interests in and to the following specifically described property or property rights (the "Disclaimed Property") (For real

estate use legal description and attach Schedule, if necessary): All right, title and interest in the Promissory Note originally payable from SNDB Investments, LLC, to Mabel Makowsky and assigned to [daughter] pursuant to the private agreement among the successors of the Mabel Makowsky Estate."

3. In February 2023, father moved to revoke the disclaimer, asserting that he did not understand the nature of the document he was signing or the value of what he was Disclaiming, and therefore, the disclaimer should be null and void. A referee agreed and recommended an order to invalidate the disclaimer. The district court adopted the referee's recommendation and filed an order accordingly. Son appealed and the court of appeals reversed and remanded on the following grounds:

a. The Minnesota Uniform Disclaimer of Property Interests Act (the "Act") governs disclaimers under state probate law. Under the Act, a "disclaimer" is a "refusal to accept an interest in or power over property." The Act requires disclaimers to have certain essential elements: "[A] disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, and be signed by the person or fiduciary making the disclaimer." Disclaimers must be "acknowledged in the manner provided for deeds of real estate to be recorded in this state" and comply with the delivery and filing requirements under state law. When the legislature passed the Act, it substantially adopted the Uniform Disclaimer of Property Interests Act.

b. Here, because the parties dispute whether a disclaimer must state the precise value of the interest being disclaimed, this case centers on the scope of the word "describe" under Minn. Stat. § 524.2-1107(c). Because the statute does not define the word "describe," this dispute presents a question of statutory interpretation. And because Minnesota appellate courts have not previously interpreted that term under the statute, the parties present an issue of first impression.

c. Here, neither the Act's definition statute nor the general definition statute in the Minnesota Uniform Probate Code define the word "describe." Dictionary definitions of "describe" include "[t]o convey an idea or impression of; characterize," or "[t]o trace the form or outline of." To "convey" means "[t]o communicate or make known; impart." To "characterize" means "[t]o describe the qualities or peculiarities" of something or "[t]o be a distinctive trait or mark." And "trace" means "[e]vidence or an indication of the . . . existence of something." Id. at 1839.

d. Taking these definitions into account, the word "describe," as used in Minn. Stat. § 524.2-1107(c), is unambiguous: it provides a flexible framework for a disclaimer to convey sufficient information to impart an idea or impression of an interest's qualities, peculiarities, or distinctive traits. Given the multitude of things that a description might include, we decline to adopt a position that — as a matter of law — a description must include specific information about the value of the interest at issue.

e. This definition is consistent with decisions in other states that have enacted the same language from the uniform act. Here, the disclaimer provided information about father's interest, and the disclaimer's lack of information about value did

not, by itself, preclude the district court from determining that the disclaimer was valid. We reach this result because a disclaimer that does not state the value of an interest may still be legally binding if it conveys enough information to impart an idea or impression of the interest's qualities, peculiarities, or distinctive traits. A disclaimer is not automatically defective when it does not state the value of the interest disclaimed.

XXXIX. DECANTING

A. *Matter of Niki and Darren Irrevocable Trust,* C.A. No. 2019-0302-BWD (Delaware Chancery Court 2025). Claims for breach of trust for role in decanting barred by unclean hands of person that demanded and orchestrated the decanting.

1. Claudia Elena Tesak ("Niki") and Darren J. Rushin ("Darren") married in El Salvador in 1997. In 2012, Niki's mother, Ildiko Juhasz de Tesak ("Ildiko"), settled an irrevocable trust under the laws of California to provide for Niki, Darren, Niki and Darren's two children, and herself (the "2012 Trust"). The 2012 Trust made Ildiko the life beneficiary, able to request the income but not to invade the principal. It further provided that, upon Ildiko's death, the trust corpus would fund two successor trusts, one for the benefit of Niki (funded with fifty-five percent of the corpus) and one in favor of Darren (funded with the remainder). Upon their deaths, the 2012 Trust would be distributed in equal shares to Niki and Darren's children in successor trusts. The 2012 Trust was funded with Ildiko's interest in Global Infinity, Inc. ("Global Infinity"), an investment company that holds various securities, and Hacienda 2-503 LLC ("Hacienda"), which owns a condominium in Mexico.

2. Sometime after the 2012 Trust was executed, Darren became dissatisfied with its terms. Specifically, under the 2012 Trust, the trust corpus would not fund a successor trust for Darren until Ildiko's death. Darren wanted a provision, instead, specifying that if Niki and Darren divorced, the trust corpus would be divided into two equal shares and administered as separate trusts (the "Divorce Provision").

3. In March 2014, Darren retained an attorney, Patrick Martin of the law firm Procopio, Cory, Hargreaves & Savitch LLP ("Procopio"), to prepare a new trust organized under the laws of Delaware to include the Divorce Provision and also to modify the division of assets such that, instead of Niki receiving fifty-five percent and Darren receiving forty-five percent of the corpus, Niki and Darren would each receive fifty percent of the corpus in trust (the "2014 Trust"). On June 4, Darren met with Martin and other advisors at Procopio's San Diego offices, without Ildiko or Niki, and directed Procopio to draft the 2014 Trust. Procopio did as Darren instructed, preparing documents to (a) transfer the situs of the 2012 Trust from California to Delaware; (b) appoint Comerica Bank & Trust N.A. ("Comerica") as co-trustee of the 2012 Trust; (c) establish the 2014 Trust with Comerica as sole trustee; and (d) appoint principal and income of the 2012 Trust to Comerica as trustee of the 2014 Trust.

4. To transfer assets from the 2012 Trust to the 2014 Trust, Martin chose to use the decanting procedure. However, Martin realized that the 2012 Trust did not grant Ildiko, the settlor, the power to distribute principal during her lifetime. Martin relayed this information to Darren by email, but Darren claims that he relied on Martin to ensure that the Decanting was valid and did not fully understand the provisions of the 2014 Trust. Two days later, Darren forwarded Martin's December 10 email to Ildiko's financial advisor,

Robert Brower, but not to Ildiko or her attorneys. Procopio finalized the 2014 Trust and sent copies for execution to Niki on December 19, so that Niki could bring the documents to Ildiko in El Salvador over the holidays. On Christmas Eve of 2014, Ildiko, in her capacity as trustee, moved the situs of administration of the 2012 Trust to Delaware, changed the governing law to Delaware, and appointed Comerica to be the co-trustee of the 2012 Trust. That same day, Ildiko settled the 2014 Trust, appointing Comerica as the sole trustee. Ildiko and Comerica, as trustees of the 2012 Trust, then purported to decant the 2012 Trust corpus into the 2014 Trust (the "Decanting"). Ildiko and Comerica executed a trustee resolution, purporting to appoint the 2012 Trust's ownership interests in Global Infinity and Hacienda to the 2014 Trust. Ildiko, Niki, and Darren also signed acknowledgements and "statements of non-objection or consent" to the Decanting. On June 14, 2015, Comerica executed the 2014 Trust.

5. Niki and Darren initiated divorce proceedings in 2018. In 2019, Ildiko engaged Delaware counsel to review the 2014 Trust. Ildiko's counsel concluded that the Decanting was invalid under Delaware law, and so informed Comerica on February 15, 2019. After consulting with counsel, Comerica also concluded that the Decanting was invalid.

6. On April 22, 2019, Comerica initiated this action through the filing of a Verified Petition for Instructions (the "Petition"). Darren filed an answer to the Petition, as well as counterclaims and crossclaims (the "Counterclaims" and the "Crossclaims"). The Counterclaims and Crossclaims allege that (1) Comerica breached its fiduciary duties as trustee of the 2012 Trust and the 2014 Trust, (2) Ildiko breached her fiduciary duties as trustee of the 2012 Trust, (3) Ildiko aided and abetted Comerica's breaches of fiduciary duty, and (4) Ildiko and Comerica participated in a civil conspiracy to "undo" the Decanting and deprive Darren of the benefits of the 2014 Trust. The parties cross-moved for judgment on the pleadings. Vice Chancellor Glasscock issued a memorandum opinion denying Comerica and Ildiko's motion for judgment on the pleadings, concluding that the doctrine of unclean hands prevented Comerica and Ildiko from seeking to invalidate transactions that they approved. Niki filed her own counterclaim and crossclaim, seeking a declaration that the Decanting was invalid and that the decanted assets must be returned to the 2012 Trust. Darren then asserted a crossclaim for conspiracy against Niki and sought a declaration instructing Comerica to distribute any non-decanted assets in accordance with the terms of the 2014 Trust.

7. Niki moved to dismiss the Counterclaims. Vice Chancellor Glasscock deferred ruling on the motion and ordered mandatory mediation. Mediation was unsuccessful. Darren moved for partial summary judgment on certain of the Counterclaims. The Court deferred decision on the remaining dispositive motions until after trial. After trial, Vice Chancellor Glasscock issued the Memorandum Opinion finding that Ildiko did not retain the power to invade the principal of the 2012 Trust, and thus was not entitled under the statute to decant that principal, such that the Decanting was invalid under Delaware law.

8. The court dismissed Darren's counterclaims and crossclaims on the following grounds:

> a. The equitable doctrine of unclean hands precludes Darren from recovering on these equitable claims, all premised on fiduciary duties purportedly owed to Darren. It is a maxim of equity that a wrongdoer with respect to the transaction at issue may not invoke equitable relief.

b. The doctrine of unclean hands is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case. The defense does not belong to the defendant, but to the Court itself.

c. Darren's conduct in advocating and facilitating the Decanting precludes him from asserting an equitable claim challenging, or seeking equitable relief in connection with, the Decanting.

d. Darren seeks relief for a scheme that he orchestrated and then sought to defend. It was Darren who prompted the Decanting because he was dissatisfied that the 2012 Trust did not contain a Divorce Provision. He therefore retained counsel at Procopio to prepare the 2014 Trust, directing Procopio to include provisions that "were largely in favor of Darren, at the expense of Niki and Ildiko," and then to decant the 2012 Trust's assets into the 2014 Trust.

e. Darren was not induced by improper conduct to consent to the Decanting, and at the time he consented, he knew that the 2012 Trust did not specify that Ildiko could invade the principal. Therefore, Darren knew of the same material facts that Comerica or Ildiko knew or should have known, and his consent bars him from bringing claims.

f. Moreover, when challenged in litigation, Darren repeatedly argued that the Decanting was valid — a position inconsistent with the claims he now raises. Darren cannot now be heard to argue that Ildiko and Comerica breached their fiduciary duties to him by approving a transaction at his behest. Nor can Darren be heard to argue that Comerica breached its fiduciary duties to him by seeking instructions that the Decanting for which he advocated was invalid. Darren's assertion of equitable claims to recover from purported harms he brought upon himself is itself offensive to equity.

g. In equity, Darren cannot seek relief from individuals who merely carried out his own wishes. Darren's Counterclaims and Crossclaims are therefore dismissed.

h. When the Decanting took place in 2015, the 2012 Trust contained two assets: (1) membership interests in Global Infinity and (2) membership interests in Hacienda. The parties agree that those assets should be returned to the 2012 Trust. After the Decanting, the 2014 Trust acquired three new assets: (1) Meow Holdings Corp. ("Meow"), a Marshall Islands corporation that owns a yacht; (2) Villa Carisa Corp. ("Carisa"), a Marshall Islands corporation that owns a property in St. Maarten; and (3) Playacar Ventures LLC ("Playacar"), a limited liability company that owns a majority interest in Casas Playacar Sol y Alta Vista SRL de CV, a Mexican corporation that owns two large residential properties in Playa del Carmen, Mexico.

i. At common law, a trustee who breaches her duties by usurping trust assets may be liable to the trust beneficiaries not only for the return of the trust property wrongfully taken, but also for any new property acquired with the trust assets. Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled at his option either to enforce a constructive trust of the property so acquired or to enforce an equitable lien upon it to secure his claim against the trustee for damages for breach of trust, as long as the product of the trust property is held by the trustee and can be traced.

j. Asset tracing is also appropriate where a trustee acquires property from the wrongful use of trust property. If the trustee wrongfully uses trust property to further her own interests, the beneficiary can impose a constructive trust or equitable lien upon the proceeds if he can trace them. Similarly, where the trustee wrongfully uses trust funds to pay for improvements upon property owned by the trustee, the beneficiary is entitled to an equitable lien upon the property.

k. One tool the Court has at its disposal for making beneficiaries whole after a trustee has breached its duties is to trace the assets wrongfully taken or used and to order their return or impose a constructive trust or equitable lien. Under the facts of this case, no party should be permitted to profit from the invalid Decanting. The parties will take targeted discovery to trace trust assets and should consider whether to jointly engage an accountant to assist them in doing so.

l. Darren rehashes an argument, previously raised and rejected, that this lawsuit triggered a "no-contest" clause (the "No-Contest Provision") in the 2014 Trust. Vice Chancellor Glasscock ruled that the No-Contest Provision does not apply to the facts of this case.

B. *Matter of Chheda*, 2025 N.Y. Misc. LEXIS 6832 (Surrogate's Court of New York, Erie County 2025). Court refuses to appoint independent co-trustee that would have ability to decant the trust to provide additional current distributions to trust remainder beneficiaries.

1. Girish B. Chheda, a cancer research scientist at Buffalo, New York's Roswell Park Cancer Institute, died at age 58, survived by his wife, Kokila, and by three children Sanjay, Shobhina, and Milan. His will was admitted to probate in 1992. He left his household personal property to his wife, Kokila. The will left estate tax-exempt assets to a trust and gave the balance outright to Kokila.

2. The trust terms provided net income to Kokila in quarterly installments, provided her with discretionary principal for all medical and other major health expenses and/or emergencies, support, education, comfort, well-being, and maintenance, and directed that all of her needs be adequately met. In addition, certain educational expenses of his children, a specified amount for a vehicle for Sanjay, limited wedding expenses for each of his children, plus a limited amount for each child to make a pilgrimage to India, were all authorized to be made by the trustees from the trust principal. Upon Kokila's death, the balance remaining in the trust was to be distributed to decedent's three children equally.

3. The co-trustees, Sanjay and Shobhina, petitioned to appoint Sheila as an additional co-trustee so that the trust would have a disinterested trustee who could decant the trust. Kokila and Milan consented to the relief being sought.

4. The surrogate denied the appointment of the additional trustee on the following grounds:

a. EPTL 10-6.6 provides the statutory framework for decanting trusts. "Decanting" is the process of invading and "pouring" the assets of one irrevocable trust into a second irrevocable trust to effectively modify troublesome or outdated provisions with new provisions better tailored to achieve the original trust's objectives.

b. EPTL 10-6.6 allows an authorized trustee with absolute discretion to invade the principal of a trust in order to "decant." The process of invading the principal is subject, however, to certain statutory limitations and requirements. The establishment of the new, decanted trust must follow the intentions set out in the original trust, acting in the best interests of the beneficiaries. Most statutes provide that the new trust may not accelerate the original trust's beneficial interests. Furthermore, EPTL 10-6.6(n)(1) precludes decanting which would reduce, limit, or modify any beneficiary's current right to a mandatory distribution of income or principal. Here, decanting would clearly reduce or modify the amount of either income or principal available to Kokila, which is precluded by statute and would be contrary to decedent's wishes.

c. EPTL 10-6.6 (h) requires an authorized trustee to exercise his or her fiduciary duty in the best interests of the beneficiaries and to uphold the testator's intent as expressed in the original trust instrument. An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

d. Here, in addition to the trust directives, the record does not show any deviation or attempted deviation from the distribution formula set out in the trust in the over thirty years since decedent's death. It is clear, then, that everyone involved in decedent's family, including all the trustees, understood that decedent's distribution formulation was intended by him to be adhered to without deviation or modification.

e. Inasmuch as the current co-trustees are also beneficiaries of the testamentary trust, they are disqualified from acting as "authorized" for decanting purposes because trust beneficiaries are statutorily excluded. As such, the co-trustees have now petitioned for Sheila's appointment as co-trustee so that she may decant.

f. The court may appoint a co-trustee upon the application of any person interested but shall not appoint a trustee, successor or co-trustee if the appointment would contravene the express terms of the will. The issue is whether it is proper for this Court to appoint a non-beneficiary third-party trustee for the trust so that such trustee may decant that trust, potentially circumventing its terms.

g. It is clear that, until she dies, Kokila is entitled under the trust, without limitation, to have all of her needs adequately met from the trust principal. Furthermore, during Kokila's lifetime, only limited, and specifically delineated, payments can be made from the trust to Sanjay, Shobhina, and Milan.

h. Appointment of a co-trustee so that the trust could then be decanted would violate the entire trust scheme — and decedent's clearly expressed intent.

Decanting would likely reduce the amount of trust income available to Kokila. It would also reduce the principal amount available to meet all of her needs — and meeting all such needs is the absolute mandate of the trust's terms.

i. It may well be that one or more of decedent's three children would like to benefit now by receiving payments from the trust in ways not specifically authorized. Their father — decedent — directed otherwise in his Will, and the decedent's intent cannot be circumvented by, in effect, authorizing the decanting ultimately contemplated. However, that is the only reason to appoint a non-family member co-trustee at this point, as the co-trustees, with commendable candor, have made clear. If a non-beneficiary co-trustee were appointed to carry out that purpose, the court would be giving judicial imprimatur to something that is clearly improper under the Will and something entirely contradictory to decedent's clearly expressed intentions.

XL. STATE NEXUS & TAXATION

A. *Est. of Scaife v. Commonwealth*, 2025 Pa. Commw. Unpub. LEXIS 534 (2025). Payments by estate under indemnification agreements signed by decedent as trust beneficiary, and enforced by the court, and related litigation expenses were not bona fide estate expenses that were deductible for state inheritance tax purposes.

1. In 1935, Sarah Mellon Scaife settled a trust ("1935 Trust" or "Trust") for the benefit of Richard M. Scaife ("Decedent"). The 1935 Trust directed that, at Decedent's death, any remaining Trust assets were to be administered for the benefit of Decedent's children, David and Jennie. From 1994 until Decedent's death in 2014, the trustees of the 1935 Trust were PNC Bank ("PNC"), H. Yale Gutnick ("Attorney Gutnick"), and James Mellon Walton ("Walton") (together, "Trustees"). Beginning in 1996 and continuing until shortly before his death, Decedent requested and received from the Trustees distributions of Trust principal totaling more than $400 million ("Distributions"). The Distributions collectively exhausted the principal assets of the Trust.

2. Because Decedent did not want David and Jennie to be aware of the Distributions, he did not seek court approval. Instead, in connection with each distribution, the Trustees requested that Decedent execute indemnification agreements pursuant to which Decedent promised to indemnify the Trustees and hold them harmless from any claims related to the Distributions ("Indemnification Agreements"). In total, Decedent executed 19 Indemnification Agreements in association with receiving 19 Distributions from the 1935 Trust. All of the Indemnification Agreements, except the last two, contain the following language: "I do hereby indemnify and save harmless the Trustees from any loss, claim, demand, surcharge, and cause of action of any kind whatsoever, at law or in equity, including any legal fees or other expenses incurred in defending against the same, resulting from (a) their exercise of the power, authority, and discretion to effect the foresaid principal distribution to me, and (b) their effecting such distribution without the filing of any account and/or a court adjudication."

3. Each of the Indemnification Agreements also contains a recital of the specific amount of the associated distribution to Decedent. There was no dispute that Decedent received all of the Distributions, which ranged in amount from approximately $36,000 to approximately $36 million. There further was no dispute that the funds from the Distributions were utilized primarily to fund Decedent's media interests, including the

Pittsburgh Tribune-Review and related entities. The last two Indemnification Agreements, executed in 2011 and 2014, distributed to Decedent all principal assets remaining in the Trust and contain additional recitals and expanded indemnification language. Therein, Decedent released and agreed to indemnify Attorney Gutnick, Walton, and PNC, in its corporate capacity and as Trustee, from all liabilities and expenses (including legal fees and costs that may arise from the Trustees' administration of the Trust, whether incurred in (1) defending against claims or (2) enforcing its rights under this Indemnification Agreement. They further contain additional language (1) noting that the Trustees obtained from their legal counsel opinions that the language of the Trust afforded them the "broadest possible discretion" to make the Distributions, and (2) explaining, inter alia, Decedent's desire to forgo an accounting and court approval of the Distributions. Decedent executed all but one of the Indemnification Agreements on his own behalf. Attorney Gutnick executed the final Indemnification Agreement both on his own behalf as an indemnified trustee and on Decedent's behalf as his power of attorney.

4. Decedent died on July 4, 2014, and was survived by David and Jennie, two ex-wives, and two grandchildren.

5. Decedent's will ("Will") was admitted to probate on July 11, 2014, and Attorney Gutnick and Walton were sworn in as executors ("Executors"). The Will and an associated revocable trust ("Revocable Trust") provided for bequests to various individuals and charitable organizations, with the residue to be distributed to a separate trust to manage Decedent's media interests. Decedent provided for no bequests to his children, although they were the remainder beneficiaries of the 1935 Trust and the beneficiaries of a separate trust settled by their grandmother.

6. Several months after Decedent's death, David and Jennie filed suit against the Trustees in the Orphans' Court Division of the Allegheny County Court of Common Pleas ("Allegheny County Orphans' Court"), alleging that the Trustees breached their fiduciary duties in approving the Distributions ("Trust Litigation"). Pursuant to the Indemnification Agreements, the Trustees, including Attorney Gutnick, requested that the Estate assume the costs of their defense, which the Executors, including Attorney Gutnick, agreed to do. In the meantime, in April 2015, the Estate paid an advance estimated inheritance tax payment of $100 million to the Department of Taxation ("Department"). Thereafter, the Estate filed an inheritance tax return on October 6, 2015, in which it reported a net taxable estate of $630,220,947, a tax due amount of $94,533,142, and a requested tax refund of $10,193,515. The Department accepted the return as filed on September 26, 2016, and issued the requested refund without interest.

7. All the while, the Trust Litigation continued for approximately six years. Multiple attorneys and law firms were involved in the Trust Litigation, with defense and related costs totaling several million dollars. Of that total, Attorney Gutnick's firm, Strassburger, McKenna, Gutnick & Gefsky, was paid approximately $1.6 million. On December 30, 2019, the Trustees, co-executors of the Estate, David, David's now-adult son, and Jennie's estate reached a settlement of the Trust Litigation ("Settlement"). The resulting settlement agreement ("Settlement Agreement") provided, in material part, that the Trustees would pay a total of $200 million, which represented (1) the accounting income that would have been earned by the 1935 Trust from the date of Decedent's death until November 29, 2018 ("Jennie's death"), allocated between David and Jennie's estate, and (2) the balance of the $200 million paid back to the 1935 Trust for administration by new

trustees for David's benefit ("Settlement Payment"). The Settlement Agreement required both the approval of the Allegheny County Orphans' Court and an order from the Westmoreland County Orphans' Court directing disbursement of the Settlement Payment from the Estate. The Allegheny County Orphans' Court approved the Settlement. Walton, as co-executor of the Estate, thereafter petitioned the Westmoreland County Orphans' Court to approve disbursement of the Settlement Payment ("Payment Petition").

8. The Commonwealth, by appearance of the Office of Attorney General, filed an answer to the Payment Petition and participated in hearings and argument. On May 20, 2021, the Westmoreland County Orphans' Court granted the Payment Petition and directed the disbursement of the Settlement Payment from the Estate. That order was not appealed. The Estate thereafter applied to the BOA for an inheritance tax refund of $28,994,769.04 plus interest, claiming that the Settlement Payment, made pursuant to the Indemnification Agreements, was a non-taxable contractual liability of the Estate pursuant to Section 2129(b) of the Inheritance Tax Act. The Estate made the Settlement Payment as directed on August 25, 2021, and the BOA denied its request for an additional refund.

9. The Estate petitioned for review to the Board. The Board denied the Estate's petition for review. The Board concluded that the Indemnification Agreements were neither bona fide nor supported by adequate money or money's worth consideration as required by Section 2129(b) of the Inheritance Tax Act. The Board further concluded that the expenses incurred in defending the Trustees in the Trust Litigation did not benefit the Estate, but, rather, were merely expenses incurred by the Trustees in administering the 1935 Trust. Finally, the Board concluded that the Estate did not submit sufficient documentation to support a deduction for the other expenses incurred in administering the Estate.

10. The Estate petitioned for review to the Westmoreland County Orphans' Court. As part of the Stipulation filed with the Westmoreland County Orphans' Court, the parties agreed that the issues to be tried were (1) whether the Settlement Payment and fees and costs incurred in defending the Trustees in the Trust Litigation were deductible expenses of the Estate; (2) whether the Commonwealth had waived the ability to challenge the validity of the Indemnification Agreements because it failed to challenge them in the Payment Petition litigation; (3) whether the Estate was precluded from arguing that the Commonwealth had waived its ability to challenge the Indemnification Agreements; and (4) whether all or any portion of the fees, costs, and expenses incurred during Estate administration were deductible under Section 2127(1) of the Act, 72 P.S. § 9127(1).

11. The Westmoreland County Orphans' Court denied the Estate's petition for review. In its written opinion, the Westmoreland County Orphans' Court concluded that (1) the Commonwealth had not waived its ability to challenge the Indemnification Agreements; (2) the Estate failed to establish that the Indemnification Agreements were bona fide because (a) Attorney Gutnick was both a Trustee and Decedent's personal and business counsel, and (b) Decedent had neither participated in drafting the Indemnification Agreements nor retained private counsel to review them; (3) the Indemnification Agreements were not supported by adequate money or money's worth consideration because Decedent executed the Indemnification Agreements not to obtain the Distributions, but rather to avoid court involvement; and (4) the litigation expenses incurred by the Estate in defending the Trustees in the Trust Litigation were analogous to

fees incurred in a will contest and did not benefit the Estate; rather, the fees benefited Decedent's children. The Westmoreland County Orphans' Court did not address the Estate's refund request related to other expenses incurred in Estate administration.

12. The Estate appealed, and the court affirmed in part, vacated in part, and remanded on the following grounds:

a. The Westmoreland County Orphans' Court erred in applying rules of statutory construction to determine whether the Estate carried its burden to establish its entitlement to a refund. Resort to statutory construction principles was unnecessary because the language of Section 2129(b) is clear. Provisions that impose taxes are strictly construed in favor of the taxpayer and against the taxing authority. Accordingly, provisions defining what property is subject to the tax, as opposed to what property is "excluded," are interpreted strictly in favor of the taxpayer. Conversely, statutes creating "exemptions" from taxes are construed in favor of the taxing authority and strictly against the taxpayer.

b. Section 2129 is one of five sections of the Inheritance Tax Act that provide for and govern deductions from the taxable estate of a decedent and generally directs that all liabilities of the decedent shall be deductible subject to the limitations set forth in this section. The deductions for indebtedness of the decedent, when founded upon a promise or agreement, shall be limited to the extent that it was contracted (1) bona fide and (2) for an adequate and full consideration in money or money's worth. As rules of construction, provisions that impose taxes are strictly construed in favor of the taxpayer and against the taxing authority. Accordingly, provisions defining what property is subject to the tax, as opposed to what property is "excluded," are interpreted strictly in favor of the taxpayer. Conversely, statutes creating "exemptions" from taxes are construed in favor of the taxing authority and strictly against the taxpayer.

c. Section 2129(b) is not ambiguous and, relatedly, that resort to statutory construction principles was not necessary. The terms "bona fide" and "consideration in money or money's worth" are not reasonably susceptible to multiple meanings. Section 2129(b) as a whole plainly applies to contractual liabilities of a decedent, which here undisputedly include the Indemnification Agreements. No construction of Section 2129(a) or (b) is required in that respect. Further, the terms "bona fide" and "consideration in money or money's worth," although surely susceptible to myriad applications, are not ambiguous merely because, as the Westmoreland County Orphans' Court concluded, the parties offered differing interpretations as to how they apply in this case. Rather, the meaning of those terms is singular and plain and not reasonably susceptible to multiple interpretations.

d. The terms "bona fide" and "adequate and full consideration in money or money's worth" are not defined in the Inheritance Tax Act. The court then will interpret them according to their common and plain usage. Taken together, to be deductible, the contractual liabilities of a decedent must be based on agreements entered into (1) in good faith and without fraud or deceit, and (2) for the chief aim of obtaining either a payment of a fair and reasonably proportionate amount of money or something of equivalent value. However, the error was harmless.

e. When the relationship between the parties to an agreement is one of trust and confidence, the normal arm's length bargaining is not assumed, and overreaching by the dominant party for his benefit permits the aggrieved party to rescind the transaction. This is so because the presence of a confidential relationship negates the assumption that each party is acting in his own best interest. Once a confidential relationship is shown to have existed, it then becomes the obligation of the party attempting to enforce the terms of the agreement to establish that there has not been a breach of that trust. Where a confidential relationship exists, the law presumes the transaction voidable, unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond the reach of suspicion.

f. Fiduciary relationships, including those between lawyers and their clients, are of the highest order of confidential relationships and impose the highest duties of trust in the fiduciary. A fiduciary duty is the highest duty implied by law. A fiduciary duty requires a party to act with the utmost good faith in furthering and advancing the other person's interests, including a duty to disclose all relevant information. This highest duty will be imposed only where the attendant conditions make it certain that a fiduciary relationship exists.

g. In some types of relationships, a fiduciary duty exists as a matter of law. Principal and agent, trustee and cestui que trust, attorney and client, guardian and ward, and partners are recognized examples. The Estate bore the burden of proving the deductibility of the Settlement Payment as a contractual liability of Decedent, which turns on whether the Indemnification Agreements are bona fide, i.e., executed in good faith and without fraud or deceit. It is undisputed that Attorney Gutnick was (1) Decedent's longtime close friend, (2) Decedent's personal and business counsel who advised him on myriad matters, including the Indemnification Agreements, (3) one of the Trustees Decedent agreed to indemnify in the Indemnification Agreements, (4) the Executor of Decedent's Estate, (5) an executive in Decedent's media interests, (6) the trustee of multiple trusts settled by Decedent, including the Revocable Trust that holds the bulk of the Estate's assets, and (7) Decedent's power of attorney during his lifetime. Thus, both the execution and postmortem enforcement of the Indemnification Agreements clearly were born of a multi-layered confidential relationship between Decedent and Attorney Gutnick that implicated the array of Attorney Gutnick's significant and potentially conflicting professional and fiduciary duties.

h. As a matter of law, then, the Indemnification Agreements, in this context, are presumptively voidable. To prove their legitimacy and, therein, the deductibility of the Settlement Payment under Section 2129(b), the Estate had the burden to establish that all 19 of the Indemnification Agreements were fair under the circumstances and beyond the reach of suspicion. The Estate failed to do so.

i. First, with regard to the execution of the Indemnification Agreements, Attorney Gutnick, as Trustee for the 1935 Trust, authorized the Distributions to Decedent and, in turn, presented the Indemnification Agreements to Decedent as his lawyer. In all of the Indemnification Agreements, Decedent agreed to indemnify Attorney Gutnick and hold him harmless as Trustee from any liability resulting from the Distributions. Decedent did not obtain any independent review of the

Indemnification Agreements' terms or reasonableness, and Attorney Gutnick executed the last Indemnification Agreement both on his own behalf as an indemnified Trustee and on Decedent's behalf as his power of attorney. Moreover, the money from the Distributions, which together totaled more than $400 million, was used to support and fund Decedent's media interests, for which Attorney Gutnick served as board chairman and president. The conflicts of interest here are manifest.

j. Second, regarding the enforcement of the Indemnification Agreements, when David and Jennie filed the Trust Litigation against the Trustees, Attorney Gutnick submitted the costs of his defense as Trustee to the Estate for payment. The Estate, via its Executors (including Attorney Gutnick), approved the payment of the requested litigation expenses. They together totaled several million dollars, approximately $1.6 million of which were paid to Attorney Gutnick's law firm. The Trustees did not prevail in the Trust Litigation, but instead agreed to settle the matter for $200 million. After the Settlement was approved by the Allegheny County Orphans' Court, the Trustees requested, pursuant to the Indemnification Agreements, that the Estate make the Settlement Payment to David's and Jennie's estates. The Estate agreed and sought and obtained from the Westmoreland County Orphans' Court approval to make the Settlement Payment from Estate funds principally held in Decedent's Revocable Trust, of which Attorney Gutnick was trustee.

k. Considered together, these facts preclude a determination on this record that the Westmoreland County Orphans' Court erred or abused its discretion in concluding that the Estate failed to carry its burden to establish that the Indemnification Agreements, in both their execution and enforcement, were fair, reasonable, and "beyond the reach of suspicion." Attorney Gutnick, who stood in the highest of confidential relationships with Decedent, also controlled, in whole or in part, (1) the claims and expenses payable by the Estate, (2) the settlement of the Trust Litigation, (3) the Revocable Trust holding the vast majority of the Estate's assets, and (4) Decedent's media interests, which were significant (if not the sole) beneficiaries not only of the funds transferred out of the 1935 Trust during Decedent's lifetime, but also of the Estate's assets after Decedent's death. Conflicts of interest and fiduciary duties abound in the numerous and layered transactions underlying this matter. Those transactions, in the end, resulted in a several-hundred-million-dollar liability of the Estate, the complete absolvement of the Trustees of any liability for Distributions, and the payment to Attorney Gutnick's law firm of approximately $1.6 million in attorneys' fees. Although we cannot divine whether these results were intended by Decedent, we must agree with the Westmoreland County Orphans' Court's determination that the Estate has not succeeded in removing them from suspicion's reach.

l. This is so notwithstanding the parties' stipulation that the Indemnification Agreements were requested by the Trustees and drafted consistently with customary PNC and standard industry practices. Those facts, without more, simply do not establish the bona fides of the Indemnification Agreements in these circumstances. In other words, that the Indemnification Agreements were common practice and were court-enforced in the proceedings below does not

mean that they were bona fide for inheritance tax purposes. Therefore, the Settlement Payment is not deductible.

m. The next issues involve the deductibility of Estate administration expenses related to the Trust Litigation and other matters. The Westmoreland County Orphans' Court concluded that the Trust Litigation expenses were not deductible because they did not benefit the Estate, but did not address the Estate's claim regarding other administration expenses.

n. All reasonable expense of administration of the decedent's estate and of the assets includable in the decedent's taxable estate are deductible, but litigation expenses of beneficiaries are not deductible. The expenses may be permitted as reasonable, legitimate expenses of an estate and simultaneously disallowed as a deduction from inheritance tax. The Westmoreland County Orphans' Court did not err or abuse its discretion in determining that the Trust Litigation expenses were not deductible.

o. In the Trust Litigation, David and Jennie sued the Trustees for breach of their fiduciary duties in making the Distributions to Decedent during his lifetime. David and Jennie did not sue the Estate seeking payment from it; nor did they seek to bring any additional money or assets into the Estate. Rather, the Estate's involvement in the Trust Litigation came exclusively by way of the Indemnification Agreements. After suit was filed, the Trustees, including Attorney Gutnick, requested that the Estate pay for their defense, and the Estate executors, including Attorney Gutnick, approved defense payments totaling several million dollars, approximately $1.6 million of which was paid to Attorney Gutnick's law firm. The primary beneficiaries of the Estate's payment of the Trustees' defense costs were, quite obviously, the Trustees and the law firms that represented them. The Trust Litigation did not involve the Estate, was not aimed at increasing the Estate corpus, did not itself preserve any Estate assets, and did not seek to confer on the Estate any direct or immediate beneficial interest.

p. Further, although it is true that the potential total value of David and Jennie's claims in the Trust Litigation exceeded the value of the Estate corpus, the liability for those claims could only be imposed on the Estate via enforcement of the Indemnification Agreements to satisfy a judgment entered in David's and Jennie's favor. In the end, however, David and Jennie's claims were not adjudicated, and no judgment was entered. Instead, the parties reached the Settlement, and the Executors sought the approval of the Westmoreland County Orphans' Court to make the Settlement Payment on the Trustees' behalf. The potential "benefit" to the Estate via the Settlement's "preservation" of the Estate corpus is, in this respect, both remote and hypothetical.

q. The issue regarding the deductibility of the expenses incurred in defending the Trustees in the Trust Litigation is whether the Estate has such a direct and immediate beneficial interest in the issues of the litigation as to warrant its liability for the expense. Here, the benefit to the Estate in paying for the Trustees' defense was contingent, indirect, and created exclusively by several layers of agreements and approvals which, at times, involved the same parties on both sides. Such a remote benefit does not support the deductibility of the costs to defend the Trustees in the Trust Litigation.

r. The Estate's petition for review to the Board included a demonstrative exhibit detailing the breakdown of the additional administrative expenses it sought to deduct. The Orphans' Court nevertheless did not address or make any findings or conclusions regarding these additional administrative expenses in its opinions, so that matter must be remanded to the Orphans' Court to determine whether, and to what extent, these expenses are deductible as expenses of the Estate.

XLI. COMPENSATION & COSTS

A. *Emerson v. N. Trust Co.*, 2025 U.S. Dist. LEXIS 80654; 2025 LX 32966 (United States District Court for the Northern District of California 2025). Tax preparation fees charged by corporate trustee are reasonable as a matter of law.

1. The Northern Trust Company ("Defendant" or "Northern Trust"), as of 2023, served as trustee for more than 34,000 trusts, including more than 12,000 non-grantor trusts — a majority of which are irrevocable trusts. During the relevant period, Northern Trust's tax department, formerly known as Global Client Tax Services, often served as tax preparer for trusts.

2. The Fallgren Trust is a non-grantor, irrevocable family trust established pursuant to the Last Will and Testament of E.V. Fallgren in 1961. The trust instrument identified two individuals as the initial trustees: E.V. Fallgren's wife and his attorney. The trust document named Title Insurance and Trust Company as the successor trustee. In 1983, the initial trustees resigned and Trust Services of America, Inc. ("TSA"), the successor to Title Insurance and Trust Company, succeeded them as trustee. In 1992, Northern Trust succeeded TSA as the trustee to the Fallgren Trust. Northern Trust remains the trustee to this day. Northern Trust provides services to the Fallgren Trust in accordance with the trust's governing documents, including trust administration, investment management, and custody and asset servicing. The Fallgren Trust's assets have grown significantly.

3. The trust instrument for the Fallgren Trust does not specify the trustee's compensation. Since February 2019, Northern Trust has charged the Fallgren Trust a trust administration fee of 1.02 percent of trust assets, which represents a 15 percent discount from Northern Trust's published trust administration fee of 1.20 percent of trust assets. Northern Trust also charges Fallgren Trust a separate tax preparation fee for the tax preparation services, which is the subject of this litigation.

4. Plaintiff Chandler Emerson is the grand-niece of E.V. Fallgren (the trust settlor) and one of dozens of remainder beneficiaries of the Fallgren Trust. As a remainder beneficiary, Plaintiff does not receive distributions from the trust. If Plaintiff survives the remaining income beneficiary, she and the dozens of other living remainder beneficiaries will receive equal shares of the trust's assets. Plaintiff admits that Northern Trust provided her with regular account statements and other communications relating to the trust including notices about the tax preparation fees. However, Plaintiff's four remaining claims are all predicated on the notion that Northern Trust's base tax preparation fee, as applied to the Fallgren Trust, is unreasonable.

5. During the relevant period, Northern Trust employed more than 100 people in its Global Client Tax Services group to provide tax preparation and related services to its clients, including trusts administered by Northern Trust. In addition to the tax administrators, multiple other individuals and groups within Northern Trust's tax organization contributed

to or otherwise supported the preparation and filing of the returns during the Relevant Period.

6. Beginning in 2017 (for the 2016 tax year) and until May 2024 (for the 2023 tax year), Northern Trust charged the Fallgren Trust only its published base fee of $900 (federal) plus $100 (California state) for the tax preparation services that it provided to the trust. Northern Trust's tax preparation fee increased in 2014 and in 2016. Northern Trust charges the same base fee to thousands of trusts each year.

7. Plaintiff filed her initial complaint against Defendant in Mendocino County Superior Court. The action was subsequently removed to the federal district court. After a series of motions to dismiss and amended complaints, Plaintiff's remaining causes of action were: (1) breach of fiduciary duty based on tax return preparation fees after November 10, 2019; (2) accounting claim based on the failure to provide accounting of trust accounts as to the tax return preparation fees after November 10, 2019; (3) violation of California Unfair Competition Law ("UCL") based on tax return preparation fees after November 10, 2018; and (4) violation of the California Financial Elder Abuse Act based on tax return preparation fees after November 10, 2018. The court denied Plaintiff's motion for class certification, finding that Plaintiff had not established commonality, adequacy, or predominance as required under Federal Rule of Civil Procedure. After the Ninth Circuit denied Plaintiff's petition, Defendant filed a motion for summary judgment, seeking summary judgment on all of Plaintiff's remaining individual claims.

8. The court granted summary judgment for the Defendant on the following grounds:

a. The court has already rejected Plaintiff's argument that Defendant must maintain records of its costs for preparing each individual trust's tax returns and tie its fees directly to those costs. No matter how Plaintiff attempts to twist and turn the inquiry, the law does not put the initial burden on the trustee to prove that it performed its fiduciary duty in response to Plaintiff's claims. Defendant is only required to provide an annual account statement that discloses the compensation paid to the trustee and its agents. Plaintiff has the initial burden in establishing that the fees are unreasonable in breach of Defendant's fiduciary duty. If Plaintiff can establish that Defendant charged unreasonable fees for its tax preparation services in breach of its fiduciary duty, then the burden shifts to Defendant to justify its actions.

b. In general, in investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust. A "trustee is entitled to be compensated in accordance with the trust instrument. If the trust instrument does not specify the trustee's compensation, as is the case here, the trustee is entitled to reasonable compensation under the circumstances. When assessing the reasonableness of a trustee's fees, California courts look to these factors: (1) the gross income of the trust estate; (2) the success or failure of the administration of the trustee; (3) any unusual skill or experience which the trustee in question may have brought to his work; (4) the fidelity or disloyalty displayed by the trustee; (5) the amount of risk and responsibility assumed by the trustee; (6) the time consumed by the trustee in carrying out the trust; (7) the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; (8) the character of the work done in the

course of administration, whether routine or involving skill and judgment; and (9) any estimate which the trustee has given of the value of his own services.

c. There is no inflexible rule for measuring the allowance; the question of what is a reasonable compensation depends largely upon the circumstances of each particular case. Both California and federal courts have held that in certain circumstances reasonableness may be decided as a matter of law. Reasonableness becomes a question of law appropriate for determination on motion for summary judgment when only one conclusion about the conduct's reasonableness is possible.

d. Plaintiff's expert CPA found that Defendant's base tax return preparation fee was higher than what is custom in the community by at least 50.5 percent. Plaintiff also argued that Defendant rejected a bid in 2016 from third-party Ernst & Young ("EY"), which would have charged only $225 for three hours of work for bulk tax return preparation. Plaintiff contended that $225 is the true barometer of what is custom in the community. Defendant provided several counterarguments: (1) the CPA's analysis depended almost entirely on generalized surveys of accountants, not the charges exacted by trust companies and banks, and did not consider that some peer institutions bundle their tax preparation services with their trust administration services (whereas Defendant does not), and any apt comparison would also consider each peer institution's trust administration fee, not only the tax preparation fee in isolation; (2) the CPA's methodology was flawed because he does not explain why the average fee calculated for 2016 to 2018 based on nationwide surveys of dissimilar tax preparers should apply to fees charged by Defendant from 2018 to 2024, and the National Society of Accountants ("NSA") survey for 2020 to 2021 survey in the Pacific region shows that the average cost of a federal tax filing for "high-income" clients is $880 — much higher than his purported average of $495, and the NSA survey does not reflect the cost to file state tax returns; thus, the difference between the NSA survey and the fees charged by Defendant for the federal tax return is only $20; (3) reliance on the 2016 EY proposal fails to consider that Defendant would have retained a significant amount of tax preparation work and related responsibility; thus, EY's proposed fee to perform a portion of the tax preparation responsibilities in 2016 is not a true barometer of what is custom for trust companies and banks; and (4) the CPA's opinion cannot defeat summary judgment because it only opines on custom and does not consider any of the other factors, including those relating to the tax characteristics of the Fallgren Trust.

e. Defendant argued that their fees are consistent with market rates. Charging a separate fee for tax preparation is consistent with customs and practices for trustees in California because tax preparation is an "extraordinary service" that warrants separate compensation. This practice is also consistent with the findings of Defendant's expert, who surveyed the fees of other institutional trustees and found that most charge a separate fee for tax return preparation. He examined eighteen fee schedules published by other bank trustees. Of the eighteen bank trustees, fourteen charged a separate tax preparation fee, and nine implemented a similar fee structure as Defendant, applying a base tax preparation fee with a separate charge for additional fees.

f. The Defendant's expert argued that because the fee structure of bank trustees varies, the most apt comparison of the tax preparation fees is in the context of the total fees. Ultimately, bank trustees are responsible for the reasonableness of the overall level of charges to a trust, however structured or computed. Viewing the tax preparation fees publicly available, nine bank trustees have tax preparation base fee of $350 to $1,000. Defendant's tax preparation fee is on the high end of fees charged at $1,000 — tied with one of its competitors. However, when viewing the tax preparation fee in the context of the administration fee rate, the minimum annual fee, and the annual cost, Defendant's fees for irrevocable trusts fall within the median.

g. Defendant's practice of charging a separate tax preparation fee is consistent with the custom of the industry. Further, given the variety in fee schedules charged by bank trustees, a more apt comparison of tax preparation fees is in the context of the total fee. Defendant's separate tax preparation fee, while on the higher end of the industry comparisons, is also consistent with the custom of the industry when considered in the context of the total fees.

h. Defendant estimated that on average, a tax administrator during the relevant period took approximately two hours to prepare a federal return, an hour for a state return, and that support staff contributed an additional hour of time. The exact amount of time needed to prepare and file a return varied significantly from trust to trust and, for any particular trust, may have also varied significantly from year-to-year depending on the specific circumstances of the trust. Plaintiff's CPA conceded that he did not consider the tasks performed by tax administrators in his lower estimate. The time consumed by the trustee weighs in favor of reasonableness.

i. Plaintiff argued that Defendant's use of software to process tax returns creates a highly automated, machine-driven process that requires no unusual skill or experience, and nothing unique is brought to the table in tax preparation. Plaintiff also argued that Defendant's employment of tax staff without CPAs and the use of an Indian company shows that no special skill or experience is needed to prepare the Fallgren Trust tax return. Defendant countered that it is a highly experienced trustee and tax preparer, having prepared and filed fiduciary tax returns for more than 10,000 trusts per year during the relevant period, and Defendant's tax employees still perform tax work including ensuing the information compiled for the returns is accurate. Here, Plaintiff has not fulfilled her burden for the "skill or experience" factor. Plaintiff asserts that no unusual skill or experience is required because of Defendant's use of software, employment of tax administrators and junior tax preparers, and outsourcing to an Indian company. However, Plaintiff's arguments are disconnected to Defendant's year-long process of preparing taxes to ensure the information inputted into the software is correct. Plaintiff implies that if a company uses a tax software and employs tax staff without CPAs — especially if the tax staff is not American — then there is no skill or experience being offered. This argument is unsupported by the evidence and is largely conclusory. In contrast, Defendant has shown that its tax preparation process and its experience in preparing more than 10,000 tax returns per year brings skill and experience. The "skill or experience" weighs in favor of reasonableness.

j. The character of the work weighs in favor of reasonableness. The arguments for the "skill or experience" factor largely overlap. Defendant has shown that its process of tax preparation is not routine but a yearlong tax preparation process supported by more than 100 tax personnel to ensure the inputs in the ONESOURCE software are accurate. While the tax data collection may be considered tax administrative tasks, the process of checking the accuracy of the data and inputting the data in the software are tax preparation tasks. The "character of the work" weighs in favor of reasonableness.

k. The amount of risk and responsibility weigh in favor of reasonableness. The tax preparation of multi-million-dollar trusts comes with a high amount of risk and responsibility. Further, the use of software does not eliminate this risk. Thus, the amount of risk and responsibility weighs in favor of reasonableness.

l. Plaintiff has not carried its burden in establishing fidelity or disloyalty. Here, Defendant has overseen Fallgren Trust for more than thirty years and Plaintiff's only allegation of disloyalty is the tax preparation fee charged. However, Plaintiff's assertions are unsupported by any evidence. Fidelity or disloyalty weighs in favor of reasonableness.

m. Plaintiff's expert conducted no individualized analysis of the Fallgren Trust to assess whether the tax preparation fee was disproportionate to the trust's income, gains, and assets. However, a review of the Fallgren Trust's significant gains through investments, dividends, and interest shows that the tax preparation fee is minuscule. Because Plaintiff cannot contest otherwise, Plaintiff illogically seeks to conclude that the factor is irrelevant. Even if Defendant does not consider the income of the trust when setting the tax preparation fee, comparing the fee to the gross income provides insight into the reasonableness of the fee. Here, the tax preparation fee is a tiny fraction of the Fallgren Trust's earning in 2023. The gross income of the trust weighs in favor of reasonableness.

n. For "the success or failure of the administration of the trustee," Plaintiff provided no argument. Northern Trust has served as trustee and tax preparer for the Fallgren Trust for thirty-two years; before this lawsuit, no beneficiary of the Trust (including Plaintiff) had ever alleged any error or fault with Northern Trust's work; and the Trust has never paid a penalty, been audited, or suffered any adverse tax consequence due to Northern Trust's work. The success or failure of the administration of the trustee weighs in favor of reasonableness.

o. Defendant's estimated valuation of its tax preparation services during the relevant period has been at least $900 for services relating to the preparation and filing of the trust's federal return and $100 for a state return. Defendant also serves as an outside tax preparer for numerous trusts in which it is not a trustee and charges those trusts a base fee of $1,050 for its services relating to the preparation and filing of the trust's federal return and $100 for the trust's state return. Thus, Defendant's own valuation of its services in an arm's-length transaction is actually higher than the fee charged to Fallgren Trust. The estimated valuation of services weighs in favor of reasonableness.

p. The relevant factors weigh in favor of the reasonableness of the tax preparation fees. Reasonableness becomes a question of law appropriate for determination

on motion for summary judgment when only one conclusion about the conduct's reasonableness is possible. Here, there is no genuine dispute of material fact as the reasonableness of the fees. Because the fees are reasonable, Plaintiff has not carried her burden in establishing a breach of fiduciary duty.

q. Plaintiff's remaining claims are violation of accounting, violation of UCL, and violation of the California Financial Elder Abuse Act. The parties do not dispute that the reasonableness of fees is also dispositive on Plaintiff's remaining derivative claims for accounting, UCL, and elder abuse. The Elder Abuse Act claim is derivative of the breach of fiduciary duty claim. Because Plaintiff had not carried her burden in establishing a breach of fiduciary duty as to tax preparation fees, the Plaintiff's Elder Abuse Act claim fails. Plaintiff's UCL unfair and unlawful claim is also based on the breach of fiduciary duty claim and the charging of "excessive" fees. Because Plaintiff had not carried her burden in establishing a breach of fiduciary duty as to tax preparation fees, Plaintiff's UCL claim fails. Plaintiff's accounting claim is derivative of her breach of fiduciary duty and UCL claim, and Defendant is entitled summary judgment on Plaintiff's accounting claim.

r. Plaintiff argued beginning in "late 2024, Northern Trust delegated its tax preparation services to a third party whose fee will be charged in June 2025 at the earliest. Defendant argued that Plaintiff has not explained how Defendant's new tax services model and any future corresponding fee that may be charged are "essential" to opposing summary judgment on claims arising from fees charged under the prior model. Plaintiff has not met her burden in establishing that the additional discovery is "essential." Plaintiff speculates that new tax services and corresponding fee may give Plaintiff more insight into the reasonableness of the prior fee but does not establish specific facts it hopes to elicit and that such specific facts are essential to oppose summary judgment.

XLII. ODDS & ENDS

A. *Atty. Griev. Comm'n of Md. v. Pisner*, 2025 Md. LEXIS 257 (Supreme Court of Maryland 2025). Intentional misappropriation of trust assets, combined with a pattern of vexatious litigation and failure to comply with court orders, warrants disbarment.

1. The Attorney Grievance Commission of Maryland (the "Commission"), through Bar Counsel (hereinafter referred to collectively as "Petitioner"), filed a Petition for Disciplinary or Remedial Action (the "Petition") against Respondent, Gary Pisner. Petitioner charged Mr. Pisner with violating several provisions of the Maryland Attorneys' Rules of Professional Conduct, specifically: Rule 1.1 (Competence), Rule 1.15 (Safekeeping Property), Rule 3.1 (Meritorious Claims and Contentions), Rule 3.4 (Fairness to Opposing Party and Attorney), and Rule 8.4(a) and (d) (Misconduct).

2. The misconduct that is the focus of this disciplinary proceeding stems from Respondent's conduct in connection with a series of legal disputes involving the Marion E. Pisner Revocable Trust, a trust he shares with his sister, Marla Pisner Rubinstein. By order dated December 14, 2023, this Court designated the Honorable Louis M. Leibowitz (the "Hearing Judge") of the Circuit Court for Montgomery County to consider the matter against Respondent and render findings of fact and conclusions of law. A two-day evidentiary hearing was held on June 10 and 14, 2024, and upon consideration of the evidence presented, the Hearing Judge found, by clear and convincing evidence, that

Respondent violated each rule of professional conduct as alleged by Petitioner: Rules 1.1, 1.15, 3.1, 3.4, and 8.4(a) and (d). Petitioner did not file any exceptions and recommends that the Respondent be disbarred. Respondent filed exceptions on September 18, 2024.

3. Respondent was admitted to the Maryland bar on June 14, 1989, and, at all times, was an attorney in good standing in the State. Respondent also holds law licenses from the Commonwealth of Pennsylvania, the Commonwealth of Virginia, and the District of Columbia.

4. The Marion E. Pisner Revocable Trust (the "Trust" or the "Pisner Trust") was established on December 12, 2008, in Montgomery County, Maryland. Upon the death of the settlor, Marion E. Pisner, on January 2, 2009, her children — Respondent and Marla Pisner Rubinstein — became the beneficiaries and co-trustees of the Pisner Trust. Pisner Trust assets included several residential properties located in Maryland and Washington, D.C., as well as funds held in bank accounts.

5. In the fall of 2010, Respondent and Ms. Rubinstein met in Bel Air, Maryland, to conduct an audit of the Pisner Trust's finances (the "Bel Air Meeting"). Although they disagreed on certain details of the meeting, both agreed that Ms. Rubinstein confronted Respondent about his use of Trust funds for personal expenses, and that Respondent promised to provide documentation regarding those expenditures. They also agreed that Ms. Rubinstein would assume day-to-day management of the Trust going forward. However, according to Ms. Rubinstein, Respondent never provided the documentation or financial information necessary for her to fulfill that role.

6. Respondent initially testified that he had provided Ms. Rubinstein with all relevant Trust documents, stating that she "walked out of the meeting with all the documents. Everything." Later, however, he acknowledged — and Ms. Rubinstein confirmed — that he had brought only a ledger to the meeting. Based on these inconsistencies, the Hearing Judge concluded that Respondent did not, in fact, relinquish control of the Pisner Trust to Ms. Rubinstein following the Bel Air meeting. The ledger maintained by Respondent reflects approximately 70 personal transactions between November 2009 and August 2013. These include tens of thousands of dollars in payments related to Respondent's divorce, personal credit card charges, and self-designated "loans" from the Trust. Ms. Rubinstein had no access to the Trust's bank accounts and was unaware of these transactions until she obtained the relevant bank statements during litigation.

7. Respondent, identifying himself as "Attorney for & Co-Trustee of the Marion E. Pisner Trust," filed a Petition for a Declaration of Rights. He asserted that, in his view, the Pisner Trust had "ceased to function" in accordance with its terms and requested that the court provide "binding guidance" on its administration. Respondent signed the petition both as counsel and co-trustee. Ms. Rubinstein requested an independent audit of the Pisner Trust from its inception. Respondent admitted to using Pisner Trust assets for personal obligations but testified that he had previously loaned the Trust money, suggesting that some of the withdrawn funds were owed to him. However, he presented no documentation to support this claim. Judge Albright removed both parties as co-trustees and appointed Robert McCarthy, Esq., as successor trustee. Mr. McCarthy had no prior relationship with either party. Respondent filed an interlocutory appeal that was unsuccessful. Respondent filed another interlocutory appeal and sought a stay. The Appellate Court assumed jurisdiction, halting the hearing.

8. Mr. McCarthy mailed a letter to Respondent at his residence in Fairfax, Virginia, again requesting Trust documentation and advising that his conduct potentially violated the Maryland Attorneys' Rules of Professional Conduct. Respondent replied with documents that Mr. McCarthy deemed unresponsive. Mr. McCarthy thereafter filed a suggestion of contempt. The court issued a Show Cause Order. Instead of responding on the merits, Respondent filed a three-part motion seeking a more definite statement, a continuance, and access to trustee records. Judge Ronald Rubin denied the motion. Respondent filed an Answer to the contempt petition, asserting that he had produced 81 documents and was under no obligation to produce more. Mr. McCarthy responded by reiterating his request for full compliance with the October 2, 2017 order. Two days before the contempt hearing, on April 2, 2018, Respondent submitted an affidavit in support of his motions and in opposition to the contempt petition, affirming under penalty of perjury that the documents provided in January 2018 were the only documents in his possession dating back to January 2015. Judge Storm denied the contempt petition on the ground that the court's October 2, 2017 order lacked specificity. Judge Storm ordered Respondent and Ms. Rubinstein to produce "in paper format or electronically, [certain] documents within Gary Pisner or Marla Rubinstein's possession, custody, control or access related to the [Pisner Trust] for the period January 1, 2009 – October 2, 2017," by April 27, 2018.

9. Before the April 27 deadline, on April 24, 2018, Respondent moved to remove Mr. McCarthy as substitute trustee, alleging a "breach of trust" based on Mr. McCarthy's interpretation of his fiduciary duties. Judge Jill R. Cummins denied Respondent's motion.

10. Respondent failed to meet the court's deadline to produce documents, and on April 30, Mr. McCarthy filed a renewed contempt petition seeking incarceration. The court issued another Show Cause Order on May 4, 2018. Again, rather than substantively responding, Respondent filed a motion for a more definite statement, asserting that he had produced everything he "deemed" responsive. In total, he provided Mr. McCarthy with 944 pages of documents. The court denied the motion. After taking testimony from Respondent, Judge Mason found him in contempt, noting that Respondent had failed to provide source documents or ledgers and stating that it was "inconceivable" that, as an attorney and fiduciary of the estate, he would not retain documentation supporting Trust expenditures. Judge Mason imposed a 60-day sentence but stayed execution until July 20, 2018, to allow Respondent another opportunity to comply.

11. Respondent filed a notice of appeal and a motion for reconsideration, alleging that Mr. McCarthy's accountant, Dana Evans, made false statements during the contempt hearing. Judge Mason reaffirmed the contempt finding and denied Respondent's motion for reconsideration but, at Mr. McCarthy's request, declined to impose the 60-day incarceration sentence. Respondent filed a notice of appeal challenging eleven separate orders. While those appeals were pending, Mr. McCarthy moved for approval of the final Pisner Trust distribution. Mr. McCarthy argued that Respondent's failure to maintain records violated his duties.

12. Mr. McCarthy proposed distributing the Pisner Trust's remaining net balance — minus $50,000 — to Ms. Rubinstein, with the withheld amount to be released to Respondent upon execution of a general release and cessation of further litigation. Respondent filed a notice of opposition and accused Mr. McCarthy and Ms. Evans of ethical violations and of improperly dissipating approximately $500,000 in Trust funds. The circuit court mailed notice of the distribution hearing to all parties, including to Respondent at his long-

standing address in Fairfax, Virginia — the same address he had consistently used throughout the proceedings. Despite having received notice, Respondent did not attend the hearing.

13. Judge James A. Bonifant granted the motion to approve the Pisner Trust distribution.

14. Mr. McCarthy filed a response to Respondent's previously filed notice of appeal moving to strike it from the record. In response, Respondent filed a 15-page pleading titled "Answer to Robert McCarthy's Motion to Strike Notice of Appeal, Request for Reconsideration of this Court's Order of April 9, 2019, with a Request for a Stay, If Necessary." In that filing, Respondent renewed claims previously rejected by the court, reasserted his authority as the Trust's attorney, and alleged that both Mr. McCarthy and Ms. Rubinstein had perjured themselves at the June 7 contempt hearing. Judge Bonifant denied Respondent's motion.

15. In the interim, Respondent filed another notice of appeal to the Appellate Court, incorporating the April 9, 2019 order along with the eleven previously challenged orders. The Appellate Court later consolidated the pending appeals into a single case.

16. Judge Robert A. Greenberg issued a Show Cause Order requiring Respondent to explain in writing why the appeal should not be dismissed for failure to comply with the rules. Respondent filed a response that largely reiterated the same arguments presented in his April 29, 2019 Answer. He also moved to recuse Judge Greenberg, citing his role as administrative judge of the Montgomery County Circuit Court and his history of appointing Mr. McCarthy in other estates and trusts cases. Judge Greenberg denied Respondent's motion to recuse and set a hearing on the motion to strike.

17. The Appellate Court issued an unreported opinion thoroughly reviewing and affirming each of the challenged rulings, including the contempt finding against Respondent. Respondent filed a motion for reconsideration and a petition for writ of certiorari to this Court, which were denied. Respondent sent a letter to the Clerk of the Appellate Court of Maryland criticizing the opinion's structure and alleging "procedural failure." The Clerk responded that the Appellate Court would not comment further and noted Respondent's failure to copy opposing counsel.

18. While the trust litigation remained pending in the Maryland state courts, Respondent, in his personal capacity, initiated a separate lawsuit against Ms. Rubinstein in the Superior Court for the District of Columbia, asserting claims for breach of contract, fraud, abuse of process, defamation, and breach of fiduciary duty. The abuse of process claim was based entirely on Ms. Rubinstein's filings in the Montgomery County Circuit Court — filings made in response to Respondent's own earlier suit. Ms. Rubinstein moved to dismiss the case. Judge Florence Y. Pan granted the motion to dismiss. Respondent sought reconsideration and filed a notice of appeal three days later. Judge Pan denied the motion for reconsideration, noting that Respondent had failed to articulate any procedural or legal basis for relief. The District of Columbia Court of Appeals affirmed the dismissal.

19. Approximately six weeks before the D.C. Court of Appeals issued its opinion, Respondent filed a second lawsuit against Ms. Rubinstein, this time in the U.S. District Court for the District of Maryland. The allegations were nearly identical to those asserted in the earlier D.C. case. This time, Respondent sought $3.7 million in compensatory damages and $2 million in punitive damages. Ms. Rubinstein moved to dismiss. Rather than substantively responding, Respondent filed a motion to strike the motion to dismiss.

Judge Theodore D. Chuang granted Ms. Rubinstein's motion to dismiss, holding that the breach of contract and fiduciary duty claims were barred by res judicata, and that the remaining claims failed to state a plausible basis for relief. Respondent filed a notice of appeal to the U.S. Court of Appeals for the Fourth Circuit. The following day, he filed a 37-page submission styled as "objections" to Judge Chuang's ruling, accusing the court of "judicial lethargy" and misapplication of the law. The Fourth Circuit affirmed the dismissal in a one-paragraph per curiam opinion, finding "no reversible error."

20. On January 5, 2022, Respondent initiated another lawsuit in the U.S. District Court for the District of Maryland, this time naming Mr. McCarthy, Kevin McCarthy (Mr. McCarthy's law partner and son), and Ms. Evans as defendants. The complaint largely recycled claims Respondent had previously raised in the Montgomery County proceedings. All three defendants moved to dismiss, arguing that the claims were barred by res judicata and collateral estoppel and otherwise failed to state a claim upon which relief could be granted. Judge George Hazel issued a memorandum opinion granting the motions to dismiss. Respondent filed a "motion for relief." Judge Stephanie A. Gallagher denied the motion. Respondent then filed a motion to alter or amend that ruling, which the court also denied. Respondent noted an appeal to the Fourth Circuit. An unpublished per curiam opinion was filed, affirming Judge Gallagher's decision.

21. The Hearing Judge concluded that Respondent violated MARPC 1.1, 1.15, 3.1, 3.4, and 8.4(a) and (d). After oral argument, on March 5, 2025, the Maryland Supreme Court ordered Respondent disbarred on the following grounds:

> a. Respondent first argues that the Petition failed to provide sufficient notice of the charges against him. A review of the Petition in this case reveals that the charges were clearly and sufficiently pleaded. Even where a petition is not the "model of clarity," if the allegations make clear the alleged wrongdoing, then the petition will be deemed sufficient. The petition makes clear the alleged misconduct and describes how said conduct violates professional standards.
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> b. Respondent next asserts that Petitioner engaged in misconduct during its investigation, including the claim that the substitute trustee, Mr. McCarthy, drafted the Petition. This allegation is unsupported by the record. Respondent also alleges an improper relationship between Mr. McCarthy and former Bar Counsel. However, he offers no evidentiary support, and the record contains none. Mr. McCarthy testified that Bar Counsel had previously prosecuted a disciplinary matter in which he was reprimanded: "I do not consider [Bar Counsel] a dear friend of mine in any stretch of the imagination. Then she became Bar Counsel, and I've had no relationship with her since that hearing 11 years ago." The Hearing Judge considered and rejected these allegations, finding Respondent's testimony to be "incredible."
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> c. Respondent contends that Bar Counsel failed to comply with discovery obligations and withheld exculpatory evidence. He further alleges that Mr. McCarthy conspired with the Commission and Bar Counsel to conceal such evidence. These allegations are unsupported by the record. Respondent offers no documentary or testimonial evidence to substantiate claims of misconduct or collusion.

d. Respondent's exceptions span more than 40 pages but do not identify any clear error. Instead, he offers alternative interpretations of the evidence or reiterates arguments already rejected by the lower courts. Challenges that merely offer alternative interpretations of the record or reiterate arguments previously rejected do not suffice to disturb findings supported by clear and convincing evidence.

e. Following the death of Marion Pisner in 2009, Respondent assumed responsibility for the administration of the Pisner Trust and served as its attorney. He retained exclusive control over the Trust's records and operations. Respondent managed the Pisner Trust's accounting software, received bank statements, prepared and filed tax returns, and oversaw the management of Trust-owned properties. He alone had access to the Pisner Trust's financial documentation. Despite holding himself out as the Pisner Trust's legal representative and fiduciary, Respondent failed to maintain adequate records of Pisner Trust transactions and refused to produce the required documentation when ordered by the court. His refusal significantly impeded the efforts of the court-appointed substitute trustee, Mr. McCarthy, to complete a fiduciary accounting of the Trust and fulfill the duties assigned by the court. Respondent's misconduct here was obstructive. By his own admission, Respondent actively concealed Pisner Trust records to avoid disclosing them during his divorce proceedings. Respondent also testified that he transferred the records to an accountant for "safekeeping" during the litigation so that his former spouse could not obtain them. Even after the divorce concluded in 2010, Respondent never attempted to retrieve those records. Despite multiple opportunities — including informal requests and three separate court orders — Respondent failed to produce sufficient documentation to permit an accounting of the Pisner Trust. Respondent violated Rule 1.1. At bottom, Respondent had an obligation to preserve and organize the Pisner Trust's financial records in a manner that would ensure accessibility and his decision to withhold, obscure, or destroy these records constituted a clear violation of the duty of competent representation.

f. Respondent violated Rule 1.15(a) by failing to maintain adequate records and by disbursing Trust funds to himself for personal use without authorization or consent from his co-trustee, Ms. Rubinstein.

g. Rule 1.15(a) requires attorneys to properly safeguard client or third-party property in their possession. Respondent received distributions in excess of his share: In 2009, he distributed approximately $1.19 million to himself while Ms. Rubinstein received $1.06 million, and in 2010, he received $136,410.93 despite a lack of supporting source documentation, while Ms. Rubinstein received $54,894.78. The record further demonstrated that many of these unauthorized distributions were used for personal expenses, including legal fees, credit card payments, and educational costs, none of which were justified or approved. Respondent violated Rule 1.15.

h. Respondent violated Rule 3.1, which provides: An attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification, or reversal of existing law. Respondent

persisted in litigation despite repeated adverse rulings, and frequently reasserted claims that had already been adjudicated.

i. When unsuccessful in Maryland state court, Respondent filed a nearly identical suit in the District of Columbia Superior Court. When that was unsuccessful, Respondent filed the same claims again in the U.S. District Court for the District of Maryland. Respondent pursued identical claims in multiple forums without curing a plainly fatal legal defect, indicating an absence of any good faith basis for relief and no effort to seek a legitimate change in the law. These violations were not without consequence. Respondent's frivolous filings caused actual harm to others. Ms. Rubinstein incurred substantial legal expenses in defending multiple actions. Mr. McCarthy and Ms. Evans both experienced increased liability insurance premiums as a result of being named in the litigation. While Respondent failed in every action, he imposed significant financial and emotional burdens on the other parties and expended judicial resources in multiple jurisdictions. Respondent violated Rule 3.1 by initiating and maintaining multiple meritless proceedings in bad faith, and by continuing to litigate matters long after he had lost on the merits.

j. Respondent violated Rule 3.4(c), which prohibits attorneys from knowingly disobeying a tribunal's directives unless they make an open refusal based on a good faith belief that no valid obligation exists. In this case, Respondent was ordered by multiple judges — Judge Albright, Judge Storm, and Judge Mason — to produce specific documents relating to the Pisner Trust, in a matter that Respondent himself had initiated. Despite these orders, Respondent failed to provide the required documentation and was ultimately held in contempt of court by Judge Mason. Throughout more than eighteen months of litigation, Respondent made no meaningful attempt to comply with the court's discovery orders. He testified that he believed he had already turned over the appropriate documents and made no effort — even in the face of potential incarceration — to retrieve responsive documents. Respondent never seriously attempted to obtain or produce the required documents, and that this prolonged noncompliance constituted a knowing violation of a tribunal's order in contravention of Rule 3.4(c).

k. Respondent's conduct also violated Rule 8.4, which governs attorney misconduct. Pursuant to Rule 8.4 (a) and (d), it is professional misconduct to violate the Rules of Professional Conduct and to engage in conduct prejudicial to the administration of justice. Respondent violated both subsections by breaching multiple ethics rules, including Rule 1.1 (competence), Rule 1.15 (safekeeping property), Rule 3.1 (meritorious claims), and Rule 3.4 (fairness to opposing party and attorney). Respondent's failure to comply with multiple discovery orders violated Rule 3.4(c). Respondent repeatedly made baseless accusations and pursued frivolous litigation against Ms. Rubinstein, Mr. McCarthy, Ms. Evans, and even Mr. McCarthy's son (Kevin McCarthy) — which the Hearing Judge noted had nothing to do with Respondent's alleged grievances against Mr. McCarthy. Respondent's claims lacked any factual or legal foundation and were often resubmitted after being rejected by trial and appellate courts. Respondent misappropriated Pisner Trust assets for personal use, failed to maintain proper records, and concealed assets in a divorce proceeding in Virginia by evading a discovery order. By engaging in this pattern of conduct, Respondent not only

violated specific ethical rules but also committed serious acts of professional misconduct that undermined the integrity of the legal system.

l. Respondent did not demonstrate any remorse for either his personal use of funds contained in the Pisner Trust or for his frivolous filings. Respondent established the mitigating factor of absence of prior attorney disciplinary history. Respondent committed numerous and serious violations of the MARPC, including intentional misappropriation of Trust assets, failure to safeguard client property, frivolous and vexatious litigation, disobedience of court orders, and conduct prejudicial to the administration of justice. These violations, considered both individually and in the aggregate, demonstrate that Respondent is unfit to continue practicing law in this State. In this case, the aggravating factors compel the conclusion that disbarment is warranted. This Court has consistently held that intentional misappropriation of client or fiduciary funds is among the most serious professional violations and typically warrants disbarment. Likewise, attorneys who persist in vexatious litigation or misuse the judicial process may also face disbarment, particularly when such conduct is compounded by other serious violations. Respondent's misuse of the legal process did not occur in a single case or over a brief period; rather, it spanned nearly a decade, involved two jurisdictions, and extended across multiple state and federal courts. Respondent neither acknowledged any wrongdoing nor demonstrated remorse at any point during these proceedings. The absence of remorse weighs heavily against mitigation. We have long recognized that a lack of contrition is a significant aggravating factor, for it allays nothing as to "the likelihood of a repetition of the conduct." Considering the totality of his conduct, the serious harm inflicted, the presence of multiple aggravating factors, and a dearth of mitigating factors, disbarment is the only sanction adequate to protect the public and preserve confidence in the profession. Respondent's actions are fundamentally incompatible with the responsibilities of an attorney licensed to practice law in this State.

B. *Barnett v. Koeneman (In re Koeneman),* 339 Ore. App. 294 (Court of Appeals of Oregon 2025). Appellant cannot rely on court of appeals to develop her arguments about how probate court violated the state and federal constitutional prohibitions against involuntary servitude.

1. In these consolidated probate cases concerning the estate of Earl Edgar Koeneman, appellant appeals the judgment discharging the personal representative and closing the estate. Appellant filed an objection in the small estate proceeding, claiming, among other things, that she was owed in excess of $500,000 from the estate for private nursing services that she had provided to the decedent.

2. The court of appeals affirmed on the following grounds:

a. On appeal, appellant states six assignments of error. Among other things, she asked the court to "narrowly construe the Oregon Probate Code to avoid unconstitutionality, in light of alleged violations of the Oregon Constitution § 34; the United States Constitution XIIIth Amendment; the Trafficking Victims Protection Act of 2000; 18 USC 1593 and ORS 30.867 where civil causes of action are authorized for an otherwise criminal offense." And she requests that the court remand with instructions "on the interpretation of the federal probate exception, and constitutional rights and federal remedies under the Oregon Probate Code." Appellant's brief covers a number of issues that raise factual and legal questions

about many things. What it does not do, unfortunately, is clearly identify individual rulings by the trial court that she wishes to challenge and provide focused argument specific to those rulings.

b. While mindful of appellant's pro se status, she bears the burden to identify the rulings that she asks the court to review. Compliance with the rules of appellate procedure is not a mere matter of form, or simply a hoop to be jumped through on the way to briefing the merits of an appeal.

c. While the court may overlook technical deficiencies that do not unduly hamper review, it is not the court's proper function as a neutral arbiter to make or develop a party's argument. In short, to create a situation in which reversal is even possible, an appellant must file an opening brief that is sufficiently compliant with our rules and contains sufficiently developed legal arguments that it will allow us to rule on the appellant's claims of error, rather than crafting arguments for the appellant.

d. Here, although appellant asserts that the probate court erred in several different ways, she is vague as to the actual rulings she is challenging and does not develop supporting legal arguments or otherwise explain how it is that any such error violated the state and federal constitutional prohibitions against involuntary servitude. In her first assignment, for example, appellant asserts that the probate court failed to afford her due process of law when it "failed to address jurisdiction in" either of the consolidated probate cases. She does not, however, identify the ruling being challenged, and her reference to an appendix "for lengthy chart of errors and preservations" does not clarify the challenged ruling or how it is connected to the relief she now seeks. All of appellant's assignments suffer from similar deficiencies.

C. *Brunckhorst v. Bischoff,* 2025 U.S. Dist. LEXIS 215660 (United States District Court for the Southern District of New York 2025). Court orders redactions of number and value of disputed company shares and the identity of trust beneficiary.

1. On September 30, 2025, the Court filed under seal two decisions in this action — one that resolved motions for summary judgment with respect to the 2010 Trust Shares held by the Barbara 2010 Trust (the "2010 Trust Summary Judgment Opinion"), (the "SJ Opinion"), and another that granted in part and denied in part the Trustees' motion to amend their Answer to Eric's Third Amended Counterclaims and Crossclaims (the "Motion to Amend Opinion"; together, with the 2010 Trust Summary Judgment Opinion, the "September 30 Opinions") ("MTA Opinion").

2. In the September 30 Opinions, the Court afforded the parties the opportunity to propose redactions and to file a joint letter justifying any redactions before unsealing those decisions. In a third Order issued on September 30, 2025, the Court invited the parties to propose redactions, with justifications, to the transcript from the oral argument on September 8, 2025, before it is unsealed. On October 7, 2025, the Trustees filed a letter moving to redact portions of the September 30 Opinions and the oral argument transcript and representing the parties' respective positions on that motion ("Joint Letter"). Also on that date, the Trustees filed documents reflecting their proposed redactions.

3. The Trustees seek to redact information about Barbara's private estate planning and Boar's Head's business. They also request that the Court approve the redaction of a clause in the Motion to Amend Opinion that concerns why the Trustees sought a tax offset. Frank does not object. Eric challenges the proposed redactions to the 2010 Trust Summary Judgment Opinion only. He opposes the Trustees' request to redact (i) the number of Boar's Head shares held by the Barbara 2010 Trust, (ii) a description of the 2009 Firm Memo and "consequent 2010 transfers that violated the Shareholder's Agreement," and (iii) the identity of the beneficiary of the Barbara 2010 Trust. The Trustees contend that this information is "[p]ersonal and financial information [that] implicate[s] significant privacy interests that overcome the strong presumption of public access." In response, Eric relies on the "strong presumption" of public access to the 2010 Trust Summary Judgment Opinion, arguing that these three categories of information "would materially assist" the public's ability to evaluate the Court's conclusions.

4. The court resolved several motions to seal or redact filings in this case and on September 24, 2024, it issued an Order (the "2024 Sealing Order") concerning redactions to the Court's Opinion and Order granting summary judgment as to the shares held in the Barbara 1994 Trust (the "1994 Trust Summary Judgment Opinion") and related filings. The Court assumes the parties' familiarity with that Order's description of the applicable standards for sealing and redactions of court filings established by *Lugosch v. Pyramid Company of Onondaga*, 435 F.3d 110 (2d Cir. 2006), and its progeny.

5. The court approved and denied redactions on the following grounds:

a. In the 2024 Sealing Order, the Court analyzed, under the common law and the First Amendment, whether to redact the sort of information that Eric now argues should be disclosed. In allowing the redaction of Boar's Head's sensitive business information, the Court explained that the proposed redactions advanced privacy interests that "outweigh[ed] the right to public access [to] . . . information in this case" and were "narrowly tailored to serve those interests." Regarding private estate planning information, the Court approved the redaction of "details like trust beneficiaries" because they were "irrelevant to the Court's summary judgment decision"; the privacy interest with respect to immaterial content prevailed over the presumption in favor of public access.

b. Applying the *Lugosch* standard to the 2010 Trust Summary Judgment Opinion, the Court arrives at the same conclusions with respect to the number of disputed shares and the identity of the Barbara 2010 Trust's beneficiary. As explained in the 2024 Sealing Order, that information is private to Boar's Head and Barbara's estate. It also has as little relevance to the Court's analysis in the 2010 Trust Summary Judgment Opinion as it did to the 1994 Trust Summary Judgment Opinion. Knowing the number of disputed shares or the identity of the Barbara 2010 Trust's beneficiary would not "materially assist the public in understanding the issues before the court, and in evaluating the fairness and integrity of the court's proceedings." Accordingly, for the reasons articulated in the 2024 Sealing Order, the Court finds that with respect to these two categories, the competing interests overcome the presumption of public access and that the Trustees' request is narrowly tailored to serve those interests.

c. The *Lugosch* analysis of the Firm Memo is different, however. While the Firm Memo is mentioned just once in the 1994 Trust Summary Judgment Opinion, the discussion of the Firm Memo occupies nearly two pages of the 2010 Trust Summary Judgment Opinion. The Court granted the motion to redact the lone mention in the 1994 Trust Summary Judgment Opinion because the Firm Memo's contents, or even the Firm Memo's existence, were not necessary to understand how the Court arrived at that ruling. Not so with the 2010 Trust Summary Judgment Opinion. The Firm Memo was critical "to determin[ing] litigants' substantive legal rights" in that ruling, triggering a "strong presumption of access."

d. That strong presumption of access to the Firm Memo is not overcome by the privacy interest in personal estate planning information. The grounds for revealing the Firm Memo's contents in the 2010 Trust Summary Judgment Opinion are even more compelling. The Firm Memo — which discusses the provenance of the Barbara 2010 Trust and explores how that trust interacts with the terms of the Shareholder's Agreement — similarly was "central" to the Court's analysis in the 2010 Trust Summary Judgment Opinion. Further, Todd, as the trustee of the Barbara 2010 Trust, is a party to this litigation. A third party typically enjoys a weightier privacy interest than a party to the litigation. It is inappropriate to redact the Firm Memo, given its centrality to the 2010 Trust Summary Judgment Opinion and the less compelling privacy interests implicated. The Court therefore denies the Trustees' request to redact the Opinion's discussion of the Firm Memo, aside from the Firm Memo's mentions of the contemplated beneficiary of the Barbara 2010 Trust.

e. For similar reasons, the Court also denies the Trustees' proposed redactions of descriptions of the Barbara 2010 Trust Agreement in the 2010 Trust Summary Judgment Opinion. The terms of that agreement are essential to understanding why the Ancillary Documents were void ab initio, a determination which led to the Court's conclusion that Eric is the proper owner of the 2010 Trust Shares. The Trustees have not supplied a basis for overcoming the "strong presumption of access" to the Opinion's descriptions of the Barbara 2010 Trust Agreement. The Court orders the 2010 Trust Summary Judgment Opinion redacted only with respect to the number of disputed shares and the identity of the Barbara 2010 Trust's beneficiary.

f. The number of disputed shares and the identity of the Barbara 2010 Trust's beneficiary also may be redacted from the Motion to Amend Opinion and the oral argument transcript.

g. The Court denies the Trustees' other proposed redaction in the Motion to Amend Opinion. The Trustees seek to redact a reference to an argument that they made with respect to the tax offsets, but they fail to identify any compelling privacy interest or "higher value" served by doing so. Accordingly, the presumption of public access is not overcome, and the Trustees' request for that proposed redaction is denied.

h. The Court grants the Trustees' request to redact from the oral argument transcript information about the value of Boar's Head shares and distributions. That information reveals sensitive business information about Boar's Head and

implicates private estate planning information. While this information could become highly relevant during the damages stage of this litigation, it bore little on the Court's analyses in the September 30 Opinions. Given the lack of relevance and the privacy interests implicated, the competing interests overcome the presumption of public access and that the Trustees' request is narrowly tailored to serve those interests.

D. *Dixon v. Green,* 2025 Fla. App. LEXIS 9277 (Court of Appeal of Florida, Fifth District 2025). Attorney cannot represent both sides of a probate dispute that are adverse to each other without waiver.

1. The primary issue in the underlying case is who will inherit a million dollars from a relative's intestate estate. However, this appeal is about the probate court's order disqualifying an attorney from further participation in the underlying case, based upon a conflict of interest. Attorney initially represented a client claiming to be the nephew and sole heir of the decedent. However, after being unable to initially prove that relationship, Attorney began representing other relatives of the decedent and directly fought to defeat the claim of his first client, the nephew.

2. Uncle Alfonso Glover, Jr. ("the Decedent") died intestate; he never married, had no children, and was predeceased by both his parents and Charles Glover — his brother and only sibling. Charles Glover married Sandra Glover in 1975 and remained wedded to her up until his death. In 1977, Charles Glover fathered a son, Michael Green ("Green") out of wedlock.

3. In the first phase of the probate case, Attorney represented Green, asserting that Green is the Decedent's nephew and sole heir to inherit his uncle's intestate estate. Some of the Decedent's cousins, Deloris Kidd, Ruth Randal, Rosa Wright, and Arlean Brookins ("the Cousins"), claimed that Green was not Charles Glover's biological son and therefore not the Decedent's nephew. Thus, the positions of Green and the Cousins were directly and completely adverse to each other, as only one side would be entitled to inherit the Decedent's intestate estate. As the probate court put it, the battle lines were thus drawn: Green vs. the Cousins. Attorney changed sides in the same case by first representing and then opposing Green's claim.

4. Because Green had been born out of wedlock and Charles Glover never formally acknowledged Green as his son, proving that Green was the Decedent's nephew was challenging. Attorney sought an order from the probate court to designate Green as an heir and to exhume the body of Charles Glover in order to obtain DNA samples. Glover's widow and the Cousins opposed exhumation. The probate court denied the motion, observing that no order would be needed if the widow later agreed to exhumation. Attorney took an appeal of that order to the First District Court of Appeal, where it was per curiam affirmed without a written opinion.

5. Later in this same probate case, Attorney represented one of the Decedent's second cousins, James Glover, and another cousin, Andrea Troutman. Meanwhile, Green hired new counsel, Attorney Jackson, who convinced Glover's widow to permit the exhumation of her late husband's body. The DNA test results established a 99.99% probability that Green was Charles Glover's son and thus was the Decedent's nephew and sole heir.

6. Attorney Jackson, on behalf of Green, filed a motion for summary judgment asserting that he should be declared the Decedent's sole heir and that the claims of the other potential heirs should be denied.

7. The court held a hearing on Green's summary judgment motion. Attorney Jackson on behalf of Green argued that the recent DNA results established that Charles Glover was Green's father, making Green the sole heir of the Decedent's estate.

8. Although a different attorney filed the sole written response in opposition to Green's summary judgment motion, he deferred to Attorney to orally argue against Green's position during the hearing. Attorney began his presentation with something of an understatement, "[a]nd it's kind of awkward because I was on the other side back during that period of time." This was an obvious reference to the fact that Attorney originally asserted in this same case that Green was the Decedent's nephew and sole beneficiary, a position Attorney now opposed. Attorney then proceeded in that hearing to advocate against Green's entitlement to inherit from the Decedent's estate. The court orally granted the motion for summary judgment and found Green to be the Decedent's sole beneficiary.

9. Attorney filed a motion for rehearing on behalf of Appellant, Dale Dixon, Administrator Ad Litem of the Estate of Alfonso Green. Attorney's rehearing motion argued that Green was barred for multiple reasons from asserting his claim to be the sole heir.

10. In response to Attorney's motion for rehearing, Green moved to disqualify Attorney from representing any party opposed to him in the estate contest.

11. The probate court found that Arneka Green was still a party to the case because she had never been discharged as the PR, and Attorney never terminated his appearance for her. The probate court found there was an adverse interest between the Greens and the Cousins and entered a written order granting Green's motion to disqualify Attorney from representing those adverse to Green.

12. The court of appeals affirmed on the following grounds:

> a. Given Green's claim and the probate court's ruling that he is the sole heir of the Decedent's estate, he certainly qualifies as an "interested person." It is difficult to conceive of anybody having a stronger claim of standing than a former client seeking to prevent his attorney from representing other clients, whose interests are directly adverse to his, in the same proceeding.
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> b. Appellant argues that there was no evidence to support any finding that Attorney represented Green. To say that Appellant is badly mistaken is charitable. Attorney announced on the record that he represented both Michael and Arneka Green, and billed the Greens for services rendered. Attorney's cover letter forwarding the invoice for services rendered was addressed solely to Michael Green. Attorney acknowledged during the summary judgment hearing that he was in an awkward position as he previously was on the other side.
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> c. The probate court concluded that the second factor, subsequent representation of an interest adverse to the former client in the same or similar proceeding, had likewise been established as it all occurred in the very same estate contest. That finding is likewise supported by competent substantial evidence. It is difficult to imagine more completely adverse interests being represented by a single

attorney, in a single case, than to begin advocating for Green being the sole heir only to change sides, arguing against Green inheriting a single penny. Attorney over time represented first one side and then the other in the same case.

d. The rules regulating The Florida Bar prohibit such representation of adverse interests. To the extent that Appellant argues that Attorney quit representing Arneka Green and Michael Green before switching sides and clients, Rule of Professional Conduct 4-1.9 provides: "A lawyer who has formerly represented a client in a matter must not afterwards … represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."

e. The disqualification order noted that Attorney never formally terminated his representation of Arneka Green, nor did he have the court enter an order satisfactorily discharging her as the PR. Thus, the probate court concluded that she was still a party. The adverse nature of the sequential representations is clear. There is no argument that the clients, Michael or Arneka Green, gave informed consent for Attorney to change sides and oppose them. A conflict of interest existed sufficient to disqualify Attorney.

f. The probate court's order also struck all "pleadings, motions, and other matters filed by Grayling Brannon in opposition to Michael Green's interest in this case." Appellant asserts that this was an abuse of discretion. However, Appellant provides no case law in support of his position and offers only conclusory statements that striking Attorney Brannon-filed pleadings adverse to Green during the past five years would create a "devastating burden" on his newer clients. Conclusory arguments are insufficient for purposes of appeal and should be deemed waived.

g. Based on the probate court's finding that Attorney changed sides, "has abandoned his client and taken up the cause of his client's adversaries, the Cousins," there is a substantial likelihood that Attorney violated one or more Florida Bar rules regarding conflicts of interest. This Court finds that the action appropriate to take here is to make a referral of Attorney to The Florida Bar.

E. *Douglas-Damar v. United States,* 2025 U.S. Dist. LEXIS 63903 (United States District Court for the District of Arizona 2025). Petition by person alleging to be Christ to be recognized as executor of God's will dismissed.

1. Self-represented Plaintiff Lamar Douglas-Damar, a/k/a "Christ," who is confined in the Arizona State Prison Complex-Eyman, filed a document titled "Petition for Probate/Guardian" in which he requests the Court grant a contest to current will and attest or prove new will and grant termination of any guardianship he is currently under.

2. Plaintiff asserts he is "a new creation in Christ" and, therefore, the "Son, next of kin, and rightful heir to the Will of God" and "true ex[e]cutor and trustee of [his] father[']s Will." He requests to "prove the will on testament of the Hol[]y Bible[,] which is God[']s will for [him]" and contests "any other Will in current use." Finally, Plaintiff contends he is "of sound body and mind" and seeks to "terminate any guardianship [he is] under."

3. The court denied the petition and dismissed the complaint as nonsensical and frivolous.

F. *Ekambi v. Njamfa,* 2025 IL App (1st) 250630-U (Appellate Court of Illinois, First District, Sixth Division 2025). Reversed foreign judgment not entitled to full faith and credit recognition.

1. On June 16, 1995, Patrick Njamfa and Marie Pendar were married in Las Vegas, Nevada. On March 9, 1999, Patrick and Maureeb Kwankam were married in Cameroon. The parties dispute whether Kwankam knew of Patrick's existing marriage when she married him, and there is no record of a divorce. On May 5, 2007, Patrick died in a Kenya Airways plane crash in Cameroon. He was survived by two children: Marcel Njamfa (child of Pendar) and Tiara Njamfa (child of Jacqueline Patcha, who is not involved in this appeal). Fourteen months after Patrick's death, Kwankam gave birth to twins (Patrick Jr. and Michael) who are allegedly Patrick's children through artificial insemination.

2. Following Patrick's death, two legal proceedings were initiated in Cameroon. A proceeding was initiated to determine the proper beneficiaries of Patrick's estate (henceforth, the "Cameroon heirship action"). Separately, Marie filed a nullity of marriage action against Kwankam, seeking to have Kwankam's marriage with Patrick declared null on grounds of bigamy (henceforth, the "Cameroon nullity of marriage action").

3. In April 2010, Kwankam and Conrad Njamfa (Patrick's brother), as co-special administrators of Patrick's estate, filed an action in the circuit court of Cook County asserting wrongful death and survival claims against Kenya Airways and others. A settlement agreement was reached in 2016. The circuit court ordered the settlement proceeds be held in escrow until the parties provided the court "with the final status of all proceedings in Cameroon as to the heirship of the [d]ecedent."

4. In 2019, Conrad wrote a pro se letter to the court stating the Cameroon heirship action had concluded and the Supreme Court of Cameroon had issued a final determination as to Patrick's heirs. On February 25, 2020, the circuit court entered a final order stating (1) Marcel and Tiara had been adjudicated as Patrick's lawful heirs, and (2) Kwankam and her children Patrick Jr. and Michael had been adjudicated as not being Patrick's spouse and heirs. Accordingly, the court ordered the settlement proceeds be paid to Conrad as guardian of Marcel and Tiara. The court of appeals affirmed.

5. On February 7, 2022, while the Kenya Airways III appeal was pending, Edmond Ekambi, as receiver of Patrick's estate, filed the instant "Petition to Register Foreign Judgment" in the circuit court of Cook County. He named three parties as respondents: Kwankam, Conrad, and Floyd Wisner, the attorney holding the escrowed funds from the Kenya Airways litigation. Ekambi sought to register a 2010 decision entered by the Cameroon High Court of Wouri-Douala in the nullity of marriage action. In relevant part, the decision: nullified Patrick and Kwankam's marriage, but recognized Kwankam's good faith and granted her rights as a putative spouse; declared Kwankam's twin sons to be co-beneficiaries of Patrick's estate; and appointed the notary public firm of Etoke Joel as receiver to distribute Patrick's estate among the beneficiaries of the estate. (Joel subsequently retired, and Ekambi was appointed as successor receiver.)

6. Ekambi acknowledged that Judgment No. 402 was not yet final, since Conrad's appeal to the Supreme Court of Cameroon was still pending. However, Ekambi claimed the appeal would not impact his "authority and obligation to collect and distribute the assets of Patrick." Ekambi demanded that Wisner release the escrowed funds to him pursuant to Judgment No. 402, but Wisner refused, stating that he would follow the 2020 Kenya

Airways order unless directed otherwise by the court. Thus, Ekambi requested the circuit court register Judgment No. 402.

7. A year later, in 2023, the Supreme Court of Cameroon reversed Judgment No. 402. The court found Kwankam knew of Patrick's marital status when she married him and, due to her bad faith, she was not entitled to rights as a putative spouse. The court further ruled that because Kwankam's twin sons were born 14 months after Patrick's death, they "could not have been [Patrick's] children or benefit from the presumption of legitimacy."

8. Ekambi petitioned the Supreme Court of Cameroon to clarify his role as receiver in light of its 2023 judgment. In 2024, the Supreme Court of Cameroon issued a clarification stating that the heirship was final, and no distribution of property was sought on behalf of Marcel and Tiara. Thus, "the duty of distribution of the said property becomes meaningless" and Ekambi "no longer has any role to play in the enforcement of said judgments."

9. Conrad filed a motion to dismiss Ekambi's petition, attaching the Supreme Court of Cameroon's 2023 decision and 2024 clarification. Ekambi did not oppose the motion. On April 1, 2025, the trial court granted Conrad's motion to dismiss and dismissed Ekambi's petition with prejudice. Kwankam filed the instant appeal.

10. The court of appeals affirmed on the following grounds:

> a. Ekambi sought to register a 2010 Cameroon judgment that was not final and was subsequently reversed by the Supreme Court of Cameroon. The trial court properly dismissed the action. Kwankam, who already filed three unsuccessful appeals in the Kenya Airways action, has filed yet another appeal to this court in an ongoing effort to get the settlement proceeds distributed to her and her children. Her claims are without merit.
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> b. Enforcement of foreign judgments in Illinois is governed by the Uniform Foreign-Country Money Judgments Recognition Act ("Recognition Act") and the Uniform Enforcement of Foreign Judgments Act ("Enforcement Act"). The Recognition Act permits a party seeking recognition of a foreign judgment as an original manner to file an action for recognition. The judgment must be one that "grants or denies recovery of a sum of money" and is "final, conclusive, and enforceable" under the foreign country's law may be recognized by Illinois courts. If the court finds the judgment is entitled to recognition, that judgment is "(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this State would be conclusive; and (2) enforceable in the same manner and to the same extent as a judgment rendered in this State."
>
> c. The Enforcement Act governs enforcement of "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this State." A judgment filed or registered under the Enforcement Act "shall be construed to be an original Illinois judgment from the date it is filed and for purposes of enforcement and revival, shall be treated in exactly the same manner as an Illinois judgment entered on that same date."
>
> d. Here, Judgment No. 402 is plainly not entitled to recognition under the Recognition Act or registration under the Enforcement Act. The judgment was not

final or conclusive when Ekambi filed his action. In fact, it was reversed a year later by the Supreme Court of Cameroon and, therefore, is not "entitled to full faith and credit in this State."

e. Kwankam's appellate brief argues the judgments of the Supreme Court of Cameroon denying her and her sons a share of Patrick's inheritance were wrongly decided, and Conrad allegedly pulled strings with government officials to prevent Kwankam from obtaining a travel visa to Cameroon. Kwankam further petitions "St Michael the Archangel" to "defend herself and her sons in battle."

f. Kwankam's notice of appeal specifies she is appealing from the trial court's April 1, 2025 order dismissing Ekambi's petition to register Judgment No. 402, and review is limited solely to the propriety of that order.

G. *In re Bradshaw,* 2025 Cal. LEXIS 3934 (Supreme Court of California 2025). Attorney disbarred for using position as trustee of revocable trust for elderly person to obtain reverse mortgages, convert equity in home into cash, and pay a company he controlled for repairs to home without competitive bids or disclosure of his ties to the company.

1. Drexel Andrew Bradshaw ("Bradshaw") first represented Ora Gosey in a landlord-tenant dispute in 2006. Gosey, then 78 years old, requested that Bradshaw's law firm, Bradshaw & Associates, P.C., prepare an estate plan, including the drafting of her will and the Gosey Trust. The Trust was established (1) "[t]o provide for the care and maintenance" of Gosey in her lifetime, (2) "[t]o facilitate management of the trust property in the event of [her] incapacity," and (3) "[t]o facilitate transfer of the trust property" upon her death. The Trust estate consisted primarily of Gosey's home in San Francisco, which included a rental unit.

2. Gosey had no children or spouse at the time of drafting; her former partner Thomas Bush, her longtime friend Willie Cole, and Bradshaw's law firm were designated, respectively, as first, second, and third successor trustee upon her disability or death. Gosey expressed a strong preference to remain in her home if she were to become incapacitated. Her will authorized the trustee to "expend as much of the Trust estate as necessary to avoid placing [her] in an assisted living community, home for the elderly, or the like," and to "apply or expend all or a part of the income and principal of said Trust, or both, for [her] comfort, health and maintenance in [her] accustomed manner of living."

3. After drafting these documents, Bradshaw did not have contact with Gosey until she fell in her home in August 2013. Gosey's tenants contacted Adult Protective Services ("APS") because Gosey refused to eat or drink, but Gosey declined APS's assistance. Shortly thereafter, Gosey was hospitalized, and her doctors determined she was unable to care for herself or her estate due to dementia. She subsequently returned to her home with the assistance of in-home care. After Bush and Cole declined to serve as successor trustee, Bradshaw's attorney Sheila Robello petitioned the probate court to appoint Bradshaw as Gosey's temporary and permanent conservator. In describing Gosey's "obvious lack of means to care for herself," Bradshaw's petition — signed under penalty of perjury — stated that Gosey had been removed from her home by APS. Bradshaw was appointed as Gosey's temporary conservator and temporary trustee of Gosey's estate on September 11, 2013, and as permanent conservator in November 2013. He petitioned the probate court to waive court accounting and to terminate its supervision over the

Gosey Trust in order to avoid "additional expense" to Trust assets. The probate court declined both requests.

4. In November 2013, around the time Bradshaw became Gosey's conservator, Bradshaw hired Juan Gonzalez to fix flooding damage from a burst pipe in Gosey's home and rental unit. Gonzalez did not have a contractor's license. Bradshaw then hired NJ Construction for small repairs at Gosey's home between November 2013 and June 2014. During that time, Bradshaw and Gonzalez entered into an agreement whereby Bradshaw would assist Gonzalez in obtaining his contractor's license. Bradshaw paid $1,000 for Gonzalez to attend a licensing course. In April 2014, Bradshaw's law firm prepared and filed with the California Secretary of State the incorporation documents for a company named Bay Construction, Inc. ("Bay Construction"). Bradshaw was the sole signatory on Bay Construction's Articles of Incorporation, and he listed himself as the initial agent for service of process and his law firm address as the corporate address.

5. After the Contractors State License Board ("CSLB") denied Gonzalez's first and second license applications, Bradshaw engaged a construction consulting firm for advice on obtaining a license for Bay Construction. The firm recommended that Bay Construction hire a Responsible Managing Officer ("RMO") in order to qualify for a contractor's license. Bradshaw then hired Raymond Invernon, a licensed contractor, to serve as an RMO supervising the work of Bay Construction. Invernon was in his 70s and lived in Idaho most of the time. Neither Gonzalez nor Bradshaw's son Colin Grey Bradshaw ("Grey"), who worked for Bay Construction with Gonzalez on repairs for Gosey's home, ever met or spoke with Invernon. Grey testified that he had never heard of Invernon. Claire Lewis, Gosey's tenant, did not recall seeing Invernon on the property. During the OCTC's investigation into Bradshaw, Invernon said he assumed no work had been done under Bay Construction's license because Bradshaw never called him about any project. Carlos Marquez, a CSLB supervisor, testified that if the CSLB had been aware that Invernon was renting his license to Bay Construction and not actually supervising its work, the CSLB would not have approved Bay Construction's application. Nancy Rasch, an attorney appointed by the probate court to investigate Bradshaw's affiliation with Bay Construction, found no evidence that Invernon supervised any of Bay Construction's work. Invernon was paid $1,000 by Bradshaw's law firm in November 2014 and another $5,000 from Bay Construction's checking account in December 2014. On December 22, 2014, Bay Construction obtained a contractor's license with Gonzalez listed as the President, Secretary, Treasurer, and Owner.

6. In October 2014, Bradshaw enlisted his personal banker to set up a business checking account for Bay Construction. Bradshaw used his own Social Security number and deposited $10,000 from his law firm's checking account to Bay Construction's new checking account. Bradshaw was and remained the sole authorized signatory on Bay Construction's checking account until the company ceased operation. He designated himself president of Bay Construction and used his law firm office as the business address; neither Gonzalez's name nor anyone else's appears on the banking documents. At Bradshaw's request, Bradshaw's wife opened two American Express cards under her name on behalf of Bay Construction. The first card, opened in July 2014, was issued to Bradshaw, his wife, and Grey. The second, opened in January 2015, was issued to Bradshaw, his wife, and Brea Violette, the receptionist at Bradshaw's law firm. The statements for both cards were sent to Bradshaw's law firm office for his review and payment authorization.

7. On February 3, 2015, Bradshaw filed the Gosey Trust's "First and Final Report and Account of Trustee," covering the period from December 2, 2013 through November 30, 2014. In this report, Bradshaw said there was "no relationship or affiliation between [him] and any agent hired by [him]" during the accounting period. Bradshaw again requested that the probate court terminate its supervision over the Gosey Trust; the probate court declined to do so. Bradshaw appealed the probate court's denial order, and the Court of Appeal reversed, terminating the probate court's supervision over the Trust on July 29, 2016.

8. Bradshaw had another client, Noretha Jones, who, like Gosey, was an elderly woman seeking Bradshaw's assistance in a landlord-tenant dispute. Bradshaw referred Jones to Bay Construction for repair work on her rental unit and, in a May 2015 letter, disclosed to Jones his affiliation with the company as follows: "When I referred you to Bay Construction, Inc., I informed you that I was affiliated with Bay Construction, Inc., in that I am their attorney, I filed their articles of incorporation and am the initial agent for service of process, my staff provides back office support for them including phone support, and that we share a receptionist. My son also works for them. Should a dispute arise between you and them, I would not be able to represent either side as it would constitute a conflict of interest." Jones's daughter-in-law, Linda Lee, testified that no one had mentioned Invernon to her and she had never met Invernon; that Grey and Bradshaw conducted the negotiation for the repair work on behalf of Bay Construction; and that she barely communicated with Gonzalez, who spoke little despite his presence at the negotiation.

9. After Gonzalez stopped working for Bay Construction in December 2015, Violette became the Chief Executive Officer, Chief Financial Officer, and Secretary on January 7, 2016, and Bradshaw seemingly took over those positions in March 2016. The updated documents filed with the Secretary of State were signed using Gonzalez's signature stamp. Bay Construction's license was suspended on January 14, 2016, and the company ceased operations that month. Through April 2016, Bradshaw and Grey charged $2,675.29 to one of Bay Construction's American Express cards for various personal purchases such as snowboarding expenses and the Presidio Social Club.

10. On February 14, 2014, ten days after Bradshaw and Gonzalez entered into the attorney-client agreement, Bradshaw petitioned the probate court for a reverse mortgage on Gosey's home. Bradshaw said a reverse mortgage was necessary because Gosey's expenses exceeded her income by $7,147 per month and the current cash balance of $76,825.81 in the estate would be exhausted by the end of November 2014. The probate court granted Bradshaw's petition, and a reverse mortgage of $346,000 was disbursed to Bradshaw, an amount he claimed would sustain Gosey's care for about four years.

11. Two and a half years later, in July 2016, Bradshaw filed a petition for a second reverse mortgage on Gosey's home, similarly stating that Gosey's monthly expenses exceeded her income by $7,644 per month and that the remaining balance from the first reverse mortgage would be exhausted in two or three months. He requested a lump sum disbursement of $889,741.05. Around this time, Gosey's condition worsened; Bradshaw's attorney, Robello, told the probate court that Gosey's doctors believed she would live only six more months. This petition prompted an investigation by the probate court.

12. According to a declaration Bradshaw submitted to the probate court, Bay Construction performed the following repairs on Gosey's home: (1) In January 2015, Bradshaw

authorized the Gosey Trust to pay Bay Construction $9,933.41 to repair the "emergency" flooding damages caused by a burst pipe underneath the property. (2) Bay Construction replaced the staircase that Gosey used to access the backyard and garden for $48,909.20, which Bradshaw found to be "dangerous" with "significant rotting." (3) Bradshaw authorized payment of $70,793.36 to Bay Construction from May to August 2015 to repair the rear foundation of Gosey's home; according to Bradshaw, a pest control company had inspected the foundation and found it had shifted due to termite infestation. There is no credible evidence that Bradshaw obtained an assessment by a licensed contractor or competitive bids for any of this work.

13. For the staircase replacement, Bradshaw obtained a permit in June 2014. But no work was done until Bay Construction's proposal was submitted and accepted by Bradshaw on January 31, 2015, roughly a month after the CSLB issued the company a contractor's license. Bradshaw offered no reason for the seven-month delay even though, according to him, "it was clear that the steps were not safe" and repair was necessary because the staircase "was the only back entrance to the home" and served as Gosey's fire escape.

14. For the foundation repair, Bay Construction's proposal quoted $40,735.05, with a quarter of that amount to be paid upon acceptance of proposal, half upon delivery of materials, and the rest upon completion of the repair. Bradshaw immediately accepted the proposal and authorized the Trust to pay the full amount of $40,735.05 to Bay Construction on the same day. In addition to that payment, Bay Construction was paid another $6,350 the next day, $15,187.89 a week later, $5,853.27 on August 10, 2015, and $2,667.15 on August 26, 2015 — for a total of $70,793.36. Bradshaw explained to the probate court that "change orders were made to the project causing delays and increased costs" after an inspector found the initially approved plans did not comply with current codes. Throughout this period, the Trust owed $45,000 in arrears to the Institute on Aging, the agency that provided daily care to Gosey.

15. The probate court learned of Bradshaw's possible affiliations with Bay Construction upon his petition for a second reverse mortgage and promptly appointed Nancy Rasch to represent Gosey. Rasch told the court that Bradshaw had not disclosed information "relevant to a determination about the reasonableness of the funds spent on repairs," principally "how Juan Gonzalez went from being an unlicensed handyman to a licensed contractor." She also said "[t]here appear[ed] to be a lack of clarity and disclosure" concerning the facts that Bradshaw did not obtain competitive bids for the work done on Gosey's home, that Bradshaw was Gonzalez's attorney, and that Bay Construction employed Bradshaw's son, Grey. The probate court issued a written inquiry ordering Bradshaw to "explain how the funds were spent that resulted in such a quick depletion of available funds, including specific information about any and all repairs paid for with those funds."

16. Bradshaw filed two supplementary declarations in response. The first did not address his role in setting up Bay Construction or his attorney-client relationship with Gonzalez. He stated that he "called several contractors in an attempt to obtain bids … but most of the contractors did not return [his] call much less offer a bid" and Bay Construction emerged as the only choice for various emergency repairs. According to Bradshaw, "the lack of response or interest from the contractors [was] due to the availability of many larger construction projects in San Francisco at the time."

17. In a second declaration, he stated: "As noted in my previous declaration, for many of those jobs I did call different contractors for quotes, but I rarely had calls back, and when I did the contractors were not interested in the job or my conservative price point." In addition, Bradshaw characterized his affiliation with Gonzalez and Bay Construction as limited. In addition, his second declaration said Bay Construction had a valid license with Invernon serving as the RMO.

18. The probate court asked if Bradshaw was using his position as a fiduciary to further a career by giving unbid work to an individual or corporation with which he had ties. The probate court eventually authorized a second reverse mortgage on the Gosey home in October 2016 on the condition that only $250,000 may be disbursed for the purpose of paying for Gosey's care and living expenses, with no other expenditures permitted without prior court approval. Bradshaw confirmed there were no more repairs necessary on the Gosey home, and Robello likewise confirmed that the approved disbursement was to be used solely for Gosey's care.

19. Shortly after Gosey passed away in June 2017, counsel for Dolores Coleman ("Coleman"), one of the beneficiaries of the Gosey Trust, petitioned the probate court to suspend and remove Bradshaw as trustee. The probate court granted Coleman's petition and appointed an interim trustee. The superior court agreed and formally removed him as trustee, concluding that Bradshaw materially breached the Gosey Trust by violating his fiduciary duties. Specifically, the superior court found that Bradshaw engaged in self-dealing "when he repeatedly engaged Bay Construction, Inc., a company in which he was a principal and a substantial creditor, to perform no-bid work on settlor Ora Gosey's home"; that he did so "knowing that Bay Construction was without credible contracting credentials"; and that he demonstrated bad faith by "actively concealing from the court and misrepresenting his interests, Bay Construction's lack of credentials and the no-bid status of the work." The court said that while each circumstance in isolation would not necessarily lead to a finding of breach, the totality of circumstances showed Bradshaw "committed significant breaches" and provided "no confidence that Bradshaw would act any differently" if reinstated as trustee.

20. During those proceedings, the parties stipulated that the work Bay Construction performed on Gosey's home was of professional quality and priced at fair market value, and on that basis, Bradshaw argued he could not have breached his duties to the Gosey Trust. The court rejected this argument. As relevant here, the probate court credited Gonzalez's testimony over Bradshaw's. Likewise, the superior court found that Bradshaw repeatedly lied about many of the facts discussed and misstated a number of material facts and omitted many others.

21. In October 2017, the OCTC charged Bradshaw with five counts of misconduct, alleging that Bradshaw (1) created and perpetuated a scheme to defraud the Trust, (2) breached his fiduciary duties as trustee, (3) misappropriated funds in the Trust to benefit Bay Construction, (4) made misrepresentations in various court documents, and (5) engaged in a contractor business without a license. After a 22-day trial, the State Bar Hearing Department concluded that Bradshaw was culpable of engaging in a scheme to defraud the Gosey Trust (count one), breaching his fiduciary duties (count two), and making several misrepresentations under penalty of perjury (count four). The hearing judge found Bradshaw not credible on several points, including the existence of an attorney-client relationship between Bradshaw and Gonzalez, Bradshaw's testimony

regarding his limited control of Bay Construction, his purported receipt of no bids or estimates from other contractors, and his purported lack of motivation to conceal his true affiliation with Bay Construction. The Hearing Department recommended disbarment.

22. The Review Department issued an opinion dismissing all counts with prejudice. The OCTC petitioned for review, and the California Supreme Court remanded the matter to the Review Department for reconsideration. In September 2022, the Court of Appeal affirmed the superior court's judgment finding a breach of trust, concluding all factual determinations were supported by substantial evidence.

23. On remand in this matter, the Review Department held that Bradshaw was culpable of three grossly negligent misrepresentations (count four) and recommended six months of actual suspension. In so concluding, the Review Department reiterated its prior rejection of various factual findings supporting a scheme to defraud (count one), rejected the factual findings of Bradshaw's bad faith and disregard of his fiduciary duties (count two), and affirmed the Hearing Department's dismissal of culpability for misappropriation (count three). Judge Ribas dissented; she would have found Bradshaw culpable on the first four counts alleged by the OCTC and would have adopted the Hearing Department's recommendation of disbarment.

24. On OCTC's petition for review, the California Supreme Court reversed on the following grounds:

a. Bradshaw was culpable of engaging in a scheme to defraud the Gosey Trust by clear and convincing evidence. Bradshaw fraudulently held himself out to be a prudent trustee who acted in good faith and in the Trust's best interest. By obtaining reverse mortgages, Bradshaw converted the equity of Gosey's home into cash within the Trust, which he had full access to and enjoyed wide discretion in spending. Bradshaw incorporated Bay Construction purportedly for the benefit of Gonzalez but retained complete control of the company's cashflow, finances, payroll, and operations behind the scenes. Bradshaw identified various "essential" repairs on Gosey's home, and by not obtaining competitive bids, he made sure Bay Construction would be awarded contracts for the repairs and paid in amounts far exceeding its initial proposals. By withholding disclosure of his financial ties with Bay Construction and its licensing arrangement from the probate court, Bradshaw interfered with the court's duty and ability to ensure Trust funds were prudently managed.

b. Bradshaw's attempts at self-enrichment through hiring and paying a company he effectively controlled, coupled with the failure to disclose the arrangement, created a heightened risk that Trust funds would not be spent in good faith or in the best interest of Gosey. Bradshaw exhibited "conduct on the part of a member of the bar which cannot be condoned," whether or not his action caused material damage to Gosey or the Trust.

c. Because Bradshaw was the sole authorized signatory on Bay Construction's only checking account, and because the credit card statements were sent to Bradshaw for review and payment, Gonzalez had no knowledge or control of Bay Construction's cashflow or finances. The Review Department erred in rejecting the findings that Bradshaw misrepresented his affiliation with Bay Construction

and that he effectively controlled the company. Bradshaw hired and paid an unlicensed contractor as part of his scheme to defraud the Trust.

d. Bradshaw concealed from the probate court the intended purposes of the reverse mortgages and he attempted to avoid court supervision in order to perpetuate the alleged fraud. There is no good faith reason for Bradshaw's lack of transparency to the probate court. Clear and convincing evidence establishes that Bradshaw attempted to enrich himself by repeatedly hiring and paying an unlicensed contracting company he controlled, without adequate disclosure of his financial ties to the company or its licensing status, all while holding himself out to Gosey and the probate court as a fiduciary acting in the Trust's best interest. We conclude that Bradshaw is culpable for engaging in a scheme to defraud the Trust.

e. Clear and convincing evidence shows Bradshaw breached his fiduciary duties. In finding no culpability for breach of fiduciary duty, the Review Department emphasized that Gosey was not harmed because there is no evidence that the repair work was not done competently at fair market value. But culpability on this count does not turn on actual harm to the client, monetary or otherwise. Bradshaw breached the Trust when he repeatedly engaged Bay Construction, Inc., a company in which he was a principal and a substantial creditor, to perform no-bid work on settlor Ora Gosey's home, which was the Trust's main asset, knowing that Bay Construction was without credible contracting credentials, all while actively concealing from the court and misrepresenting his interests, Bay Construction's lack of credentials and the no-bid status of the work.

f. Bradshaw placed the interests of Bay Construction over the primary purpose of the Gosey Trust, which was the care and maintenance of Gosey, as evidenced by his disbursement of punctual payments to Bay Construction even as the Trust owed $45,000 in arrears to Gosey's caregiver, the Institute on Aging. Whether Bradshaw breached his fiduciary duty does not turn on what DBI decides to do after the fact. The employment of an unlicensed contractor is inconsistent with the prudent person standard and does not show due regard for the Trust.

g. The fact that the contractor Bradshaw employed was a company he controlled and had a financial interest in only strengthens the case for finding breach. It is true that the Trust permitted self-dealing, but that permission did not obviate the duty to act in good faith and as a prudent person would. Upon determining that the back staircase of Gosey's home was "dangerous" and obtaining a permit for repair in June 2014, Bradshaw did nothing for seven months — even though the staircase was Gosey's only fire escape — until Bay Construction submitted a proposal and was given the job without other bids. Even accepting that Bay Construction's repairs on Gosey's home were done competently at fair market value, a trustee, acting as a prudent person in this context, would not award more than $150,000 of work to a company he controlled without obtaining competitive bids. In addition, the Trust instrument did not exempt Bradshaw from the duty to disclose his financial ties with Bay Construction. In sum, the ends do not justify the means when it comes to a trustee's faithful discharge of fiduciary duties. Clear and convincing evidence shows Bradshaw breached the Trust by prioritizing his

interests over Gosey's and by exposing Gosey to the risks of engaging a contractor that lacked genuine credentials and qualified supervision.

h. Clear and convincing evidence shows Bradshaw intentionally misrepresented his relationship with Bay Construction and Gonzalez. It is significant that Bradshaw failed to disclose the true nature of his relationship with Bay Construction when the probate court was investigating his possible misconduct as trustee and attempting to account for Trust assets that had been rapidly depleted. In particular, the probate court sought to ascertain Bradshaw's connections to Bay Construction through written declarations after Rasch had informed the court that such affiliations existed and Bradshaw displayed a lack of candor and transparency throughout her investigation. When viewed in that light, any contention that Bradshaw was only grossly negligent — because he made his representations with the advice of his lawyer or because he genuinely believed he did not have to report any interest in Bay Construction short of formal ownership — is unpersuasive.

i. Having found Bradshaw culpable for engaging in a scheme to defraud, breaching his fiduciary duty, and making intentional misrepresentations in violation of sections 6106 and 6068, we now turn to the appropriate discipline for his misconduct.

j. State Bar disciplinary proceedings are meant to protect the public, the courts, and the legal profession. In 2009, Bradshaw stipulated to misconduct for failing to inform his client Kita Miller of the amount of a settlement he received on her behalf. Specifically, he received a check of $47,500 made out to her but mailed her a check for $11,181.22 without informing her of the actual amount received. Bradshaw was subject to a private reproval. The Review Department reduced the weight assigned by the Hearing Department to this factor from moderate to minimal. But the prior disciplinary action occurred within six years of the events resulting in the current matter.

k. Bradshaw is culpable for three counts of misconduct, with each count encompassing multiple acts over a sustained course of action.

l. The court assigns substantial weight to the misconduct involving a highly vulnerable victim. Bradshaw's actions defrauding and draining a trust meant to benefit an elderly woman with advanced dementia were highly reprehensible. Gosey had no spouse or children; when she sustained a fall in 2013, it took days for her to receive medical attention because no one knew until her tenant checked in with her. Gosey's age, mental condition, and lack of community made her especially vulnerable. As Gosey's attorney and trustee of the Gosey Trust, Bradshaw was responsible for acting in her best interest, yet he repeatedly prioritized his own pecuniary interests over her welfare. Bradshaw paid Bay Construction liberally from the Trust even as bills from Gosey's caregiver were in arrears. Bradshaw knew Gosey had mere months remaining in hospice when he petitioned the probate court for a second reverse mortgage on her home, requesting a lump sum of $889,741.05. Bradshaw took advantage of Gosey's high level of vulnerability, and this factor must be accorded substantial weight, consistent with the public protection purpose of State Bar disciplinary proceedings.

m. Bradshaw has a history of "asserting nefarious motives on the part of those who questioned his dubious actions." During a September 2016 hearing in the probate court, Bradshaw accused the court of attempting to "demonize" him when the judge expressed valid concerns over Bradshaw's ties with Bay Construction and his lack of candor around his involvement. In addition, Rasch testified that Bradshaw wrote her a letter accusing her of defamation after she made a complaint to the State Bar based on her investigation. Throughout this disciplinary action, Bradshaw repeatedly deflected responsibility toward his lawyer Robello and has yet to acknowledge his wrongdoing. Because Bradshaw "has no appreciation that [his] method of practicing law is totally at odds with the professional standards of this state," the court accords substantial weight to this factor.

n. The record does not show Bradshaw's discipline should be mitigated for extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct.

o. Bradshaw's lack of integrity, determined by two separate fact finders, was further highlighted by the testimony of OCTC's rebuttal character witness, Richard Zitrin, an expert on legal ethics who also testified as a complaining witness at Bradshaw's first disciplinary action. In this matter, Zitrin testified that for six years in a row, Bradshaw failed to disclose his criminal record, including a felony conviction for grand larceny by check in 1991, when applying to a lawyer referral service run by a local bar association. When Zitrin investigated Bradshaw's representation of Kita Miller through the referral service — the investigation that resulted in a private reproval against Bradshaw — Bradshaw misled Zitrin into believing that his fee agreement with Miller allowed him to deposit the settlement check made out to her into his own trustee account.

p. The record established multiple counts of misconduct in Bradshaw's handling of the assets and home of a highly vulnerable elderly victim to whom he owed a fiduciary duty. He misused his authority and Gosey's confidence in an attempt to enrich himself and made willful misrepresentations to various courts in order to obscure his relationship with Bay Construction and frustrate the probate court's ability to supervise his conduct as trustee of the Gosey Trust. The risks to the public, the courts, and the profession are compounded by the fact that Bradshaw had been disciplined for dishonesty in handling client funds not long before the present scheme and by Bradshaw's continuing indifference and lack of insight or remorse toward his misconduct.

q. Because the totality of the circumstances shows that Bradshaw has repeatedly failed to uphold the most basic duties of an attorney, he is unfit to serve as a member of the bar or an officer of the court. Because the principal concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys, Bradshaw is disbarred.

H. *In re Est. of Roberson,* 2025 Tenn. App. LEXIS 460 (Court of Appeals of Tennessee, at Knoxville 2025). Lack of proof of paternity bars inheritance.

1. Richard Douglas Roberson ("Decedent") passed away on August 20, 2021, in Hamilton County at the age of 85. Decedent had two children, Deborah R. Johnson ("Plaintiff") and Randall Roberson, who passed away in August 1973. Randall Roberson was the legal father of two children, Bobby and Jeffrey Roberson. Upon Decedent's death, Plaintiff was appointed as the administrator of the Estate of Richard Douglas Roberson ("Estate") pursuant to the Letters of Administration entered in the Chancery Court of Hamilton County.

2. Shortly thereafter, Tracy Allen Pell a/k/a Tracy Allen Roberson ("Defendant"), who resides in Northeastern Correctional Complex in Clifton, Tennessee, contacted counsel for the estate and advised that he was an heir to the estate as a child of Randall Roberson. Notably, Defendant was mentioned in Decedent's obituary as follows: "Decedent is survived by . . . grandchildren, Bobby Roberson[,] Jeff Roberson[,] Tracy Roberson[,] and Saderia Johnson[.]"

3. On August 10, 2022, Plaintiff initiated this declaratory judgment action to determine whether Defendant was or was not the son of Randall Roberson and to declare what interest, if any, Defendant had in the Estate. The case proceeded to a hearing, at which Bobby and Jeff Roberson denied that Defendant was their brother.

4. Defendant, who was born on April 1, 1972, approximately 16 months prior to Randall Roberson's death in August 1973, presented numerous documents establishing his relationship to the Roberson family. Of note, Defendant was adopted on May 5, 1983, and had his name legally changed from Tracy Allen Roberson to Tracy Allen Pell in recognition of his adoptive father, James Albert Pell, Jr. Likewise, Decedent regularly acknowledged Defendant as his "grandson" in court proceedings relating to the adoption in 1983 and other criminal matters that occurred much later. However, the record was devoid of any evidence establishing Defendant's legal relationship with his purported father, Randall Roberson. Defendant presented two copies of his birth certificate with his name listed as "Tracey Allen Schwiger" with "Schwiger" marked out and "Roberson" penciled in. A father was not listed on the first birth certificate, and James Albert Pell, Jr. was listed as the father on the second birth certificate.

5. The trial court found that Defendant had not carried his burden of proof to establish the required relationship of parent and child between himself and Randall Roberson. The court held that half of the estate would be distributed to Plaintiff as Decedent's daughter and that the remainder of the estate would be divided equally between Bobby and Jeff Roberson, as the established legal heirs of Decedent's son, Randall Roberson. Defendant's appeal followed.

6. The court of appeals affirmed on the following grounds:

> a. Defendant was born in 1972, that Randall Roberson passed away in 1973, and that Defendant was adopted in 1983 by Mr. Pell. Defendant's adoption would ordinarily pretermit any inheritance through a potential biological father. However, an adopted child is permitted to inherit through his or her biological parent if such parent "dies without the relationship of parent and child having been previously terminated and any other person thereafter adopts the child." Such relationship between the biological parent and child must be established.
>
> b. Defendant acknowledged that his mother and Randall Roberson never participated in a marriage ceremony in accordance. Defendant also never timely

filed a paternity action to establish his paternal relationship with Randall Roberson, who died in 1973. Accordingly, Defendant failed to establish the required paternal relationship between himself and Randall Roberson.

I. *In re Est. of Wennes,* 2025 Minn. App. Unpub. LEXIS 600 (Court of Appeals of Minnesota 2025). Court did violate due process rights by imposing a 15-minute time limit for hearing, and dead man is not required to sign a deed for it to be valid.

1. In June 1989, decedent Lillian Clara Wennes signed a will conveying her "entire residuary estate" to her husband if he survived her. If her husband did not survive her, Wennes gave her entire residuary estate to her daughter, respondent Jean M. Beguhl. In February 2009, approximately four months after her husband passed away, Wennes executed a Transfer on Death Deed ("TODD") conveying her homestead to respondent. Wennes died in December 2018. The death certificate indicates that Wennes was widowed and not remarried.

2. In October 2024, Wennes' grandson, self-represented appellant David J. Beguhl, filed an amended petition for determination of descent, arguing that Wennes' homestead should have been distributed between himself and three of his siblings. In the petition, he claimed that prior to Wennes' death, Wennes stated that he and his siblings would "inherit her estate." Respondent filed an objection two months later, arguing that the homestead at issue was Wennes' non-probate property and Wennes executed the TODD naming her as the sole beneficiary. In support of her objection, respondent cited to Wennes' will, which was signed in June 1989 and in the district court's file.

3. At a December 2024 initial hearing, appellant argued that the "[TODD] is evidence of forgery." Appellant then explained that he "wrote out a whole explanation on how [he] came to that conclusion" and offered to address the claim through his opening and closing statements. The district court responded, "Well, we only have about 15 minutes total for today's hearing. . . . So[,] what I could do . . . is, I could give you five minutes, so I could give [opposing] counsel the opportunity to respond, or you could rest on your written submissions." When asked to clarify "rest on the written submissions," the district court explained: "I wouldn't recommend you read those right into the record, because I can read them — And I can review them. But I also wanted to maybe let you know that today's hearing — so this is kind of an initial calendar, so we only have about 15 minutes. There — if it's warranted, there is a potential that an evidentiary hearing can be scheduled, and at that time, that's when exhibits could be admitted and exchanged, and there would be a full-blown evidentiary hearing, which would mean witnesses would be called and testimony would be taken. But I'm going to tell you, David, that just based on the written submissions here today, you would have to — you would have to be prepared to really prove that the TODD is, in fact, not valid, because that deed is already in the County Recorder's hands and accepted, you know."

4. The district court issued an order for submissions and requested appellant to file written submissions that establish a prima facie case that Wennes had a subsequent Will other than what is in the Court's file and that the deed on file is a forgery. Appellant primarily focused on Wennes' marital status and the fact that Wennes' husband did not sign the deed. He noted that the marital status in the TODD says "single" while her death certificate says "Widowed (and not remarried)." And while acknowledging that Wennes signed the TODD "four months and eighteen days after Mr. Wennes had passed away," appellant argued that Mr. Wennes' signature was required. He maintained that there was

an updated will devising Wennes' homestead to himself and his siblings, that respondent and her attorney were the only ones in possession of that will, and that they continued to deny its existence.

5. In February 2025, after reviewing the written submissions, the district court determined that appellant failed to establish factual and legal support for his position that decedent's homestead should be decreed to himself and three others. It found that the TODD transferring the homestead to respondent was validly executed and, even assuming there was another will as appellant suggested, the homestead remained a non-probate asset. For these reasons, the district court denied appellant's petition of descent and dismissed the matter.

6. The court of appeals affirmed on the following grounds:

a. Appellant misunderstood the purpose of the initial hearing in December 2024. At the hearing, the district court referee allowed appellant an opportunity to explain why he believed the TODD was forged and why he believed there was another will. The district court explained that appellant would need to be prepared to prove that the TODD was not valid and gave appellant an opportunity to address respondent's arguments. After respondent's oral argument, appellant stated that he wanted to go through his exhibits and the district court again noted that if appellant continued with his objection that a trial would be scheduled where witnesses are called, and testimony was taken and explained that it was not making findings today. After a brief recess, the district court reminded both parties that there was not enough time for an evidentiary hearing but stated that it would take the matter under advisement, issue an order, and may request additional submissions before proceeding to an evidentiary hearing. After the hearing, the district court gave appellant an opportunity to submit additional written submissions to support his challenge to the TODD. And although appellant did, in fact, provide additional written submissions, he failed to establish a prima facie case to support his challenge.

b. The district court treated appellant fairly. The district court took time to explain the purpose of the initial hearing and the evidentiary hearing process, and gave appellant an opportunity to explain why he believed the TODD was forged. The district court explained what appellant would need to be prepared to address at the initial hearing and for an evidentiary hearing. The district court was patient and respectful during the hearing.

c. Next, appellant argues that the district court's "emphasis on this objection without proper consideration of the [appellant's] interest suggests the lack of impartiality." Appellant's argument suggests that he is primarily dissatisfied with the outcome of the proceedings. But previous adverse rulings by themselves do not demonstrate judicial bias.

d. There is nothing in this record suggesting that the district court committed judicial misconduct by displaying bias or a lack of impartiality by limiting the time for argument or not considering appellants argument. The district court simply stated, "based on your written submissions so far, I'm not sure that a Court could find in your favor." This is the district court's opinion based on the facts introduced throughout the proceedings.

J. *Estate of Rosborough,* 2025 Tex. App. LEXIS 5915 (Court of Appeals of Texas, Fifth District 2025). Testimony of existence of a "will kit" is not proof of an alleged will.

1. Victor Glen Rosborough died in 2020, intestate, no will having been filed in the probate court, and unmarried. Tori Woods and Caresse Jackson claim to be his daughters. In June 2022, the probate court signed an order requiring that the following individuals submit to genetic testing: Jackson's "alleged half-sister" Woods, Jackson, Woods' mother, and Melba Rosborough, decedent's mother. Woods filed a "motion to strike DNA test." At a hearing, Woods' attorney argued there was no proof that DNA testing of Jackson was conducted at an accredited facility and that Jackson's DNA test results should be stricken. When, in response to questioning from the probate judge, Woods' counsel admitted he had not seen Jackson's test results and had not read them, the probate judge denied Woods' motion to strike "on that basis alone." That same day, the probate court signed an order denying Woods' motion to strike.

2. Woods filed a motion to recuse the probate judge. Another judge sitting by assignment as presiding judge held a hearing at which Woods testified that her attorney did not assist her in drafting the motion to recuse and did not file the motion to recuse. Woods read part of her motion to recuse that stated the judge "allowed heirship hearings to be removed from the docket for what reasons I don't understand." Woods testified she believed the judge was texting "opposing parties from the bench," and this showed "a personal relationship with the other parties that could create a bias or a personal interest in the outcome for other parties." At the conclusion of the hearing, the assigned presiding judge stated that he was going to deny the motion to recuse. That same day, the assigned presiding judge signed an order denying the motion.

3. Trial before the probate court was held on Woods' and Jackson's applications to determine Rosborough's heirs. Decedent's mother and sister testified, and both affirmed the decedent had acknowledged two daughters, Tori Woods and Caresse Jackson. Jackson testified that she is Rosborough's daughter born in February 1990. Jackson had not had a relationship with Rosborough, but she "knew of him" through her mother. When Jackson was an adult, her husband bought her an Ancestry DNA kit that indicated Rosborough was her father's name, and that prompted her to reach out to him. Jackson and Rosborough "had a great conversation, and then [they] kept in touch." Jackson's attorney offered into evidence a DNA test showing Jackson is the granddaughter of Rosborough's mother. After overruling Woods' objection that "there was no DNA evidence from Mr. Rosborough," the court admitted the test results. Jackson testified she was not contesting Woods' "status as an heir," and she understood that meant "the estate would be divided equally between the two of" them.

4. Woods testified her mother sought a decree of legitimation in 1988, and "a decree of legitimation was signed" that Rosborough was Woods' father. Woods did not know about Jackson until months after Rosborough's death. Woods occupied Rosborough's home after his death. In 2020, Woods saw a will in a file cabinet in Rosborough's bedroom when she went into Rosborough's house "the first time." Woods "saw a will kit, but it was empty after [her] aunt entered the home." Woods could not "speak for anybody else" that might have seen the will, and no one was present when Woods saw the will.

5. At the conclusion of the hearing, the probate court advised that it heard significant testimony about Jackson's ability to inherit and found conclusively that she is entitled to inherit. As to Woods, the court stated that she had failed to meet her fundamental

obligation of establishing that she's entitled to inherit. The court ordered Woods to "file something with this Court" and "supplement her pleadings to establish it on the face of the pleadings." The court advised Woods that, if she did not do so "by Friday," the court would sign a "judgment of heirship saying that the only heir to this estate is Ms. Caresse Jackson." The court found that Rosborough died without a will, and the heir of his estate was his daughter Jackson, subject to Woods' "mandatory requirement to file a supplemental pleading establishing on the face of the pleading that she's entitled to inherit and to provide an exhibit to that with proof that she is entitled to inherit that complies with the Texas Estates Code and the Texas Family Code." The court established a $50,000 bond.

6. On October 2, 2023, the probate court signed a judgment declaring heirship establishing that Woods and Jackson were both children of Rosborough and awarding them each fifty percent of Rosborough's real and personal property. Woods appealed pro se.

7. The court of appeals affirmed on the following grounds:

> a. The court holds pro se litigants to the same standards as licensed attorneys and requires them to comply with applicable laws and rules of procedure. To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel.
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> b. The law is well established that, to present an issue to this Court, a party's brief shall contain, among other things, a concise, nonargumentative statement of the facts of the case, supported by record references, and a clear and concise argument for the contentions made with appropriate citations to authorities and the record. Bare assertions of error, without argument or authority, waive error. When a party fails to adequately brief a complaint, she waives the issue on appeal.
>
> c. Even construing Mother's brief liberally, we conclude Mother has waived review of her issues. The entirety of Woods' argument section in her corrected brief is as follows: "The only evidence presented at the heirship hearing by the Appellee was a DNA test report that was already deemed ineligible by the judge during the previous hearing for Motion to Strike DNA Test. The Motion to Strike DNA Test was denied, despite the illegibility of the documents and DNA test report (which therefore prevented proper analysis). Also, this was a grandparentage test that was presented to the court (during both the Motion to Strike DNA Test hearing and the Heirship hearing), and not the required siblingship test. The Decedent's will was never allowed to be probated according to the law. The probate court erred in disregarding important statues in regards to establishing paternity and heirship. There is a capped age limit on establishing paternity in New York and New Jersey (residence(s) of the Appellee) at 21 and 23 years of age, respectively. (Please see Article 5 of the Family Court Act, New York, the New Jersey Parentage Act.) As well, there are Texas Statutes that recognize a presumed, acknowledged, or adjudicated father. (Please see Sec. 160.609 and Sec. 160.204 of the Texas Family Code.) The Appellee was not required to present any family history during the heirship hearing. It is an abuse of discretion to not properly consider evidence at trial, and this abuse of discretion adversely affected the Appellant."

d. There is no will in the record and only Woods' testimony she saw a will or a "will kit" to indicate a will ever existed. The contents of the alleged will were never established. There is nothing in this record, and Woods has identified nothing, to support reversal of the trial court's determination.

K. *John-Crane v. Leadfoot Recovery Co.*, 2025 U.S. Dist. LEXIS 100875 (United States District Court for the District of Oregon, Eugene Division 2025). Although a trustee may represent herself pro se, she may not represent a trust pro se.

1. Self-represented Plaintiff Jamie John-Crane alleges that Plaintiff is the trustee of the JCJC Living Revocable Trust ("the Trust"). Plaintiff brings state and federal claims on behalf of the Trust. Plaintiff alleges that, on August 23, 2024, Defendants "unlawful[ly] and reckless[ly]" attempted to repossess a 2023 Ford Bronco that is owned by the Trust. Plaintiff seeks "compensation for physical injury, emotional distress, property damage, and violations of state and federal law[]" that resulted from the attempted repossession.

2. Defendants moved to dismiss, which the court granted on the following grounds:

a. Self-represented (pro se) pleadings are held to less stringent standards than pleadings by attorneys. A court should construe the pleadings of self-represented plaintiffs liberally and give self-represented plaintiffs the benefit of any doubt. Additionally, a self-represented litigant is entitled to notice of a complaint's deficiencies and provided the opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment.

b. On behalf of the Trust, Plaintiff brings six state claims: Breach of Peace; Trespass to Private Property; Negligence and Negligent Supervision; Assault and Battery; False Imprisonment; and Intentional Infliction of Emotional Distress, and six federal claims: Armed Kidnapping; Armed Use of Fictitious Obligations; Robbery of Property Held in Trust; Fair Debt Collection Practices Act; and two claims under the Sherman Antitrust Act.

c. Defendants move to dismiss the Complaint because it fails to "present any facts alleging that Defendants offended against the Trust." Plaintiff failed to respond. Although a trustee may represent herself pro se, she may not represent a trust pro se. A trustee may not represent a trust pro se in federal court. Here, self-represented Plaintiff alleges that she is the trustee of the JCJC Living Revocable Trust and brings state and federal claims on behalf of the Trust. Because Trusts cannot be represented by a pro se party and must have licensed counsel in federal court, Plaintiff fails to state any claims on behalf of the Trust.

L. *Larsen v. Larsen*, 2025 N.Y. Misc. LEXIS 7682 (Supreme Court of New York, Kings County 2025). Counsel of record for trustees permitted to withdraw where trustees violate court order by bombarding court staff with improper emails, against the explicit advice of counsel.

1. Louann, Katerina, and Lydia (the "Trustees"), each of whom is a trustee of certain family trusts ("the Trust Plaintiffs"), sued in their respective capacities as trustees, and also sue derivatively on behalf of corporate entities, which are also named as nominal defendants.

2. Their attorney ("Movant") moved to be relieved as counsel of record for the various plaintiffs named in this action, which the court granted on the following grounds:

a. Sufficient cause has been found to exist when there has been a breakdown in the attorney-client relationship or when the client flatly challenged counsel's loyalty and professional integrity, or when the client, by his or her conduct, renders it unreasonably difficult for the lawyer to carry out employment effectively.

b. The Trustees contend, without a scintilla of any supporting evidence, that there have been "Corrupt Court Filing Manipulation tactics and illegal changing of the Court filed documents." Additionally, as recorded in the transcript of the parties' appearance, plaintiff-trustee Louann acknowledged that she took it upon herself to speak with other attorneys in the courthouse about her suspicions that certain documents were somehow "changed" or "modified" after they were uploaded to the e-filing system, despite the fact that Movant currently represents her and the other Trustees in this action. Movant's representative, Mr. Pierce, advised the Court that he has explained multiple times to Ms. Larsen that even if some formatting modifications may occur upon uploading, the contents of the e-filed documents are not altered, and yet, she continues to insist otherwise.

c. Moreover, each of the three Trustees have repeatedly made unauthorized communications to the Court which were done not only "against the advice of counsel," but also in blatant violation of the January 13, 2025 order by the Hon. Reginald A. Boddie, J.S.C., who explicitly ordered them to "refrain from contacting the Court directly in any manner, unless directed otherwise by the Court." The Trustees previously made these communications to Justice Boddie's chambers staff, and continued to send them to the court's chambers staff after the case was reassigned. Notably, Plaintiffs' counsel was warned about "emails and accusations that have been made by your client to the courthouse," and advised that "Ms. Larsen has an attorney and she cannot arbitrarily continue to just send targeted emails accusing people of things that are incorrect." Mr. Pierce stated that he has advised his clients not to send the emails, as it is his job to contact the Court on their behalf, but Ms. Larsen "vehemently disagrees, and the communications that continue are not on advice of Counsel, they are against advice of Counsel."

d. Ms. Larsen's refusal to accept Mr. Pierce's explanations regarding the e-filed documents, and her rejection of his proposal to personally compare the original and e-filed versions so as to assuage her concerns, illustrates a breakdown in the attorney-client relationship. Similarly, Ms. Larsen's solicitation of contrary advice from other attorneys in the courthouse regarding the purported document modifications shows that she has challenged Mr. Pierce's loyalty and professional integrity by undermining him before his colleagues and this Court.

e. Additionally, the actions of all three Trustees in continuing to violate Justice Boddie's order by bombarding Court staff with improper emails, against the explicit advice of Mr. Pierce, constitutes conduct that renders it unreasonably difficult for Movant to represent them effectively. Hence, under all of the circumstances, Movant has established good and sufficient cause to withdraw as counsel of record for Plaintiffs.

M. *Ludwiczak v. Brancato,* 2025 U.S. Dist. LEXIS 44771 (United States District Court for the Western District of Kentucky, Owensboro Division 2025). Private attorneys and executors of estates are not state actors for purposes of claims of violations of constitutional rights.

1. Plaintiff Barrett James Ludwiczak, pro se, is incarcerated at Daviess County Detention Center. He sued Frank Anthony Brancato, an attorney, and Bamberger & Brancato, PSC, a law firm. Plaintiff alleges that Defendant Brancato was the attorney who prepared his mother's will and that he is now the executor of his mother's estate. Plaintiff asserts that Defendant Brancato violated his First Amendment rights when he threatened to sue Plaintiff for "leaving an honest review regarding his malpractice and conflict of interest in his not following my mother's wishes in leaving me her interest in the Windsor property." Plaintiff also asserts that Defendant Brancato violated his rights under the Seventh Amendment when he favored one beneficiary over another and "willingly presented bias testimony against my lawsuit, in favor of my father, the defendant in my lawsuit." Plaintiff also makes what the Court construes as state-law claims — claims that Defendant Brancato breached his fiduciary duty as the executor of Plaintiff's mother's estate and intentionally inflicted emotional distress upon him. As relief, Plaintiff seeks damages.

2. The federal district court dismissed the suit on the following grounds:

a. When a prisoner initiates a civil action seeking redress from a governmental entity, officer, or employee, the trial court must review the complaint and dismiss the complaint, or any portion of it, if the court determines that the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief.

b. In order to survive dismissal for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Although pro se pleadings are to be held to a less stringent standard than formal pleadings drafted by lawyers, the court is not required to conjure up unpled allegations.

c. Section 1983 creates no substantive rights but merely provides remedies for deprivations of rights established elsewhere. To the extent that Plaintiff is suing Defendant Brancato as a private attorney, Plaintiff's constitutional claims against him fail because private attorneys are not considered to be state actors for purposes of § 1983. Similarly, to the extent that Plaintiff is suing Defendant Brancato as the executor of his mother's estate, his constitutional claims against him fail because courts have consistently held that executors of estates are not state actors for § 1983 purposes.

N. *Martin v. Redstone Fed. Credit Union,* 2025 U.S. Dist. LEXIS 184419 (United States District Court for the Northern District of Alabama, Northeastern Division 2025). Allegations that are incomprehensible and nonsensical, based on rejected sovereign citizen theory, and relate to a fictional trust do not support a cognizable claim under Alabama or federal law.

1. The plaintiff, Allen-Anthony Martin, proceeding pro se, alleged six claims against the defendant, Redstone Federal Credit Union ("Redstone"): i.e., breach of fiduciary duty (Count I); "Trust Fraud and Malfeasance of Office" (Count II); "Default by Non-Response and Power of Attorney for Lien Filing" (Count III); "Violation of UCC § 9-201 — Enforcement of Security Agreement" (Count IV); "Trespass and Unreasonable Conduct" (Count V); and, "Violation of Constitutional Rights" (Due Process) (Count VI). The last two Counts, V and VI, alleged violations of plaintiff's constitutional rights. Accordingly, the court possesses federal-question jurisdiction.

2. Plaintiff's "amended complaint" appears to be merely a revision of the claims alleged in Count III ("Default by Non-Response and Power of Attorney for Lien Filing") and Count IV ("Violation of UCC § 9-201 — Enforcement of Security Agreement"). Ordinarily, an amended complaint supersedes the original complaint, which becomes a legal nullity. However, the court will assume, as Redstone does, that plaintiff intended the allegations contained in his original complaint to be read together with the revisions to Counts III and IV contained in the "amended complaint." The two pleadings thereby constitute plaintiff's statement of his six claims.

3. As best as the court could discern, plaintiff's lawsuit centers around a document attached to his complaint, and titled "UCC [Uniform Commercial Code] Financing Statement." Plaintiff apparently filed the document in the State of Florida's "Secured Transaction Registry" on September 11, 2023. The document lists the Debtor's Names as: "ALLEN ANTHONY MARTIN TRUST©"; and "ALLEN ANTHONY MARTIN, NON-ADVERSE, NON-BELLIGERENT, NON-COMBATANT PRIVATE FOUNDATION." The same document lists the "Secured Party's Name" as "Allen-Anthony Martin."

4. The section of the form titled "Collateral" contains the following statement: "This is the entry of collateral by Trustee/Secured Party on behalf of the Trust/Estate; ALLEN ANTHONY MARTIN TRUST© in the Commercial Chamber under necessity to secure the rights, title(s), interest and value therefrom in and of the Root of Title from inception, as well as all property held in trust including but not limited to DNA, cDNA, cell lines, retina scans, fingerprints and all Debentures, Indentures, Accounts, and all the pledges represented by same included but not limited to the pignus, hypotheca, hereditments, res, the energy and all products derived therefrom nunc pro tunc, contracts, agreements, and signatures and/or endorsements, facsimiles, printed, typed or photocopied of owner's name predicated on the "Straw-man" Eris legis/Trust/Estate described as the debtor and all property is accepted for value and is Exempt from levy. Lien places on debtor entities is for all outstanding property still owed but not yet returned to trust from entities such as municipalities, governments and the like, not on trust entity itself. Trustee is not surety to any account by explicit reservation/indemnification. The following property is hereby registered and liened in the same: all Certificates of Birth Document [redacted in original], SSN/UCC Contract Trust Account-prepaid account Number [redacted in original] Exemption Identification Number [redacted in original], is herein liened and claimed at a sum certain $100,000,000.00, also registered: Security Agreement No. 03131982-AAM-SA, Hold Harmless and Indemnity Agreement No. 03131982-AAM-HHIA, Copyright under item no.: 03131982-AAM-CLC Adjustment of this filing is in accord with both public policy and the national Uniform Commercial Code. Trustee/Secured Party Allen-Anthony: Martin, is living flesh and blood human being sojourning upon the land/ground/soil of the land known as Alabama, and not within fictional boundaries, territories nor jurisdiction of any fictional entity including fictional Federal geometric plane(s)."

5. Plaintiff signed his name as "Secured Party." He alleges that the UCC form is evidence that he is a beneficiary of a "Cestui Que Vie Trust," with an enforceable security interest. Plaintiff alleges that he applied for a $10,000 loan from Redstone "under the Cestui Que Vie Trust, a legally binding instrument that designated [Redstone] as the Trustee responsible for administering funds on behalf of the Plaintiff." Redstone denied plaintiff's loan application on May 6, 2024. Plaintiff contends that Redstone's denial of the loan application was a breach of fiduciary duty and fraud. Plaintiff also alleges that Redstone

failed to adequately respond to the requests for information and other "notices" that he sent to defendant.

6. Plaintiff further states that: "On November 1, 2024, Plaintiff attempted to resolve the dispute in person by visiting Defendant's physical location and speaking with a representative regarding the denial of the loan and failure to respond to his requests. Despite Plaintiff's legitimate attempt to address the matter, Defendant's employees issued a trespass notice against Plaintiff and called law enforcement. Plaintiff was stalled in the office for 20 minutes. Law enforcement officers (5 of them) proceeded to aggressively handle Plaintiff and pat him down before attempting to physically remove him from the bank with no explanation. This action [was] done by Officer Emani Richardson Badge #20027. Once outside, Defendant's representative handed Plaintiff the notice and told him it was enforceable for all locations until legal counsel contacted him. Plaintiff did not receive any explanation for this action."

7. Plaintiff contends that Redstone's conduct was unlawful. Redstone filed a motion to dismiss all of plaintiff's claims, which the federal district court granted on the following grounds:

> a. A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.
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> b. Plaintiff's complaint is an impermissible "shotgun pleading," because it is a lengthy, largely repetitive collection of irrelevant facts and citations to legal authorities that offer no apparent support for any colorable claims against Redstone.
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> c. Plaintiff's complaint should be dismissed in its entirety because it relies on "sovereign citizen" theories that have been widely rejected by courts as frivolous.
>
> d. The basis for theories espoused by adherents of the sovereign citizen movement has been described by another district court as follows: "The foundation of [a sovereign citizen] claim is equal parts revisionist legal history and conspiracy theory. Supposedly, prior to the passage of the Fourteenth Amendment, there were no U.S. citizens; instead, people were citizens only of their individual states. Even after the passage of the Fourteenth Amendment, U.S. citizenship remains optional. The federal government, however, has tricked the populace into becoming U.S. citizens by entering into "contracts" embodied in such documents as birth certificates and Social Security cards. With these contracts, an individual unwittingly creates a fictitious entity (i.e., the U.S. citizen) that represents, but is separate from, the real person. Through these contracts, individuals also unknowingly pledge themselves and their property, through their newly created fictitious entities, as security for the national debt in exchange for the benefits of citizenship. However, the government cannot hold the profits it makes from this use of its citizens and their property in the general fund of the United States because doing so would constitute fraud, given that the profits technically belong to the actual owners of the property being pledged (i.e., the real

people represented by the fictitious entities). Therefore, the government holds the profits in secret, individual trust accounts, one for each citizen."

e. Those beliefs manifest as names written in all capital letters and the same names written with just the initial letters capitalized. A sovereign citizen plaintiff may reference a "cestui que vie" trust, ostensibly based upon the Cestui Que Vie Act of 1666, and seek to validate the so-called trust through the filing of UCC financing statements, in which he lists himself as both the secured party and the debtor. Although plaintiff disavows the characterization of his claims as based upon "sovereign citizen" ideology, his complaint contains hallmarks of those discredited theories, as illustrated by the contents of the UCC Financing Statement set out above.

f. Plaintiff's complaint is due to be dismissed because it is based upon frivolous, sovereign citizen theories, as opposed to cognizable legal claims.

g. Plaintiff alleges that Redstone's failure to provide a written agreement or documentation related to plaintiff's trust interest is a violation of the Statute of Frauds (1666 Act), which requires contracts involving interests in land or property rights, including trust agreements, to be evidenced in writing. Plaintiff also invokes the Racketeer Influenced and Corrupt Organizations Act, contending that Redstone's conduct in denying his loan application and failing to adequately respond to his notices constitutes a pattern of racketeering activity.

h. Plaintiff's claim of "Trust Fraud and Malfeasance of Office" is not based on any recognized cause of action under Alabama or federal law. Instead, it is incomprehensible and replete with the legal-sounding but meaningless verbiage commonly used by adherents to the so-called sovereign citizen movement. Court filings by "sovereign citizens" are written in a code-like language that judges, lawyers, and other court staff usually cannot understand. This is because sovereigns believe that if they find the right combination of words, punctuation, ink color, and timing, they can obtain anything they want.

i. Additionally, plaintiff has not alleged facts that would support a civil RICO claim. Plaintiff has failed to allege facts that support any of the requisite elements.

j. Plaintiff states, in part: "By failing to respond within five business days to Plaintiff's second formal notice, Defendant's non-response has implicitly granted Plaintiff a Power of Attorney (POA), as allowed by law in circumstances where a fiduciary or trustee fails to perform its duties and obligations. This implied POA allows Plaintiff to act on Defendant's behalf, including the right to file a Claim of Lien against Defendant and any third parties involved, for the amount of $1,000,000 per recipient, as stipulated in Plaintiff's UCC-1 filing and the fee schedule attached hereto as Exhibit A. This claim of lien is fully enforceable by Plaintiff as a secured party and creditor of the trust. By failing to respond within five business days to Plaintiff's second formal notice, Defendant's non-response has implicitly granted Plaintiff a Power of Attorney (POA), as allowed by law in circumstances where a fiduciary or trustee fails to preform its duties and obligations. This implied POA allows Plaintiff to act on Defendant's behalf, including the right to file a Claim of Lien against Defendant and any third parties involved, for the amount of $1,000,000 per recipient, as stipulated in Plaintiff's

UCC-1 filing and the fee schedule attached hereto as Exhibit A. This claim of lien is fully enforceable by Plaintiff as a secured party and creditor of the trust."

k. Plaintiff's allegations, taken as a whole, are: incomprehensible and nonsensical; based on rejected sovereign citizen theory; and relate to a fictional trust. For those reasons, they do not support a cognizable claim under Alabama or federal law.

l. Claims based on Redstone's failure to provide the plaintiff access to illusory trust funds or to respond to legally meaningless notices have no merit and should be dismissed.

m. It is well settled under Alabama law that, absent circumstances not present here, the relationship between a bank and its customer is a creditor-debtor relationship that does not impose a fiduciary duty on the bank. Accordingly, Redstone's denial of plaintiff's loan application does not support a claim of breach of fiduciary duty, and this claim fails.

n. The fact that "law enforcement" officers were allegedly involved in plaintiff's removal from Redstone's premises does not make Redstone liable for any unconstitutional acts that may have occurred. In addition to the fact that Redstone is a private actor, there were no "trust funds" or other property of which plaintiff could be deprived.

o. Plaintiff's use of nonexistent case citations in his complaint and amended complaint must be addressed. Of the twelve citations to legal authority contained in the complaint, eight are "fake." Further, all five cases cited in plaintiff's amended complaint do not exist. As just one example, in Count I of the complaint, plaintiff cites "*Wells Fargo Bank, N.A. v. Bank of America*, 121 Cal. Rptr. 3d 517 (2011)," and states "[t]his case discusses the elements of a fiduciary duty and the breach thereof, particularly in the context of corporate and financial institutions." A Westlaw search of that citation leads to *People v. Xinos*, a case that involves a motion to suppress information obtained from a criminal defendant's "event data recorder" in a vehicular manslaughter case.

p. As stated previously, complaints drafted by pro se plaintiffs are treated with more leniency than those prepared by attorneys. Even so, that leniency does not extend to the duty of candor to the court required of all parties — including pro se litigants. Although such conduct may be sanctionable under Rule 11, the court will not take further action at this time in light of the disposition of defendant's motion. However, plaintiff is strongly cautioned that any future pleadings, motions, or other papers submitted to this court or any other must comply with Rule 11.

O. *Powell v. Jefferson Cnty. Dep't of Job & Fam. Servs.*, 2025 U.S. Dist. LEXIS 42714 (United States District Court for the Southern District of Ohio, Eastern Division 2025). Court dismissed under Eleventh Amendment immunity and other grounds claims for $10 trillion in damages related to probate court guardianship matter.

1. Plaintiff David Powell, pro se, filed this lawsuit. He has since amended his Complaint three times and named fifteen Defendants in total. The allegations in Mr. Powell's various Complaints are difficult to discern but seem to relate to his role as the guardian on behalf of Linda Courcier. Defendants also describe discrepancies between the various

Complaints filed on the Court's docket and the Complaints served on Defendants. The Complaints served on Defendants vary based on the Defendant being served.

2. Generally, the Complaints filed with the Court and served on Defendants allege that Mr. Powell was improperly removed as Ms. Courcier's guardian. Mr. Powell does not state his relationship to Ms. Courcier. When Ms. Courcier was visiting Ohio, she had a medical emergency, which he alleged led to a conspiracy initiated by the Jefferson County Probate Court to improperly remove him as her guardian and to prevent him from visiting her. The scope of the alleged conspiracy is broad, and includes various media organizations, sovereign states, prominent athletes, political figures, and members of crime families all worked together to kidnap Ms. Courcier, hold her hostage, and fraudulently represent that she passed away in December 2023.

3. He seeks the release of Mr. Courcier from a facility in Ohio, the Sunnyslope Center, to his custody so that they can return to Florida. He asks to be named as Ms. Courcier's Social Security payee, and for an award of attorneys' fees in the amount of $400,000, and $10 trillion in unspecified damages. He asks the Court to issue an arrest warrant of various state and local entities, politicians, corporations, and athletes.

4. Mr. Powell also filed a Motion for Preliminary Injunction, a Motion for Summary Judgment, and a Motion titled "2nd Request Motion to Add Plaintiff's New Names & et al. to all Caption Pleadings of Plaintiff's et al. & Defendant's et al. Docket's Case No. Clerical Misprision or Clerical Mistake by Officers of the Court."

5. Several Defendants moved to dismiss Mr. Powell's claims for failure to state a claim for relief or for lack of subject-matter jurisdiction: State of Ohio, the Ohio Department of Job and Family Services, Ohio Medicaid, Ohio Department of Job and Family Services Bureau of State Hearings, Ohio Ombudsman Long-Term Care (collectively, the "State of Ohio Defendants"); Jefferson County Department of Job and Family Services; Coleman Health Service; and Commissioner of Social Security. Several other Defendants did not appear after Mr. Powell's deficient attempts to effect service of process. When Mr. Powell failed to effect service of process after almost a year, the Magistrate Judge recommended that the Court dismiss without prejudice Mr. Powell's claims against the non-moving Defendants. Mr. Powell filed a Motion broadly objecting to the Report and Recommendation and opposing the various motions to dismiss filed by Defendants. The Court adopted the Report and Recommendation and dismissed the claims against the non-moving Defendants without prejudice.

6. The court denied the motion for injunction, and dismissed the claims, on the following grounds:

> a. Mr. Powell's Motion for a Preliminary Injunction states, in its entirety: "Pursuant to Civil rule 8(a), 9(g), 54, 55, 58, 64, 65, 65.1, 69 Plaintiff(s) et al. hereby moves the Court to enter as prayed FORTHWITH Injunction Relief Blanket Protective, Restraining, & SEIZURE OF PERSON MS. COURCIER BACK TO GUARDIAN MR. POWELL ORDER JUDGMENT in favor of prevailing Appellant(s) et al. and against Defendant's et al. 18, 19, 19.1, 20 necessary implication. On the grounds Estoppel by Acquiescence, nil-dicit default, Judgment. The Court after reviewing the motion and relevant laws, finds that the motion for Blanket Protective, Restraining, & seizure of person order Habeas Corpus, Mandamus relief is well taken and is GRANTED."

b. Mr. Powell has not alleged facts sufficient to warrant a preliminary injunction. His single-paragraph motion has not shown that he has any likelihood of success on the merits, let alone a strong likelihood of success. Mr. Powell does not argue that he will suffer irreparable harm if the injunction is not issued. There is no discussion of harm to others or the public interest in his Motion.

c. To the extent that Mr. Powell seeks monetary damages from the State of Ohio Defendants, his claims are dismissed under sovereign immunity under the Eleventh Amendment. Mr. Powell sues the State of Ohio itself, along with several other state agencies or state officials named in their official capacities (Ohio Department of Job and Family Services, Ohio Medicaid, Ohio Department of Job and Family Services Bureau of State Hearings, Ohio Ombudsman Long-Term Care), so the State of Ohio is effectively the real party in interest. He seeks monetary damages of $10 trillion and $400,000 in attorneys' fees. Therefore, his claims for monetary, non-prospective relief are barred by the Eleventh Amendment.

d. Under Ohio law, the probate court may appoint a guardian over a person. Federal courts are prohibited from exercising jurisdiction over certain conflicts involving property subject to a state court probate proceeding. Matters involving a Guardian, Conservator, or other fiduciary appointed and supervised by the Probate Court fall comfortably within its scope.

e. Mr. Powell's Complaint primarily asks this Court to reverse the decision of the Jefferson County Probate Court appointing a guardian for Ms. Courcier, and to instead award him guardianship. Matters involving guardianship are excluded from this Court's jurisdiction under the probate exception. Even if the probate doctrine did not apply, the Court notes that to the extent that Mr. Powell is attempting to overturn orders entered by an Ohio probate court, the Rooker-Feldman doctrine limits this Court's ability to adjudicate such claims.

f. Ms. Courcier's death likely renders moot Mr. Powell's claim. Second, Mr. Powell does not make clear what cause of action he brings against the State of Ohio Defendants. Even under the liberal pleading standards afforded to pro se litigants, the Court should not have to guess at the nature of the claim asserted. Her death at minimum makes it impossible for the Court or any of the Defendants to return guardianship to Mr. Powell, or to release her into his custody. Further, none of the State of Ohio Defendants are able to award guardianship or are responsible for naming the Social Security payees.

g. The Complaint served on Jefferson County JFS has not been filed with the Court. JFS is entitled to dismissal on these grounds. But even if the Complaint were properly served on Jefferson County JFS, Mr. Powell does not provide factual allegations with the detail necessary to give Jefferson County JFS notice of a viable cause of action against it under any of the legal theories referenced by Mr. Powell. Mr. Powell's allegations are difficult to decipher and leave Jefferson County JFS guessing as to what causes of action he asserts. Even under the more lenient construction afforded to pro se litigants, Mr. Powell fails to state a claim upon which relief can be granted.

h. The Complaint served on Coleman Health does not match any of the Complaints on the Court's docket. Since initiating this lawsuit almost a year ago, Mr. Powell has not shown that proper service was made on Coleman Health. Thus, dismissal is proper for insufficient service of process. As with his claims against Jefferson County JFS, Mr. Powell's claims against Coleman Health are difficult to discern. Although he alleges some wrongdoing on Coleman Health's part, the Court cannot determine from the pleadings what role Coleman Health played in the alleged deprivation of Mr. Powell's rights. His factual allegations do not state in sufficient detail allegations necessary to give notice of the causes of action against Coleman Health. Mr. Powell therefore fails to state a claim upon which relief can be granted.

i. Mr. Powell names the Social Security Administration in this lawsuit because a new representative was appointed to manage Ms. Courcier's Social Security benefits. At minimum, Mr. Powell's Complaint is too incomprehensible to establish federal court jurisdiction over his claims, and at best, the Complaint fails to plead sufficient facts to state a plausible claim for relief.

P. *Roefer v. Riley,* 2025-Ohio-272 (Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County 2025). Buick Regal was not a concealed estate asset.

1. Anita Roefer ("Roefer") and Michelle Riley's ("Riley") are the daughters of Sheila Barnes ("Barnes"). Barnes' health began to deteriorate in July 2015. In late 2015, Riley moved in with Barnes and Riley's husband moved in with them shortly thereafter. About this same time, Barnes' cash withdrawals and expenses "escalated." Barnes had a stroke in October 2016 and, in January 2017, Barnes executed a durable power of attorney ("POA") appointing Riley as her agent. On April 20, 2017, Roefer paid $4,051.22 to satisfy a lien against Barnes' 2012 Buick Regal.

2. In May 2017, a competency evaluation was conducted on Barnes in which she was diagnosed with dementia and the appointment of a guardian was recommended. On May 23, 2017, Barnes transferred title to the Buick to Roefer. Also on May 23, 2017, Roefer executed a waiver and consent to the appointment of Riley as guardian for Barnes. On June 30, 2017, Barnes revoked the January 2017 POA appointing Riley as her agent and executed a new POA appointing Roefer as her agent. Roefer and Riley, each acting under their perceived authority stemming from competing POAs over Barnes, made or authorized financial transactions concerning some of Barnes' assets, including paying personal expenses using Barnes' debit cards, withdrawing cash from Barnes' accounts using Barnes' ATM card, and cashing in one of Barnes' annuities.

3. In August 2017, Riley filed an application for guardianship over Barnes based on the May 2017 competency evaluation. In October 2017, the court appointed an independent, nonfamily member, Kathryn T. Joseph (the "Guardian"), as guardian of Barnes' person and estate. On March 25, 2019, Barnes died. Roefer, Riley, and their brother Reginald were beneficiaries under Barnes' will.

4. Roefer filed a complaint against Riley alleging that Riley concealed Barnes' estate assets. Riley responded by filing an answer and a counterclaim against Roefer for concealment of Barnes' estate assets. A proceeding was held in front of a magistrate. Almost one year later, on October 6, 2023, the magistrate issued a decision granting in part and denying in part Roefer's complaint and Riley's counterclaim. Roefer filed an

objection to the magistrate's decision alleging the following: "The [c]onclusion that . . . Roefer concealed the transfer of an estate asset and insurance payments totaling $9,722.45 is not based in the facts of the decision or the law applied herein."

5. The court both dismissed Roefer's objection to the magistrate's decision as untimely and overruled Roefer's objection to the magistrate's decision on the merits. Furthermore, the court adopted the magistrate's decision finding that Riley concealed estate assets in the amount of $11,641.19 and Roefer concealed estate assets in the amount of $10,695.06.

6. Roefer appealed. The court of appeals affirmed in part and reversed in part on the following grounds:

> a. In this case, the magistrate's decision was filed on October 6, 2023, and Roefer filed her objection to the magistrate's decision on October 23, 2023, without leave of court. Roefer needed to file her objection by October 20, 2023, which was 14 days after the magistrate's decision was filed. Therefore, Roefer's objection to the magistrate's decision was untimely. In this case, the "last day of the period" fell on Friday, October 20, 2023, which was not a legal holiday, and the "period of time . . . allowed" is 14 days, which is not "less than seven days." Therefore, Roefer's period of time to file objections to the magistrate's decision was not extended. Roefer failed to file her objection within the 14-day allotment and the trial court did not err by finding that her objection was untimely.
>
> b. Roefer's appellate brief does not contain citation to any legal authority, which is required. In Roefer's second assignment of error, she argues that the court erred by "entering judgment of concealment of automobile insurance premiums" when the "payments were returned during Attorney Joseph's guardianship control." Not only does Roefer fail to cite any legal authority to support this assignment of error, she fails to point out where in the record there is evidence that the insurance premiums at issue were paid from assets belonging to Barnes' estate or where in the record there is evidence that these alleged payments were "returned."
>
> c. In Roefer's third assignment of error, she argues that "Riley took notably large expenditures for personal use during the period she knew of the incompetency of Barnes but failed her burden of showing evidence that Barnes made inter vivos 'gifts.' . . ." On appeal, Roefer has failed to cite legal authority to support this argument.
>
> d. Upon complaint made to the probate court by a person interested in the estate, testamentary trust, or guardianship against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, personal property or choses in the action of the estate, testamentary trust, or guardianship, the court shall compel the person or persons suspected to appear before it to be examined, on oath, touching the matter of the complaint.
>
> e. In Roefer's first assignment of error, she argues that the court erred "in ruling the transfer of the Buick . . . to . . . Roefer was a concealment of estate assets." In Roefer's fourth assignment of error, she argues that the court erred "in finding the value of the [Buick was $13,500] when . . . the evidence shows [Riley] never

presented any admissible evidence of value and misquoted the model and value of the vehicle."

f. The partial transcript reveals that Roefer testified that she and Barnes went to the "title bureau" on May 23, 2017, and Barnes transferred title to the Buick to Roefer. Roefer further testified that when she and Barnes returned to Barnes' house, Riley asked Roefer if Barnes transferred title of the Buick to Roefer and Roefer answered, "Yes, she did." Riley, on the other hand, testified that in May 2017, Roefer asked Barnes if Roefer could have the Buick. Riley told Barnes that Barnes' caretakers needed the Buick to take Barnes to doctors' appointments and to run other errands. Riley next testified as follows: "And then I found out that [Roefer] got access to getting the car. She got the title, um, for the car. And I was thinking at the time well maybe she's getting the title of the car, uh, looking at these, uh pictures from the text messages that it's just gonna be here, the title's gonna — the title's paid off and there's a title available. But I had no recollection that she was gonna be — that the car was gonna be hers to have and not stay there on the premises."

g. There is no evidence in the record to support the probate court's finding that title to the Buick was transferred to Roefer on May 24, 2017. Roefer testified that title was transferred on May 23, 2017, and Riley testified that title was transferred in May 2017. The only evidence in the record about when Roefer signed the waiver and consent to appoint Riley as Barnes' guardian is Roefer's testimony that this occurred on May 23, 2017, which is the same day that title to Barnes' Buick was transferred to Roefer. Therefore, the probate court's finding that title was transferred to Roefer "only one day after contemplating and agreeing that, due to alleged incompetency, . . . Barnes should be under guardianship" is unsupported by the record. Furthermore, there is no evidence in the record about which of these two events that happened on the same day — Roefer's signing of the "consent and waiver" and Barnes' transferring title to the Buick to Roefer — occurred first.

h. The court plainly erred when it included the value of the Buick among the assets that Roefer concealed from Barnes' estate. Riley's counterclaim alleged that Roefer concealed Barnes' Buick, which Riley also alleged was part of Barnes' estate. Therefore, Riley acted as the "plaintiff" regarding allegations of concealment of the Buick and Riley failed to meet her burden to produce evidence of such. The evidence in the record regarding the title transfer is that it occurred in "May 2017" and that it occurred on May 23, 2017. Taking into consideration that the court sustained Roefer's counsel's objection to Riley's testimony about the value of the Buick, there is no evidence in the record concerning the value of the car. Roefer argues that "the trial court assumed the value was based on a value of a Buick SUV instead of . . . Barnes' Buick Regal sedan." The record, including the admitted exhibits and the partial transcript, does not reveal any mention of a "Buick SUV" or any other evidence of the value of any model of Buick. It is possible that this evidence was presented at the concealment proceeding during the portion for which we have no transcript. However, we will not speculate about possibilities.

i. Had the probate court properly found that, based on the evidence in the record, Riley failed to show that Roefer concealed the title transfer of the Buick from Barnes' estate, Roefer's estate distribution reduction of more than $10,000 would be eliminated. Accordingly, Roefer's first and fourth assignments of error are sustained. This case is remanded to the trial court issue of a journal entry reflecting that the title transfer of Barnes' Buick to Roefer was not a concealment of an estate asset and eliminating the value of the Buick's reduction in Roefer's estate distribution.

Q. *Sacred Union of Souls Ministry Trust v. Am. Credit Acceptance, LLC,* 2025 U.S. Dist. LEXIS 128233 (United States District Court for the Northern District of Georgia, Gainesville Division 2025). The First and Fourteenth Amendments do not prohibit court rules that even a so-called "private, faith-based ecclesiastical trust" is required to have a licensed attorney represent it in federal court, even if those rules conflict with sincerely held religious tenets of private ecclesiastical associations.

1. On April 17, 2025, Plaintiff Sacred Union of Souls Ministry Trust ("Plaintiff" or the "Trust") filed a Complaint in the Superior Court of Forsyth County in which it asserts that Defendant American Credit Acceptance, LLC ("Defendant" or "ACA") violated various federal and state statutes and regulations. Maria Theresa Pagano ("Pagano"), who does not appear to be an attorney, signed and filed the Complaint on behalf of the Trust. The Superior Court directed the Plaintiff Trust to obtain counsel, but Pagano continued to file documents on behalf of the Trust. The Superior Court rejected Pagano's contention that she can represent the Trust and again directed the Trust to retain counsel, but Pagano continued to file documents on behalf of the Trust. Defendant removed the case to this Court on May 20, 2025, on the basis of federal-question jurisdiction.

2. The Court directed Plaintiff to retain counsel no later than June 4, 2025, because a Trust cannot represent itself in this Court or be represented by a person who is not licensed to practice law and authorized to appear in this Court, including a nonlawyer "Trustee" such as Pagano, but instead, it must be represented by a licensed attorney who is authorized to appear in the Northern District of Georgia. Plaintiff did not comply with that Order, and no attorney has appeared on behalf of the Trust.

3. Plaintiff did not comply with the Court's further orders by retaining counsel. Instead, Pagano, as Trustee for the Plaintiff Trust, filed an "Expanded Motion for Declaratory Relief and E-Filing Access." Pagano requests that pursuant to Rule 57 of the Federal Rules of Civil Procedure, and all other applicable statutes and constitutional guarantees, the Court grant the motion for declaratory relief, removal of lien, award of damages, and an Order granting electronic filing ("E-Filing") access to Plaintiff as Trustee.

4. The magistrate recommended dismissal of the action on the following grounds:

a. A "Trust" cannot represent itself in this Court, but instead, it must be represented by a licensed attorney who is authorized to appear in the Northern District of Georgia. Nor can a trust be represented by another person who is not licensed to practice law and authorized to appear in this Court, such as Pagano, who is not a licensed attorney. Federal law only authorizes parties to conduct their own cases personally or by counsel. Thus, nonlawyers such as Pagano may not represent another individual or entity in an action. Nor can a nonlawyer trustee represent a trust in federal court.

b. In an attempt to evade the requirement that the Trust retain counsel, Pagano claims in the "Expanded Motion for Declaratory Relief and E-Filing Access" that she filed on behalf of the Trust, Doc. 7, that "[t]he Trust Indenture expressly prohibits the use of outside legal counsel for religious reasons, reserving all authority and appearance to the Trustee in all matters, including litigation." She further contends that "[t]he First and Fourteenth Amendments prohibit the imposition of government regulations or practices — including compelled representation by state-barred attorneys — that conflict with sincerely held religious tenets of private ecclesiastical associations." There is no legal support for Pagano's contention that the Court cannot require the Plaintiff Trust to retain a licensed attorney to represent it in this Court or that the Court is required to allow someone who is not a licensed attorney to represent the trust.

c. In *Hosanna-Tabor*, the Supreme Court considered the freedom of a religious organization to select its ministers in the face of statutes prohibiting discrimination in employment such as Title VII or the Americans with Disabilities Act under a "ministerial exception" and held that there is such an exception "grounded in the Religion Clauses of the First Amendment." The requirement that a Trust be represented by a licensed attorney in this Court does not implicate the ministerial exception at issue in *Hosanna-Tabor*, and nothing in that decision provides support that even is not required to have a licensed attorney represent it in federal court or that it can be represented by someone who is not licensed to practice law. At least one federal court has considered and rejected the same argument made by Pagano, i.e., that requiring a licensed attorney for a religious-based express trust violates the Constitution, because that argument is without legal support. Pagano has not provided any authority that supports her contention that a "religious" or "ecclesiastical" trust can be represented in federal court by a nonlawyer Trustee.

d. Because Plaintiff has not complied with the Court's Orders to retain counsel and because it cannot proceed pro se or be represented by a nonlawyer "Trustee," i.e., Maria Theresa Pagano, this action should be dismissed.

R. *Simmons v. Lindstrom*, 2025 NYLJ LEXIS 1200 (Supreme Court of New York, Westchester County 2025). Claims against estate barred by collateral estoppel from divorce proceedings.

1. This is an action for declaratory judgment, money damages, and attorneys' fees. The case involves Tashera Simmons' suit against the Estate of Earl Simmons ("Estate"). Earl Simmons ("Earl Simmons" or "decedent") was known by the professional name DMX until his death in April 2021. Plaintiff seeks a declaratory judgment that the settlement agreement, entered into during her divorce from Earl Simmons in 2016, provided for ownership of 50 percent of decedent's intellectual property ("IP"), including copyright, trademark, publicity rights, and union residuals. The second cause of action alleges a breach of contract. Earl Simmons maintained through his life that the agreement only provided for royalty payments, not ownership, as do two of his children who are serving as administrators to his estate and are unrelated to plaintiff.

2. Defendants Desiree Lindstrom and Sasha Simmons represent the Estate. Although named, Xavier Simmons, Sean Simmons, and Tacoma Simmons were suspended as administrators in 2024 and the action against each of them should be dismissed. They are plaintiff's children with Earl Simmons. It is unknown why they were suspended, but they

did try to enter into an agreement after Earl Simmons' death to transfer the Estates' IP to plaintiff shortly before their suspension. Only Desiree Lindstrom and Sasha Simmons have appeared in this action. The causes of action are for a declaratory judgment and breach of contract.

3. The Co-Administrators' attorney asserts that plaintiff "claims (the 'Ownership Claims') that she has a 50 percent ownership interest in any and all intellectual property, including copyrights and trademarks, he acquired during their marriage (collectively, the 'DMX Marital IP')"; that plaintiff and Earl were married on August 9, 1998, and the decedent released several albums under the professional trade name DMX during the marriage; that on January 8, 2013, a matrimonial action was commenced, and settled by stipulation, dated June 28, 2016 ("2016 Settlement"); that on November 3, 2017, plaintiff sought an Order holding Earl in contempt for violating the 2016 settlement and judgment, which was withdrawn and resulted in the 2018 Settlement; that "consistent with the settlement . . ., in lieu of the QDRO, Earl signed five Letters of Direction directed at Universal Music Publishing Group ("UMPG"), ASCAP, Sound Exchange, Def Jam Records, and Her Royal Majesty's Records d/b/a Bodog Music (collectively, the "Five LODs")"; that in "the over two years between Earl's execution of the documents in accordance with the settlement and Earl's April 2021 death, pursuant to the Five LODs, Plaintiff received 50 percent of Earl's royalty income attributable to only those portions of certain recordings (i.e., those from between August 9, 1998 and January 8, 2013.)"; that after the divorce and 2018 Settlement, Earl continued to use the DMX Marks and other entities, and entered into agreements; that plaintiff "was not a party to the Def Jam Agreement, and did not license the DMX Marks."

4. With respect to the plaintiff's claim for "payment of alleged child support and spousal support arrears in the sum of $214,000 which were provided for in the 2016 Settlement," Co-Administrators' attorney argues that the 2018 Settlement addressed the child support and spousal support arrears indicating plaintiff "had earned more than she was entitled to and that the excess sums would be applied against Earl's future obligations."

5. A pertinent clause central to the dispute states: "The wife shall receive by QUADRO fifty percent of the husband's intellectual property rights, which shall include but not be limited to royalties from Universal Music & ASCAP, publishing, mechanical, public performances, and synchronization."

6. The court determined that the motion should be granted in part, invoking the doctrine of collateral estoppel and on the merits. The court found that the 2016 settlement agreement did not unequivocally assign ownership of Earl Simmons' copyrighted works, trademark, or certain other revenue and rights, and that the agreement makes no mention of ownership or title to such property.

7. The court granted the motion to dismiss in part on the following grounds:

> a. Collateral estoppel prohibits the litigation of claims which were necessarily decided in a prior action where the party to be precluded had a full and fair opportunity to be heard. Here, plaintiff expressly raised the issue of whether the 2016 settlement agreement conferred an ownership interest in decedent's copyright and trademark during proceedings related to plaintiff's contempt motion in 2017. It is undisputed that the subsequent consent order which concluded

those proceedings did not specifically confer such ownership despite otherwise modifying the 2016 agreement.

b. Moreover, plaintiff testified under oath during those proceedings that she understood that the consent order concluded the litigation related to the parties' divorce, which would necessarily include any further dispute regarding interpretation of the 2016 settlement agreement. Under the circumstances of this case, the Court will not, in effect, reopen those proceedings to reinterpret the parties' 2016 settlement agreement, particularly where the party best positioned to contest a contrary interpretation is now deceased. Even if the Court were to consider plaintiff's arguments on the merits, the Court would still hold the 2016 settlement agreement does not confer ownership in decedent's intellectual property.

c. Here, the 2016 settlement agreement does not unequivocally assign ownership of decedent's copyrighted works or trademark and, indeed, makes no mention of ownership or title to such property. Instead, plaintiff proffers an interpretation of the phrase "intellectual property rights" to include ownership, but had that phrase meant ownership, then there would be no need to define those rights further in the subsequent clause, all tellingly limited to various categories of royalty payments. Indeed, to find that the phrase "intellectual property rights" meant ownership in this context would violate a central tenant of contract interpretation by rendering superfluous the subsequent recitation of royalty payments encompassed by the phrase.

d. Under the circumstances of this case, the agreement's lack of any appraisal or valuation of decedent's intellectual property establishes that the parties did not intend to actually transfer title to the property, as a distributive award of ownership in a divorce dissolution would not be possible without a valuation of the intellectual property. Instead, due to federal prohibition on the involuntary transfer of copyright ownership during a divorce dissolution, the rights to money derived from a copyright are subject to equitable distribution, but the exclusive rights of ownership always remain with the author. Therefore, plaintiff's claims that the 2016 settlement agreement conferred ownership rights in decedent's intellectual property is dismissed, including the first cause of action seeking declaratory relief in its entirety.

e. Plaintiff's claim that the agreement included the transfer of decedent's publicity rights must also be dismissed since New York did not recognize an independent common-law right of publicity in 2016, and the statutory right under the Civil Rights Law at the time was an aspect of the right of privacy, not property.

f. Similarly, plaintiff's claim that the settlement agreement included union residuals from various organizations is not supported by the plain language of the agreement, which omits any reference to such revenue. Moreover, since union residual payments are the product of union labor agreements and reflect continuing payment for decedent's labor in various entertainment mediums, those payments plainly do not relate to any intellectual property rights contemplated by the agreement.

g. The Court finds that the "intellectual property rights co-ownership agreement" purportedly signed by plaintiff in August 2023 was void ab initio since the purported co-administrators lacked legal authority to bind the Estate at the time of its execution, and, in any event, failed to adhere to the internal notice and voting process set forth in the September 2022 settlement agreement extending the temporary letters of administration.

h. Dismissal is premature, however, regarding plaintiff's breach of contract claim related to $214,000 in alleged child support arrears.

S. *Skelton v. Gray,* 2025 Tex. App. LEXIS 6064 (Court of Appeals of Texas, Fourth District, San Antonio 2025). Exclusion of testimony in the criminal transcript constitutes some evidence of attorney's innocence by negating an element of intent in the crime of forgery of a will, and trial court erred in granting no-evidence motion for summary judgment in related attorney malpractice claim.

1. Patricia Skelton, an attorney, hired criminal defense attorney, Guy James Gray, to represent her after she was indicted for forging a copy of a deceased client's will. At trial, it was uncontested that Skelton cut and pasted the signatures of her client and two witnesses onto an unsigned copy of the client's last will and testament after discovering that the executed original was illegible. She then filed the altered document with the court in a probate proceeding. The primary issue of contention during the trial was whether Skelton acted with the intent to harm or defraud. A jury convicted Skelton of criminal forgery, and she was sentenced to a suspended one year in prison and two years of community supervision. Skelton appealed, and the court of appeals affirmed.

2. Meanwhile, family members of Skelton's deceased client contested the purported will in probate court. In that case, a jury found that the will at issue was valid, that Skelton did not forge the will, and that the probated will was an accurate copy of the deceased client's original will. Following the findings in the will contest, Skelton applied for a writ of habeas corpus, claiming actual innocence, prosecutorial misconduct, and ineffective assistance of counsel. After the trial court dismissed Skelton's petition, the court of appeals granted the writ and vacated the conviction, finding that Skelton's ineffective assistance claim was meritorious. In the wake of the vacatur, the state declined to proceed further with the prosecution and dismissed the charges.

3. Skelton then sued Gray for legal malpractice and breach of fiduciary duty in reference to his handling of the original forgery trial. The trial court granted Gray's motion to dismiss, concluding, in part, that her malpractice claim failed for lack of exoneration. Skelton appealed, and the court of appeals reversed and remanded the legal malpractice claim, because Skelton's conviction had been vacated in her habeas proceeding. Gray appealed to the Texas Supreme Court, which held that the vacatur of Skelton's conviction on habeas review was not equivalent to exoneration as a prerequisite to recovery on her legal malpractice claim. The supreme court reversed the trial court's dismissal of Skelton's malpractice claim and remanded the case for trial, noting that Skelton was now required to obtain a finding of her innocence as part of her malpractice suit.

4. On remand, in an effort to follow the supreme court's holding, the trial court bifurcated the case into two separate trials, one on the issue of Skelton's actual innocence of the forgery charges and another regarding her claims of legal malpractice against Gray. Gray moved for summary judgment on the threshold issue of actual innocence. Skelton filed a

cross-motion for summary judgment, arguing that the evidence attached to her motion conclusively proves she is innocent of forgery. Gray objected to six of Skelton's exhibits on the grounds that she did not produce them during discovery, they contain inadmissible hearsay, and they are irrelevant. The trial court sustained Gray's evidentiary objections, denied Skelton's motion for summary judgment, granted Gray's motion, and entered judgment in favor of Gray. Skelton appealed.

5. The court of appeals reversed and remanded on the following grounds:

a. Although Gray lodged numerous objections to Skelton's summary judgment evidence, the trial court did not specify the ground on which it excluded the evidence. While this court has recently held that an objection is not required to preserve error as to the exclusion of evidence in a summary judgment proceeding, we have not extended such leeway in the case of an express waiver. Skelton may not now claim that the trial court erred in excluding evidence where she abandoned her effort to have the evidence considered and, in fact, acknowledged that the items at issue are not evidence.

b. Gray objected to all Skelton's evidence on the ground that it was not produced during discovery. Skelton argues that this same evidence was attached to her original motion for summary judgment when the present malpractice suit was originally filed in 2021. While Gray does not contest that he had the evidence, he argues that Skelton's failure to disclose her intent to use it to prove Skelton's innocence in the present proceeding put him at a disadvantage in preparing his motion for summary judgment. Specifically, Gray claims that he filed a no-evidence motion for summary judgment because, based on the lack of discovery response, he believed Skelton had no evidence to offer as to innocence. It is disingenuous for Gray to now claim he might not have filed a no-evidence motion for summary judgment had these documents been provided in response to his discovery requests. To the extent it based the exclusion of the Probate Verdict, the Probate Transcript, and the Criminal Transcript on Gray's Rule 196 objection, the trial court abused its discretion as those documents were explicitly excluded from Gray's discovery requests.

c. The Habeas Transcript, on the other hand, was not excluded in the request for production and should have been disclosed. Because Skelton failed to do so, she bears the burden of showing there was good cause for her failure to respond to discovery or her failure did not unfairly surprise or unfairly prejudice Gray. In this case, the record shows that all the parties knew the Habeas Transcript existed and that Skelton knew she would be relying on it in her malpractice case at least as early as 2021. Skelton has offered no explanation at all for her failure to disclose her intention to use the Habeas Transcript as evidence of her innocence. Under these facts, it would be reasonable to conclude that Skelton did not act in good faith regarding the discovery requests. This, coupled with the contradicting arguments of counsel regarding prejudice, support the trial court's decision to exclude the evidence.

d. Gray objected to the Criminal Transcript, the Will Contest Transcript, and the Habeas Transcript on hearsay grounds. Statements made in prior trials or hearings are generally considered hearsay if offered to prove the truth of what was stated during those proceedings.

e. The trial court did not err in sustaining Gray's hearsay objection to the Probate Transcript. The Habeas Transcript was properly excluded. It is, therefore, unnecessary for us to address Skelton's arguments as to whether it was admissible under a hearsay exception. The only issue before the court in this case is whether Skelton is actually innocent of forgery. In this proceeding, she is bound to prove her innocence by a preponderance of the evidence. Skelton has never claimed that she did not alter her client's will; instead, the controlling issue from the inception of these proceedings has been Skelton's intent to harm or defraud. Indeed, if she is unable to prove that she did not intend to harm or defraud another when she altered the will and filed it with the court, her actual innocence claim will fail. Consequently, any evidence pointing to Skelton's intent in altering the will is, without question, relevant to a material issue in this case. Both documents, taken alone, tip the scale in favor of a finding that Skelton is innocent of forgery and are, therefore, relevant to this proceeding.

f. However, as noted above, relevant evidence may not be admissible when its relevancy is outweighed by the unfair prejudice its admission could cause. While a portion of the Probate Verdict addresses an issue identical to the point of contention in this case, the parties are not the same. Moreover, the case was tried in a completely different legal context. In the will contest proceeding, the ultimate issue before the jury was the distribution of an estate, not whether Skelton forged the will. As such, there is a likelihood that the issue of forgery was not fully litigated, or even that the jury decided the issue of forgery in a manner that would enable them to get to the ultimate issue of estate distribution according to the testator's intentions. If either is the case, the verdict regarding forgery is unreliable. To make that determination, it would take significant time and legal resources to flush out the differences between this case and the will contest in terms of parties, facts, applicable law, and legal implications. Given the Probate Verdict's tendency to muddy the water of this proceeding, the trial court was within its discretion to find that its probative value was outweighed by its prejudicial effects. The trial court did not err in sustaining Gray's objection to the Probate Verdict.

g. A similar result is not reached, however, regarding Skelton's testimony in the Criminal Transcript. The relevant issues in the criminal trial and this case are identical, and, aside from differing burdens of proof, the legal framework in each of the cases is virtually the same. There is nothing about the testimony or the legal context in which it was given that would confuse a factfinder or require additional expenditures of time and resources to make it clear. Because there is nothing unfairly prejudicial about Skelton's testimony in the Criminal Transcript, the trial court erred in sustaining Gray's objection.

h. Here, because Skelton's testimony in the Criminal Transcript constitutes some evidence of Skelton's innocence by negating an element of the crime of forgery, we find the trial court erred in granting Gray's no-evidence motion for summary judgment. The evidence, though, is not conclusive. On this record, there remain genuine issues of material fact surrounding the question of Skelton's innocence. The weight to be given to the evidence remaining is for a factfinder to determine. The trial court did not, therefore, err in denying Skelton's motion for summary judgment.

T. *Weaver v. Safeco Ins. Co. of Am.*, 2025 U.S. Dist. LEXIS 210117 (United States District Court for the District of New Mexico 2025). New Mexico law does not extend tort liability to self-directed negligence that results in a family member's loss of consortium.

1. On June 20, 2021, John Weaver died in a single-vehicle accident on Interstate 40 while driving a Harley-Davidson motorcycle. Plaintiffs allege that Weaver had consumed alcohol, was driving at an unsafe speed, and failed to maintain a proper distance, causing him to lose control of the motorcycle. There is no allegation that anyone other than Weaver was involved in the crash. According to the complaint, Weaver maintained a close and mutually dependent relationship with his parents before his death.

2. On June 18, 2024, Plaintiffs Deborah Weaver and Charles Weaver, the parents of the deceased, filed suit in the Second Judicial District of Bernalillo County against Safeco Insurance Company of America ("Safeco"), Progressive Northern Insurance Company ("Progressive"), Joseph Buchanan (the claims adjuster for Progressive), Ohio Security Insurance Company ("Ohio Security"), and, notably, the estate of their own deceased son. The decedent's mother, Deborah Weaver, now serves as the personal representative of the estate.

3. Plaintiffs bring a negligence claim against their son's estate. They allege that John Weaver operated his motorcycle negligently or recklessly, drove at an unsafe speed, and lost control, causing the crash that resulted in his death. Because of this alleged negligence, his parents sustained a loss of consortium. Building on that theory, Plaintiffs further contend that the estate of John Weaver is legally responsible to his parents for the negligent conduct and the resulting harm. The negligence claim is the only cause of action asserted against the estate.

4. On December 24, 2024, Defendants removed the case to federal court, invoking diversity jurisdiction. Defendants contend that removal was proper because the out-of-state insurance companies are diverse from Plaintiffs, who reside in Bernalillo County, New Mexico. Although the complaint identifies the estate of John Weaver as a New Mexico resident, Defendants argue that it was fraudulently joined to defeat diversity jurisdiction because Plaintiffs cannot establish a viable negligence claim against their deceased son's estate.

5. Plaintiffs moved to remand, disputing the existence of diversity and maintaining that their negligence claim against their son's estate is actionable. Remand was denied on the following grounds:

a. Defendants removed this case to federal court based on diversity jurisdiction. Ambiguities should be resolved in favor of remand because there is a presumption against removal jurisdiction.

b. However, fraudulent joinder is an exception to the requirement of complete diversity when there is no cause of action stated against a resident defendant or when no cause of action exists.

c. Once fraudulent joinder is proven, the district court should disregard the fraudulently joined non-diverse party for removal purposes.

d. The Court's jurisdiction over this matter depends on whether complete diversity of citizenship exists, which turns on whether fraudulent joinder occurred. Once

the removing party establishes fraudulent joinder, the Court will disregard the non-diverse party for the purpose of assessing diversity.

e. Under New Mexico law, as in common law generally, a negligence claim requires proof of four elements: (1) duty, (2) breach, (3) causation, and (4) damages. The existence of a duty is a threshold question. Without a duty, there can be no negligence.

f. Plaintiffs advance a broad view of the duty of care, asserting that "in New Mexico, every person has a duty to exercise ordinary care for the safety of the person and property of others." Expanding that reasoning, they argue that New Mexico law recognizes a universal duty of ordinary care that "everyone has a duty towards everyone else." No policy considerations support such a drastic expansion of the driver's duty. Plaintiffs have not shown that John Weaver owed his parents a duty to avoid self-harm through negligent driving. They have not sufficiently supported the leap from "every person has a duty to exercise ordinary care for the safety of others" to "everyone has a duty towards everyone."

g. Plaintiffs cite no case law or legislative history to suggest that this approach extends so far as to permit recovery by a tortfeasor's own family members for loss of consortium. Plaintiffs' statutory argument improperly expands the scope of "injured third parties" to encompass the tortfeasor's non-present parents, an interpretation that stretches the plain meaning and purpose of the law well beyond its limits. Although New Mexico courts have, in certain cases, expanded the scope of tort recovery to protect victims, recognizing a duty owed by a tortfeasor to his own family members would depart from established precedents.

h. The duty of ordinary care requires individuals to act reasonably to prevent physical harm on others. It does not impose a duty on a person to avoid injuring himself to avoid derivative harms such as loss of consortium, affection, society, and companionship. Read together, these authorities suggest that New Mexico law does not extend tort liability to self-directed negligence that results in a family member's loss of consortium.

i. To state a claim for loss of consortium, a plaintiff must prove two elements: (1) a "sufficiently close relationship" with the decedent, and (2) the defendant owed a duty of care to the plaintiff. While Plaintiffs correctly state that a loss of consortium can still proceed even if the underlying tort claim is unsuccessful, New Mexico law nonetheless requires the physically injured person to at least have a viable cause of action for general damages before a family member may recover for loss of consortium. As a result, even if Plaintiffs could independently bring a loss of consortium claim, they still have not shown that John Weaver had a viable cause of action for physical injury against himself, or that he owed his parents a duty of care. None of the authorities Plaintiffs rely on provide a persuasive policy justification for recognizing such a novel duty.

j. Plaintiffs nevertheless ask the court to depart from existing law to impose such a duty. They contend that because suicide was historically treated as a crime at common law and carried significant repercussions, the same reasoning should apply to fatal accidents resulting from one's own negligence. They urge this Court to recognize Weaver's duty to his parents on that basis, reasoning that a fatal

injury "produces a ripple effect" that deprives the state of revenue and family members of emotional and financial support. The Court cannot plausibly read Plaintiffs' arguments as advocating for the revival of civil or criminal liability of action for conduct resulting in one's own death simply because state loses revenue or family loses financial support.

k. Plaintiffs' policy arguments, though sincere, appeal more to morality than to principles of law. Recognizing a self-directed duty would create boundless and unpredictable liability. Every suicide or accidental self-inflicted death could spawn derivative lawsuits by family members. Such a ruling would also conflict with settled legal principles. Tort law governs relationships between distinct parties. It does not hold a person liable to themselves. For these reasons, New Mexico does not recognize a legal duty of self-preservation that creates liability to family members. Weaver owed no legal duty to his parents to avoid self-injury, and Plaintiffs' derivative loss of consortium claim cannot proceed. Since Plaintiffs have no possible cause of action against the non-diverse defendant, Weaver is fraudulently joined, and this Court will disregard the citizenship of John Weaver's estate for removal purposes.

U. *In re Ginger Evelyn Brazzel 2011 Inter Vivos Tr.,* 2025 La. App. LEXIS 2391 (Court of Appeal of Louisiana, Second Circuit 2025). Regret does not create sufficient grounds for allowing parties who have neglected to retain counsel or participate with the court's scheduling and pretrial orders to suddenly upend and further delay a proceeding so that they can implement the very plan of action that had been available and advisable for them to follow by retaining counsel during the preceding four years.

1. The underlying matter at issue in the present case involves estranged siblings and the fight over the management of and order of expending funds in two trusts. Evelyn Brazzel and Lester Brazzel Sr. had three children named Gregory Brazzel ("Gregg"), Lester Brazzel Jr., and Ginger Brazzel ("Ginger"). When Evelyn died, her estate created testamentary trusts on behalf of each of the children. Evelyn's trust for Ginger terminated on Ginger's 25th birthday. On May 10, 2011, Ginger used the assets from that dissolved testamentary trust to create, as settlor and beneficiary, the current Ginger Evelyn Brazzel 2011 Inter Vivos Trust ("Ginger's Inter Vivos Trust"). Regions Bank serves as trustee for Ginger's Inter Vivos Trust. Likewise, when Lester Sr. passed, his estate created testamentary trusts for each of his children. Ginger's trust is known as the Brazzel Testamentary Trust f/b/o Ginger Evelyn Brazzel ("the Testamentary Trust"). Regions Bank also serves as the trustee for the Testamentary Trust. Unlike the provisions of Evelyn's testamentary trust for Ginger terminating on her 25th birthday, the Testamentary Trust provided it would exist until her death.

2. Lester Jr. then died and his interests were represented by Lee H. Ayres acting as the Independent Executor of the Ancillary Succession of Lester Brazzel Jr. ("the Succession"). The lawsuit began when Gregg and the Succession filed seeking to modify both Ginger's Inter Vivos Trust and the Testamentary Trust. Regions Bank opposed the petition to modify the trusts. Gregg and the Succession filed an amended petition consisting of a single paragraph to include Mark Jonker ("Jonker"), Katherine Smith ("Smith"), and Jonathan Winkler as plaintiffs in proper person because they are members of the committees of the Testamentary Trust and Ginger's Inter Vivos Trust. Although they became parties to this lawsuit in 2020, Smith and Jonker never sought

representation, and relied on Gregg and the Succession to advance their claims and protect their common interests. Smith and Jonker interjected themselves in the ongoing litigation but allowed the matter to proceed for four years, intentionally did not retain counsel, and did not participate in any meaningful way as a litigant despite their decision to join the litigation as a party. As the litigation progressed, a scheduling order was issued, witness and exhibit lists exchanged, and a trial date set. Smith and Jonker elected to continue their gamble of relying on the attorneys of others without retaining counsel or further actively engaging in the litigation. Trial in this matter was originally set for January17, 2024, and a pretrial order was prepared for that trial date. Smith and Jonker were contacted and had no trial inserts. The trial was continued and reset for June 18, 2024, by motion for continuance filed by Gregg and over Regions Bank's objections.

3. Six weeks before the new trial date, Regions filed an exception of no right of action, arguing that the Succession and Gregg had no standing to sue because they were not beneficiaries of either of the trusts established for Ginger's benefit. While the exception was pending, the pretrial order was filed by the parties on May 24, 2024, and Mark Jonker, Katherine Smith, and Jonathan Winkler did not respond. Mr. Winkler had passed away. Three weeks before trial was to begin, the trial court granted Regions' exception of no right of action and dismissed with prejudice all claims by Gregg and the Succession. The plan to sit idly by in the litigation that had worked to Smith and Jonker's benefit for four years suddenly developed into a regrettable but not unforeseen reality, and they were positioned as the only remaining plaintiffs. Such a predicament was certainly one of the many calculated risks assumed by Smith and Jonker when they elected, and repeatedly reconfirmed, not to have their own independently retained and engaged legal counsel enrolled.

4. The day before trial was set to commence, Smith and Jonker filed motions to continue the trial to allow them time to retain counsel. They also filed a motion to amend the pretrial order to make clear that they intend to call the same witnesses and offer the same exhibits as were listed by their former co-plaintiffs. These motions were denied by the trial court. Trial was held. Jonker and Smith represented themselves pro se and were not allowed to call any witnesses or present any exhibits because they had not contributed to the pretrial memorandum. At the end of trial, the court dismissed all their claims with prejudice.

5. Smith and Jonker appealed and the court of appeals affirmed on the following grounds:

> a. The power necessary for the exercise of a court's jurisdiction inheres in the court with the corollary that such power embraces the reasonable enforcement of its lawful orders and directives such that those subject to its lawful orders and directives can be compelled to adhere to them. The inability — or even the failure — of a court to reasonably enforce its judgments, orders, or directives would render them mere words on paper. A court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done.
>
> b. The trial court has great discretion in granting or denying a continuance, and its ruling should not be disturbed on appeal in the absence of a clear abuse of that discretion. An abuse of discretion occurs when such discretion is exercised in a way that deprives a litigant of his day in court. That did not occur in the present matter.

c. Jonker and Smith have been parties to this lawsuit since 2020, when they interjected themselves as plaintiffs. There is no indication during the four years the matter has been pending that they attempted to obtain counsel prior to the dismissal of Gregg and the Succession from the lawsuit in May 2024. Jonker and Smith admit that they never intended to get other counsel and relied on being able to have their interests protected by Gregg and the Succession's counsel. There is no doubt every litigant in every civil proceeding would like to save money, but that desire by Smith and Jonker comes with the real-world risk of finding themselves as parties to litigation without legal counsel if they continuously refuse to hire one. While this strategy may have saved them money had everything worked out the way they hoped, it was a gamble that came with certain risks, and the realization of such a known risk is not a reason to continue a trial. The record reflects that the trial had already been continued once, and it is reasonable for the trial court to refuse to continue it again for parties that have not availed themselves of counsel in the four years they had been a party to the litigation. For these reasons, this assignment of error is without merit.

d. The theory inherent in pretrial procedure is the avoidance of surprise and the allowance of the orderly disposition of the case. Regret does not create sufficient grounds for allowing parties who have neglected to participate with the court's scheduling and pretrial orders to suddenly upend and further delay a proceeding so that they can implement the very plan of action that had been available and advisable for them to follow by retaining counsel during the preceding four years. It was not an abuse of discretion for the trial court to enforce its own scheduling order and refuse to allow Jonker and Smith to suddenly wish they had been engaged and amend the pretrial order. There had been two separate occasions during which they could have introduced their own witness and exhibit lists or adopted the exhibit and witness list of the Succession and Gregg; however, on both occasions, Jonker and Smith elected to do nothing. They made the unfortunate decision to rely completely on the trial preparation of the other plaintiffs to the lawsuit, but it is reasonable for the trial court to elect not to punish the defendants for Jonker and Smith's failure to prepare for the already rescheduled and long-awaited trial.